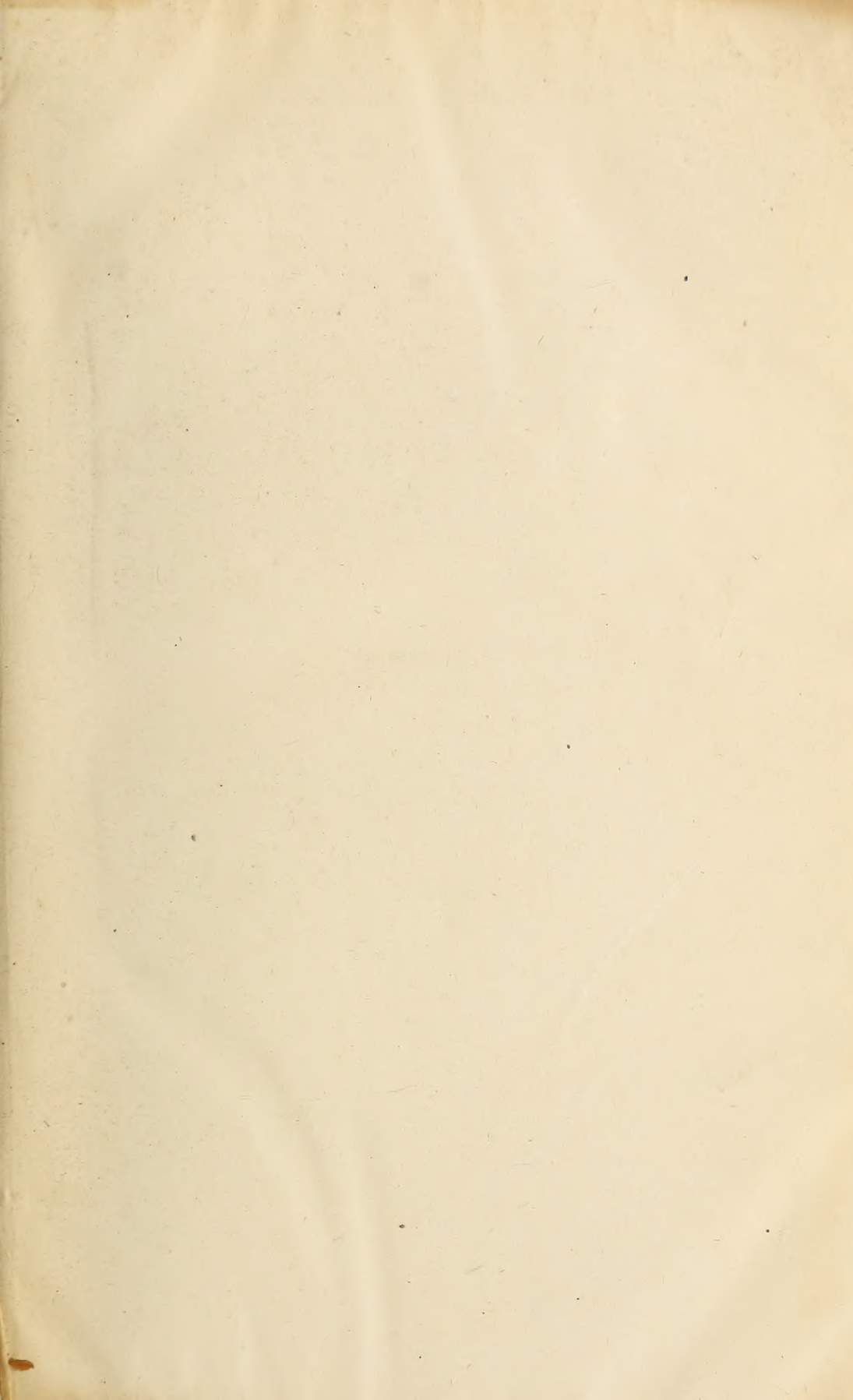





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THE
AMERICAN AND ENGLISH
ENCYCLOPÆDIA
OF
LAW

EDITED BY
DAVID S. GARLAND AND LUCIUS P. MCGEHEE
UNDER THE SUPERVISION OF
JAMES COCKCROFT

SECOND EDITION

VOLUME VI

45561
22/6/99

NORTHPORT, LONG ISLAND, N. Y.
EDWARD THOMPSON COMPANY
LONDON: C. D. CAZENOVE AND SON, 26 HENRIETTA STREET.

1898

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THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

CHLOROFORM.—Chloroform is defined as “an oily liquid of an aromatic ethereal odor, consisting of carbon, hydrogen, and chlorine. It evaporates speedily, and has a specific gravity of 1.5. It is an important anæsthetic agent, and is also used externally to alleviate pain.”¹

CHOCOLATE.—A paste composed of the roasted kernel of the *theobroma cacao*, ground, and mixed with other ingredients—usually a little sugar, cinnamon, or vanilla.²

CHOICE.—The voluntary act of selecting or separating from two or more things that which is preferred; the determination of the mind in preferring one thing to another; election; the thing chosen.³

CHOKE.—“To choke” is defined as to render unable to breathe, by filling, pressing upon, or squeezing the windpipe; to suffocate; to stifle; to strangle.⁴

CHOLERA.—See generally the titles **BOARDS OF HEALTH**, vol. 4, p. 596; **HEALTH**; **POLICE POWER**; **QUARANTINE**.

CHOOSE. (See also **APPOINT**, vol. 2, p. 473; and see generally the titles **ELECTIONS**; **PUBLIC OFFICERS**.)—To choose is to make choice of; to select; to take by way of preference from two or more things offered; to elect.⁵

1. **Poison.** (See also the title **POISONS AND POISONING**.)—State *v.* Baldwin, 36 Kan. 4, 20. In that case the trial court gave the definition as given in the text. This the appellate court held to have been no error. The trial court further remarked that “in common parlance *chloroform* is classed among the poisons.” Coupled with the statement that it was still necessary for the jury to find from the evidence that *chloroform* was a poison, this was also held no ground for a reversal.

2. Webster's Dict.

Revenue Law—Distinction Between “Chocolate” and “Confectionery.” (See also the title **REVENUE LAWS**.)—It has been held that for tariff purposes Congress has at all times since the Act of May 2, 1792, intended to preserve the distinction between *chocolate* and “confectionery.” Under the Act of June 6, 1872 (17 Stat. 231), § 1, *chocolate, eo nomine*, is dutiable at the rate of five cents per pound, and although put up in a particular form and sold as “confectionery,” is not subjected to the duty imposed on the latter article by the Act of June 30, 1864, § 1 (13 Stat. 202). *Arthur v. Stephani*, 96 U. S. 125. And see *In re Schilling*, 53 Fed. Rep. 82.

3. Webster's Dict.

In Wills.—Where in a will a testator bequeathed “to my son John the *choice* of one of my two tracts of land,” the other tract to be sold and the money to be divided between

the testator's two daughters and his grandchildren, it was held that the son took a fee, among other reasons, because the testator intended a preference to the son, giving him a *choice*. *Clark v. Mikell*, 3 Desaus. (S. Car.) 168, cited in *Steele v. Thompson*, 14 S. & R. (Pa.) 100.

Will Distinguished from Choice. (See also the title **PRECATORY TRUSTS**.)—In *McRee v. Means*, 34 Ala. 365, it is said: “Will is sometimes used as the synonym of *choice*, wish, pleasure; but it is also used frequently in the sense of command, direction, determination, and resolution. It has, when found in testamentary papers, a universally received mandatory signification.”

4. *U. S. v. Barber*, 20 D. C. 93, dissenting opinion of Bradley, J. In that case the defendant was indicted for murder. The indictment alleged that he threw the deceased into a canal, by means of which the deceased was then and there “mortally *choked*, suffocated, and drowned.” This indictment was held fatally defective in that it did not conclude with an averment that the deceased died by means of being thus “mortally *choked*, suffocated and drowned.” See also **ENCYCLOPÆDIA OF PLEADING AND PRACTICE**, titles **HOMICIDE**; **INDICTMENT**.

5. Webster's Dict.

In Wills.—Under a devise to a party of premises for life, provided he *chooses* to re-

CHOSE. (*Chose in action*; see CHOSE IN ACTION.)—A thing, suit, cause; personal property.¹ It is a chattel personal, and is either in possession or in action. It is used in divers senses, of which the four following are the most important:²

Chose local, a thing annexed to a place, as a mill, etc.³

Chose transitory, that which is movable, and may be taken away or carried from place to place.

Chose in possession, that which a person has not only the right to enjoy, but also the enjoyment of.⁴

CHOSEN FREEHOLDERS. (See also the titles BOROUGH, vol. 4, p. 721; COUNTIES; COUNTY COMMISSIONERS; MUNICIPAL CORPORATIONS; PUBLIC OFFICERS; TOWNS AND TOWNSHIPS.)—A board of county officers in New Jersey, having charge of the finances of the county, and composed of persons chosen by and representing the several townships, precincts, or wards of the county.

CHOSSES IN ACTION. (As to the assignability of choses in action, and for cases determining what are and what are not choses in action in this connection, see the title ASSIGNMENTS, vol. 2, p. 1014 *et seq.* As to the larceny of choses in action, see the title LARCENY. As to the husband's right to the wife's choses in action, and what have been held choses in action in this connection, see the title HUSBAND AND WIFE. As to gifts *inter vivos* or *causa mortis*, see the title GIFTS. As to attachments, see the title ATTACHMENTS, vol. 3, p. 211. As to execution, see the title EXECUTION. As to the jurisdiction of the Circuit Court of the United States where choses in action have been assigned and suit brought thereon, see the title UNITED STATES COURTS. As to the various kinds of choses in action, see such specific titles as BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 65; BONDS, vol. 4, p. 618, etc. As to the proper parties to actions, see ENCYCLOPÆDIA OF PLEADING AND PRACTICE, titles EQUITABLE ASSIGNMENTS, vol. 7, p. 766; PARTIES TO ACTIONS.)—A chose in action is a right of proceeding in a court of

side therein, and then to A. B. in fee, it is not necessary to complete A. B.'s right to the premises, on the death of the devisee for life, that such devisee should have actually resided in the premises; the intention to reside there, being evidence that such intention would have been carried into effect had circumstances permitted, is sufficient. *Roe v. Down*, 2 Chit. Rep. 529, 18 E. C. L. 408.

In Statute—Chosen to Office.—Where in a statute providing that "if any person *chosen* or appointed" to office dies, the court "may declare the office vacant," and appoint a person to perform the duties of the office, a person dies after he has been *chosen* an officer at an election, but before the votes are counted, the court has authority to declare the office vacant and to fill the vacancy. *State v. Hunt*, 54 N. H. 431.

Synonymous with "Select."—In *Cook v. South Park Com'rs*, 61 Ill. 119, the court, *per* Thornton, J., said: "The commissioners were authorized to 'select.' The term implies choice. To *choose* signifies to take one thing rather than another. When we *select* we *choose*. It is true that other lands than those designated could not be taken, because it would have been in excess of the power, yet the commissioners might have refused to select. The law conferred an authority to be exercised, but not to be exercised at all hazards and without regard to results."

Same—Indictment.—Where a statute provided that an indictment should state that the grand jurors were "*chosen*, selected, and sworn," and the word *chosen* was omitted, it was held that the omission was not fatal. The words *chosen* and "selected" having in common parlance the same meaning, the omission of *chosen* was of no practical importance. *Kruget v. State*, 1 Neb. 365.

1. Webster's Dict.

2. Wharton's Law Dict.

3. This answers probably to the *res immobilis* of the civil law.

4. **Chose in Possession.** (See also CHOSE IN ACTION.)—Taxes and customs are a *chose* in possession if paid, a *chose* in action if unpaid. The king acquires and the subject loses a property in them the instant they become due. 2 Black. Com., § 408. Patents, copyrights, trade-marks, and similar rights are generally classed as incorporeal personal property. *Rapalje & Lawrence Law Dict.*

"The word *chose*, and the phrase *choses* in possession and *choses* in action, are defined by Bouvier as follows: '*Chose* (Fr., thing): personal property. *Choses* in possession: personal things of which one has possession. *Choses* in action: personal things of which the owner has not the possession, but merely a right of action for their possession.'" *Vawter v. Griffin*, 40 Ind. 601.

law to procure the payment of a sum of money.¹

Choses in Possession.—The term is used in contradistinction to choses in possession, which are chattels of which one is in possession or control, such as coin, wheat, books, and the like.²

1. Rapalje & Lawrence Law Dict. See also *Haskell v. Blair*, 3 Cush. (Mass.) 534; *Gillett v. Fairchild*, 4 Den. (N. Y.) 80; *People v. Tioga C. P.*, 19 Wend. (N. Y.) 75; *Ramsey v. Erie R. Co.*, 57 Barb. (N. Y.) 398; 1 Chit. Gen. Pr. 99.

2. **Other Definitions.**—In *Turner v. State*, 1 Ohio St. 426, the court said: "Personal property is divided into property in possession and property in action (2 Bl. Com. 388), 'or such where a man hath not the occupation, but merely a bare right to occupy the thing in question, the possession whereof may, however, be recovered by a suit or action at law; from whence the thing so recoverable is called a thing or *choses in action*.'"

A *Chose in Action* is defined to mean a mere right of action to a personal chattel not in actual possession. *Yerby v. Lynch*, 3 Gratt. (Va.) 471.

In *Streever v. Birch*, 62 Hun (N. Y.) 302, the court said: "Then, what are things in action or *choses in action*? 'Rights to receive or recover a debt, or money or damages for breach of contract, or for tort connected with contract.' *Bouvier's Law Dict.*, under 'Property' and *Choses in Action*."

In *Shuler v. Millsaps*, 71 N. Car. 298, the court said: "A *choses in action* is a right to receive or recover a debt, or money, or damages, for breach of contract, or for a tort connected with contract, but which cannot be enforced without action. 1 Chitty's Prac. 99."

In *Dial v. Gary*, 14 S. Car. 573, it was said that a *choses in action* embraces two ideas: first, a visible, tangible thing; and second, the right to sue for and recover that thing. See also *Hamilton County v. State*, 115 Ind. 84.

"The phrase *choses in action* is defined by Burrill to be a thing which a man has not the actual possession of, but which he has a right to demand by action, as a debt or demand due from another." *Vawter v. Griffin*, 40 Ind. 601. See also *Ramsey v. Gould*, 57 Barb. (N. Y.) 398; *Hamilton County v. State*, 115 Ind. 84.

Synonymous with Things in Action.—The terms *choses in action* and "things in action" are synonymous. *Dillard v. Collins*, 25 Gratt. (Va.) 346. See also *Webb v. Edwards*, 46 Ala. 29.

Present Right of Action.—In *Haskell v. Blair*, 3 Cush. (Mass.) 534, it was held that the term *choses in action* did not necessarily imply a present right of action. The court said: "But if the words *choses in action*, when first used with reference to an assignment or transfer thereof, necessarily imported a present right of action (a question which we have not examined), they have long since acquired a more extended meaning. The general definition is, 'a right not reduced into possession.' A definition which includes the present case is, 'the interest in a contract, which, in case of nonperformance, can only be reduced into beneficial possession by an action or suit.' Chitty on Bills (10th Am.

ed.) 6. See also 2 Wooddeson 387, 388. A note, bond, or other promise not negotiable is denominated a *choses in action*, before the promisor or obligor is liable to an action on it, as well as after. A note for money, payable on time, is a *choses in action* as soon as it is made; and though it be not payable to order or bearer, yet it is immediately assignable, just as a note on time, payable to order or bearer, is immediately negotiable. So the note now in suit, being payable in work, after a certain day, to the promisee or bearer, on demand, was a *choses in action*, assignable before or after that day, and before demand, though no action could be maintained on it till after demand."

Same—Municipal Aid.—But in *Hamilton County v. State*, 115 Ind. 85, it was held that until a railroad company, to which aid had been voted by a county, occupied a position which would enable it to enforce whatever right or interest it might have in the appropriation, such appropriation was not a *choses in action* in its favor which it could assign or mortgage. See the title MUNICIPAL AID.

Railroad Aid—United States Courts.—A county subscribed for stock of a railroad company, to be paid by an issue of county bonds under an act which prescribed that the bonds, when executed, "shall be deposited with trustee, * * * to be held in escrow and delivered to the said railroad company when it shall become entitled to the same" by compliance with the prescribed conditions upon which the subscription was made. It was held, where the bonds were withheld by the trustee, upon compliance with the conditions, that the right of the railroad company was one "to recover the contents of a *choses in action*." Act of Congress, August, 1888. And, therefore, where the railroad company and the trustee are citizens of the same state, an assignee of the company could sue to recover the bonds in a federal court. *Jackson v. Pearson*, etc., R. Co., 60 Fed. Rep. 113. See *infra*, *Jurisdiction of United States Courts*, in the notes to this definition.

Whether the Thing to Be Recovered in the Action Must Be Money.—In *Neale v. Haddock*, 2 Hayw. (N. Car.) 183, the court said: "'*Choses in action* are not vested in the husband by the marriage, though he survive, as debts upon bond or contract, unless they are recovered.' *Terms de Ley, choses en action*. It is defined to be when a man may sue for some duty due to him, as debt upon obligation, rent, action of covenant, ward, trespass of goods taken away, beating, or such like, and they are called things in action because he is driven to his action to recover them. In every one of these instances the thing to be recovered is money, either as due by express contract, as debt, or by an implied one, as damages. A sum of money to be recovered for debt or damages is indeed a *choses en action*, and nothing else can be so. A different idea has been affixed to this term by some of the judges. They have supposed

Torts. — The term "choses in action" has been held to include only rights of action founded on contract, or for injuries to property, and not rights of action for torts which are purely personal, such as an action for slander, for example.¹

But in its more enlarged sense, a chose in action may be considered as any right to damages, whether arising from the commission of a tort, the omission of a duty, or the breach of a contract.²

Examples. — Promissory notes, bills of exchange, debts, and policies of

from 2 Bl. Com. 389 that all subjects of property are things in action, where the owner hath not the actual possession; whereas, the legal idea is that everything is properly in possession which is not a *chose in action*. Nothing can be a *chose in action* which the owner by his own act can obtain the possession of without an action; not so of a sum of money due for debt or recoverable for damages. That a chattel detained is not a *chose in action* is proven by this, that the husband alone must bring detinue for a detainer before the coverture; also he alone must bring replevin." And, apparently to the same effect, see *Robertson v. Stuart*, 1 Hayw. (N. Car.) 159.

Same — Detention of Particular Chattels. — In *Sallee v. Arnold*, 32 Mo. 532, 82 Am. Dec. 144, it was held that a ward's chattels in the possession of her guardian were in possession of the ward, and upon her marriage her possession was transferred to her husband; in other words, it was held that the right of the ward in the chattels was a chose in possession and not a *chose in action*.

Same — Bailments. — If a chattel is found and not converted to the use of the finder, or if it is hired, or loaned, or otherwise bailed, it does not thereby become a *chose in action*. *Magee v. Toland*, 8 Port. (Ala.) 36. See also *Pitts v. Curtis*, 4 Ala. 350.

Conversion. — Where personal property is converted, the interest of the former owner is changed into a mere *chose in action*. In *Dunklin v. Wilkins*, 5 Ala. 201, the court said: "The remaining point is the precise one settled in the cases of *Goodwyn v. Lloyd*, 8 Port. (Ala.) 237, and *Brown v. Lipscomb*, 9 Port. (Ala.) 472. In both these cases it was held that when personal property is converted, the interest of the former owner is changed into a mere *chose in action*; in the case last cited we say: 'If the owner of a personal chattel is not in actual possession, but it is withheld by another, and the owner, ignorant of the fact, under such circumstances parts with his title, it is conceived the purchaser would succeed to his rights; but if the owner is disposed by one *bona fide* claiming title, and the fact of dispossession and *bona fide* claim is known to or communicated to him, his title is changed into a *chose in action*, which cannot be transferred or conveyed to another.'" See also the titles *ASSIGNMENTS*, vol. 1, p. 1021; *HUSBAND AND WIFE*; *TROVER AND CONVERSION*.

Civil Law. — In *Gordon v. Muchler*, 34 La. Ann. 604, the court said: "*Choses in action* correspond substantially to, or, at least, are included within, the civil-law definition of incorporeal rights. Our law, differing therein

from the common law, distinctly recognizes the assignability of that class of incorporeal rights known at common law as *choses in action*, and provides for the perfectibility of such assignments by notice to the debtor and entirely independent of his consent, and, from the moment of such notice, creates a privity between the debtor and the assignee, amounting to a perfect legal tie." See also *INCORPOREAL RIGHTS*.

Distinguished from Goods. — All the definitions of the word "goods" refer to things that are visible and in possession, while the definition of *chose in action* refers to something invisible, intangible, as a debt or demand or right of action. *Vawter v. Griffin*, 40 Ind. 601. See also *GOODS*.

Estate. — The term "estate" is broad enough to include *choses in action*. *Lee v. Hill*, 87 Va. 497. See also *ESTATE*.

1. **Torts.** — *Deshler v. Dodge*, 16 How. (U. S.) 622; *Dillard v. Collins*, 25 Gratt. (Va.) 346; *Gibson v. Gibson*, 43 Wis. 32. The court, in the last case, admitted that the term sometimes had a broader sense, including all rights of action, whether *ex contractu* or *ex delicto*, but held that in the statute under consideration, by applying the maxim of *noscitur a sociis*, the term should be confined to rights *ex contractu*, and, perhaps, injuries to property.

Malicious Prosecution. — In *Noonan v. Orton*, 34 Wis. 259, a right of action for malicious prosecution was held not to be a *chose in action*.

2. *Magee v. Toland*, 8 Port. (Ala.) 36.
In *Smith v. Smith*, (Tenn. 1897) 38 S. W. Rep. 439, the court said: "It is well settled that torts committed upon a married woman are comprehended within the definition of the term *choses in action*. *People v. Tioga C. P.*, 19 Wend. (N. Y.) 73, 74; *Berger v. Jacobs*, 21 Mich. 215; *Chicago, etc., R. Co. v. Dunn*, 52 Ill. 260; 3 AM. AND ENG. ENCYC. OF LAW (1st ed.), tit. *CHOSSES IN ACTION*."

The terms *choses in action* and "things in action" embrace demands arising out of tort as well as causes of action originating in a breach of contract. *Gillet v. Fairchild*, 4 Den. (N. Y.) 80; *Hall v. Robinson*, 2 N. Y. 293; *Cincinnati v. Hafer*, 49 Ohio St. 60.

Right of Action for Personal Injuries. — In *Bennett v. Bennett*, 116 N. Y. 598, the court said: "And while a right of action for a personal injury may not be within the definition, as frequently given, of a *chose in action*, that term in its broadest sense does embrace it. *People v. Tioga C. P.*, 19 Wend. (N. Y.) 73, 74; *Berger v. Jacobs*, 21 Mich. 215; *Chicago, etc., R. Co. v. Dunn*, 52 Ill. 260, 4 Am. Rep. 606; 3 AM. AND ENG. ENCYC. OF LAW (1st ed.), tit. *CHOSSES IN ACTION*."

insurance are prominent examples of choses in action.¹ For these and other examples, see note 2.

1. *Ex p. Ibbetson*, 8 Ch. Div. 519.

2. **Accounts.**—Book accounts and bills receivable, including all debts of every kind due the assignor from any person, were held things in action, and immediate personal delivery upon their assignment was held unnecessary under the *California* Civil Code. *Kirk v. Roberts*, (Cal. 1892) 31 Pac. Rep. 620.

An open account is a "*chose in action* for the payment of money" within the statutes authorizing assignees to sue in their own names. *Crawford v. Brooke*, 4 Gill. (Md.) 213; *Shaffer v. Union Min. Co.*, 55 Md. 74; *Sere v. Pitot*, 6 Cranch (U. S.) 335.

A Building Contract secured under the mechanics' lien law is assignable under the *Virginia* code as a *chose in action*. *Iaeg v. Bossieux*, 15 Gratt. (Va.) 83, 76 Am. Dec. 189.

A Written Contract for a sale of land is a *chose in action*. *Cook v. Bell*, 18 Mich. 387.

Civil Damage Act.—In *Streever v. Birch*, 62 Hun (N. Y.) 302, the plaintiff brought an action under the Civil Damage Act. The defendant had furnished the plaintiff's servant with intoxicating liquors. While intoxicated the servant was frozen, and the plaintiff furnished medical attendance to him, in accordance with a verbal contract to that effect. It was held that the plaintiff was not, by the intoxication of his servant, injured in his property. The court said: "The plaintiff has no cause of action at common law. And his statutory action is limited to injury to property. Take this word in its broadest meaning, as including things in possession and things in action. Then, what are things in action or choses in action? 'Rights to receive or recover a debt, or money, or damages for breach of contract, or for tort connected with contract.' *Bouvier's Law Dict.*, under 'Property' and *Choses in action*. If we turn to the Code (§ 3343), for definitions of its own use of the words, we find: 'An "injury to property" is an actionable act whereby the estate of another is lessened, other than a personal injury or the breach of a contract.' 'The word "property" includes real and personal property.' 'The words "personal property" include money, chattels, things in action, and evidences of debt.' Certainly the plaintiff was not injured as to any property in possession. Was he injured as to any *chose in action*? Not unless he had a legal claim, and he had none."

A Claim against a City for damages for injury to real estate has been held a *chose in action*. *Cincinnati v. Hafer*, 49 Ohio St. 60.

Claim Against Directors.—In *In re Park Gate Wagon Co.*, 17 Ch. Div. 234, it was held that "things in action," as used in section 95 of the English Company's Act of 1862, included claims by the liquidator against the directors for malpractices in reference to the property of the company.

Debenture.—A debenture of a joint stock company, by which the company undertakes to pay a sum of money with interest and charge their property with the payment thereof, is a *chose in action* within the English Bankruptcy Act. *In re Pryce*, 4 Ch. Div. 685.

Dower.—In *Lamar v. Scott*, 3 Strobb. L. (S. Car.) 563, the court said: "The estate in dower is everywhere treated of as an estate in lands, tenements, and hereditaments. I do not find any authority to say that before her dower is admeasured a widow is seized as joint tenant, or tenant in common with the heir, and it may be that until her dower is laid off to her it is a *chose in action*, as was argued at the bar. But it is, nevertheless, a legal right enforceable by a well-known remedy. In *Jacob's Law Dictionary*, title *Chose*, it is said: 'If one disseize me of my land, my right or title of entry into the land, or action for it, is a *chose in action*.' In such case the title to the land remains unchanged in character, but the remedy to gain possession is a *chose in action*. The action for dower is a local action, and a tenant in dower may, as well as all others entitled to possession, bring trespass or trespass to try title against an intruder upon her possession or right of possession. For these reasons I think it very clear that dower belongs to that division of estates called real, as distinguished from personal, or a mere chattel interest."

Executors and Administrators—Interest of Heir.—In *Sterling v. Sims*, 72 Ga. 51, it was held that the right of an heir to have her interest in the estate of her deceased ancestor, in the hands of his administrator, was a *chose in action* and not a chose in possession. The court said: "A chose in possession is where a person has not only the right to enjoy but also the actual enjoyment of the thing. 1 *Abbott's Law Dictionary* 220. A *chose in action* includes all rights to personal property not in possession which may be enforced by action; demands arising out of torts as well as contracts; it is sometimes used as the right of bringing an action. *Ramsey v. Gould*, 57 Barb. (N. Y.) 408; *Hall v. Bartlett*, 9 Barb. (N. Y.) 299; *People v. Tioga C. P.*, 19 Wend. (N. Y.) 75; *Gibson v. Gibson*, 43 Wis. 32; *Gillet v. Fairchild*, 4 Den. (N. Y.) 82."

Same—Distributive Share or Legacy.—A distributive share in an estate or a legacy is a *chose in action* while in the hands of the executor or administrator. *Wildman v. Wildman*, 9 Ves. Jr. 177; *Hayward v. Hayward*, 20 Pick. (Mass.) 517; *Parsons v. Parsons*, 9 N. H. 321.

Deposit in Bank.—In *Gordon v. Muchler*, 34 La. Ann. 604, it was held that the right of a depositor against a bank was a mere *chose in action*. See also *Walker v. Bradford Old Bank*, 53 L. J. Q. B. 280, 12 Q. B. Div. 511.

Garnishment. (See also the title GARNISHMENT.)—The expression *choses in action* in the provision of the *Illinois* statute in regard to garnishment refers only to those in the custody, charge, or possession of the garnishee belonging to the defendant, and held against third parties. *Burgess v. Capes*, 32 Ill. App. 372.

Insurance Policy.—In *Ex p. Ibbetson*, 8 Ch. Div. 519, a life insurance policy was held to be a "thing in action."

To the same effect see *Ionia Company Sav. Bank v. McLean*, 84 Mich. 628; *New York L. Ins. Co. v. Flack*, 3 Md. 341.

CHRISTIAN. — A Christian is one who professes to believe or is assumed to believe in the religion of Christ; especially one whose inward and outward

And a fire insurance policy. *Watertown F. Ins. Co. v. Grover, etc.*, *Sewing Mach. Co.*, 41 Mich. 131; *Matts v. Cumberland Mut. F. Ins. Co.*, 44 N. J. L. 478.

A Judgment is a *chase in action* within the meaning of statutes authorizing the assignment of *chases in action*. *Ware v. Bucksport, etc.*, R. Co., 69 Me. 97; *Murphy v. Cochran*, 1 Hill (N. Y.) 339. See *Wilson v. McElroy*, 2 Smed. & M. (Miss.) 241.

Jurisdiction of United States Courts. (See also CONTENTS, and see the title UNITED STATES COURTS.) — By section 629 of the Rev. Stat. U. S., it is provided that no Circuit Court shall have cognizance of any suit to recover the contents of any promissory note, or other *chase in action* in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. In *Plant Invest. Co. v. Jacksonville, etc.*, R. Co., 152 U. S. 76, Field, J., said: "The same provision is contained in the act of March 3, 1887, c. 373, 24 Stat. 552, amendatory of the act to determine the jurisdiction of the circuit courts of the United States. As we said in the case of *Shoecraft v. Bloxham*, 124 U. S. 730, 735, 'the terms used — "the contents of any promissory note or other *chase in action*" — were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. They were not happily chosen to convey this meaning, but they have received a construction substantially to that purport in repeated decisions of this court.' And in support of this doctrine the case of *Corbin v. Black Hawk County*, 105 U. S. 659, was cited. In that case a suit brought to enforce the specific performance of a contract was held to be a suit to recover the contents of a *chase in action*, and therefore could not be maintained under the statute in question in a federal court in the name of the assignee, if the assignor could not have maintained such suit."

Same — Bond and Mortgage. — The assignee of a bond and mortgage who sued in equity to obtain payment was held within the provision, and must show that his assignor was competent to sue. *Sheldon v. Sill*, 8 How. (U. S.) 441. In that case the court said: "The term *chase in action* is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises which confer on one party a right to recover a personal chattel or a sum of money from another, by action."

Same — Claim for Freight. — In *Conn v. Chicago, etc.*, R. Co., 48 Fed. Rep. 177, a claim against a railroad company for overcharges in freight was held not to be a *chase in action*, within the provision. The court said: "The limitation thus enacted in regard to suits upon assigned causes of action is expressly confined to those brought to recover the contents of a promissory note or other *chase in action*; and, in *Ambler v. Eppinger*, 137 U. S. 480, it is held that the phrase *chase in action* cannot be construed to include rights of action founded on

some wrongful act or some neglect of duty, causing damage, but must be limited to suits founded upon contracts containing within themselves some promise or duty to be performed. In *Deshler v. Dodge*, 16 How. (U. S.) 622, and *Bushnell v. Kennedy*, 9 Wall. (U. S.) 387, the same construction was given to the similar phrase found in the eleventh section of the Act of 1789, so that it is thus clearly decided by the Supreme Court that the limitation found in the Act of 1888, and already cited, cannot be made applicable to claims of the nature of those declared on in the present action, which are for damages resulting from the alleged violation of the duty imposed upon the railway company to charge only legal rates for the transportation of property over its line of railway."

Same — Open Accounts. — In *Sere v. Pitot*, 6 Cranch (U. S.) 335, it was held that the term *chase in action* included open accounts.

Same — Specific Performance. — In *Corbin v. Black Hawk County*, 105 U. S. 659, it was held that a suit to compel specific performance of a contract and enforce other stipulations was a suit within the section. See also *Shoecraft v. Bloxham*, 124 U. S. 735.

Same — Torts. — In *Deshler v. Dodge*, 16 How. (U. S.) 622, it was held that the provision did not extend to damages for tortious injuries.

Negotiable Instruments. — Promissory notes and bills of exchange are *chases in action*. *Phelps v. Phelps*, 20 Pick. (Mass.) 561.

Bills of Exchange. — In *McNeillage v. Holloway*, 1 B. & Ald. 218; a bill of exchange is distinguished from a *chase in action*, it being there held that where a bill of exchange was payable to a *feme sole*, who intermarried before the same was due, the husband might sue in his own name without joining the wife. *Bayley, J.*, said: "I am of the same opinion. This being a negotiable security, the right of action shifts with the possession. Chattels personal vest absolutely in the husband by marriage. *Chases in action* do not; for in order to reduce them into possession it is necessary to join the wife. The case of a negotiable security is a middle case; whoever has the instrument in his possession, and the legal right to it, may sue upon it in his own name."

Reversionary Interest. — A reversionary interest in a chattel has been held not to be a *chase in action*. *Pitts v. Curtis*, 4 Ala. 350.

Stock. (See also the title STOCK.) — In *Brown v. Booke*, 53 Md. 155, certain certificates of indebtedness of the mayor and city council of Baltimore, termed Baltimore city stock, were held *chases in action*.

So, in *Slaymaker v. Gettysburg Bank*, 10 Pa. St. 373, bank stock was held a *chase in action*. The court said: "That stock cannot be considered in the light of a thing in possession, and personal estate, as distinguished from a *chase in action*, would also appear from this, that at common law it could not be taken in execution and sold for debts."

In *Colonial Bank v. Whitney*, 30 Ch. Div.

life is conformed to the doctrines of Christ. One who is born in a Christian country or of Christian parents. Pertaining to the church.¹

261, it was held that shares in a company were not things in action within the English Bankruptcy Act of 1883. Fry, L. J., *dissenting*, said: "The first question is whether, according to the ordinary legal meaning of the words 'things in action,' which I take to be technical words, they include such shares as those in controversy. This leads to the consideration of some very elementary points in English law. According to my view of that law, all personal things are either in possession or in action. The law knows no *tertium quid* between the two. 'No chattel,' says Lord Coke, in Fulwood's Case, 4 Coke 65a, 'either in action or possession, shall go in succession,' as if the two alternatives were the only possible ones. 'Property in chattels personal,' says Blackstone, 'may be either in possession, which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing, or else it is in action, where a man hath only a bare right, without any occupation or enjoyment.' Bl. Com., bk. 2, c. 25, p. 389. And so Lord Hardwicke, in the great case of Ryall v. Rolle, 1 Atk. 165, 182, speaks of personal property, whether in possession or action only, as equivalent to all kinds of personal property. The expression 'choses in suspense' is found in Brooke's Abridgment, in conjunction with *choses in action*; but, so far as I can understand, the two expressions are synonymous. It has been suggested that the expression *choses in action* was originally only applicable to debts, and that by a lax usage it has acquired a secondary and wider significance. I am not able to adopt this view. The article '*Choses in Action* and *Choses in Suspense*,' in Brooke's Abridgment, fol. 140, seems to show that as early as 5 Edw. IV. the expression was held to include the king's right to the marriage of his ward; in 9 Hen. VI. the property in deeds in the hands of a third person was considered as a *chose in action*; and in the 33 Hen. VIII. the classification of *choses in action* into real, personal, and mixed was recognized. Indeed, the whole article appears to me inconsistent with the notion that according to early usage the expression was confined to debts. On the contrary, that early usage appears to me to have been as wide as the modern usage, as explained by Mr. Joshua Williams in the passage which has been cited by Lord Justice Cotton." This dissenting opinion was confirmed in the House of Lords, Colonial Bank v. Whinney, L. R. 11 App. 426, and shares were held to be *choses in action*, overruling *Ex p. Union Bank*, L. R. 12 Eq. 354; *Société Générale de Paris v. Tramways Union Co.*, 14 Q. B. Div. 424. The reasoning of Fry, L. J., and his definition of things in action, were especially adopted on appeal by several of their lordships. See also *Dundas v. Dutens*, 1 Ves. Jr. 106.

Same.—Stock Held Not a Chose in Action.—Where a statute prohibited an attorney from purchasing any bond or thing in action, it was held that this did not preclude the purchase of the stock of the corporation by an

attorney. The court said: "The purchase of stock is not within the prohibition. It is not one of the securities or evidences of debt mentioned, nor is it a *chose in action* within the meaning of this statute. *Chose in action*, as defined by Burrill, is 'a thing which a man has not the actual possession of, but which he has a right to demand by action, as a debt or demand due from another.' See also 2 Black. Com. 338, 396, 397; *Gillet v. Fairchild*, 4 Den. (N. Y.) 82. The *chose in action* intended by the statute is one on which a suit can be brought. This action is not brought upon the stock. That is not the cause of action; and although in some respects it may resemble a *chose in action*, it is not strictly such. The statute is a penal one, and cannot be extended to what is not expressly included in it. It is plain, I think, that the purchase of stock was not a violation of the statute." *Ramsey v. Gould*, 57 Barb. (N. Y.) 398.

United States Government Bonds.—In *Brown v. Bokee*, 53 Md. 155, United States government bonds were held *choses in action*. The court said: "It has been argued that the five-twenty bonds are not *choses in action* because no suit upon them can be brought against the United States. But if they are not *choses in action* what are they, and under what description of property or rights known to the law do they come? It is clear that whatever other qualities they may have, they are not money or currency. They are widely different from legal-tender notes."

Witnesses.—Interest in Real Estate.—A statute provided that where the assignor of a "thing in action" or contract had been examined as a witness, the adverse party might be so examined. It was held that the vendor by quitclaim deed of the right to take water from the land of another, which right was not reduced to possession, such vendor having no legal title to such right, but claiming only under a contract giving him the equitable right, was an assignor of a thing in action or contract within the section. *Glasford v. Baker*, 1 Wash. Ter. 224. See also the title WITNESSES.

Right of Entry to Land.—The right of a person disseized of land, or of the right of entry thereto, is a *chose in action*. 4 Kent's Com. (10th ed.) 67; *Glasford v. Baker*, 1 Wash. Ter. 224.

1. Webster's Dict.

It is used in an ecclesiastical sense—*Christian* church, *Christian* doctrine. *Christianitas curia*, the court *Christian*, or ecclesiastical judicature, as opposed to the civil court or lay tribunal. Burrill's Law Dict.

In Constitution.—In *New Hampshire* it has been held that the term *Christian*, in the constitution of the state, is used in its ordinary sense, and designates one who believes or assents to the truth of the doctrines of *Christianity*, as taught by Jesus Christ in the New Testament. It includes Protestants and Roman Catholics, but not Mahometans, Jews, pagans, or infidels. The political or conventional use of the word, denoting one who

CHRISTIANITY. — See generally the title RELIGIOUS SOCIETIES. As to Christianity as a part of the common law, see the titles COMMON LAW; CONSTITUTIONAL LAW; RELIGIOUS LIBERTY; SUNDAY.

CHRISTIAN NAME. (See also the title NAME.) — The name given at the font, distinct from the surname.¹

CHRISTIAN SCIENCE. (See also the titles BOARDS OF HEALTH, vol. 4, p. 596; MALPRACTICE; PHYSICIANS AND SURGEONS.) — See note 2.

CHRONIC. — See note 3.

CHUCK-A-LUCK. (See also the title GAMING.) — The name given to a game of chance.⁴

CHURCH. (See also the titles CEMETERIES, vol. 5, p. 781; DISTURBING MEETINGS; EXEMPTION FROM TAXATION; INTOXICATING LIQUORS; PEWS; RELIGION; RELIGIOUS LIBERTY; RELIGIOUS SOCIETIES.) — A church is a temple or building consecrated to the honor of God and religion,⁵ or an assem-

ssents to the truth of the doctrines of the religion of Christ, or who, being born of *Christian* parents or in a *Christian* country, does not profess any other religion or belong to any of the other religious divisions of men, is the sense in which the word is ordinarily used in constitutions and statutes and legal documents, and refers to those commonly known as nominally *Christians*, rather than to those professing the faith of some particular church, who are termed *Christians* in the theological or sacred sense of the term. Hale v. Everett, 53 N. H. 9.

1. Wharton's Law Dict.

A person can have but one *Christian name*, and an indictment containing two *Christian names* has been quashed. Rex v. Newman, 1 Ld. Raym. 562.

Abbreviations. (See also the titles ABBREVIATIONS, vol. 1, p. 97; NAMES.) — Where the *Christian name* is required, it has been held that a well-known abbreviation is sufficient; thus, Wm. for William. Henry v. Armitage, 12 Q. B. Div. 257. See also Reg. v. Bradley, 3 El. & El. 634, 107 E. C. L. 634; Reg. v. Plenty, L. R. 4 Q. B. 346. See generally the title WARRANTS.

Corporations. — An act declared that all misnomers in writs, petitions, etc., might be corrected and amended on motion, "whether in the *Christian* or surname." It was held that the words "*Christian* or surname" did not limit the act to natural persons, but that the term *Christian name* was used in the sense of "given name," and included the name given to a corporation by the legislature. Johnson v. Central R. Co., 74 Ga. 397.

2. In State v. Buswell, 40 Neb. 158, it was held that the exercise of the art of healing, for compensation, whether exacted as a fee or expected as a gratuity, could not be classed as an act of worship; and, therefore, a *Christian scientist* was within a statute providing for licenses to practice medicine, where the statute further provided that "any person shall be regarded as practicing medicine within the meaning of this act, who shall operate on, profess to heal, or prescribe for, or otherwise treat, any physical or mental ailment of another."

3. **Instructions.** — In Jones v. Yarborough, 2 Ala. 525, the court says: "The circuit judge, in his charge to the jury, seems to have sup-

posed that in order to distinguish a disease as *chronic* it is necessary that it should have been of long standing. As applied to diseases of the body, *chronic* and acute are the antitheses of each other. An acute disease is one usually attended with violent symptoms, promising speedily to attain a crisis; while a *chronic* disease is deep-rooted and obstinate, threatening a long continuance. Now, it may be true that it usually requires some time after a disease has manifested itself, to discover that it is *chronic*; yet as the reverse may be, and sometimes is, the case, it was not permissible to instruct the jury that if the negro in question had a *chronic* disease of the chest on the 25th of December, 1838, it was scarcely possible that he was sound a few weeks previously when he was sold." See generally DISEASE.

4. Montee v. Com., 2 J. J. Marsh. (Ky.) 132.

5. **Building.** — Robertson v. Bullions, 9 Barb. (N. Y.) 64; Pawlet v. Clark, 9 Cranch (U. S.) 326.

Same — **Mechanics' Lien.** — In Presbyterian Church v. Allison, 10 Pa. St. 413, a *church* was held to be a building within a mechanics' lien law. See generally the title MECHANICS' LIENS.

Disturbing Religious Meetings. (See also the title DISTURBING MEETINGS.) — In Stratton v. State, 13 Ark. 688-691, it was held that the word *church*, in a statute against disturbing religious meetings, meant the building or house used on the occasion of the disturbance alleged, and not the body of people or worshippers associated together for a religious purpose.

Intoxicating Liquors — Building Not Exclusively Used for Church Purposes. — A building not used exclusively for *church* purposes, although one floor was used for religious meetings, was held not a *church* within the New York statute prohibiting the licensing of a saloon within two hundred feet of a *church* building. People v. Dalton, 9 Misc. Rep. (N. Y. C. Pl.) 249. See the title INTOXICATING LIQUORS.

Intoxicating Liquors — Schoolhouse. — In State v. Midgett, 85 N. Car. 538, it was held that an indictment for selling spirituous liquors within a certain distance of a *church* could not be supported by evidence of such a sale within the prescribed distance of a schoolhouse, al-

bly or society of persons united by the profession of the same Christian faith, meeting together for religious worship.¹

though divine service was held therein on suitable occasions.

Exemption from Taxation. (See also the title EXEMPTION FROM TAXATION.)—In *Howell v. Philadelphia*, 8 Phila. (Pa.) 280, it was held that property leased by a religious congregation for purposes of stated religious worship was exempt from taxation under a statute providing that all *churches*, meeting-houses, or other regular places of stated religious worship should be exempt.

1. **Society.**—*Robertson v. Bullions*, 9 Barb. (N. Y.) 64; *Pawlet v. Clark*, 9 Cranch (U. S.) 326; *Neale v. St. Paul's Church*, 8 Gill (Md.) 116; *Gaff v. Greer*, 88 Ind. 131; *Silsby v. Barlow*, 16 Gray (Mass.) 330.

In *Society v. Hatch*, 48 N. H. 396, it is said: "It is, we think, a matter of common observation that the terms *church* and 'society' are popularly used to express the same thing, namely, a religious body organized to sustain public worship."

A statute prescribed that it should be lawful for the male persons belonging to any *church* to choose the trustees. In *Robertson v. Bullions*, 9 Barb. (N. Y.) 95, affirmed 11 N. Y. 243, Hand, J., said: "The whole statute has reference to religious associations. A *church* (*ecclesia*) may be, first, a temple or building consecrated to the honor of God and religion; or, second, an assembly of persons united by the profession of the same Christian faith, met together for religious worship. Jac. Law Dict., *Church*; Toml. Dict., *Church*; 5 Petersd. Abr. 409; *Pawlet v. Clark*, 9 Cranch (U. S.) 292. These give the legal, though the word has various popular definitions. Webster's Dict., *Church*. In our statute I think it is used in the sense of the second definition above."

Presbyterian Committee of Publication.—In *Wilson v. Perry*, 29 W. Va. 171, it was held that the incorporation of the "Presbyterian Committee of Publication," under the name of "The Trustees of the Presbyterian Committee of Publication," was not the incorporation of the "Presbyterian *Church* of the United States." The court, in distinguishing the committee from the *church*, said: "Webster defines the word *church* as follows: '1st. A formally organized body of Christians believing and worshipping together. 2d. A body of Christian believers observing the same rites and acknowledging the same ecclesiastical authority. 3d. The collective body of Christians or those who acknowledge Christ as the Saviour of mankind.' He defines the word 'denomination' as follows: 'A class or collection of individuals called by the same name. A sect.' It is apparent that the third definition of the word *church* given by this lexicographer will include those mentioned in the first and second definitions, by whatsoever name they may be called, as well as all religious denominations which acknowledge Christ as the Saviour of mankind. By the Book of Church Order of the Presbyterian *Church* in the United States the word *church* is defined: 'A number of professing Christians with their offspring associated together for divine worship and godly

living agreeably to the Scriptures and submitting to the lawful government of Christ's *church*.'" And see *Deaderick v. Lampson*, 12 Heisk. (Tenn.) 531.

The Corporation.—In *Wilson v. Presbyterian Church*, 2 Rich. Eq. (S. Car.) 198, the court said: "In one sense (and the common sense) the word *church* is understood to mean a number of Christian persons, agreeing in their faith, usually assembling together at one place, for purposes of worship—submitting to its ordinances, and receiving its sacraments. This is entirely distinct from the meaning of the word *church* as applied to a corporation. In the former sense of the word, many persons are usually members of the *church*, and most commonly a large majority, who neither are nor can be members of the corporation—married women, infants, and slaves. When persons are incorporated by the name of *church*, this can be regarded only as a name of designation; or at most, as indicating, when property is given to them, the trusts upon which it is given. This does not constitute the corporation a *church*, in what I consider the proper sense of the word, any more than if they were called by any other name. Nor do I consider a corporation for the managing of *church* funds can properly be called an ecclesiastical corporation, any more than if property were given to the South Carolina Society for the support of the minister of St. Michael's *Church*. In either case they are merely regarded as trustees for the entire body of worshipers, and are merely a civil institution for the management of property."

In *Baptist Soc. v. Fisher*, 18 N. J. L. 257, the court say: "Their being members and supporters does not constitute them the *church*. This term is one of very comprehensive signification. It anciently signified any public meeting convened to consult upon the common welfare of a state, was afterwards used to designate the place of sacred or religious meetings, and again it was applied to religious congregations, assemblies, or associations; but at the present time and under our institutions and laws, it must be understood to express a spiritual or religious corporation. This is now its ordinary acceptation, and it must be considered as used in that sense in these articles of association. If a corporation, therefore, it must be under the authority of trustees, managers, directors, or officers of some description."

In *Anderson v. Brock*, 3 Me. 247, the court say: "A *church*, separate from the society with which it is connected, has not the rights and privileges of a corporation. It is, however, a body, having a distinct existence and character, in our ecclesiastical history and usages, and as such is recognized by the law."

Congregation and Church.—In *First Baptist Church v. Witherell*, 3 Paige (N. Y.) 301, Chancellor Walworth thus distinguishes between the terms "congregation" and *church*: "But I apprehend that in this they have overlooked the distinction between the congregation, and the *church* strictly so called, which comprises

CHURCHYARD. — See the title CEMETERIES, vol. 5, p. 781.

CHYMOSIN. — See note 1.

CIDER. (See also the title INTOXICATING LIQUORS.) — Cider is a fermented liquor made from the juice of apples.²

only a part of the congregation or society. The *church* consists of an indefinite number of persons, of one or both sexes, who have made a public profession of religion; and who are associated together by a covenant of *church* fellowship, for the purpose of celebrating the sacrament, and watching over the spiritual welfare of each other. But a religious society, or congregation, as recognized by the third section of the statute providing for the incorporation of religious societies, is, with us, what is usually denominated a poll parish in some of the neighboring states. It consists of a voluntary association of individuals or families, united for the purpose of having a common place of worship, and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the ordinances of baptism, etc."

In *Gaff v. Greer*, 88 Ind. 131, it was held, in the decision of a presbytery that the withdrawal of a majority from its jurisdiction was a secession from the *church*, that the word *church* in that decision was used for congregation.

Parish. (See also PARISH.) — In *Ayres v. Weed*, 16 Conn. 291, where a testator devised his estate to the Protestant Episcopal *Church* in New Canaan, parol evidence was held admissible to show that the terms *church* and "parish" were by this denomination of Christians used indiscriminately, and in the same sense as the term "societies."

In *Baker v. Fales*, 16 Mass. 498, the court says: "Mr. Wise, a writer on this subject, defines a particular *church* to be 'a society of Christians meeting together in one place, under their proper pastors, for the performance of religious worship and the exercising of Christian discipline, united together by covenant,' as most of those undoubtedly were who composed that society. *Parochia*, or parish, he says, signifies, in a *church* sense, a competent number of Christians dwelling near together, and having one bishop, pastor, etc., or more, set over them. Therefore, parish, in this sense, is the same with a particular *church* or congregation; and this, he observes, is plainly agreeable with the sense, custom, and platform of the New England *churches*; a whole diocese is one parish, it not exceeding, in ancient times, the bounds of a parish or a small town, or a part of a town."

Church Members. — See the title RELIGIOUS SOCIETIES.

Pews in Churches. — See the title PEWS.

1. **Patent Cases.** — For a definition of this term in connection with a patent, see the case of *Blumenthal v. Burrell*, 43 Fed. Rep. 667, 11 U. S. App. 631.

2. *State v. Schaefer*, 44 Kan. 93; *Com. v. Reyburg*, 122 Pa. St. 304.

Intoxicating Liquors. (See also the title INTOXICATING LIQUORS.) — In *People v. Foster*, (Mich. 1887) 7 West. Rep. 896, it was held that

the sale of fermented *cider* by a druggist, to be used as a beverage, was unlawful.

Upon the question as to whether *cider* is an intoxicating liquor, see *Com. v. Smith*, 102 Mass. 144; *State v. McLafferty*, 47 Kan. 141; *State v. Schaefer*, 44 Kan. 93; *Com. v. Reyburg*, 122 Pa. St. 304; *Eureka Vinegar Co. v. Gazette Printing Co.*, 38 Alb. L. J. 267.

Cider is an alcoholic beverage, obtained by the fermentation of the juice of apples, and cannot lawfully be sold in a state whose statutes prohibit the sale of "alcohol, or any spirituous, ardent, vinous, malt, or fermented liquors." *Eureka Vinegar Co. v. Gazette Printing Co.*, 35 Fed. Rep. 570.

The effect of a statute of *Illinois* declaring that spirituous, vinous, and malt liquors were intoxicating was to render it unnecessary to prove it on a trial; but *cider*, not being a fluid belonging to either of the classes mentioned, is not intoxicating by the legislative enactment, and in a prosecution for selling *cider* as an intoxicating liquor, proof should be made that such fluid is intoxicating. *Feldman v. Morrison*, 1 Ill. App. 460.

Where a statute declares that "ale, etc., *cider*, and all wines shall be considered intoxicating liquors, within the meaning of this act," sales of unfermented *cider* may be indictable and punishable as sales of "intoxicating liquor." *Com. v. Dean*, 14 Gray (Mass.) 99.

An averment of the sale of intoxicating liquor is sustained by proof of the sale of unfermented *cider*. *Com. v. Dean*, 14 Gray (Mass.) 99. The provision of Mass. Stat. 1868, c. 14, § 21, that the term "intoxicating liquor" in said statute shall be construed to include *cider* applies to an indictment under the Gen. Stat., c. 87, § 7, for keeping a liquor nuisance. *Com. v. Smith*, 102 Mass. 144.

Contract. — Where a contract was made between A. and B., whereby A. having a quantity of apples agreed to sell his *cider* to B. at a certain price per hogshead, to be delivered at T. at a future time, and to lend such pipes as he had for the use of the *cider* to be manufactured on his, A.'s, premises, and to be paid for before it was removed; and A., in pursuance, delivered a quantity of juice expressed from the apples to a servant hired by B. to manufacture the *cider* on A.'s premises; and before the *cider* was completely manufactured it was seized by the excise officers, because the place where it was deposited had not been entered, and was condemned in the exchequer as B.'s property, together with the casks, and in assumption for goods sold and delivered brought by A. against B. it appeared that the word *cider* at the place where the contract was made meant the juice of the apples as soon as it was expressed; it was thereupon held that the contract must be construed to have been for the sale of *cider* in that sense of the word, and that the property passed to B. as soon as the apple juice was delivered to his

CIGARETTES. — See note 1.

CIGARS. — A cigar is a bunch of tobacco rolled together and put into shape for smoking, and intended for that use.²

CIPHER. — To use figures or to practice arithmetic. To designate by character; to represent.³

CIRCUIT. — A division of the country appointed for a particular judge to visit for the trial of causes or for the administration of justice.⁴

CIRCUIT COURT OF APPEALS. — See the title UNITED STATES COURTS.

CIRCUIT COURTS. — See the titles COURTS; UNITED STATES COURTS; and see CIRCUIT.

CIRCULAR. (See also the title POSTAL LAWS.) — A circular letter, or paper, often printed, copies of which are addressed to various persons; as a business circular, a political circular.⁵

servant. *Studdy v. Sanders*, 5 B. & C. 628, 12 E. C. L. 336.

1. **Revenue Laws.** — As to the distinction between *cigarettes* and smoking tobacco in revenue laws, see *Carroll v. Ertheiler*, 1 Fed. Rep. 690.

2. **Revenue Laws.** (See also the title REVENUE LAWS.) — *D'Estrinoz v. Gerker*, 43 Fed. Rep. 286. In this case a *cigar*-shaped bundle of an extremely large size had been classified as manufactured tobacco. It was in evidence that it was used as an ornament in *cigar* dealers' windows, but could be smoked as a *cigar*. It was held that it was for the jury to determine whether the article was a *cigar* or not.

3. Webster's Dict.

"To Cipher," Not Equivalent to "the General Rules of Arithmetic." — Where a statute requires that when a child shall be bound out by the overseer of the poor "the indenture shall contain an agreement on the part of the person to whom such child shall be bound that he will cause such child to be instructed * * * in the general rules of arithmetic," an indenture containing a clause that the master "will teach the child or cause it to be taught * * * to cipher" is not a sufficient compliance with the stipulation of the statute. *People v. Hoster*, 14 Abb. Pr. N. S. (N. Y.) 414.

Telegram. (See also the title TELEGRAPHS AND TELEPHONES.) — A telegram which is expressed in abbreviations known to the transmitting company is in no sense "in cipher," and if such abbreviated telegram be altered through the negligence of the company, the sender will be entitled to recover such damages as result naturally and proximately from the company's default, and which he could not himself avert, acting in good faith and in the exercise of ordinary prudence. And the burden of proof is upon the negligent company to show that the loss might have been mitigated by a different course of conduct which a reasonably prudent man ought to have taken. *Pepper v. Telegraph Co.*, 87 Tenn. 554, 10 Am. St. Rep. 699.

4. *Bouvier's Law Dict.*

In England, *circuits* are divisions of the country for judicial business. There are seven, formerly eight, of these judicial *circuits*; namely, the Northern, Northeastern, Midland, Southeastern, Oxford, Western, and North and South Wales (the last consisting of two divisions), into which the judges went

originally twice a year, viz., in the vacations after Hilary and Trinity terms. In recent times the judges go oftener, and at no precisely fixed periods. Two judges go on each of the *circuits* and hold court. *Wharton*; 3 Bl. Com. 58; 3 Steph. Com. 221. County court *circuits* were created by 8 & 9 Vict., c. 95.

In the United States. — *Circuit* court is in many of the states a name for a court of general original jurisdiction, clothed with power to try by judge and jury the issues of fact in ordinary actions, but subject to a review of its determinations in the supreme court of the state or other appellate tribunal. *Abbott's Law Dict.* The English custom is still retained in some of the states, as in *Massachusetts*, where the judges sit in succession in the various counties of the state, and by the arrangement of terms the full bench of the supreme court makes a *circuit* of the state once a year.

5. Webster's Dict.

Circular Notes. (See the title LETTERS OF CREDIT.) — Similar instruments to "letters of credit." They are drawn by resident bankers upon their foreign correspondents in favor of persons traveling abroad. The correspondents must be satisfied of the identity of the applicant before payment; and the requisite proof of such identity is usually furnished upon the applicant's producing a letter with his signature by a comparison of the signature. *Brown's Law Dict.*

Circulating Medium. — This term is more comprehensive than "money," as it is the medium of exchanges, or purchases and sales, whether it be in gold or silver coin or any other article. *Rapalje & Lawrence Law Dict.* See the title MONEY.

Circular Distinguished from Letter — Lotteries. (See also the titles LOTTERIES; POSTAL LAWS.) — In *U. S. v. Noelke*, 17 Blatchf. (U. S.) 556, the court say: "The first objection taken to the first count is, that the writing set out in that count is improperly described as a letter and *circular*. It is insisted that the statute, in proscribing a letter or *circular*, recognizes the distinction between the two things; that by a *circular* is intended a written or printed communication, general and not personal in its character, and that by a letter is intended a communication personal and individual in character, and not general; that if the paper set forth is a letter, then it is not, and cannot be, a *circular*, within the meaning of the stat-

CIRCULATION. (See also the titles BANKNOTES, vol. 3, p. 771; MONEY; REVENUE LAWS; TAXATION.)—The government of the United States imposes a tax on circulation incident to banking operations. Circulation in this connection has been defined as "currency; or circulating notes or bills current for coin."¹

CIRCUMSCRIBE.—Circumscribe means to inclose within a certain limit; to hem in; to confine; to bound; to limit; to restrict.²

CIRCUMSTANCES.—The condition of things surrounding or accompanying an act, event, or transaction; relative facts, as distinguished from a principal fact of which they may be corroborative or the reverse.³

ute, and if it is a *circular*, then it cannot be a letter. We think, however, that the same paper may be both a letter and a *circular*. No doubt, there may be many *circulars* that are not letters, but a *circular* which is in the form of a letter may be well described as a letter and a *circular*, and there is no reason for excluding such a *circular* from the operation of the statute. There is nothing on the face of the paper set forth in the first count indicating that it was not a *circular*, that is, a paper intended to be issued to a great number of persons, or for general circulation; yet it undoubtedly is a letter in form. This mode of describing it may, perhaps, have imposed on the government the necessity of proving that the paper was both a letter and a *circular*."

1. U. S. v. White, 19 Fed. Rep. 724. And in this case it was held that the act bore no reference to so-called notes used by mercantile firms to be redeemed in goods.

In U. S. v. Wilson, 106 U. S. 620, it was held that certificates of indebtedness issued by a person or corporation are not taxable as *circulation*, unless they are calculated or intended to *circulate* or to be used as money. See also Hunt, Appellant, 141 Mass. 519.

A Bank Note in *circulation* means a note which is passing from hand to hand, as a negotiable instrument, representing a certain value. When it is returned to the bank from which it is issued, it ceases to *circulate*. Bank of Africa v. Colonial Government, 13 App. Cas. 220.

2. Cheyney v. Smith, (Arizona 1890) 23 Pac. Rep. 685.

3. **Circumstances of Terror.**—Where a statute concerning forcible entries and detainer denounces all entries into premises, at the time in the actual peaceable possession of another, if made with violence and strong hand, whether such entry be by the actual breaking into the house situate on the premises, or by any kind of violence, or "*circumstances of terror*;" and a large number of men were employed to take possession of premises in the possession of another, though he had no house on them and was not personally present, and they entered hurriedly at daylight, tore down one fence and put up another and a shanty, and fired off a pistol-shot to celebrate its completion, it was held that there were sufficient "*circumstances of terror*" to make the entry a forcible one. Gray v. Collins, 42 Cal. 152.

Circumstances Compared with Facts.—Probable cause has been described as a mixed proposition of law and fact. Whether the

circumstances alleged to show it probable are true and existed, is a matter of fact; but whether, supposing them to be true, they amount to probable cause, is a question of law. In commenting upon this rule, the court, in Vinal v. Core, 18 W. Va. 38, say: "It seems to me quite obvious that when they say 'whether the *circumstances*, supposing them to be true, amount to probable cause, is a question of law,' by the *circumstances* on which probable cause is thus to be based they could not have meant to include in any degree the opinions or motives of the defendants, for such opinions and motives cannot form the basis of a question of law. They speak, too, of these '*circumstances* being true and existing.' The very language used by them seems to me to clearly indicate that by *circumstances* which form the basis of probable cause, they mean actual existing facts as distinguished from opinions and motives of the defendants, which, however, they may affect, as they certainly would. The question whether the defendant was or was not actuated by malice, cannot in any manner render the cause of the prosecution either more or less probable. That must depend, as the opinion of these learned judges, I think, indicates, on the *circumstances* actually existing as matters of fact. The term *circumstances* was adopted instead of the term 'facts,' probably because under the word *circumstances* might be included such matters as the bad character of the accused, which some might regard as not included in the word 'facts,' had it been used instead of *circumstances*, though the bad character of the accused might and ought to be regarded as an existing fact and should be included among them." See also the title MALICIOUS PROSECUTION.

Executor. (See also the title EXECUTORS AND ADMINISTRATORS.)—Thrift, integrity, good repute, business capacity, and stability of character are *circumstances* which may very properly be considered in determining the question of adequate security, under the provisions of the New York civil code for objections to an executor. Martin v. Duke, 5 Redf. (N. Y.) 597.

Pecuniary *circumstances* are not alone to be considered. Dodge v. Mastin, 17 Fed. Rep. 665.

Insolvent Circumstances — Failing Circumstances.—See the title INSOLVENCY AND BANKRUPTCY; and see INSOLVENT.

Extraordinary Circumstances.—See EXTRAORDINARY.

Chain of Circumstances.—See CHAIN.

CIRCUMSTANTIAL EVIDENCE.—See the titles EVIDENCE; PRESUMPTIONS.

CIRCUS.—See note 1.

CITATION.—A summons to appear, applied particularly to process in the spiritual, probate, and matrimonial courts.²

CITE. (See also CITATION.)—To call or summon. Therefore, first, to notify a party of a proceeding against him, or call him to appear and defend; and, second, to quote or refer to authorities in support of a proposition in jurisprudence.³

1. **Theatre Distinguished from Circus.**—In *Jacko v. State*, 22 Ala. 74, it was held that theatre and *circus* were not synonymous, and that a license to keep a theatre would not protect a *circus*. See also the title THEATRES.

2. Wharton's Law Dict.

Probate Practice.—A process used in orphan's, surrogates', probate, and sometimes in other courts to secure the attendance of parties and persons having an interest in the proceedings. It has been defined as "an official call or notice to appear in court," and as a general rule it is issued and served upon a particular individual, who is thereby made a party to the proceedings. This is so in the case of *citations* to minors, to the creditors of poor debtors, to trustees, executors, and administrators, and to persons who have fraudulently concealed or embezzled the estate of insolvent debtors, and in other instances. *Arnold v. Sabin*, 1 Cush. (Mass.) 529. See also the title CITATIONS, 4 ENCYC. PL. AND PR. 537.

Removal of Causes. (See also ENCYC. OF PL. AND PR., title REMOVAL OF CAUSES.)—The term *citation* is also used to describe the notice of the removal of a cause into the United States supreme court on writ of error. Thus, in *Cohens v. Virginia*, 6 Wheat. (U. S.) 411, Mar-

shall, C. J., said: "It is simply notice to the opposite party that the record is transferred into another court, where he may appear, or decline to appear, as his judgment or inclination may determine."

Citation Distinguished from Notice.—In *Perez v. Perez*, 59 Tex. 325, the court said: "The words *citation* and 'notice' are by no means synonymous. A *citation* is a writ well known to our law and always has the same significance. It must be directed to some officer, and must be served by him; it must, if issued by a court having a seal, be under the seal of the court. It must contain the names of the parties upon whom service is to be had, unless in the exceptional case of unknown heirs, etc., of a deceased person, who are to be served by publication. A notice is much less formal. It is not necessarily under seal, although issued by a court of record. It may be served by others than the sheriff or like ministerial officer. It may, as in cases of the probate of written wills, be executed by the clerk, and that by merely posting at public places." And in this case it was held that where the term *cite* or *citation* is used in a statute, it refers to the technical writ. See the title ABBREVIATION, vol. 1, p. 101.

3. Abbott's Law Dict.

CITIZENSHIP.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the following titles in the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*: *NATURALIZATION*; *REMOVAL OF CAUSES*; *UNITED STATES COURTS*.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ALIENS*, vol. 2, p. 64; *CHINESE EXCLUSION ACTS*, vol. 5, p. 1101; *CIVIL RIGHTS*; *CONFLICT OF LAWS*; *CONSTITUTIONAL LAW*; *CONTRACT LABOR LAW*; *DOMICIL*; *ELECTIONS*; *EXTRADITION*; *FOREIGN CORPORATIONS*; *IMMIGRATION*; *INDIANS*; *INHABITANTS*; *INTERNATIONAL LAW*; *INTERSTATE COMMERCE*; *MILITARY LAW*; *MINES AND MINING*; *PUBLIC LANDS*; *PUBLIC OFFICERS*; *TREATIES*; *UNITED STATES COURTS*; *WAR*.

I. DEFINITIONS. — Citizenship is the state of being vested with the rights and privileges of a citizen.¹

A **Citizen** is one who, by birth, naturalization, or otherwise, is a member of an independent political society, and as such is subject to its laws and entitled to its protection in the enjoyment of civil or private rights.² The possession of political rights is not essential to citizenship.³

Two Citizenships — **State and National.** — There is, in the political system of the United States, a government of the several states and a government of the United States; each is distinct from the other and has citizens of its own, who

1. Webster's Dictionary; Century Dictionary; Abrego v. State, 29 Tex. App. 149, *citing* 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 242.

2. Blanck v. Pausch, 113 Ill. 60; Walsh v. Lallande, 25 La. Ann. 188. See also Lyons v. Cunningham, 66 Cal. 42; State v. Fairlamb, 121 Mo. 150, *citing* 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 242.

Citizens Are Members of the Political Body to which they belong; they are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. U. S. v. Cruikshank, 92 U. S. 542.

In the Roman Government, the Term "Citizen" appears to have been used to designate a person who had the freedom of the city and the right to exercise all the political and civil privileges of the government. There was also at Rome a partial citizenship, including civil but not political rights. Thomasson v. State, 15 Ind. 449. See also Amy v. Smith, 1 Litt. (Ky.) 332.

3. **Political Privileges Not Essential to Citizenship.** — Minor v. Happersett, 21 Wall. (U. S.) 162; Lyons v. Cunningham, 66 Cal. 42; Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136; People v. De La Guerra, 40 Cal. 311; Blanck v. Pausch, 113 Ill. 60; Laurent v. State, 1 Kan. 313; Opinion of Justices, 44 Me. 507.

Thus women are citizens, but a state may deny to them the privilege of suffrage, and this power of the state is not curtailed by the Fourteenth and Fifteenth Amendments to the Federal Constitution. Minor v. Happersett, 21 Wall. (U. S.) 162; Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136. See State v. Fairlamb, 121 Mo. 151.

But in Amy v. Smith, 1 Litt. (Ky.) 326, a contrary conclusion was reached, the court saying: "No one can, in the correct sense of the term, be a citizen of a state, who is not entitled, upon the terms prescribed by the institutions of the state, to all the rights and privileges conferred by those institutions upon the highest class of society. It is true that females and infants do not personally possess those rights and privileges in any state in the Union, but they are generally dependent upon adult males, through whom they enjoy the benefits of those rights and privileges. * * * [An adult male] may not only not be in the actual enjoyment of those rights and privileges, but he may even not possess those qualifications of property, of age, or of residence, which most of the states prescribe as requisites

to the enjoyment of some of their highest privileges and immunities, and yet be a citizen. But, to be a citizen, it is necessary that he should be entitled to the enjoyment of those privileges and immunities upon the same terms upon which they are conferred upon other citizens, and unless he is so entitled he cannot, in the proper sense of the term, be a citizen." Mills, J., dissented from the conclusion of the court on this point, saying: "The mistake on this subject must arise from not attending to a sensible distinction between political and civil rights. The latter constitute the citizen, while the former are not necessary ingredients. A state may deny all her political rights to an individual, and yet he may be a citizen. The rights of office and suffrage are political purely, and are denied by some or all the states to part of their population who are still citizens. A citizen, then, is one who owes to government allegiance, service, and money by way of taxation, and to whom the government in turn grants and guarantees liberty of person and of conscience, the right of acquiring and possessing property, of marriage and the social relations, of suit and defense, and security in person, estate, and reputation. These, with some others which might be enumerated, being guaranteed and secured by government, constitute a citizen."

This definition of a citizen from the dissenting opinion of Mills, J., in this case, is quoted in State v. Fairlamb, 121 Mo. 151.

The term "citizen" conveys the ideas of connection or identification with the state or government and a participation in its functions, and implies the actual possession and enjoyment, or the perfect right of acquisition and enjoyment, of an entire equality of privileges, civil and political. Scott v. Sandford, 19 How. (U. S.) 476, *per* Daniel, J. See also Abrego v. State, 29 Tex. App. 149.

No Necessary Relation Between Citizenship and Right to Vote. — In Lanz v. Randall, 4 Dill. (U. S.) 425, Mr. Justice Miller, presiding in the circuit court, said in substance that there is no necessary relation between citizenship and the right to vote. Minors and women, though citizens, have not usually the privilege of voting; and on the other hand, in some states and many municipalities persons are allowed to vote who have no claim to be citizens, simply because they are residents and possess the other qualifications. And he added: "At one time, I believe, persons were permitted to vote in one state on account of property held there, though citizens of a different state. Of this, however, I do not feel sure, though there was no reason, in the nature of things or in the Federal Constitution, why it should not be so."

owe it allegiance and whose rights within its jurisdiction it must protect.¹ A person may be a citizen of the United States without being a citizen of a state, and an important element is necessary to convert the former into the latter—a person must reside within the state making a citizen of him, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.² A person cannot, however, be a citizen of a state without being a citizen of the United States.³

II. HOW CITIZENSHIP ACQUIRED—1. Generally.—The Fourteenth Amendment to the United States Constitution indicates the two methods by which a person may become a citizen: First, by birth in the United States; and, second, by naturalization therein.⁴ This classification, as will be seen, however, is not exhaustive.

1. U. S. v. Cruikshank, 92 U. S. 542.

"Citizenship of the United States."—There seems to be no satisfactory definition of a "citizen of the United States." The Constitution uses the word "citizen" to express the political quality of the individual in his relations to the nation; to declare that he is a member of the body politic, and is bound to it by the reciprocal obligations of legislation on one side, and protection on the other. There would seem to be no other kind of citizenship, higher or lower, state or national, nor is the word used in the laws of the United States in any other sense. The phrase, "a citizen of the United States," without addition or qualification, means no more or less than a member of the nation. Opinion of Edward Bates, vol. 10, Opinions of Attorneys-General.

"People of the United States" and "Citizens."—The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body, which, according to our republican institutions, forms the sovereignty which holds the power and conducts the government through its representatives. It is what is familiarly called the "sovereign people," and every citizen is one of this people and a constituent member of this sovereignty. Scott v. Sandford, 19 How. (U. S.) 393.

Citizen of United States Is Citizen of State of Residence.—In *Gassies v. Ballou*, 6 Pet. (U. S.) 761, Chief Justice Marshall declared that a citizen of the United States, residing in any state of the Union, is a citizen of that state; and Chief Justice Fuller, in *Boyd v. Nebraska*, 143 U. S. 159, observes that the Fourteenth Amendment embodies this view.

"Citizen"—"Subject"—"Inhabitant."—The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection, and protection for allegiance. For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words "subject," "inhabitant," and "citizen" have been used, and the choice between them is sometimes made to depend upon

the form of the government. "Citizen" is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the states upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more. *Minor v. Happersett*, 21 Wall. (U. S.) 162.

See also *The Pizarro*, 2 Wheat. (U. S.) 227.

"Citizens" and "Inhabitants."—These words do not mean the same thing. A man may be a citizen without being an inhabitant of a state, as a man may be an inhabitant without being a citizen. *Quinby v. Duncan*, 4 Harr. (Del.) 383.

Dissolution of the Union—Its Effect on Citizenship.—The attempt by force to dissolve the Union did not essentially change the fundamental relations of the citizens of those revolting states to the federal government, as established by its constitution. *De jure* they still owed paramount allegiance to the government, and continued citizens of the United States. *Hoskins v. Gentry*, 2 Duv. (Ky.) 285.

So, a person residing in one of the states engaged in the late rebellion at the breaking out of the war, soon after left his home, remaining absent until the termination of hostilities. Meanwhile his family continued to reside at their home in the rebellious state, while his place of abode was for a portion of the time in the loyal states and the residue in neutral countries, but he intended all the while to return to his former home at the close of the war. He was always faithful to the Union and opposed to secession. It was held that he would not be regarded as an alien enemy; that he lost none of his rights as a citizen of the United States by reason of his temporary and constrained residence in the rebellious district after the war commenced, and was at liberty at any time to sue in the courts of Illinois. *Zacharie v. Godfrey*, 50 Ill. 186, 99 Am. Dec. 506.

2. *Slaughter-House Cases*, 16 Wall. (U. S.) 74.

3. *Lanz v. Randall*, 4 Dill. (U. S.) 425, cited approvingly in *Minneapolis v. Reum*, 12 U. S. App. 446.

4. *Elk v. Wilkins*, 112 U. S. 94; *McKay v. Campbell*, 2 Sawy. (U. S.) 118; *Minor v. Happersett*, 21 Wall. (U. S.) 167.

Presumption of Citizenship from Birth in State.

—Every person at his birth is presumptively a

2. By Birth in Jurisdiction. — Natural citizenship is created by birth within the jurisdiction of the United States.¹ To be a citizen of the United States

citizen or subject of the state of his nativity, and, where his parents were then both subjects of that state, the presumption is conclusive. *Minneapolis v. Reum*, 12 U. S. App. 446; *Minor v. Happersett*, 21 Wall. (U. S.) 162; *Vatt. Law Nat.*, p. 101; *Morse Nat.*, pp. 61, 125.

Presumption from Residence. — The law presumes all persons who reside here to be citizens of the United States until the contrary appears. *State v. Beackmo*, 6 Blackf. (Ind.) 488.

1. *Lynch v. Clarke*, 1 Sandf. Ch. (N. Y.) 639; *In re Look Tin Sing*, 21 Fed. Rep. 905.

All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States. U. S. Rev. Stat., § 1992. See *Planters' Bank v. St. John*, 1 Woods (U. S.) 585; *McKay v. Campbell*, 2 Sawy. (U. S.) 118.

Birth in United States, of Alien Parents. — Prior to the adoption of the Fourteenth Amendment to the Constitution, the case of *Lynch v. Clarke*, 1 Sandf. Ch. (N. Y.) 584, was the leading case holding that birth within the United States created citizenship. The complainant in this case was born in 1819, in New York, of alien parents, during their temporary sojourn in the state. During the first year of her age her parents left this country, taking her with them, and never returned. It was held that the complainant was a citizen of this country by birth. This decision was based on the fact that this was the doctrine of the common law with respect to all persons born within the king's allegiance, and, therefore, the law of the colonies, and then became the law of each state when independence was declared, and so continued until the adoption of the United States Constitution; after the adoption of the Constitution, the exclusive jurisdiction of this subject of citizenship passed to the United States government, and the same doctrine has there remained, and thus became the common law of the United States when the Union was consummated. This doctrine is national, and not for individual states. In the course of an interesting opinion the court said: "In regard to the effect of birth upon the right of citizenship, it is my duty not to establish the rule of law for the first time, but to ascertain a rule which has been in force from the era of the Federal Constitution, and which has affected the rights of persons and property constantly from that period to the present. Were this, however, to be determined solely on its intrinsic propriety and adaptation to our circumstances, I am not sure that any rule different from that of the common law ought to be adopted in our country. It is indispensable that there should be some fixed, certain, and intelligible rules for determining the question of alienage or citizenship. The place of nativity furnishes one as plain and certain, and as readily to be proved, as any circumstance which can be mentioned. If we depart from that and adopt the rule of some of the continental nations, we have two more remote and difficult tests introduced. We are to ascertain first, by evidence of facts removed one genera-

tion from the time of the inquiry, the *status* or citizenship of the parents at the time of the birth of the *propositus*; and next the election or intention of the *propositus* himself, in reference to his adoption of the country where he was born, or that of which his parents were citizens. And sometimes, as in this case, the question will arise before he attains to the age of election. In harmony with the certainty of the common-law rule respecting natives born, are our statutory provisions for the admission of aliens to the rights of citizenship. Such admission is a judgment of a court of record. Thus, in almost every instance, we have an unerring guide or test, capable of ready investigation and authentication. The exceptions are the children of ambassadors (who are deemed to be born within the allegiance of the sovereign represented) and the children of our own citizens born abroad." See also *New Hartford v. Canaan*, 54 Conn. 39; *Ludlam v. Ludlam*, 26 N. Y. 371, 84 Am. Dec. 193; *Munro v. Merchant*, 26 Barb. (N. Y.) 400; *U. S. v. Rhodes*, 1 Abb. (U. S.) 40; *Calvin's Case*, 7 Coke 1.

Persons Born in the United States of Chinese Parents. — In thorough harmony with the views expressed in *Lynch v. Clarke*, 1 Sandf. Ch. (N. Y.) 584, is the decision *In re Look Tin Sing*, 21 Fed. Rep. 905, to *Sawy.* (U. S.) 353. In this case the petitioner belonged to the Chinese race, and was born in California in 1870. In 1879 he went to China, and returned to San Francisco in September, 1884, and sought to land in that city, claiming that he was a natural born citizen of the United States. His parents resided in California, and had lived there twenty years, and had always been subject to the commands of the Chinese government. His father sent the son to China with the intention of his returning. His father was a merchant, and not in any diplomatic or other official capacity under the Chinese government. The petitioner had no certificate, as required by the Acts of 1882 and of 1884, and the United States District Attorney, on behalf of the government, objected to his landing in the United States for want of a certificate. In an elaborate opinion, Mr. Justice Field, of the Supreme Court of the United States, construes the words in the Fourteenth Amendment to the Federal Constitution, "subject to the jurisdiction thereof," and holds that the previous doctrine, before the amendment, except as applied to Africans and their descendants, was, that birth within the dominion and jurisdiction of the United States of itself created citizenship; that the Fourteenth Amendment to the Federal Constitution was adopted as an authoritative declaration of this doctrine as to the white race, and also to do away with the exceptions as to the negroes and their descendants; and that a child born of Chinese parents within the dominion and jurisdiction of the United States is a citizen of the United States.

To the same effect are: *Ex p. Chin King*, 13 Sawy. (U. S.) 333, 35 Fed. Rep. 354; *In re Yung Sing Hee*, 36 Fed. Rep. 437; *Gee Fook Sing v. U. S.*, 7 U. S. App. 27, 49 Fed. Rep.

by reason of birth, a person must not only be born within its territorial limits, but must also be born subject to its jurisdiction; that is, in its power and obedience.¹

Indians. — The Civil Rights Act makes all persons citizens who were born in the United States and not subject to any foreign power, excluding Indians not taxed.² Indians, born members of any of the Indian tribes within the United States which still hold their tribal relations, are not citizens.³ But under the United States statutes native-born Indians may become citizens by taking up allotments where, according to law, Indian lands are allotted in severalty, or by residing in the United States separate and apart from any Indian tribe and adopting the habits of civilized life.⁴

146; *Lem Hing Dun v. U. S.*, 7 U. S. App. 31, 49 Fed. Rep. 148; *In re Wong Kim Ark*, 71 Fed. Rep. 382.

Birth in British Dominions, though of alien parentage, confers British citizenship. 2 Stephen's Com. (12th ed.) 405.

1. *McKay v. Campbell*, 2 Sawy. (U. S.) 129.

Children of Ambassadors and Ministers are, in theory, born in the allegiance of the powers the ambassadors or ministers represent. U. S. v. Rhodes, 1 Abb. (U. S.) 40; *In re Look Tin Sing*, 10 Sawy. (U. S.) 353, 21 Fed. Rep. 905; *Calvin's Case*, 7 Coke 18a; *De Geer v. Stone*, 22 Ch. Div. 254. See the title **MINISTERS AND AMBASSADORS**.

"Subject to the Jurisdiction" of the United States. — In the Fourteenth Amendment to the United States Constitution, which provides that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens, the phrase "subject to the jurisdiction thereof" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states, born within the United States. *Slaughter-House Cases*, 16 Wall. (U. S.) 73, *per Miller, J.*

The last phrase in this dictum of Judge Miller, viz., "or subjects of foreign states," must be modified in view of the decisions quoted in the last note *supra*, with reference to the citizenship of children born in the United States of Chinese parents. Thus, in *In re Look Tin Sing*, 10 Sawy. (U. S.) 353, 21 Fed. Rep. 905, Mr. Justice Field said: "Any doubt on the subject, if there can be any, must arise out of the words 'subject to the jurisdiction thereof.' They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws, and with the consequent obligation to obey them when obedience can be rendered; and only those thus subject by their birth or naturalization are within the terms of the amendment. The jurisdiction over these latter must at the time be both actual and exclusive. The words mentioned except from citizenship children born in the United States of persons engaged in the diplomatic service of foreign governments, such as ministers and ambassadors, whose residence, by a fiction of public law, is regarded as part of their own country. * * * In the sense of public law, they are not born within the jurisdiction of the United States. The language used has also a more extended purpose. It was designed to except from citizenship persons who, though

born or naturalized in the United States, have renounced their allegiance to our government, and thus dissolved their political connection with the country. The United States recognize the right of every one to expatriate himself and choose another country." This exposition of the phrase is approved in *In re Wong Kim Ark*, 71 Fed. Rep. 382.

Birth in Country in Hostile Occupation. — If enemies come into any of the king's dominions and surprise any castle or fort and possess the same by hostility, and have issue there, that issue is no subject to the king, though he be born within his dominion, for he was not born under the king's ligeance or obedience. *Calvin's Case*, 7 Coke 18a.

2. U. S. Rev. Stat., § 1992.

An Indian is not a citizen, but a domestic subject. 7 Opp. Atty.-Gen. 756. And is not a "white person," within the naturalization laws of the United States. And the same is true of half-breed Indians. *In re Camille*, 6 Sawy. (U. S.) 541.

3. **Child Born in Indian Tribe.** — The Indian tribes within the territory of the United States, being independent political communities, a child born in one of such tribes is not a citizen of the United States, although born within its territories. *McKay v. Campbell*, 2 Sawy. (U. S.) 118; *Karrahoo v. Adams*, 1 Dill. (U. S.) 344.

And so an Indian born in tribal relations is not a citizen, because not born "subject to the jurisdiction of the United States." Congress may properly confer citizenship upon Indians, but consent of the government in some form is necessary. *U. S. v. Osborne*, 6 Sawy. (U. S.) 406.

An Indian Woman, by Marriage to a Citizen of the United States, becomes a citizen of the United States, with all the rights, privileges, and immunities of such citizen, being a married woman. Supp. to U. S. Rev. Stat., vol. 1, 608 (50th Congress, 1st session, c. 818).

4. Supp. to U. S. Rev. Stat., vol. 1, p. 536 (49th Congress, 2d session, c. 119).

Before the passage of this act it was held by the Supreme Court of the United States that an Indian born a member of one of the Indian tribes within the United States is not, merely by reason of his birth within the United States and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States within the meaning of the Fourteenth Amendment to the Constitution. *Elk v. Wilkins*, 112 U. S. 94.

Rights of Former Slaves. — By the Thirteenth Amendment to the Federal Constitution the system of slavery of the colored race which formerly existed in certain parts of the Union was abolished, and by subsequent amendments and by the Civil Rights Act the colored race was raised into perfect equality of civil and political rights with all other persons within the jurisdiction of the states.¹

3. By Naturalization — *a.* **DEFINITION.** — Naturalization is the act of adopting a foreigner and clothing him with the privileges of a native citizen; ² the admission of a foreign subject or citizen into the political body of the nation, and the bestowal upon him of the qualities of a citizen or subject.³

b. **IN WHOM POWER TO NATURALIZE VESTED** — (1) *United States.* — The power of naturalization is vested exclusively in Congress, and cannot be exercised by any of the states.⁴

(2) *Limits of Power of States.* — The states may confer such of the privileges of their own citizens upon aliens, with regard to the ownership of land or the participation in the state government, as each may think fit within its own limits, and as to the state government, can place them on an equal footing with citizens, but cannot make them citizens of the United States.⁵

Prohibition on State Legislation as to Citizens of United States. — But though the states may grant privileges to unnaturalized persons, they are forbidden by the Federal Constitution to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or to deny or abridge the right of any such citizen to vote on account of race, color, or previous condition of servitude.⁶

1. Colored Race. — U. S. Constitution, Thirteenth, Fourteenth, and Fifteenth Amendments; *Ex p.* Virginia, 100 U. S. 339; *Strauder v. West Virginia*, 100 U. S. 303; *U. S. v. Cruikshank*, 92 U. S. 542.

The clause of the Fourteenth Amendment as to citizenship was inserted not merely as an authoritative declaration of the generally recognized law of the country so far as the white race is concerned, but also to overrule the doctrine of the *Dred Scott* Case, affirming that persons of the African race brought to this country and sold as slaves, and their descendants, were not citizens of the United States nor capable of becoming such. *Scott v. Sandford*, 19 How. (U. S.) 393. The clause changed the entire status of these people. It elevated them from their condition of mere freedmen, and conferred upon them equally with all others native-born the rights of citizenship. When it was adopted, the naturalization laws of the United States excluded colored persons from becoming citizens, and the freedmen and their descendants, not being aliens, were without the purview of those laws, so the inability of persons to become citizens under those laws in no respect impairs the effect of their birth or the birth of their children upon the status of either as citizens under the amendment in question. *Per* Mr. Justice Field, in *In re Look Tin Sing*, 10 Sawy. (U. S.) 359, 21 Fed. Rep. 905.

2. *Bouv. L. Dict.*; *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 827; 9 Opinions of Attorneys-General, 259.

3. *Minneapolis v. Reum*, 12 U. S. App. 446.

4. Power Vested in National Government. — *U. S. v. Villato*, 2 Dall. (Pa.) 373; *Thurlow v. Com.*, 5 How. (U. S.) 504; *Smith v. Turner*, 7 How. (U. S.) 283.

The power to naturalize foreign subjects or

citizens is one of the powers granted by the states to the national government. *Minneapolis v. Reum*, 12 U. S. App. 446.

The English Naturalization Act, 1870, provides for the naturalization of aliens as British subjects, upon petition to a secretary of state in accordance with the provisions of the act.

5. *Scott v. Sandford*, 19 How. (U. S.) 393; *Minneapolis v. Reum*, 12 U. S. App. 446; *Barzizas v. Hopkins*, 2 Rand. (Va.) 276; *In re Wehlitz*, 16 Wis. 443, 84 Am. Dec. 700; *State v. Cole*, 17 Wis. 674.

As to the privileges granted to aliens by legislation in the several states, see the title **ALIENS**, vol. 2, p. 64.

In *Lanz v. Randall*, 4 Dill. (U. S.) 425, it was held that a resident of Minnesota, who was born a subject of the Grand Duke of Mecklenburg, had declared his intention to become a citizen of the United States many years before he brought his suit, had resided in the state of Minnesota for fifteen years, had several times voted at elections held in that state, where the constitution of the state authorizes such residents to do so without naturalization, but had never applied to or been admitted to citizenship under the federal naturalization laws, was still an alien and a subject of the Grand Duke of Mecklenburg.

It is not in the power of a state to denationalize a foreign subject who has not complied with the federal naturalization laws, and to constitute him a citizen of the United States or the state, so as to deprive the federal courts of jurisdiction over a controversy between him and a citizen of a state conferred upon them by the Constitution of the United States. *Minneapolis v. Reum*, 12 U. S. App. 446.

6. Fourteenth and Fifteenth Amendments to the Constitution of the United States.

c. WHO MAY BE NATURALIZED. — With certain exceptions, any alien friend may be admitted to become a citizen of the United States.¹

Aliens Honorably Discharged from Military Service. — Any alien of the age of twenty-one years or over who has been honorably discharged from the military service of the United States can be admitted to citizenship, upon his petition to the proper court, without any previous declaration of his intention to become a citizen.²

Minor Residents. — Any alien who is a minor and has resided in the United States three years next preceding his arrival at the age of twenty-one years, and who has continued to reside therein up to the time he makes application to be admitted a citizen thereof, may, after reaching his majority, and having resided five years at least within the United States, including the three years of his minority, be admitted to citizenship in the United States without having first declared his intention to become a citizen.³

Seamen. — Any seaman who is a foreigner who declares his intention of becoming a citizen of the United States, in any competent court, and has served three years on board a merchant vessel of the United States subsequent to the date of his declaration, may, on his application to any competent court, and on the production of a certificate of discharge and good conduct during that time, together with the certificate of his declaration of intention to become a citizen, be admitted to citizenship in the United States.⁴

Widow and Children of Declarants. — When any alien who has declared his intention to become a citizen dies before he is actually naturalized, his widow and children shall be considered as citizens of the United States, and entitled to all rights and privileges as such, upon taking the oath prescribed by law.⁵

Married Women. — It has been stated that a married woman may be naturalized without the concurrence of her husband.⁶

Mexicans. — Citizens of Mexico are eligible to American citizenship, and may be individually naturalized by complying with the provisions of the United States naturalization laws.⁷

Natives of China. — Mongolians or persons belonging to the Chinese race are not entitled to become citizens of the United States by naturalization.⁸

1. U. S. Rev. Stat., § 2165 *et seq.*

By U. S. Rev. Stat., § 2169, it is provided that the provisions of the naturalization laws shall apply to aliens being free white persons, and to aliens of African nativity, and to persons of African descent.

2. Aliens Discharged from Military Service. — Rev. Stat. U. S., § 2166.

In such a case, it is not necessary for the alien to prove more than one year's residence within the United States previous to his application to become a citizen. Rev. Stat. U. S., § 2166.

Persons Discharged from United States Navy or Marine Corps. — Any alien of the age of twenty-one years and upwards, who has enlisted or may enlist in the United States navy or Marine Corps, and has served or may hereafter serve five consecutive years in the United States navy or one enlistment in the Marine Corps, and has been or may hereafter be honorably discharged, may be admitted to citizenship without a previous declaration of his intention to become a citizen. 28 U. S. Stat. at Large 124 (53d Congress, 2d session, c. 155).

England. — An alien who has served for four years in the British navy, in time of war, is a natural-born subject under 13 Geo. II., c. 3. *In re Giraud*, 32 Beav. 385.

3. U. S. Rev. Stat., § 2167.

4. U. S. Rev. Stat., § 2174.

5. U. S. Rev. Stat., § 2168.

6. *Priest v. Cummings*, 16 Wend. (N. Y.) 617, 20 Wend. (N. Y.) 338.

In *In re Langtry*, 31 Fed. Rep. 879, Mr. Justice Field remarked of a report that the applicant was a married woman whose husband was living in England as a British subject: "If this be so, the question will arise, on her application for final naturalization papers, whether she can be naturalized in this country. No person can be a citizen of two countries, and a wife is by law a citizen of her husband's country."

The act of Congress of 1802, c. 28, does not exclude females from the rights of citizenship by naturalization. *Brown v. Shilling*, 9 Md. 74.

7. *In re Rodriguez*, 81 Fed. Rep. 337, where it was held that, whatever the status of a native citizen of Mexico from the standpoint of the ethnologist, he is embraced within the spirit and intent of the United States naturalization laws.

8. **Mongolian Not a "White Person."** — In the case of *In re Ah Yup*, 5 Sawy. (U. S.) 155, upon a petition by a native Chinaman for naturalization, the question as to the admissibility of Mongolians to become United States citizens under the naturalization laws is much discussed. The statute provides that "the provisions of this title shall apply to aliens being

Alien Enemies Not Admitted. — No alien who is a citizen, denizen, or subject of any country, state, or sovereign with whom the United States may be at war at the time of his application can be admitted to citizenship in the United States.¹

d. HOW NATURALIZATION EFFECTED — (1) *Under General Laws* — (a) **Constitutional Power to Establish Uniform Laws.** — Congress has power to establish a uniform rule of naturalization.²

(b) **What Courts May Naturalize.** — It is provided by the United States Revised Statutes that a circuit or district court of the United States, or a district or supreme court of the territories, or a court of record of any of the states, having common-law jurisdiction and a seal and clerk, may receive the declaration of an alien of his intention to become a citizen of the United States,³ and the same courts have power to entertain and pass upon applications for naturalization.⁴

Declaration Made Before Clerk. — The Revised Statutes also provide that an alien's declaration of intention to become a citizen of the United States may

free white persons and to aliens of African nativity and to persons of African descent." U. S. Rev. Stat., § 2169. The question presented, therefore, was whether a Mongolian was a "white person" within the statute. Sawyer, Circuit Judge, after a learned examination, concluded that "neither in popular language, in literature, nor in scientific nomenclature do we ordinarily, if ever, find the words 'white person' used in a sense so comprehensive as to include an individual of the Mongolian race," and declared that he was not aware that the same term, as used in the statutes as they stood from 1802 until the passage of the Revised Statutes, was ever supposed to include a Mongolian. He showed, from the reports of the debates in the United States Senate at the time of the adoption of the Revised Statutes, that it was entirely clear that Congress intended, by the use of the words "white person," to exclude Mongolians from the right of naturalization, and he concluded: "I am, therefore, of the opinion that a native of China of the Mongolian race is not a white person within the meaning of the act of Congress."

The whole question was conclusively settled by section 14 of the Chinese Exclusion Act (22 U. S. Stat. at Large 58), which provides "hereafter no state court or court of the United States shall admit Chinese to citizenship." *In re Gee Hop*, 71 Fed. Rep. 274.

1. U. S. Rev. Stat., tit. 30.

2. U. S. Const., art. 8, § 1; *Minneapolis v. Reum*, 12 U. S. App. 446.

3. U. S. Rev. Stat., § 2165.

4. The various acts upon the subject of naturalization submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge in both law and fact. The judgment, if entered in the record in legal form, closes all inquiry as to the testimony on which it has been pronounced, and, like every other judgment, is complete evidence of its own validity. *Spratt v. Spratt*, 4 Pet. (U. S.) 393.

General Common-law Jurisdiction Not Necessary. — It is not necessary that the court should have general common-law jurisdiction, but if

any part of its jurisdiction answers the designation, the requirement of the statute is fulfilled. *U. S. v. Power*, 14 Blatchf. (U. S.) 223; *Ex p. Cregg*, 2 Curt. (U. S.) 98; *Gladhill, Petitioner*, 8 Met. (Mass.) 168; *State v. Whittemore*, 50 N. H. 245, 9 Am. Rep. 196; *Matter of Conner*, 39 Cal. 98, 2 Am. Rep. 427.

Probate Court. — The jurisdiction of the probate court of Shelby county, Tennessee, is not a common-law jurisdiction in the sense of the naturalization laws, and is not, within the meaning of section 2165 of the Revised Statutes of the United States, authorized to take a declaration by an alien of an intention to become a citizen of the United States. *Ex p. Tweedy*, 22 Fed. Rep. 88.

City, Police, and County Courts. — In various states, city, police, and county courts, when courts of record, have been held to have jurisdiction to take declarations of intent to become citizens. *Levy's Case*, 14 Opinions Attorneys-General 509.

California. — *Matter of Conner*, 39 Cal. 98, 2 Am. Rep. 427.

Illinois. — *People v. McGowan*, 77 Ill. 649, 20 Am. Rep. 254.

Kentucky. — *Morgan v. Dudley*, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735.

Massachusetts. — *Gladhill, Petitioner*, 8 Met. (Mass.) 168; *Ex p. Cregg*, 2 Curt. (U. S.) 98.

Nebraska. — *State v. Webster*, 7 Neb. 469.

New Hampshire. — *State v. Whittemore*, 50 N. H. 245, 9 Am. Rep. 196.

New York. — *U. S. v. Power*, 14 Blatchf. (U. S.) 223.

Court Without Any Clerk. — A court whose judge acts as its only clerk is not a court having a clerk, within the meaning of the United States Rev. Stat., § 2165, providing for the naturalization of aliens, and is not competent to naturalize. *Ex p. Cregg*, 2 Curt. (U. S.) 98; *State v. Webster*, 7 Neb. 469.

Application for Naturalization Need Not be Disposed of in Court where Declaration Taken. — The final application for citizenship is not required to be made to the same court or within the same jurisdiction where the original declaration is taken. *Campbell, J.*, in *Andres v. Arnold*, 77 Mich. 90; *McCarthy v. Marsh*, 5 N. Y. 280.

be made before the clerk of any of the courts enumerated above.¹

Jurisdiction Conferred on State Courts. — The declaration in the United States statutes that certain state courts may hear and act upon applications for naturalization is permissive merely, for Congress is without power to interfere with or control state courts, except in so far as the Federal courts have appellate jurisdiction.² The states may regulate the hearing of such petitions in their own courts, or may forbid it altogether.³ Whether the declaration in the United States statutes is sufficient to confer jurisdiction on the state courts in the absence of a recognition of that jurisdiction by the state legislature appears not to have been determined, but where the state legislature recognizes the exercise of this jurisdiction by the state courts their acts are valid.⁴

(c) **Legal Prerequisites** — *aa.* **PRELIMINARY DECLARATION OF INTENTION.** — The alien seeking admission to citizenship must declare upon oath before a competent court, at least two years prior to his admission to citizenship, that it is his *bona fide* intention to become a citizen,⁵ and to renounce his allegiance to any prince, potentate, or state, and particularly by name to the prince or state

1. U. S. Rev. Stat., § 2165, subd. 6.

Declaration Taken at Applicant's Residence. — In *In re Langtry*, 31 Fed. Rep. 879, Mr. Justice Field expressed great doubt as to the legality of a declaration of intention to become a citizen of the United States, taken, not at the clerk's office, but at the residence of the applicant, to which the records of the court in which such declarations were entered had been carried for that purpose by the deputy clerk. The learned judge declared that he did not think that the statutes furnished any authority for the clerk of the court to take declaration of one to become a citizen out of the clerk's office, except in open court, and for that purpose to carry the records of the court to the private residence of the party.

But in *Andres v. Arnold*, 77 Mich. 85, the court, Morse, J., *dissenting*, held that a declaration of intention to become a citizen need not be made before the clerk in his office, or in open court. It was declared that the validity and effect of such a declaration depended not upon the place where it was made, but upon the person before whom it was made, namely, the clerk, and that there was no reason why the declaration might not be taken before him at any place where he happened to be.

2. *Ex p.* Knowles, 5 Cal. 300, 4 Am. L. Reg. 598; *State v. Judges*, etc., 58 N. J. L. 97. See also *Houston v. Moore*, 5 Wheat. (U. S.) 1; *Martin v. Hunter*, 1 Wheat. (U. S.) 304; 1 Kent's Com. 399 *et seq.*

3. **State May Regulate Naturalization in State Courts.** — In *State v. Judges*, etc., 58 N. J. L. 97, it was held that an act of the *New Jersey* legislature which provided that no person should be naturalized as a citizen of the United States by any court of New Jersey within thirty days next preceding any election was valid, and not in conflict with the clause of the Federal Constitution giving exclusive power to the United States over the subject of naturalization. The court proceeded upon the ground that Congress is without power to interfere with or control state courts, except in so far as the federal courts have appellate jurisdiction; that Congress cannot authoritatively bestow judicial powers on state courts;

and that state courts are not bound, in consequence of any acts of Congress, to assume and exercise jurisdiction. In delivering the opinion of the court, Van Syckel, J., said: "My conclusion, therefore, is, that it is competent for the state legislature to forbid state courts altogether to entertain or act upon applications for naturalization, and therefore it could lay any restraint, regulation, limitation, or condition upon the practice in such cases which it might deem expedient or proper. No right is claimed, or could be conceded on behalf of the state, to interfere in any respect with the subject of naturalization in federal courts."

4. *Ex p.* Knowles, 5 Cal. 300, 4 Am. L. Reg. 598; *Matter of Christern*, 43 N. Y. Super Ct. 523; *People v. Sweetman*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 358.

Matter of Ramsden, 13 How. Pr. (N. Y. Super Ct.) 429, where Hoffman, J., summed up his conclusions upon this question as follows: "The power of legislation upon this subject existed in the states prior to the Constitution. The legislation would have been executed in the ordinary tribunals of justice. The power has been superseded by an act of Congress passed under the Constitution. Congress adopt the state tribunals as the agents to exercise the power, as they would have performed it before. The concurrence of the state legislatures, expressed or fairly implied, adds the sanction of the state to this delegation of power. Whether such tribunals are bound to act may admit of controversy. That their acts are lawful, if they do so, seems undeniable."

State Courts Quoad Hoc Courts of the United States. — State courts, in hearing and determining applications for naturalization, are exclusively under the laws of the United States, and should be deemed *quoad hoc* courts of the United States. *People v. Sweetman*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 358; *Matter of Christern*, 43 N. Y. Super Ct. 523.

5. Rev. Stat. U. S., § 2167.

Declaration of Intention Must be Made under Oath. — U. S. v. Walsh, 22 Fed. Rep. 644.

The intention must be declared in such form as to show the time it was actually formed. *In re Randall's Petition*, 14 Phila. (Pa.) 224.

whereof he is at the time a subject or citizen.¹ The declaration must be recorded.² The preliminary declaration of intention is dispensed with in certain cases.³

bb. OATH OF ALLEGIANCE AND RENUNCIATION OF FOREIGN ALLEGIANCE AND TITLES. — At the time of his application for citizenship the alien must declare on oath that he will support the Constitution of the United States; that he renounces and abjures all allegiance and fidelity to every foreign prince, potentate, or state, particularly by name to the prince, potentate, or state of which he was before a citizen or subject;⁴ and if he has borne any hereditary title or has been a member of any order of nobility, he must make an express renunciation of such title or order;⁵ and these proceedings must be recorded.⁶

cc. PROOF OF RESIDENCE AND GOOD CHARACTER. — The alien must prove that he has resided within the United States five years at least, and within the state or territory where the court sits for one year,⁷ and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; but the oath of the applicant is not admissible to prove his residence.⁸

1. Rev. Stat. U. S., § 2167.

Form of Renunciation of Allegiance. — Where a party declares his intention to renounce all allegiance and fidelity to every foreign prince, potentate, state, and sovereignty whatever, and particularly to the Queen of Great Britain and Ireland, he is complying substantially with the act of Congress on the subject, even though the declaration does not give the name of the queen. *Ex p. Smith*, 8 Blackf. (Ind.) 395.

2. *State v. Barrett*, 40 Minn. 65; *Matter of Christern*, 56 How. Pr. (N. Y. Super. Ct.) 5.

Proof of Declaration of Intention by Original or Certified Copy. — The original affidavit of a declaration of intention to become a citizen of the United States, or a copy properly certified by the clerk of a district court of Minnesota, attested by its seal, is competent evidence of the declaration of intention. *State v. Barrett*, 40 Minn. 65.

3. See *supra*, this section, *Who May Be Naturalized*.

4. Rev. Stat. U. S., § 2165, cl. 2.

5. Rev. Stat. U. S., § 2165, cl. 4.

6. Rev. Stat. U. S., § 2165, subd. 2, 4.

7. Rev. Stat. U. S., § 2165.

Residence Must Be Proved by Witnesses. — In proceedings instituted for naturalizing an alien, his residence cannot be proved by affidavit, but must be shown in open court by the testimony of witnesses. *Matter of —*, 7 Hill (N. Y.) 137.

The oath of the applicant is not receivable as cumulative testimony as to his residence; the statute is a prohibition to the court to receive the applicant's oath on this point. *U. S. v. Grottkau*, 30 Fed. Rep. 672.

8. Rev. Stat. U. S., § 2165, cl. 3.

Method of Proof of Good Moral Character. — The oath of an alien applying for naturalization is admissible to prove his good moral character and attachment to the principles of the Constitution, but it should be corroborated by other evidence. Affidavits are not admissible upon these points. *Matter of —*, 7 Hill (N. Y.) 137.

Effect of Conviction of Perjury. — Where an alien during his residence in the United States

has been convicted of perjury, it has been held that he has not behaved as a man of good moral character, so as to entitle him to admission to citizenship; and that the fact that he had received a pardon did not alter the case. *In Re Spenser*, 5 Sawy. (U. S.) 195.

Comprehension of the Principles of the Constitution. — Courts should not admit any alien to citizenship without being satisfied that he has at least some general comprehension of what the Constitution is, and of the principles which it affirms. *In re Bodek*, 63 Fed. Rep. 815, where Dallas, C. J., said: "It may safely be assumed, I think, that Congress, in requiring it [the declaration to support the Constitution] to be made before the court, meant to assure its being made with decent solemnity; but, more than this, it is expressly provided that it shall be made 'on oath,' and therefore, in my opinion, it should not be accepted in any case in which, upon examination, it appears that the applicant does not understand its significance, or is without such knowledge of the Constitution as is essential to the rational assumption of an undertaking avouched by oath to support it. In many instances these declarations are made by men who have no counsel to inform or restrain them, and who themselves have no adequate appreciation of their purport or of the sacredness of the accompanying oath which, in order to accomplish the object in view, they are often quite willing to take as a matter of course. * * * Furthermore, the law requires that 'it shall be made to appear to the satisfaction of the court' that the applicant has behaved as a man attached to the principles of the Constitution;" and this renders inevitable the same conclusion.

In *In re Rodriguez*, 81 Fed. Rep. 337, a very ignorant man, unable to read or write the English language or to explain the principles of the Constitution of the United States, and not knowing how they were governed, was held entitled to naturalization upon proof that he was a very good man, peaceable, industrious, and law-abiding, the court declaring that "by his daily walk, during a residence of ten years in the city of San Antonio, he has practically

(d) **Judgment Admitting to Citizenship — Act of Admission a Judgment.** — In passing upon applications for admission to citizenship, courts act judicially. They receive and weigh testimony, compare it with the law, and pronounce upon the law and the facts.¹ The action of the court has the force and effect of a judgment, and is conclusive as to all matters necessarily before the court and involved in the issue.²

Cannot be Collaterally Impeached. — It follows, therefore, that a judgment of naturalization cannot be impeached collaterally on the ground that some of the prerequisites to naturalization required by the statute did not exist.³

A Judgment of Naturalization Confers All the Privileges of Citizenship belonging to natural born citizens of the United States, save only such as are withheld by the Constitution of the United States.⁴

Decree Procured by Fraud — Cancellation. — The rule has been laid down that where a certificate or decree of naturalization has been obtained by fraud in a state court, the United States can bring a proceeding for the cancellation of such certificate or decree in the same manner as for the can-

illustrated and emphasized his attachment to the principles of the Constitution."

Naturalization Denied to Socialist. — In *Ex p. Sauer*, 81 Fed. Rep. 355, the court refused to naturalize a German socialist whose doctrines, as explained by himself, the court held to be directly antagonistic to the principles of the Constitution of the United States.

1. Courts Act Judicially in Naturalizing. — *Spratt v. Spratt*, 4 Pet. (U. S.) 406; *Green v. Salas*, 31 Fed. Rep. 106; *In re Bodek*, 63 Fed. Rep. 814; *Ex p. Knowles*, 5 Cal. 300, 4 Am. L. Reg. 598; *McCarthy v. Marsh*, 5 N. Y. 263; *Matter of —*, 7 Hill (N. Y.) 137; *Matter of Christern*, 43 N. Y. Super. Ct. 523.

The power conferred upon courts to naturalize aliens is judicial, and not ministerial or clerical, and consequently cannot be delegated to clerks, but must be exercised by the court. *Matter of Clark*, 18 Barb. (N. Y.) 444.

2. Stark v. Chesapeake Ins. Co., 7 Cranch (U. S.) 420; *Spratt v. Spratt*, 4 Pet. (U. S.) 406; *The Acorn*, 2 Abb. (U. S.) 434.

3. Judgment of Naturalization Not Collaterally Impeachable — United States. — *Spratt v. Spratt*, 4 Pet. (U. S.) 393; *Stark v. Chesapeake Ins. Co.*, 7 Cranch (U. S.) 420; *U. S. v. Walsh*, 22 Fed. Rep. 644.

Illinois. — *People v. McGowan*, 77 Ill. 644, 20 Am. Rep. 254.

Minnesota. — *State v. Macdonald*, 24 Minn. 48.

New York. — *Ritchie v. Putnam*, 13 Wend. (N. Y.) 524; *McCarthy v. Marsh*, 5 N. Y. 263.

South Carolina. — *McDaniel v. Richards*, 1 McCord L. (S. Car.) 187.

Virginia. — *Com. v. Towles*, 5 Leigh (Va.) 743.

Wisconsin. — *State v. Hoeflinger*, 35 Wis. 393. But see *Vaux v. Nesbit*, 1 McCord Eq. (S. Car.) 352.

An order of a court of competent jurisdiction admitting an alien to citizenship has the character and attributes of a judgment and is equally conclusive, and, when proof of citizenship is made by the introduction in evidence of an exemplified copy of the record of naturalization from a court of competent jurisdiction, the record is conclusive as to the preliminary proceedings necessary to give the

naturalizing court jurisdiction, namely, the petition, declaration of intention, and oath of allegiance, and the record is conclusive as to the question of the requisite length of residence in the United States of the person naturalized. *The Acorn*, 2 Abb. (U. S.) 444.

Inaccurate Recital Immaterial. — The validity and efficacy of a judgment of naturalization are not impaired by an inaccurate statement in the recitals therein. Such recitals constitute no part of the judgment, and whether they are correct or otherwise is immaterial. *In re McCoppin*, 5 Sawy. (U. S.) 630.

Record Invalid on Face. — But while a record of naturalization which is valid upon its face is conclusive, it seems that where the face of the record shows a mistake on the part of the court the naturalization is invalid. *Banks v. Walker*, 3 Barb. Ch. (N. Y.) 438.

4. Osborn v. U. S. Bank, 9 Wheat. (U. S.) 738.

The Protection of Naturalized Citizens while in foreign countries is especially provided for by U. S. Rev. Stat., § 2000.

President of the United States. — No person is eligible to the office of President of the United States, except a natural born citizen, or a citizen of the United States at the time of the adoption of the Constitution. Art. 2, § 1, par. 4.

United States Senate. — No person is eligible to the office of senator who has not been nine years a citizen of the United States. Art. I, § 3, par. 3.

Representative in Congress. — No person can be a representative who has not been seven years a citizen of the United States. Art. I, § 2, par. 2.

England — Naturalization Act. — Under the Naturalization Act, 1870, an alien who becomes by naturalization a British subject is entitled to all political and other rights, powers, and privileges to which a natural born British subject is entitled, and is subject to the same obligations. But when in the limits of the country of which he was previously a citizen he is not deemed a British subject unless he has ceased to be a subject of such state in pursuance of its laws or a treaty. See also *Reg. v. Manning*, 2 C. & K. 887, 61 E. C. L. 887, *Mette v. Mette*, 28 L. J. Prob. 117.

cellation of patents that have been fraudulently procured.¹

(e) **Record of Naturalization Proceedings and Proof of Naturalization.**—The United States statutes require that naturalization proceedings shall be recorded,² and where the citizenship of a person naturalized comes subsequently in issue, proof of that citizenship is properly made by the record.³ No particular form of record is required, however, and the sufficiency of the record, if it reasonably amounts to an act of admission on the part of the court, cannot be impeached collaterally.⁴

Insufficient Records Not Helped by Parol. Where the records which should show naturalization proceedings contain no record of the naturalization, or are insufficient to prove naturalization, parol evidence is inadmissible to supply alleged deficiencies therein.⁵

1. U. S. v. Norsch, 42 Fed. Rep. 417. See also Little Rock Junction R. Co. v. Burke, 66 Fed. Rep. 83.

2. U. S. Rev. Stat., § 2165.

3. Boyd v. Nebraska, 143 U. S. 135; Green v. Salas, 31 Fed. Rep. 106.

Alienage Presumed to Continue.—In the absence of proof that an alien has become a citizen of the United States, his original status is presumed to continue. Hauenstein v. Lynham, 100 U. S. 483.

4. **Sufficiency of Record.**—The original minutes of a court in which it was claimed that an alien had been naturalized, only declared that he "took the oath, etc." A certificate of naturalization of the same date, which purported to be a copy of the court records, was somewhat fuller. But in neither did a judgment of the court admitting the alien to citizenship appear, nor was it shown that the court was satisfied of his good moral character. It was held that it must be presumed that when the court administered the oath of allegiance it was satisfied as to the character of the applicant, and that the administration of the oath amounted to a judgment of the court for his admission to citizenship, and, therefore, that the alien was duly naturalized. Campbell v. Gordon, 6 Cranch (U. S.) 176. See also Com. v. Towles, 5 Leigh (Va.) 743.

In Matter of Coleman, 15 Blatchf. (U. S.) 406, the question was whether a certificate of citizenship had been lawfully issued to Coleman. In the records of the court issuing the certificate, there were on file Coleman's oath of allegiance and the declarations of himself and a witness under oath as to all the matters requisite to entitle him to admission as a citizen, and these papers had upon them the initials of a judge of the court. But there was no order or judgment of admission in the records further than an entry in a "naturalization index" of Coleman's name, the date of his naturalization, the nation to which he previously owed allegiance, and the name and residence of the witness by whom he proved the facts entitling him to citizenship. It was shown that, for a number of years previous to Coleman's naturalization, the same records and no others had been kept in all cases of naturalization as in his. It was held that the books and papers on file constituted a sufficient record of naturalization, and that the certificate was properly issued; that the applicant was not required to see that the proceedings upon his naturalization were recorded,

and was, therefore, not responsible for defects in the record; that although an act of admission by the court was necessary, yet the court had a right to say what it regarded as its act of admission; and that whatever the court so regarded was to be considered as its act or order of admission when brought in question in collateral proceedings. See also, to the same effect, Matter of Christern, 43 N. Y. Super. Ct. 523.

5. **Record Cannot be Contradicted by Parol.**—A court has no power to enter an order admitting an alien to citizenship *nunc pro tunc* where the records of the court for the period which should show the naturalization contain no record thereof, or of the antecedent steps requisite under the statute, and only show that the petitioner declared his intention to become a citizen. The court will not admit the supposition that things may have been done in respect to the naturalization of persons which do not appear of record. Matter of Desty, 8 Abb. N. Cas. (N. Y. Super. Ct.) 250. See also Slade v. Minor, 2 Cranch (C. C.) 139.

If it is claimed that an alien has been naturalized in a certain court, and shown that, if naturalized, he was naturalized in that court, and the records thereof, upon examination, show no judgment admitting him to citizenship, it cannot be proved by parol that he was admitted in such court, and that no entry was made of his admission; and in such a case citizenship cannot be presumed from the fact that the alien has held real estate, or has voted or held office. Dryden v. Swinburne, 20 W. Va. 89.

Inadmissibility of Clerk's Certificate in Absence of Record.—The United States naturalization laws expressly require the record of proceedings of naturalization to be recorded, and in the absence of proof of the loss or destruction of a record the record can be proved only by itself or by an extract therefrom. Consequently the certificate of the clerk of the district court reciting that the applicant has been duly admitted to citizenship, but failing to show or verify any extract from the record or minute of the action of the court, is not competent evidence to show naturalization. The record, if not correctly made up, or if lost or destroyed, should be perfected or replaced by appropriate proceedings in the court where the judgment was pronounced, and it is not competent to supply alleged deficiencies in the record by parol evidence. Green v. Salas, 31 Fed. Rep. 106. See also Miller v. Reinhart, 18 Ga. 239.

Records Destroyed or Impossible of Production. — But in cases where the record has been lost or destroyed, or by reason of lapse of time and the death of the person naturalized the record cannot be produced, secondary evidence is admissible to prove naturalization.¹ But even after death and the lapse of many years, it appears that courts will not presume in favor of the former existence of a record of naturalization where the establishment of such a record would defeat rights long exercised and acknowledged, and where there is no evidence that the person claimed to have been a citizen exercised any rights of a citizen beyond holding land.²

Correcting Erroneous Record. — An erroneous or defective record of naturalization can be corrected only in a proceeding brought for that purpose.³

How Far Retroactive. — No court has authority, in naturalizing an alien, to declare in its order that such alien shall be held to be a citizen from a time preceding the making of the order, and such a declaration is without effect. Citizenship begins only from the date of the order.⁴ Naturalization, however, has been held to relate back and confirm a title to land purchased during alienage, although it does not confirm a title claimed by descent.⁵

1. Where Records are Destroyed or Cannot Be Produced. — *Kreitz v. Behrensmeyer*, 125 Ill. 141, 8 Am. St. Rep. 349; *Sasportas v. De la Motta*, 10 Rich. Eq. (S. Car.) 38; *Nalle v. Fenwick*, 4 Rand. (Va.) 585.

Where no record of naturalization can be produced, evidence that a person having the requisite qualifications to become a citizen did, in fact, and for a long time, vote and hold office and exercise rights belonging to citizens is sufficient to warrant a jury in inferring that he had been duly naturalized as a citizen. *Boyd v. Nebraska*, 143 U. S. 135, *overruling State v. Boyd*, 31 Neb. 682.

Where a son claimed citizenship on the ground that his father had been naturalized long before the son came of age, and it appeared that the father had been dead for a number of years, it was held that the son might prove citizenship without the production of the father's original certificate of naturalization, or a duplicate thereof; that although such a certificate constituted the best evidence, resort to secondary evidence might be had where, as in this case, the production of primary evidence was impossible. *People v. McNally*, 59 How. Pr. (N. Y. Supreme Ct.) 500.

In an action of ejectment it became necessary to prove the naturalization of a person who had been dead for many years. It was claimed that he was naturalized in the District of Columbia, but the records of naturalization proceedings in the district had been destroyed many years before. It was held that, under the circumstances, secondary evidence was properly admitted upon the question of citizenship, and it being shown that he possessed every requisite qualification to enable him to become a citizen, and that he constantly exercised rights belonging to citizens, the question of his citizenship was properly left to the jury. *Hogan v. Kurtz*, 94 U. S. 773.

2. Where Presumption of Record Would Affect Long-settled Rights. — In an action of ejectment the plaintiffs claimed as the heirs of one James Dunlap, who had been a subject of the king of Great Britain, and their title was dependent upon proving his naturalization. No record of naturalization was produced, but it was shown that a long time had intervened

after his arrival in the United States, and after his first acquisition of real estate therein, during which there had been no proceedings instituted under the laws of escheat and forfeiture, and the plaintiffs asked the court for an instruction to the effect that the jury had a right to presume from these circumstances that James Dunlap had become a citizen. It was held by the Supreme Court of the United States that the trial judge did not err in refusing the instruction asked for. The court, by Marshall, C. J., said: "The alienage of James Dunlap being fully proved, and the laws of Virginia requiring, as indispensable to his citizenship, that he should take the oath of fidelity to the commonwealth, in a court of record, of which the clerk is directed to grant a certificate, we do not think that this fact, which, had it taken place, must appear on record, ought to be presumed unless there were some other fact, such as holding an office of which citizens alone were capable, or which required an oath of fidelity, from which it might be inferred." *Blight v. Rochester*, 7 Wheat. (U. S.) 546.

3. Proceedings to Correct Records. — *U. S. v. Walsh*, 22 Fed. Rep. 644; *Green v. Salas*, 31 Fed. Rep. 106; *Matter of Christern*, 43 N. Y. Super. Ct. 523, 56 How. Pr. (N. Y.) 5.

Correcting Clerical Error. — A record of the naturalization proceedings may, upon a proper application and showing, be amended *nunc pro tunc* so as to correct an error of the clerk and make the record conform to the truth. *State v. Macdonald*, 24 Minn. 48.

4. Dryden v. Swinburne, 20 W. Va. 89.

5. How Far Naturalization Retroactive. — Naturalization, before office found, relates back, and confirms the title to land purchased during alienage. *Jackson v. Beach*, 1 Johns. Cas. (N. Y.) 399. But it does not retrospectively confirm a title claimed by descent. *Jackson v. Green*, 7 Wend. (N. Y.) 333; *Vaux v. Nesbit*, 1 McCord Eq. (S. Car.) 370. Naturalization does not have such a retroactive operation as to vest or confirm in the person naturalized an estate which, but for his being an alien, would have descended to him in fee at the death of the person last seised. The *New York* statute of 1843, providing that any naturalized citizen, to whom an estate would have descended if he

(f) **Criminal Offenses Connected with Procurement or Use of Certificates of Naturalization.** — In order to prevent the abuse of the United States naturalization laws, Congress has created several criminal offenses connected with the fraudulent procurement or use of certificates of naturalization.¹

Perjury in the Oaths or Affidavits Required of Applicants for citizenship is punishable by fine and imprisonment.²

Procuring, or Attempting to Procure, Admission to Citizenship by Fraud in various specified methods, as by assuming a fictitious name or identity, or by falsely making, forging, or counterfeiting oaths or affidavits required by statutes, is made punishable by fine or imprisonment, or both. The statute is directed not only against the acts of applicants for naturalization, but also against the acts of witnesses in naturalization proceedings.³

Unlawfully Using Certificate to Procure Registration. — Any person who, knowing that a certificate has been unlawfully issued, uses it to procure, or in attempting to procure, his registration as a voter, or who so uses a certificate issued to another person, is liable to fine or imprisonment, or to both.⁴

The Sale of a Certificate of Naturalization to a person other than him to whom it was originally issued is a criminal offense under the statutes of the United States.⁵

(2) **Under Special Laws.** — Naturalization may be effected by special laws which confer the privilege of citizenship on the individuals named in the laws.⁶

(3) **Collective Naturalization.** — Collective naturalization, as distinguished from individual naturalization, of all inhabitants, is effected only when a country or province becomes incorporated in another country by conquest, cession, or free gift.⁷ In the United States it is effected by the acquisition of a foreign territory, with its people, who thereby become citizens of the United States.⁸

had been a citizen at the death of the person last seised, might hold the same as though he had been a citizen at the time of the descent cast, applied only to persons already naturalized at the time the act was passed, and had no reference to the future. *Heney v. Brooklyn Benev. Soc.*, 39 N. Y. 333, *affirming* 33 Barb. (N. Y.) 360.

1. See *U. S. v. Tynen*, 11 Wall. (U. S.) 88.

2. U. S. Rev. Stat., § 5395; *U. S. v. Walsh*, 22 Fed. Rep. 644; *U. S. v. Jones*, 14 Blatchf. (U. S.) 90.

This enactment extends only to oaths authorized or required by the statute, and hence a person cannot, under it, be punished for perjury who has taken a false oath as to his residence. *U. S. v. Grottkau*, 30 Fed. Rep. 672.

3. U. S. Rev. Stat., § 5424.

4. U. S. Rev. Stat., § 5426; *U. S. v. Burley*, 14 Blatchf. (U. S.) 91; *Matter of Coleman*, 15 Blatchf. (U. S.) 406.

The unlawful use or possession of certificates of citizenship is further punishable under § 5425 of the U. S. Rev. Statutes.

5. U. S. Rev. Stat., § 5424.

The sale of certificates which were procured by fraud is punishable under this statute equally with the sale of valid certificates. *U. S. v. Ragazzini*, 50 Fed. Rep. 923.

6. Cooley's Const. Law, 243. See *Collingwood v. Pace*, 1 Vent. 419.

7. 1 Phillim. Int. Law 382.

8. Cooley's Gen. Prin. Const. Law 244.

Admission of Territory as State. — Congress having the power to deal with the people of the territories in view of the future states to be formed from them, there can be no doubt that, in the admission of a state, a collective nat-

uralization may be effected, in accordance with the intention of Congress and the people applying for admission. Admission on an equal footing with the original states, in all respects whatever, involves equality of constitutional right and power, which cannot thereafter be controlled, and it also involves the adoption as citizens of the United States of those whom Congress makes members of the political community, and who are recognized as such in the formation of the new state with the consent of Congress. *Boyd v. Nebraska*, 143 U. S. 135.

Treaty with Great Britain — Territory of Michigan. — Under the second article of the Jay Treaty with Great Britain, British subjects who resided at Detroit before and at the time of the evacuation of the territory of Michigan, and who continued to reside there afterwards without, at any time prior to the expiration of one year from such evacuation, declaring their intention of becoming British subjects, became *ipso facto*, to all intents, American citizens. *Crane v. Reeder*, 25 Mich. 303.

The Treaty with Spain by Which Florida was Ceded to the United States admitted the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. They did not thereby, however, become possessed of political power nor entitled to share in the government until Florida became a state. In the meantime Florida continued to be a territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

4. By Succeeding to Status of Father. — Citizenship may be acquired without birth within the territory of the United States or without naturalization by a child succeeding to the status of his father as a citizen. It is enacted in the Revised Statutes of the United States that all children born out of the limits or jurisdiction of the United States, whose fathers at the time of their birth are citizens thereof, are citizens of the United States, but the right of citizenship does not descend to children whose fathers never resided in the United States.¹

American Ins. Co. v. 356 Bales of Cotton, 1 Pet. (U. S.) 511.

By the **Annexation of Texas**, under a joint resolution of Congress of March 1, 1845, and its admission into the Union on an equal footing with the original states, December 29, 1845, all citizens of the former republic became, without any express declaration, citizens of the United States. *McKinney v. Saviego*, 18 How. (U. S.) 235; *Cryer v. Andrews*, 11 Tex. 170; *Barrett v. Kelly*, 31 Tex. 476; *Carter v. Territory*, 1 N. Mex. 317; *Citizenship-Passports*, 13 Opp. Atty.-Gen. 397.

Acquisition of Louisiana and California. — The purchase of Louisiana and the acquisition of California by the United States present familiar illustrations of collective naturalization. 1 Phillim. Int. Law 382. See as to Louisiana, *Desbois's Case*, 2 Martin (La.) 185; *U. S. v. Laverty*, 3 Martin (La.) 733; *Scott v. Sandford*, 19 How. (U. S.) 525, *per* Catron, J. As to California, see *Tobin v. Walkinshaw*, 1 McAll. (U. S.) 186.

Indians. — By the treaty of September 27, 1830, provision was made for such heads of families of the Choctaws as desired it, to remain and become citizens of the United States. 7 Stat. 335.

By the treaty of December 29, 1835, such individuals and families of the Cherokees as were averse to a removal west of the Mississippi, and desirous to become citizens of the states where they resided, were allowed to do so. 7 Stat. 483.

By the act of Congress of March 3, 1843, it was provided that, on the completion of certain arrangements for the partition of the lands of the tribe among its members, "the said Stock-bridge tribe of Indians, and each and every of them, shall then be deemed to be, and from that time forth are hereby declared to be, citizens of the United States, to all intents and purposes, and shall be entitled to all the rights, privileges and immunities of such citizens." 5 Stat. 647, c. 101, § 7.

And such was the act of March 3, 1839, relating to the Brothertown Indians of Wisconsin. 5 Stat., c. 83, pp. 349, 351.

The act of Congress approved February 8, 1887, was much broader, and by its terms made every Indian situated as therein referred to a citizen of the United States. 24 Stat. 388, c. 119. See *supra*, this title, *By Birth in Jurisdiction*, paragraph *Indians*.

American Revolution — American Antenati. — All white persons, or persons of European descent, who were born in any of the colonies, or resided or had been adopted there before 1776, and had adhered to the cause of independence up to July 4, 1776, were, by the Declaration, invested with the privileges of citizenship.

U. S. v. Ritchie, 17 How. (U. S.) 525; *Inglis v. Sailor's Snug Harbour*, 3 Pet. (U. S.) 99. See also the title **ALIENS**, vol. 2, p. 65.

1. Children Born Out of United States. — U. S. Rev. Stat., §§ 1993, 2172; *State v. Adams*, 45 Iowa 99, 24 Am. Rep. 760; *Oldtown v. Bangor*, 58 Me. 353; *Ludlam v. Ludlam*, 26 N. Y. 356, 84 Am. Dec. 193.

The presumption is that natives of the United States retain their citizenship while traveling abroad, and therefore that their children born abroad are American citizens. *Wolff v. Archibald*, 14 Fed. Rep. 369.

A Child Born on Board an American Vessel, of American parents, while the vessel was in a foreign country in the course of a voyage, is a citizen of the United States. *U. S. v. Gordon*, 5 Blatchf. (U. S.) 18.

And conversely, persons born on a public vessel of a foreign country while within the waters of the United States, consequently within their territorial jurisdiction, are not citizens of the United States. They are considered as born in the country to which the vessel belongs, and in the sense of public law are not born within the jurisdiction of the United States. *In re Look Tin Sing*, 21 Fed. Rep. 905, 10 Sawy. (U. S.) 353, *per* Field, J.

Foreign-born Child of Father who Has Renounced Allegiance. — But a person born in a foreign state, whose father was once a citizen of the United States, but renounced his allegiance before the birth of such person, is not a citizen of the United States, or entitled to registration as a voter. *Browne v. Dexter*, 66 Cal. 39.

The Infant Children of Aliens, though born out of the United States, become citizens by the naturalization of their parents, if such children live in the United States when the parents are naturalized. U. S. Rev. Stat., § 2172.

The English Law, as settled by the Statutes 7 Anne, c. 5, 4 Geo. II., c. 21, and 13 Geo. III., c. 21, is slightly different from the law in the United States. By 7 Anne, c. 5, and 4 Geo. II., c. 21, the children of natural born British subjects, though born out of the British dominions, are declared to be natural born British subjects, and by 13 Geo. III., c. 21, children of those whose fathers are natural born subjects, by virtue of the preceding acts, are themselves declared to be natural born subjects. Thus, the children and grandchildren of natural born British subjects, though themselves born abroad, are natural born British subjects; but the status does not descend another generation, and the children of such grandchildren are aliens. *De Geer v. Stone*, 22 Ch. Div. 243. See also *In re Willoughby*, 30 Ch. Div. 324.

The status of foreign-born children and grandchildren under these acts is not affected by the alienage of the mothers of such chil-

Infant Children of Naturalized Alien. — The infant children of aliens, though born out of the United States, if dwelling within the United States at the time of the naturalization of their parents, become citizens by such naturalization.¹

5. By Marriage in the Case of Women. — Women may become citizens of the United States by marriage without naturalization. The Revised Statutes provide that any woman who marries a citizen of the United States, and who might herself be lawfully naturalized, is to be deemed a citizen.²

dren and grandchildren. *De Geer v. Stone*, 22 Ch. Div. 243; *Collingwood v. Pace*, 1 Vent. 427; *Bacon v. Bacon*, Cro. Car. 601; *Doe v. Jones*, 4 T. R. 308. But see the dicta in *Calvin's Case*, 7 Coke 182.

The children of natural born subjects, who, under 4 Geo. IV., c. 21, are to be considered natural born subjects of the United Kingdom, must have been legitimate from their birth, and not rendered so by the subsequent marriage of their parents. *Shedden v. Patrick*, 1 Macq. H. L. Cas. 535.

Children Born Abroad of British Subjects in Foreign Service. — The Statutes 7 Anne, c. 5, and 4 George II., c. 21, do not extend to children born out of the British dominions whose fathers at the time of the birth of such children are in the actual service of any foreign prince or state then in enmity with the crown of England. Stat. 4 Geo. II., c. 21, § 2.

Children of Soldiers Born Abroad. — Children born out of the British dominion, whose fathers were in the British military service, are not, by the fact of their fathers' military service, rendered British subjects. *De Geer v. Stone*, 22 Ch. Div. 243.

1. U. S. Rev. Stat., § 2172; *State v. Penney*, 10 Ark. 621; *Crane v. Reeder*, 25 Mich. 303. See also *Calais v. Marshfield*, 30 Me. 511.

If a child be naturalized by the naturalization of the father, the naturalization must take place *eo instanti*. It cannot be a naturalization or not, according to a future event. *Campbell v. Gordon*, 6 Cranch (U. S.) 179.

The naturalization of an inhabitant of Florida, by virtue of the treaty between the United States and Spain, ceding Florida to the United States, inured to the benefit of the minor children of such inhabitant, who thereby became citizens of the United States. See *Contested Elections*, 1834, 1835, 2d sess. 38th Congress, 41, stated in *Boyd v. Nebraska*, 143 U. S. 169.

The minor child of one who became a citizen of the United States by virtue of the Jay Treaty with Great Britain, if such child resided in the United States at the time that the father became a citizen under the treaty, became a citizen of the United States under the statute providing for the minor children of naturalized aliens. *Crane v. Reeder*, 25 Mich. 303.

Inchoate Status of Minor. — Minors acquire an inchoate status by the declaration of intention on the part of their parents. If they attain a majority before the parent completes his naturalization, they have an election to repudiate the status which they find impressed upon them and to determine that they will accept allegiance to some foreign potentate or power, rather than hold fast to the citizenship which the parent has initiated for them. *Boyd v. Nebraska*, 143 U. S. 178.

England. — Children who, during infancy, have become resident with a naturalized parent in any part of the United Kingdom, or with a naturalized father while in the service of the crown out of the United Kingdom, are to be deemed naturalized British subjects. Naturalization Act, 1870, § 10; Naturalization Act, 1895.

2. U. S. Rev. Stat., § 1994.

This statute applies as well to the wives of naturalized as to those of native-born citizens. *Headman v. Rose*, 63 Ga. 458; *Kreitz v. Behrensmeyer*, 125 Ill. 141, 8 Am. St. Rep. 349.

In *Kane v. McCarthy*, 63 N. Car. 299, it was held that a woman who, in 1857, had married in Ireland a naturalized citizen of the United States, could inherit property, although she had always resided in Ireland, and continued to do so after descent cast. See also *Burton v. Burton*, 1 Keyes (N. Y.) 359.

In *Kelly v. Owen*, 7 Wall. (U. S.) 496, the court construes the act of Congress of Feb. 10, 1855, which declares that "any woman who might lawfully be naturalized under the existing laws, married, or who shall be married, to a citizen of the United States, shall be deemed or taken to be a citizen," and holds that the term "married or who shall be married" means that when any woman who, under previous acts, might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passing of the act, or subsequently, or before or after marriage, she becomes by that act a citizen also. His citizenship, whenever it exists, confers, under the act, citizenship upon her.

This case sets at rest the doubt expressed in *Burton v. Burton*, 1 Keyes (N. Y.) 359, whether the words "who might herself be naturalized" require the statutory period of residence on the part of the wife in order to entitle her to be considered a citizen.

And it was held by Attorney-General Williams that an alien woman who has intermarried with a citizen of the United States residing abroad, the marriage having been solemnized abroad, and the parties, after the marriage, continuing to reside abroad, is to be regarded as a citizen of the United States within the meaning of the act of Congress (U. S. Rev. Stat., § 1994), though she may not have resided within the United States. 14 Opp. Atty.-Gen. 402. See also *Headman v. Rose*, 63 Ga. 458.

In England the status of a wife or widow is that of her living or deceased husband. Naturalization Act 1870, § 10.

By 7 and 8 Vict., c. 66, an alien woman, by marriage with a natural born or naturalized British subject, becomes, to all intents and purposes, a British subject. Reg. v. Manning, 2 C. & K. 887, 61 E. C. L. 887, 1 Dem. C. C. 467. See also *De Wall's Case*, 6 Moo. P. C. 216, 12 Jur. 145.

III. HOW CITIZENSHIP LOST — 1. Expatriation — a. DEFINITION. — Expatriation is the voluntary renunciation of one's nationality and allegiance by becoming a citizen of another country.¹

b. EXISTENCE OF THE RIGHT. — At the common law the right of voluntary expatriation is altogether denied, the maxim being, *Nemo potest patriam exuere*.² In the United States the right is by act of Congress declared to be "the natural and inherent right of all people indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness;"³ and long before this statute it had been held to be fundamental under our system of government.⁴

1. Century Dictionary.

The Effect of Expatriation is to divest the citizen expatriating himself both of his obligations and his rights as a citizen. He becomes *ipso facto* an alien, his lands are escheatable, and the rights appertaining to citizenship once lost cannot be recovered by residence, but he must go through the formula prescribed by law for the naturalization of an alien born. *The Santissima Trinidad*, 1 Brock. (U. S.) 478.

2. 1 Bl. Com. 370; 2 Kent's Com. 42; *Storie's Case*, 3 Dyer 300b; *Calvin's Case*, 7 Coke 1; *Macdonald's Case*, *Foster's C. L.* 59; *Fitch v. Weber*, 6 Hare 51.

3. U. S. Rev. Stat., § 1999; *Pequignot v. Detroit*, 16 Fed. Rep. 214; *Comitis v. Parkerson*, 56 Fed. Rep. 556; *U. S. v. Crook*, 5 Dill. (U. S.) 453. See also 8 Opp. Atty.-Gen. 139; 9 Opp. Atty.-Gen. 62, 356; 14 Opp. Atty.-Gen. 295.

Right of Expatriation Discussed and Declared. — Speaking upon this subject, Mr. Justice Field, in *In re Look Tin Sing*, 10 Sawy. (U. S.) 355, 21 Fed. Rep. 905, and considering the effect of the Fourteenth Amendment to the United States Constitution, declared that the language of that amendment "was designed to except from citizenship persons who, though born or naturalized in the United States, have renounced their allegiance to our government, and thus dissolved their political connection with the country. The United States recognized the right of every one to expatriate himself and choose another country. This right would seem to follow from the greater right proclaimed to the world in the memorable document in which the American colonies declared their independence and separation from the British crown, as belonging to every human being — God-given and inalienable — the right to pursue his own happiness. The English doctrine of perpetual and unchangeable allegiance to the government of one's birth, attending the subject wherever he goes, has never taken root in this country, although there are judicial dicta that a citizen cannot renounce his allegiance to the United States without the permission of the government, under regulations prescribed by law; and this would seem to have been the opinion of Chancellor Kent when he published his Commentaries. But a different doctrine prevails now. The naturalization laws have always proceeded upon the theory that any one can change his home and allegiance without the consent of his government. And we adopt as citizens those belonging to our race, who, coming from other lands, manifest attachment to our institutions, and desire to be incorporated with us. So profoundly convinced are we of the right of these

immigrants from other countries to change their residence and allegiance, that as soon as they are naturalized they are deemed entitled, with the native-born, to all the protection which the government can extend to them wherever they may be, at home or abroad. And the same right which we accord to them to become citizens here is accorded to them as well as to the native-born, to transfer their allegiance from our government to that of other states. * * * So, therefore, if persons born or naturalized in the United States have removed from the country and renounced, in any of the ordinary modes of renunciation, their citizenship, they thenceforth cease to be subject to the jurisdiction of the United States." See also *Browne v. Dexter*, 66 Cal. 39.

4. *Stoughton v. Taylor*, 2 Paine (U. S.) 661. See also *Jansen v. The Brigantine Vrow Christina Magdalena*, Bee Adm. 23, affirmed in *Talbot v. Janson*, 3 Dall. (U. S.) 133, where Judge Bee, in the District Court, and Mr. Justice Iredell, in the United States Supreme Court, entered into a full discussion of the extent and natural limits of the right of expatriation.

Whether Citizen Can Expatriate Himself in Absence of Law Prescribing Method. — In *Murray v. Schooner Charming Betsy*, 2 Cranch (U. S.) 120, it was doubted whether the right of expatriation could be exercised, except in a manner prescribed by law; and the same doubt was expressed in *The Santissima Trinidad*, 7 Wheat. (U. S.) 283, affirming 1 Brock. (U. S.) 478, and in *U. S. v. Gillies*, Pet. (C. C.) 159. And in the late case of *Comitis v. Parkerson*, 56 Fed. Rep. 556, it is strongly argued that, while Congress has a right to legislate upon the subject of expatriation, yet the right of expatriation cannot be exercised by a citizen of the United States, in the absence of legislation prescribing the method of its exercise. This case arose after the passage of the act of 1868, "concerning the rights of American citizens in foreign states," the preamble of which is a declaration of the fundamental and inherent nature of the right of expatriation, but it was declared that the preamble of the act left the question whether allegiance could be acquired or lost by any other means than statutory naturalization, in precisely the same situation as it was before. The existence of the right of expatriation was not, however, directly involved in the case, and it should be observed that the expressions in the opinion upon this subject are at variance with several of the opinions of the attorney-general and dicta in other well-considered adjudications cited in the last note *supra*.

In *Williams' Case*, 2 Cranch (U. S.) 82, note, Chief Justice Ellsworth, sitting in the

English Statute. — The right of a British subject to expatriate himself is fully recognized in England now under the provisions of the act of 1870.¹

c. WHAT AMOUNTS TO ACT OF EXPATRIATION. — The usual evidence of expatriation is actual emigration, coupled with acts inducing an intention to transfer one's allegiance. Proof that a citizen who emigrated to a foreign country took an oath of allegiance to it and entered and continued for years in its service is sufficient to show expatriation.²

2. By Marriage in Case of Women. — At one time it was held that a female citizen of the United States did not lose her citizenship by marriage with an alien,³ but since the right of expatriation has been so fully recognized, and since the converse proposition that an alien woman, by marriage with an American citizen, becomes a citizen, has been declared by statute, it appears that a woman's marriage with a foreigner should be regarded as an act of expatriation, at least when accompanied with residence abroad.⁴

United States District or Circuit Court in Connecticut, decided that an American citizen could not expatriate himself so as to cease to be a citizen of the United States.

Assent of Governments, National and State, Presumed. — The right of an American citizen to emigrate and renounce his allegiance to the government of the Union and of his state is universally conceded; and whenever the right has been exercised, it is presumed to have been done with the concurrence of both governments, though without the express sanction of either. *Alsberry v. Hawkins*, 9 Dana (Ky.) 177, 33 Am. Dec. 546.

1. English Naturalization Act 1870, §§ 6, 4, and 3.

Resumption of Citizenship. — Under section 8 of the British Naturalization Act 1870, any person who has by the exercise of the right of expatriation become an alien, may resume his status as a British subject in the same way that an alien born may become a British subject and with the same effect; that is, he is not to be deemed a British subject when within the dominions of the state of which, by his expatriation, he became a citizen or subject, unless by the laws of that state he has ceased to be a citizen or subject thereof.

England — Expatriation Inuring to Minor Children. — When, under the British Naturalization Act of 1870, a parent has, by the exercise of the right of expatriation, become an alien, the children of such parent who, during infancy, have become resident in the country of which the parent is a naturalized citizen, and who, according to the laws of such country, have become naturalized therein, cease to be British subjects. Naturalization Act of 1870, § 10.

2. *Juando v. Taylor*, 2 Paine (U. S.) 652; *Brown v. Dexter*, 66 Cal. 39.

Actual Removal and Intention to Acquire New Citizenship Essential. — Expatriation cannot be effected without removal from the country under circumstances of good faith. The *Santissima Trinidad*, 7 Wheat. (U. S.) 347; *Comitis v. Parkerson*, 56 Fed. Rep. 556.

Such removal must be without intent to return, and must be accompanied either by an act of naturalization in the foreign country, or acts and words from which a renunciation of the former citizenship and adoption of the new may be implied. 14 Opp. Atty.-Gen. 295.

There is no prescribed mode of renunciation

of citizenship. If a citizen of the United States, native or naturalized, emigrates, carries his family and effects with him, takes up his permanent residence abroad, and assumes the obligations of a subject to a foreign government, this implies a dissolution of his previous relations with the United States and puts an end to his citizenship. Opinion of Atty.-Gen. Black, 9 Opp. Atty.-Gen. 62.

Mere Residence and Marriage in a Foreign Country, even though war intervenes between such country and the United States, do not, in the absence of special enactment, deprive a citizen of the United States of his rights as an American citizen, he taking no part in the war. *U. S. v. Gillies*, Pet. (C. C.) 159. See also *Comitis v. Parkerson*, 56 Fed. Rep. 556.

His foreign domicile, however, may place him for commercial purposes in the same situation as the citizens of the foreign country in which his domicile is fixed, but by a return to his native country he throws off all foreign disabilities. *The Venus*, 8 Cranch (U. S.) 253.

Thus, where a child gained citizenship by his father's becoming a citizen of the United States by the treaty of 1783 with Great Britain, and on becoming of age removed to a British province and adhered to its government, he was, on his return to the United States, entitled to the rights of citizenship. *Calais v. Marshfield*, 30 Me. 511.

Involuntary Military Service in a Foreign Army by a citizen of this country, and the acceptance of a bounty therefor, do not have the effect of depriving him of his citizenship here. *State v. Adams*, 45 Iowa 99, 24 Am. Rep. 760.

3. *Shanks v. Dupont*, 3 Pet. (U. S.) 242; *Inglis v. Sailors' Snug Harbour*, 3 Pet. (U. S.) 99.

4. American Woman Losing Citizenship by Marriage. — In *Pequignot v. Detroit*, 16 Fed. Rep. 211, Judge Brown, now Associate Justice of the United States Supreme Court, held that a native Frenchwoman who married a citizen of the United States, and thereby became an American citizen, resumed her allegiance to her native country by a second marriage to a French citizen, after a divorce from her first husband, and that by such second marriage she became an alien. In this case there was not even any residence abroad or intention of residing abroad during the period of the second marriage. In the opinion, Judge Brown quoted the act declaring that an alien who mar-

In England, by Statute, a married woman is to be deemed to be the subject of the state of which her husband is a subject for the time being.¹

Change of Citizenship. — A citizen of the United States is entitled to transfer his citizenship from one state to another by a change of domicil, whenever he desires to do so.² And where there has been an actual removal with intent to make a permanent residence, and the acts of the party correspond with the purpose, the change of domicil is completed, and the law forces upon him the character of a citizen of the state where he has chosen his domicil, although he may have uniformly declared that he nevertheless considered himself as continuing a citizen of the state he had left.³

CITY. (See also the title MUNICIPAL CORPORATIONS.) — 1. In *England* a city was an incorporated town which was or had been the see of a bishop. In the *United States* this definition has never been applicable, and a city may be defined as an incorporated town,⁴ invested by the sovereign power with the highest grade of municipal duties and privileges, and having the power to

ries a citizen shall be deemed a citizen, and also section 1999 of the Revised Statutes with regard to the right of expatriation, and said: "It seems to me that we should regard the sections above quoted as announcing the views of Congress upon this branch of international law, and ought to apply the same rule of decision to a case where a female American citizen marries an alien husband that we should to a case where an alien woman marries an American citizen. * * * It will be noticed that legislation upon the subject of naturalization is constantly advancing toward the idea that the husband, as the head of the family, is to be considered its political representative, at least for the purposes of citizenship, and that the wife and minor children owe their allegiance to the same sovereign power."

It was decided by Attorney-General Hoar that a woman born in the United States, but married to a citizen of France, and domiciled there, was not "a citizen of the United States residing abroad" within the meaning of the Internal Revenue Law. It seems, from the opinion, that Attorney-General Stanbery had previously made a similar decision. 13 Opp. Atty.-Gen. 128.

American Woman Held Not to Lose Citizenship by Marriage. — It was held, on the other hand, in *Comitis v. Parkerson*, 56 Fed. Rep. 556, that a native citizen of Louisiana did not lose her citizenship and become an alien by marriage with an Italian subject resident in New Orleans, the husband never having the purpose of returning to Italy, but continuing at all times to reside in Louisiana. See also *Beck v. McGillis*, 9 Barb. (N. Y.) 35.

It was decided by Attorney-General Bates that a woman born in this country who married a Spanish subject residing here, and then removed to Spain with her husband and child, and subsequently died there, was still an American citizen at her death. 19 Opp. Atty.-Gen. 321.

And Attorney-General Taft held that where an alien woman acquired American citizenship by marriage with an American citizen, her citizenship was not lost by her remarriage, after the death of her husband, with an alien. 15 Opp. Atty.-Gen. 599. See also *Kreitz v. Behrensmeyer*, 125 Ill. 141, 8 Am. St. Rep. 349.

1. English Naturalization Act of 1870, § 10.
2. *Cooper v. Galbraith*, 3 Wash. (U. S.) 546; *Morris v. Gilmer*, 129 U. S. 315; *Cooper v. Galbraith*, 3 Wash. (U. S.) 546.

3. *Butler v. Farnsworth*, 4 Wash. (U. S.) 101.
Change of Citizenship as It Concerns Federal Jurisdiction. — The right of a party to sue in the courts of the United States is none the less because a change of domicil was induced by the purposes, whether avowed or not of invoking, for the protection of his rights, the jurisdiction of the federal courts. *Morris v. Gilmer*, 129 U. S. 328.

But, in order that a change of citizenship from one state to another should affect the right of bringing a suit in the federal court, it must be made with the *bona fide* intention of becoming a citizen of the state to which the party removes. *Jones v. League*, 18 How. (U. S.) 79; *Case v. Clarke*, 5 Mason (U. S.) 70; *Butler v. Farnsworth*, 4 Wash. (U. S.) 101; *Evans v. Davenport*, 4 McLean (U. S.) 574; *Morris v. Gilmer*, 129 U. S. 315.

If a new citizenship is really and truly acquired, the party's right to sue is a legitimate constitutional and legal consequence, not to be impeached by the motive of his removal. *Briggs v. French*, 2 Sumn. (U. S.) 251.

A removal which does not contemplate an absence from the former domicil for an indefinite and uncertain time, is not a change of it. There must be actual residence in the place, with the intention that it is to be a principal and permanent residence. *Ennis v. Smith*, 14 How. (U. S.) 400.

Officers of the United States Army stationed in one of the states do not cease to be citizens of the state in which they resided and exercised the rights of citizenship when called into service. *Stoker v. Leavenworth*, 7 La. 395.

4. **Municipal Corporation.** — The general principles of law affecting the government of strictly municipal corporations, such as *cities*, towns, and villages, can best be considered under the title MUNICIPAL CORPORATIONS. See generally the titles MUNICIPAL SECURITIES; COUNTIES; TOWNS AND TOWNSHIPS; BOROUGHs, vol. 4, p. 721.

Other Definitions of City. — In *Burke v. Monroe County*, 77 Ill. 615, the court says: "In 1 Bouvier's Law Dict., art. *City*, the author says, a *city* is a town incorporated by that

legislate upon, decide, and control local and subordinate matters pertaining to its respective locality.

name. Webster says, a *city* is 'a corporate town; a town or collective body of inhabitants, incorporated and governed by particular officers, as a mayor and aldermen.'

In *Mitchell v. Franklin County*, 25 Ohio St. 154, it is said that the word *city* "in this state imports a municipal corporation."

In *New Orleans v. Clark*, 95 U. S. 654, it is said: "A *city* is only a political subdivision of the state, made for the convenient administration of the government. It is an instrumentality with powers more or less enlarged according to the requirements of the public, and which may be increased or repealed at the will of the legislature." See also *Wooster v. Plymouth*, 62 N. H. 208; *Payne v. Treadwell*, 16 Cal. 223.

"A *city* or town is a compact community, with its *city* or town council, its committee on streets and alleys, and its street commissioner," etc. *Wheeling v. Campbell*, 12 W. Va. 36; *Meyer v. Lincoln*, 33 Neb. 572.

"**Town**" Construed to Include City. (See also **TOWN**.)—In *State v. Glennon*, 3 R. I. 278, it was held that the word "town" in a statute regulating the sale of intoxicating liquors might be construed to include a *city*. The court said: "Town is the generic term used in this country, as embracing all kinds of municipal corporations which have the right to make police rules or regulations, controlling all persons and things within certain specified limits. In this sense of the word, a *city* is a town. It is a municipal corporation, possessing all the powers of other municipal corporations, with such additions and limitations as are contained in the charter which gives it existence as a *city*."

The Constitution of *New Jersey* provided that the legislature should pass no private or local laws regulating the internal affairs of towns or counties. It was held that the word "towns" in this provision included *cities*. The court said: "Mr. Tomlyn, in his law dictionary, under the title 'Town,' says: 'Under the name of a town or village, boroughs, and, it is said, *cities*, are contained, for every borough or *city* is a town.' Lord Coke, in 1 Inst. 116, showing the capaciousness of the term, has this language: 'And it appeareth by Littleton that a town is the genus, and a borough is the species.' Bouvier's definition of the word *city* is, 'a town incorporated by that name.' These authorities suffice to show that the term in question is sufficiently elastic to take in, when put to some of its uses, the institution denoted by the term *city*. *Van Riper v. Parsons*, 40 N. J. L. 4. See generally the title **STATUTES**."

In *State v. Simmons*, 35 Mo. App. 380, upon the question of whether the term "town" includes *cities*, the court said: "We find the case of *Van Riper v. Parsons*, 40 N. J. L. 1, so fully and satisfactorily covering this point that we transcribe the language of the court in that case." See also *Glasgow v. St. Louis*, 15 Mo. App. 123.

For an instance of the use of the words "town" and *city* indiscriminately in the act

of the legislature, as referring to the same place, see *Murphy v. Waycross*, 90 Ga. 36.

Same — Variance.—In *Harvey v. Osborn*, 55 Ind. 542, it was held that the fact that the certificate to a deposition showed it to have been taken at the *city*, instead of at the town, of O., as specified in the notice of such taking, was no cause for suppressing such deposition. The court said: "A town is not always a *city*, but a *city* is always a town. Webster's definition of a *city* is that it is a large town, an incorporated town."

Cities Held to Include Towns.—The constitution of *Washington* provides for the appointment of commissioners to establish harbor lines in navigable waters lying in front of *cities*. It was held that the word *cities* included incorporated towns. *State v. Harbor Line Com'rs*, 4 Wash. 6.

And that *city* may include a town, see *People v. Stephens*, 62 Cal. 236; *Van Riper v. Parsons*, 40 N. J. L. 4.

"**City**" Held to Include an Incorporated Town.—A statute provided that all laws "requiring any *city* to support and provide for its paupers * * * are hereby repealed." It was held that the repealing clause embraced incorporated towns as well as *cities*, as apart from this construction the object of the act could not be attained, and moreover the word *city* as defined by lexicographers embraces incorporated towns. *Burke v. Monroe County*, 77 Ill. 610.

Same — Appeal Bonds.—In *Elma v. Carney*, 4 Wash. 419, the court held that the term "incorporated *cities*" within a statute excusing such *cities* from filing a bond upon appeal, applied to all municipal corporations; and therefore that towns were not required to file bonds on appeal.

City Purposes. (See also the title **MUNICIPAL CORPORATIONS**.)—Within the provision of the Constitution of *New York* that no county, *city*, or town shall incur any indebtedness except for county, *city*, or town purposes, it has been held that the lighting of the streets and public places was a *city* purpose. *Hequembourg v. Dunkirk*, 49 Hun (N. Y.) 551.

Improvements for the common and general benefit of all the citizens fall within the term "*city* purposes." *People v. Kelly*, 76 N. Y. 488.

So, in *People v. Kelly*, 76 N. Y. 475, it was held that this provision did not prohibit the *cities* of New York and Brooklyn from acquiring the stock of the Brooklyn Bridge Company, the purpose of the act being to extinguish the corporation and to authorize the two *cities* to complete the construction of the bridge.

City Officers. (See also the titles **MUNICIPAL CORPORATIONS**; **PUBLIC OFFICERS**.)—In *Burroughs v. Eastman*, 93 Mich. 436, it was held, where the charter of a *city* enumerates and provides for the officers of the *city*, that, when the statute refers to the *city* officers, it means only those officers provided for by the charter. So, in *State v. Kiichli*, 53 Minn. 147, it was held that the president of the *city* council was not an officer of the *city*.

2. A city is a large number of houses and inhabitants established in one place.¹

CIVIL. (See also **CRIMINAL**.) — Pertaining to a city or state, or to a citizen in his relations to his fellow-citizens or to the state; as, civil rights, civil government.² Pertaining to an organized community; reduced to order; subject to government; as, civil society.³

The term "civil" is often used as opposed to "military."⁴

In *Burch v. Hardwicke*, 30 Gratt. (Va.) 24, the chief of police of a *city* was held to be an officer of the state, and not of the municipality in which he exercised his office. See also the title **STATES**.

City Council. — See the titles **MUNICIPAL CORPORATIONS**; **ORDINANCES**.

Number of Inhabitants. — The Code of Virginia provides that the word *city* shall be construed to mean a town containing a population of five thousand and more. In *Roche v. Jones*, 87 Va. 484, it was held that where other sections of the code use the word *city*, the term does not apply to a town which has less than five thousand population.

City Warrants. — See the titles **MUNICIPAL CORPORATIONS**; **MUNICIPAL SECURITIES**.

1. **Vicinity.** — *Society of Cincinnati's Appeal*, 154 Pa. St. 630. In that case it was held that where a fund was started to erect a monument in the *city* of Philadelphia, the site of the monument need not be within the corporate limits of the *city* as they were at the time the fund was started, but that "the words descriptive of the site were used in their popular sense, to signify the *city* of Philadelphia as geographically and popularly understood, the coterminous built-up territory identified in the popular mind as the *city*, and expanding from time to time in accordance with the enlarged meaning of the term in the minds of the people."

In *Smith v. Sherry*, 50 Wis. 210, it is said: "The idea of *city* or village implies an assemblage of inhabitants living in the vicinity of each other and not separated by any other intervening civil division of the state." And see *Enterprise v. State*, 29 Fla. 128, where it was held that an attempt to incorporate two distinct tracts of land as corporate territory under one government was unauthorized and void. See also the title **MUNICIPAL CORPORATIONS**.

2. The word has a variety of applications; but in almost all one may readily trace the idea of the character, privileges, or peculiarities of the ancient citizen. Thus it is now used in opposition to what is military; again, in contrast with barbarous, uncivilized, or rustic; and in turn as the opposite of that which is ecclesiastical or priestly; and it may designate that which is for the individual in distinction from the government. But in all these uses it presents the citizen as the standard with which the other is compared. Abbott's Law Dict.

3. Webster's Dict.

Civil and Criminal Jurisdiction Compared. — In *Landers v. Staten Island R. Co.*, 53 N. Y. 450, the court said: "The terms *civil* and 'criminal,' when used whether in reference to jurisdiction or judicial proceedings generally, have respect to the nature and form of the

remedy and the cause of action or occasion for instituting legal proceedings. *Civil* stands for the opposite of criminal, and hence we have courts known as courts of *civil* jurisdiction and of criminal jurisdiction, distinguished by the character of the prosecutions in each. A *civil* action is brought to recover some *civil* right, or to obtain redress for some wrong, not being a crime or misdemeanor, and is thus distinguished from a criminal action or prosecution. A criminal action is a prosecution in a competent court of justice in the name of the government for the punishment of a crime, and a *civil* action is one prosecuted for the redress of an injury or the prosecution of a wrong. Bouvier's Inst., pl. 2642, 2643; Bacon's Abr., Actions, A." See also the title **JURISDICTION**.

Civil Commotion. — See **COMMOTION**.

Civil Contempt. — See **CONTEMPT**.

Civil Imposition. — See **IMPOSITION**.

Civil Cases. — See **CIVIL SUITS, ACTIONS, OR CASES**.

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Civil Actions. — See **CIVIL SUITS, ACTIONS, OR CASES**.

Civil Day. — See **DAY**.

Civil Disabilities. — See **DISABILITY**.

Civil Effects. — See **EFFECTS**.

Civil Law. — See **LAW**.

Civil Liberty. — See **LIBERTY**.

Civil Nature. — See **NATURE**.

Civil Obligation. — See **OBLIGATION**.

Civil Office. — See **OFFICE**.

Civil Officers. — See **OFFICE**.

Civil Process. — See **PROCESS**.

Civil Rights. — See **RIGHTS**, and the title **CIVIL RIGHTS**.

Civil War. — See **WAR**.

4. *Cantwell v. Owens*, 14 Md. 219. See the title **MILITARY LAW**.

Civil Court Distinguished from Court Martial. — In *State v. Davis*, 4 N. J. L. 354, the court said: "The first question which presents itself in the consideration of the case is, whether the proceedings of a court martial can be reviewed here on certiorari. The martial law has for its object the order, discipline, and duty of an army. It operates on the person to compel obedience. It extends to all in actual service, whether as soldiers by voluntary enlistment or as militia called out for a limited time. In countries which claim to be free, and of course in this country, it is prescribed by the supreme power of the state, and is sometimes called 'the rules of war.' In the execution of this law there are courts of various grades, and from the inferior there is an appeal to, or rather a revision of the sentence by, the superior, and ultimately by the commander in chief. But so long as they keep themselves within their jurisdiction, the *civil* courts cannot interfere.

But if the legislature create a court which operates upon the persons and property of private citizens in *civil* life, even though the court should be composed of military officers, yet still it is a *civil* court; it is a court too of inferior jurisdiction, the proceedings of which may be brought up and examined in the supreme court of judicature of the state. It is true that whole cities or districts may, on great emergencies, from the necessity of the thing, be declared to be under martial law, and be subjected to all the rules of war by a military commander; and in that case the power of the *civil* courts is wholly superseded. But no such thing has yet taken place in New Jersey. The court then, whose proceedings are before us, being a court constituted by statute, and acting against the private citizen by way of fine to punish for neglect of military duty, and not acting at all upon the person to compel obedience, must, I think, be considered as a *civil* and not as a military court. And if 'so, its proceedings are the proper object of examination here, as are also those of all other inferior jurisdictions. After looking into the return made to this writ, I shall only observe, that the proceedings here complained of were had in time of war. They were, no doubt, thought to be justified by the exigency of the occasion. But we must examine them as lawyers. The judgment of fine against the plaintiff is professedly founded upon the general orders of the commander of the brigade, and not upon the act of the legislature. The general, after stating in his general orders, that the law of the state is not explicit as to the mode of imposing and recovering fines from those who have refused to obey their country's call, says he thinks it

his indispensable duty to issue those orders; and thereby he requires the captains of companies to ascertain those who were delinquent under the general orders of August, 1812, and April, 1813, and to fine them indiscriminately in the sum of fifty dollars each. It is true that the act says, any person neglecting or refusing to perform his tour of duty, when called, shall pay a fine not exceeding fifty dollars. But it constitutes no court to judge of this neglect, or to impose this fine; and the general has undertaken to supply this defect by his general orders, constituting a court of his own. Now, I believe it is a clear principle, that when the law imposes a penalty or sets a fine, it must be adjudged of, sued for, and recovered in the known and established courts of law having cognizance thereof; and according to the usual course of such courts, unless some other tribunal be expressly created and appointed for that purpose; and that whether the penalty or fine be given to general or special, public or private uses. I apprehend, therefore, there was a mistake in the general's creating this new court, and in giving this new jurisdiction to the captains under his command. But, in this case, even the general order was not pursued. The captain did not impose the fine as appears by the record, but what is called the 'battalion court of appeal' imposed it. They say in the return, 'The court, not considering the excuse a lawful one, fined him [the defendant below], according to general orders, in the sum of forty-nine dollars and seventeen cents.' The proceedings, therefore, in my opinion, are altogether irregular, and must be set aside."

See also the titles MARTIAL LAW; MILITARY LAW.

CIVIL DAMAGE ACTS.

BY PHILIP P. WELLS.

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For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *DAMAGES*; *DEATH BY WRONGFUL ACT*; *EXEMPLARY DAMAGES*; *HABITUAL DRUNKARD*; *INTOXICATING LIQUORS*.

I. THE STATUTES — 1. Nature and Scope. — In many of the United States statutes have been enacted, known as the Civil Damage Acts, giving to persons suffering injuries resulting from the intoxication of any person an action

against those who furnished the liquor causing such intoxication. As a general rule, any person may, under these statutes, have an action for injuries directly inflicted upon him by an intoxicated person, or indirectly resulting from the latter's intoxication, when the liquor which caused or helped to cause the intoxication was furnished by the defendant.¹

Common Law. — The action is entirely a creature of the statutes, for at common law it was not actionable to give or sell intoxicating liquors to a strong and able-bodied man,² unless the relations of buyer and seller were affected by other peculiar conditions, or by peculiar rights of third persons which might be injuriously affected thereby.³

2. Rules of Construction — To What Localities Applicable. — These statutes are general and apply to all localities not specially exempted by their terms.⁴

No Extra-territorial Effect — Not Retroactive. — But they have no extra-territorial effect,⁵ nor are they retroactive.⁶

In What Sense Penal. — It is often said that they are penal in their nature, but this is in general with reference to the fact that they recognize wrongs and provide remedies unknown to the common law, from which it is argued that they should be strictly construed.⁷ Strictly speaking, they are generally not penal,⁸ but it is otherwise in those states where the damages are limited in amount and are to be recovered as a penalty.⁹

Liberal Construction to Effect Their Purpose. — Nevertheless, they are directed to the suppression of a great evil, and should not be emasculated by too narrow a construction,¹⁰ and in practice the courts, without extending their meaning to cases manifestly not within their terms, have, within these limits, given them a liberal construction to effect their beneficent purpose.¹¹

1. Nature of the Statutes. — *Schafer v. State*, 49 Ind. 460.

2. Common Law. — *Cruise v. Aden*, 127 Ill. 231.

3. Struble v. Nodwift, 11 Ind. 64.

Thus, where one intoxicated person attached burning paper to the clothes of another in a saloon, whereby the latter was severely burned, the saloon keeper was held liable for the injury on the ground that it was his duty to protect his customers from such assaults. *Rommel v. Schambacher*, 120 Pa. St. 579, 6 Am. St. Rep. 732.

One Who Made a Slave Drunk and unable to care for himself, in consequence whereof the slave died from exposure to inclement weather, was held liable to the master for the injury to his property. *Harrison v. Berkley*, 1 Strobb. L. (S. Car.) 525, 47 Am. Dec. 578.

Action by a Husband for Selling Drugs to Wife. — In *Holleman v. Harward*, 119 N. Car. 150, it was held, on common-law principles, that one who, despite the warnings of a husband, persists in selling intoxicating drugs to the latter's wife, knowing that she buys them for use as a beverage, whereby she contracts a habit destructive to her mental and physical faculties, and causing loss to the husband of her companionship and services in the household, is liable in damages to the husband for injuries so sustained. See also *Hoard v. Peck*, 56 Barb. (N. Y.) 202.

4. To What Localities Applicable. — *Wightman v. Devere*, 33 Wis. 570.

5. No Extra-territorial Operation. — The owner of property in Vermont which is injured by a resident thereof while intoxicated by liquor purchased and consumed in New York, cannot recover in the latter state from the seller of the

liquor. *Goodwin v. Young*, 34 Hun (N. Y.) 252.

6. Not Retroactive. — Therefore, evidence of sales before the passage of the act is inadmissible. *Dubois v. Miller*, 5 Hun (N. Y.) 332.

7. In What Sense Penal. — *Freese v. Tripp*, 70 Ill. 496; *Meidel v. Anthis*, 71 Ill. 241; *Fentz v. Meadows*, 72 Ill. 540; *Kellerman v. Arnold*, 71 Ill. 632; *Hayes v. Phelan*, 4 Hun (N. Y.) 733; *Schneider v. Hosier*, 21 Ohio St. 110.

8. Reinhardt v. Fritzsche, 69 Hun (N. Y.) 565.

9. Sackett v. Ruder, 152 Mass. 397.

The Repeal of Such a Statute destroys all rights vested under it unless expressly saved. *Curran v. Owens*, 15 W. Va. 208.

10. Mead v. Stratton, 87 N. Y. 493, 41 Am. Rep. 386.

11. Liberal Construction to Effectuate Their Purpose — Georgia. — *Belding v. Johnson*, 86 Ga. 177.

Illinois. — *Schroder v. Crawford*, 94 Ill. 357, 34 Am. Rep. 236; *King v. Haley*, 86 Ill. 106, 29 Am. Rep. 14; *Shugart v. Egan*, 83 Ill. 56, 25 Am. Rep. 359; *Schmidt v. Mitchell*, 84 Ill. 195, 25 Am. Rep. 446.

Indiana. — *Collier v. Early*, 54 Ind. 559; *English v. Beard*, 51 Ind. 489; *Krach v. Heilman*, 53 Ind. 517; *Backes v. Dant*, 55 Ind. 181; *Mulcahey v. Givens*, 115 Ind. 286; *Schlösser v. State*, 55 Ind. 82; *Barnaby v. Wood*, 50 Ind. 405.

Iowa. — *Woolheather v. Risley*, 38 Iowa 486.

Minnesota. — *Swinfin v. Lowry*, 37 Minn. 345.

New York. — *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323.

Ohio. — *Duroy v. Blinn*, 11 Ohio St. 331;

3. Notice Not to Sell — Terms of Statutes. — Many of the statutes declare that no recovery shall be had in any civil action brought to recover damages suffered by reason of the intoxication of any person against a person who shall, by selling or giving away any intoxicating drink, have caused such intoxication, unless one of the persons who might have such a cause of action, in case of such damage, shall, prior to such sale or giving away, have given written notice to the person selling or giving away such intoxicating drink, forbidding such sale or giving away to the person whose intoxication shall have caused such damage.¹

In Prohibition Towns. — In *New York*, before any one, whether licensed or unlicensed, can be held liable for selling or giving away liquor, notice must be served upon him, or, if he has a license, either upon him personally or upon his agent. And this rule applies to a town which has voted in favor of the prohibition of the sale of liquor therein.²

Statement of Relationship Between the Parties. — Under the *Massachusetts* statutes, if the notice forbidding the sale of intoxicating liquors does not expressly state the relationship between the giver thereof and the person concerning whom it is given, it must be shown that the seller knew or believed that the requisite relationship existed between them, and it is not enough that he had reasonable cause to believe that such relationship existed.³

Statement of Habit. — And under this statute a notice signed by the wife of a person in the habit of drinking spirituous or intoxicating liquors to excess, to a dealer, need not contain a statement of the habit.⁴

Omission of Words "Spirituous" or "Intoxicating" — Substantial Compliance. — And where a notice stated that the husband "has been in the habit of getting liquor here and coming home drunk," and requested the defendant not to give him any more "drink," it was held to be sufficient, the omission of the words "spirituous" or "intoxicating" being regarded immaterial.⁵

Manner of Service. — Under the *Texas* statute requiring that the liquor dealer shall be "notified in writing through the sheriff or other peace officer," the service must be a personal one, and be made by delivering to the person either

Mulford v. Clewell, 21 Ohio St. 191; *Davis v. Justice*, 31 Ohio St. 359, 27 Am. Rep. 514.

1. Notice to Liquor Seller. — This is the language of section 40, c. 401, *New York Laws* of 1892.

There are similar provisions in other states. See *State v. Cooper*, 114 Ind. 12.

In *Ohio* it is held that a sale to a husband after notice by the wife not to sell to him, will not render the seller liable for damages, unless the sale was otherwise illegal under the statute. *Russell v. Tippin*, 12 Ohio Cir. Ct. Rep. 52.

Under a Former Act of West Virginia (c. 107, § 16, Acts of 1877), the written notice required must have been served on the defendant while he was engaged in the sale of intoxicating liquors for himself or for another as a business, and it was essential that when such person was so served with notice the husband named in the notice was in the habit of drinking to intoxication. *Pegram v. Stortz*, 31 W. Va. 220.

But this statute has been subsequently amended, so that now it is not necessary to give notice in order to maintain a civil action. Section 20, c. 32, *West Virginia Code* (ed. 1891), p. 236. See *Halstead v. Horton*, 38 W. Va. 736; *Mayer v. Frobe*, 40 W. Va. 264.

2. Snyder v. Launt, 1 N. Y. App. Div. 142

3. Requisite Relationship — Massachusetts Statute. — *Sackett v. Ruder*, 152 Mass. 397.

A notice in writing as follows: "I forbid you selling or delivering liquor to I. N. Taylor," and signed "I. N. Taylor, Jr.," was held to be a sufficient compliance with the statute. *Taylor v. Carroll*, 145 Mass. 95. The court said: "We are of opinion that the notice in this case was a sufficient compliance with the statute. The meaning of the notice is clear. It is a notice by a son to the defendant requesting him not to sell intoxicating liquor to his father. The signature imports that the signer is the son of the I. N. Taylor named in the body of the notice. The defendant upon receiving the notice would naturally understand its meaning and purpose, and it is found that he did in fact so understand it. If he sold intoxicating liquor to the father after receiving the notice, he did so at his peril."

4. Tate v. Donovan, 143 Mass. 590.

5. Omission of Words "Spirituous" or "Intoxicating." — *Kennedy v. Saunders*, 142 Mass. 9. Here the court said: "It is not necessary that the notice should be in the language of the statute; it is sufficient if it conveys to the person notified, in clear and unmistakable terms, the substance of the requirement of the statute. * * * The meaning was clear, and the defendant must have understood it."

the original notice or a copy thereof. Merely reading the notice to the person to be served therewith is not a sufficient service.¹

4. Differences in the Several Statutes.—The Statutes Differ Considerably in the different states, some confining the remedy to injuries resulting from intoxication caused by liquor illegally sold, others extending it to all sales; some restricting the liability to the seller and his agents, while others, under certain circumstances, make the owner of the premises where the liquor is sold also liable for the injury, and subject the premises themselves to a lien therefor.

There Are Minor Variations as to the persons intended to be benefited, the injuries for which damages are recoverable, and other matters. This article is concerned chiefly with the general principles underlying this legislation as developed in cases arising thereunder, and for specific differences the reader is referred to the statute books of the several states.²

1. Service of Notice.—*Reagan v. Wooten*, (Tex. App. 1890) 16 S. W. Rep. 546.

2. Some of the Main Features of This Legislation in the several states are here noted.

Arkansas.—Substantially like Illinois. But the statute applies to but one county. Laws Ark. 1873, p. 386, § 4.

Colorado.—The statute applies only to cases of selling to habitual drunkards after notice not to sell to them. Mills's Anno. Stat. Colo. 1891, § 1513.

Connecticut.—The statute is limited to the sale of "spirituous and intoxicating" liquors, to be drunk on the premises, and to injuries to person and property only. Gen. Stat. Conn. 1888, § 3101.

Illinois.—"Every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person, property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication in whole or in part of such person or persons. And any person owning, renting, leasing, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who, having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors that have caused in whole or in part the intoxication of any person, shall be liable, severally or jointly with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages." Rev. Stat. Ill. 1889, c. 43, § 9. This statute is typical of the most sweeping enactments on this subject.

Indiana.—Limited to sales in violation of the statute. Acts Ind. Spec. Sess. 1875, p. 59, § 20.

Iowa.—Substantially like Illinois. McLain's Anno. Code, §§ 2418, 2419.

Kansas.—Owner of premises not liable. Comp. Laws Kan. 1885, § 2301.

Kentucky.—Limited to sales to a known inebriate after notice in writing not to sell to him. Gen. Stat. Ky. 1888, c. 16, § 3.

Maine.—Includes injuries to person, property, means of support, "or otherwise." Rev. Stat. Me. 1883, c. 27, § 49.

Massachusetts.—Provides for notice by the mayor or selectman of the city or town where an habitual drunkard resides, not to sell to such drunkard. In case of a sale contrary to the notice, the person giving such notice may bring an action in his own name and at his election for the benefit of either the husband, wife, child, parent, or guardian of the drunkard, the damages to be not less than one hundred nor more than five hundred dollars. Stat. Mass. 1885, c. 282. This is an example of another type of legislation, prescribing a penalty which is to be recovered by or for the benefit of the injured person.

Michigan.—The owner of the premises is not liable, but the remediable injuries are to person, property, means of support, "or otherwise." 3 How. Anno. Stat. Mich., § 2283, cl. 20.

Minnesota.—Applies only to dealers who have violated the conditions of their bonds. Gen. Stat. Minn. 1887, c. 16, § 3.

Nebraska.—The seller must pay all damages that the community or individuals may sustain in consequence of the traffic, and must support all paupers, widows, and orphans, and the expense of all civil and criminal prosecutions, growing out of, or justly attributed to, his traffic in intoxicants. A married woman may maintain in her own name an action for the benefit of herself and her children. Comp. Stat. Neb. 1891, p. 555, §§ 15, 16.

New Hampshire.—Applies to sales to an habitual drunkard after notice not to sell to him. Damages limited to from fifty to five hundred dollars. Gen. Laws N. H. 1878, c. 109, § 28.

New Mexico.—Substantially like Colorado. Laws New Mex. 1887, p. 45.

New York.—Substantially like Illinois. Laws N. Y. 1873, c. 646.

North Carolina.—Applies to illegal sales to minors. Exemplary damages may be recovered to any amount not less than twenty-five dollars. Code N. C. 1883, § 1078.

Ohio.—Applies to sales contrary to notice. Rev. Stat. Ohio 1890, § 4357.

Pennsylvania.—Applies to sales in violation of law and to injuries to person or property only. Also to sales to an habitual drunkard contrary to notice, for which damages of from fifty to five hundred dollars may be recovered. Bright. Purd. Dig. Pa., p. 1082, § 47.

Rhode Island.—Applies to injuries to person or property only. Laws R. I. May Sess. 1886, c. 596, § 48.

II. CONSTITUTIONALITY OF THE STATUTES.—The constitutionality of such legislation has been called in question upon broad grounds as an unwarrantable interference with private rights, and upon the narrower basis of specific techni-

South Carolina.—Applies to sales contrary to notice. Where a married woman gives notice not to sell to her husband she may recover for the cost of maintenance of herself and family while her husband is incapable of providing for her or them. Other persons can recover only for injuries to person or property. Gen. Stat. S. Car., § 1738.

Utah.—A married woman may bring a suit in her own name on the liquor seller's bond, for all damages sustained by herself and children or either on account of the traffic. Laws Utah 1882, p. 32, § 7.

Vermont.—The wife or minor children of any person imprisoned for a crime committed while intoxicated may recover from any one who illegally sold the liquor causing such intoxication two dollars per day for every day of such imprisonment, with double costs. The owner of the premises is liable if he knows of the illegal sale of liquor thereon. Laws Vt. 1886, No. 36, p. 30.

Washington.—Substantially like Illinois. Code Wash. 1881, § 2059.

West Virginia.—Substantially like Illinois. Code W. Va. 1891, c. 32, § 20, p. 236.

Wisconsin.—Applies to sales to minors and habitual drunkards after notice not to sell to them. Rev. Stat. Wis., § 1560.

Sales to Habitual Drunkards—Intoxicated Persons.—Where the statute provides for damages for the sale of liquor to an habitual drunkard, there must be evidence to prove that the buyer was habitually intoxicated, and the seller is liable although the buyer was not drunk at the time of the sale. Fountain v. Draper, 49 Ind. 441.

And the seller's knowledge that the buyer is an habitual drunkard may be proved by the general reputation of the latter as such. Fountain v. Draper, 49 Ind. 441; Adams v. State, 25 Ohio St. 584; Elkins v. Buschner, (Pa. 1888) 16 Atl. Rep. 102.

The plaintiff may amend on trial by alleging the seller's knowledge of the buyer's habit. Fletcher v. Forler, 83 Mich. 52.

In some states the seller is liable though he had no knowledge of the buyer's habit. Edwards v. Woodbury, 156 Mass. 21; McMahon v. Dumas, 96 Mich. 467.

In Pennsylvania one who sells to an intoxicated person is liable though the buyer gives no outward sign of intoxication which would be noticed by a casual observer. Elkin v. Buschner, (Pa. 1888) 16 Atl. Rep. 102.

And in Michigan the plaintiff need not allege that the defendant knew the buyer to be intoxicated. Fletcher v. Forler, 83 Mich. 52.

Evidence of Intoxication.—Where the seller has seen the buyer intoxicated before, and the buyer on the evening when the sale took place is shown to have acted as he usually did when drunk, there is sufficient evidence of a sale to him while intoxicated. McMahon v. Dumas, 96 Mich. 467.

An Objection that the Buyer Was Not in Fact Intoxicated at the time of the sale, or in the habit of becoming so, should be made before

the evidence is all in. Wright v. Treat, 83 Mich. 110.

Good Reason for Believing Buyer Intoxicated—Instruction.—In an action for selling to the plaintiff's husband while intoxicated, the defendant cannot complain of a charge that the jury must not find for the plaintiff unless satisfied that the defendant had good reason for believing that the plaintiff's husband was drunk at the time of the sale. Solomon v. State, 71 Miss. 567.

Selling to Minor.—In an action for selling to a minor the seller is liable although he had reason to believe and did believe at the time of the sale that the buyer was of full age. McGuire v. Glass, (Tex. App. 1890) 15 S. W. Rep. 127.

The minimum penalty of fifty dollars prescribed by the *Michigan* statute for selling to minors is the minimum for each suit, and not for each sale. Theisen v. Johns, 72 Mich. 285.

Notice Not to Sell.—The *New York* statute providing for such notice does not repeal the earlier civil damage statute. Quinlan v. Welch, 141 N. Y. 158. But it limits existing rights of action to cases where such notice has been given. Reinhardt v. Fritzsche, 69 Hun (N. Y.) 565.

Under the *New York* statute of 1892, notice must be given to unlicensed as well as to licensed sellers. Snyder v. Launt, 1 N. Y. App. Div. 142.

Under the *Illinois* statute a wife in giving notice not to sell to her husband need not notify the marshal, although the marshal is required to post the husband's name if the wife does so notify him. Lloyd v. Kelly, 48 Ill. App. 554.

In *Massachusetts* a notice signed by a stranger in the presence of a married woman, and at her request, is a sufficient notice not to sell to her husband. Finnegan v. Lucy, 157 Mass. 439.

In *Ohio* it is no defense that the seller did not know that the buyer was the one named in the notice. Weber v. Wiggins, 11 Ohio Cir. Ct. Rep. 18. And a married woman's notice to all dealers not to sell to her husband, filed with the township clerk, is sufficient to hold a dealer in a municipal corporation within the township though not filed with the clerk of such municipal corporation. Casey v. Painter, 50 Ohio St. 527.

Under the *Tennessee* statute of 1889 making it a misdemeanor to sell to a husband after notice not to do so, signed by the wife, has been duly served and returned, the wife may recover in a civil action for damages resulting from a sale in disregard of such notice; and an allegation that the defendant was duly and lawfully served with such notice is sufficient without setting forth the service and return. Riden v. Grimm, 97 Tenn. 220.

In *Illinois* the wife of an habitual drunkard may recover damages from one who sells to him although no notice not to sell has been given. Lane v. Tippy, 52 Ill. App. 532.

Separate Damages.—In *Massachusetts*, upon a declaration containing four counts, two alleg-

cal requirements in the fundamental law of certain states, but its validity has been uniformly upheld.¹

Indiana — Former Jeopardy — Exemplary Damages. — Except that in Indiana it is held that the constitutional provision that no man shall be twice put in jeopardy for the same offense bars the recovery of exemplary damages in an action for injuries resulting from intoxication caused by the sale of liquor in violation of the criminal law.²

III. THE WRONGFUL ACT — 1. Generally — Elements of the Act. — These statutes in effect provide a remedy in the nature of an action of tort, and declare the sale of intoxicating liquor to be wrongful whenever it produces intoxication which results in certain injuries. The elements of the wrongful act, therefore, are: a sale of intoxicating liquor; the intoxication of the buyer produced wholly or in part by the liquor sold; and, lastly, an injury caused by the intoxication.

2. The Sale of Intoxicating Liquor — Actual Sale Necessary. — In general, there is no liability unless there was an actual sale of liquor.³

ing sales, contrary to notice, to an habitual drunkard, and the others, the letting him loiter on the premises, separate damages may be recovered under each count though but one notice has been given. *Kennedy v. Saunders*, 142 Mass. 9.

1. Statutes Constitutional — Indiana. — *Schafer v. State*, 49 Ind. 460; *Jackson v. Reeves*, 53 Ind. 231; *Horning v. Wendell*, 57 Ind. 171.

Iowa. — *Hitchner v. Ehlers*, 44 Iowa 40; *Church v. Higham*, 44 Iowa 482; *Weitz v. Ewen*, 50 Iowa 34.

Kansas. — *Werner v. Edmiston*, 24 Kan. 147.

Maine. — *McGee v. McCann*, 69 Me. 79.

Massachusetts. — *Moran v. Goodwin*, 120 Mass. 158, 39 Am. Rep. 443.

Michigan. — *Kreiter v. Nichols*, 28 Mich. 496.

Nebraska. — *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409.

New Hampshire. — *Bedore v. Newton*, 54 N. H. 117.

New York. — *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Volans v. Owen*, 74 N. Y. 526, 30 Am. Rep. 337; *Baker v. Pope*, 2 Hun (N. Y.) 556; *Franklin v. Schermerhorn*, 8 Hun (N. Y.) 112.

Ohio. — *Sibila v. Bahney*, 34 Ohio St. 399.

Vermont. — *Stanton v. Simpson*, 48 Vt. 628.

Wisconsin. — *Wightman v. Devere*, 33 Wis. 570; *State v. Ludington*, 33 Wis. 107.

Requiring Bond. — The provision of the *Wisconsin* statute requiring liquor dealers to give bond to answer the damages contemplated by the act, is valid. *State v. Fisher*, 33 Wis. 154.

2. Former Jeopardy — Exemplary Damages. — *Struble v. Nodwift*, 11 Ind. 64; *Koerner v. Oberly*, 56 Ind. 284, 26 Am. Rep. 34. See also *Schafer v. Smith*, 63 Ind. 226; *Albrecht v. Walker*, 73 Ill. 69. Compare *Joekers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625.

3. Actual Sale Requisite. — The use of liquor by a saloon keeper is not "traffic" within the *Nebraska* statute, and the sureties of a saloon keeper who kills a third person while intoxicated by his own liquor are not liable therefor. *Curtin v. Atkinson*, 36 Neb. 110.

A married woman cannot recover simply upon proof that the defendant is a liquor seller and that the plaintiff's husband was seen to

come out of his store intoxicated. *Lovclan v. Briggs*, 32 Hun (N. Y.) 477.

Consent of Dealer — Use by Employee. — There must be proof that the liquor was obtained with the consent of its owner or his servant. Where the person intoxicated was an employee in a brewery and simply took the liquor without the consent of the owner or his servant, the owner was not liable, even though he subsequently took pay for the liquor, for this did not so ratify the transaction as to make it a "sale." *Kreiter v. Nichols*, 28 Mich. 496. See also *Campbell v. Schlesinger*, 48 Hun (N. Y.) 428.

Sales by Cask or Barrel from a Brewery are within the statute. *Clears v. Stanley*, 34 Ill. App. 338.

Evidence — Former Refusal to Sell. — Evidence that the defendant knew the buyer's intemperate habits and had refused to let him have liquor on previous occasions is inadmissible to prove that the defendant did not make the sale in question. *Richards v. Moore*, 62 Vt. 217. See also *McManigal v. Seaton*, 23 Neb. 549.

Connecting Third Party with Sale — Evidence Too Remote. — In the absence of testimony to connect a third person with an actual sale of liquor to the buyer on the day in question, evidence that such third person was reputed to be engaged in the illicit sale of liquor about that time is inadmissible to prove that the defendant did not make the sale in question. *Richards v. Moore*, 62 Vt. 217.

Question for Jury. — Where the defendant, the barkeeper alleged to have made the sale, and the intoxicated person testify that there was no sale, but there is evidence that the alleged buyer went into the defendant's saloon sober and came out drunk, and was seen at the bar with glasses before him, it is a question for the jury whether there was or was not a sale. *Hanewacker v. Ferman*, 47 Ill. App. 17. See also *Curran v. Percival*, 21 Neb. 434.

Preponderance of Evidence. — And in general a preponderance of evidence tending to prove a sale is sufficient to support a verdict for the plaintiff. *Morenus v. Crawford*, 51 Hun (N. Y.) 89. But it is otherwise where the evidence is conflicting and uncertain. *Bell v. Zelter*, 75 Mich. 66.

A Gift by Way of Hospitality creates no liability, unless it is especially so provided in the statute.¹

To Whom Sale Made. — Moreover, the sale must be to the person whose intoxication causes the injury; a sale to another person followed by a subsequent sale to him made by such other person, creates no liability.²

Liquor Sold Must Be Proved to Be Intoxicating. — And the liquor sold must be proved to have been intoxicating.³

3. Liability for Lawful and Unlawful Sales. — The liability may be imposed for all sales or only for those which are unlawful;⁴ that is, whether the sale was authorized by the license law of the state, or was made in violation thereof. This depends upon the words of the statute, and unless there are words

Liquor Furnished Upon Order and Promise of Payment of Third Person. — The plaintiff's husband assisted firemen at night in removing property from a burning building into the defendant's saloon, and the defendant, at the request of the owner of said building, furnished liquor to the firemen. The plaintiff's husband was found that night dead drunk and badly frozen. There was testimony that he had drunk whiskey that night in the presence of the defendant, but the witness so testifying had said the contrary at a previous trial. It was held that there was sufficient evidence of a sale. *Judge v. Jordan*, 81 Iowa 519.

In such a case evidence that the defendant furnished liquor to the firemen is admissible since the jury may have found that the plaintiff's husband was considered as a fireman. But evidence that the saloon was kept open solely for the purpose of receiving the goods from the burning building is irrelevant. *Judge v. Jordan*, 81 Iowa 519.

Instruction Held Too Narrow. — A request to charge that it must be affirmatively proved that the defendant sold liquor to the plaintiff's husband as alleged in the petition, should be denied as too narrow. *Jones v. Bates*, 26 Neb. 603.

1. Gift by One Not a Dealer. — The *Illinois* statute does not apply to one who is not engaged in the business of selling liquor and who gives a glass of liquor at his home as a matter of hospitality, without any purpose or expectation of profit. *Cruse v. Aden*, 127 Ill. 231.

But a charge to the jury that one who sold or furnished liquor is liable, is not error if in fact the evidence shows conclusively that the liquor was sold and not given. *Miller v. Hammers*, 93 Iowa 746.

Obtaining Liquor From friend Who Made the Purchase. — Where the injury results from the intoxication of one who procured the liquor from a friend, the sale to such friend creates no liability. *Dudley v. Parker*, 132 N. Y. 386.

Sale to One of Two Companions — Liquor Consumed by Both. — Where liquor is sold to one of two companions in a saloon, and consumed by both, the seller is liable for the results of the intoxication of the one who did not buy the liquor. *Gullikson v. Gjorud*, 82 Mich. 503.

But in such a case the seller is not liable unless he had good reason to believe that the buyer would share it with the person afterwards intoxicated. *Dudley v. Parker*, 55 Hun (N. Y.) 29.

Sale Inferred — Neither Paid For nor Charged. — If the alleged buyer was accustomed to deal

with the defendant, the jury may infer from that fact that the liquor was sold and not given, though it was neither paid for nor charged to him. *Rafferty v. Buckman*, 46 Iowa 195.

2. Sale Must Be Made to Party Whose Intoxication Causes the Injury. — Where A. sells to B., and B. to C., and C. becomes intoxicated and injures D., there may be a recovery by D. against B. but not against A. *Bush v. Murray*, 66 Me. 472. See also *Dudley v. Parker*, 132 N. Y. 386.

The Delivery of Liquor to a Minor in pursuance of a sale to his mother is not a sale to the minor within the *Massachusetts* statute. *O'Connell v. O'Leary*, 145 Mass. 311.

Statement of Physician that Liquor Sold Him is For Patient. — The statement of a physician who is in the habit of getting intoxicated, made at the time he purchases liquor, that he wants it for a patient and for medicinal purposes, does not, in the absence of proof to the contrary, raise the presumption that it is a sale to the patient. *Boyd v. Watt*, 27 Ohio St. 259. See the cases in the preceding note.

3. Must Be Proved to Be Intoxicating. — After a sale has been proved, the intoxicating quality of the liquor sold may be shown by circumstantial evidence. *McDougall v. Giacomini*, 13 Neb. 431.

The testimony of an eye-witness that a man at the bar of a saloon was furnished with a glass of liquor that looked like beer, that he paid for it, and was presently thereafter very much intoxicated, is evidence tending to show that intoxicating liquor has been sold to him. *Wilson v. Booth*, 57 Mich. 249. See also *Astheimer v. O'Pray*, (Supreme Ct.) 16 N. Y. Supp. 470.

Proof that the purchaser bought liquor of the defendant, drank it, and presently became intoxicated, shows the character of the liquor sufficiently without direct evidence. *Smith v. People*, 38 Ill. App. 638; *Kennedy v. Sullivan*, 34 Ill. App. 46, *affirmed* 136 Ill. 94.

Where it appears that at least one sale to the plaintiff's husband was of a liquid not intoxicating, it is error to charge the jury that liquor sold at a saloon is presumed to be intoxicating. *Dolan v. McLaughlin*, 46 Neb. 449.

"Beer" is not necessarily intoxicating. *Blatz v. Rohrbach*, 116 N. Y. 450. See *BEER*, vol. 3, p. 906; and the title *INTOXICATING LIQUORS*.

4. Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323.

restricting the operation of the statute to unlawful sales it extends to lawful and unlawful sales alike.¹ But where it is so restricted there is no liability unless the sale is illegal.²

4. No Liability in the Absence of Intoxication. — There is no liability unless the liquor produces or helps to produce intoxication.³ Without this a mere sale of intoxicating liquor followed by the plaintiff's injury gives rise to no cause of action under the statutes.⁴

5. Injuries Arising from Habitual Intoxication. — Sometimes the plaintiff's injury is due to the habitual intoxication of the buyer, rather than to the results of any single fit of drunkenness. Whether there can be any recovery in such a case, is not uniformly determined by the statutes and decisions in the several states.⁵

1. In Absence of Restrictive Words, Lawful Sales Included. — In such a case the fact that the seller was licensed to sell intoxicating liquors is no defense. *Jones v. Bates*, 26 Neb. 693. And his license is therefore inadmissible in evidence. *Roth v. Eppy*, 80 Ill. 283; *McNeil v. Collinson*, 128 Mass. 313; *Moran v. Goodwin*, 130 Mass. 158, 39 Am. Rep. 443; *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409.

2. When Restricted to Illegal Sales. — *Myers v. Conway*, 55 Iowa 166; *Peacock v. Oaks*, 85 Mich. 578; *Baker v. Beckwith*, 29 Ohio St. 314; *Sibila v. Bahney*, 34 Ohio St. 399; *Granger v. Knipper*, 2 Cinc. Super. Ct. Rep. 480; *Russell v. Tippin*, 12 Ohio Cir. Ct. Rep. 52.

Burden of Proof. — In *Vermont* the burden of proving that a sale by a town agent authorized to sell liquors was unlawfully made, is on the plaintiff, but a mere preponderance of evidence will suffice to that end. *Stanton v. Simpson*, 48 Vt. 628.

Evidence of Unlawful Sale. — Evidence of the sale of ale as a beverage, in a room containing a bar, bottles and glasses, tends to prove an illegal sale. The fact that the seller is licensed is matter of defense. *McQuade v. Hatch*, 65 Vt. 482.

Evidence that the buyer had been an habitual drunkard for many years before the sale is admissible to prove that the alleged sale to him was unlawful. *Huff v. Aultman*, 69 Iowa 71, 58 Am. Rep. 213.

3. Intoxication Essential to Recovery of Damages. — Proof that the plaintiff's husband bought liquor at the defendant's store does not put upon the defendant the burden of proving that the said liquor did not produce the intoxication of the buyer. *MacLeod v. Geyer*, 53 Iowa 615; *McEntee v. Spiehler*, 12 Daly (N. Y.) 435.

There can be no recovery if the intoxication is "partial" and not total. *Ginty v. Bradley*, 53 Ill. App. 597.

4. Sale, but No Intoxication. — *Hall v. Barnes*, 82 Ill. 228; *Welch v. Jugenheimer*, 56 Iowa 11, 41 Am. Rep. 77; *Fox v. Wunderlich*, 64 Iowa 187; *MacLeod v. Geyer*, 53 Iowa 615; *Chase v. Kenniston*, 76 Me. 209; *Bryant v. Tidgewell*, 133 Mass. 86; *Goram v. Cable*, 63 Hun (N. Y.) 628, 44 N. Y. St. Rep. 272.

But if intoxication actually results from the sale of liquor, the seller is liable though he did not induce the buyer to drink or know that he would get drunk. *Barnaby v. Wood*, 50 Ind. 405.

Time Between Drinking and Act, to Become Sober — Instruction. — It is error to instruct the jury that if there was time between the drinking, and the act which produced the injury, for the intoxicated person to become sober, the seller was not liable. The question is whether the person had in fact so recovered. *King v. Haley*, 86 Ill. 106, 29 Am. Rep. 14.

Any evidence tending to show that the intoxicated person had become sober before the injury, or was made drunk by liquor obtained from some other person than the defendant, is admissible, and the defendant may show how long it usually takes an intoxicated person to become sober again. *Brannan v. Adams*, 76 Ill. 331; *Barks v. Woodruff*, 12 Ill. App. 96.

Where one who had not recovered from the effects of intoxication produced by liquor sold by the defendant a few days before, got two drinks from other persons and a bottle of whiskey from the defendant, and was shortly afterwards found killed, with the bottle of whiskey upon his person, it was held that there was sufficient evidence to warrant a verdict against the defendant. *Sellars v. Foster*, 27 Neb. 118.

Suicide — Proof Simply of Sale of Liquor. — In an action for the injury resulting from the suicide of the plaintiff's father, it appeared that the deceased left the defendant's saloon at ten o'clock P. M., in a perfectly sober condition, after drinking two glasses of "Spenk beer," that he went home at eleven o'clock and was found dead the next morning. There was evidence that "Spenk beer" was not intoxicating. It was held that the complaint should be dismissed. *Blatz v. Rohrbach*, 60 Hun (N. Y.) 169.

5. Injuries Arising from Habitual Intoxication. — Dealers who contributed to the habitual intoxication of the plaintiff's husband cannot be sued jointly with those who caused the particular intoxication resulting in his death. *Tetzner v. Naughton*, 12 Ill. App. 148; *Hitchner v. Ehlers*, 44 Iowa 40. See also *Huggins v. Kavanagh*, 52 Iowa 368; *Richmond v. Shickler*, 57 Iowa 486; *Flint v. Gauer*, 66 Iowa 606; *Murphy v. Curran*, 24 Ill. App. 475.

Ohio. — In an action under the Ohio statute of 1870, the defendant may show that during the period of the continuous sales alleged, the buyer became intoxicated by liquors which he bought of other persons. *Kirchner v. Myers*, 35 Ohio St. 85, 35 Am. Rep. 598. See *Rantz v. Barnes*, 40 Ohio St. 43.

6. All Contributors to the Intoxication Are Liable. — It is no defense that the intoxication which caused the injury was produced in part by liquor sold by others. The statutes in effect declare the act of producing intoxication a wrong, and make every one who has contributed to it by furnishing intoxicating liquor a wrongdoer, and liable for all the damages resulting therefrom.¹

Nebraska. — An allegation that by reason of the liquor sold to the plaintiff's husband by the defendant he has become an habitual drunkard, is not irrelevant. *Roberts v. Taylor*, 19 Neb. 184.

In an action for death caused by long fits of intoxication, it is inapplicable to charge the jury that all who contribute are equally liable. *Dolan v. McLaughlin*, 46 Neb. 449.

New Hampshire. — In an action by a widow to recover for the death of her husband, it may be shown that his death was the result of habitual intoxication, caused by liquor sold him by the defendant. *Squires v. Young*, 58 N. H. 192.

Iowa. — The jury may be told that one who contributes directly to the specific fits of intoxication is liable although the intoxication has become habitual. *Cox v. Newkirk*, 73 Iowa 42; *Arnold v. Barkalow*, 73 Iowa 183.

Massachusetts. — But, in Massachusetts, it is held that the seller is not liable for damages caused by habits of intoxication to the formation of which he contributed, unless the liquor sold by him caused the specific fit of intoxication complained of. *Bryant v. Tidgewell*, 133 Mass. 86. See also *Tetzner v. Naughton*, 12 Ill. App. 148.

1. Are Persons Contributing to the Intoxication Liable — *Illinois.* — *Emory v. Addis*, 71 Ill. 273; *Hackett v. Smelsley*, 77 Ill. 109; *Roth v. Eppy*, 80 Ill. 283.

Indiana. — *Fountain v. Draper*, 49 Ind. 441. *Iowa.* — *Woolheather v. Risley*, 38 Iowa 486; *Kearney v. Fitzgerald*, 43 Iowa 580.

Kansas. — *Werner v. Edmiston*, 24 Kan. 147; *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625.

Massachusetts. — *Bryant v. Tidgewell*, 133 Mass. 86.

Nebraska. — *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409; *Elshire v. Schuyler*, 15 Neb. 561.

New Hampshire. — *Bodge v. Hughes*, 53 N. H. 614.

Ohio. — *Reugler v. Lilly*, 26 Ohio St. 48; *Boyd v. Watt*, 27 Ohio St. 259; *Sibila v. Bahney*, 34 Ohio St. 399.

Illustrations. — In *Boyd v. Watt*, 27 Ohio St. 259, the court sustained the following propositions, contained in the charge of the trial judge: 1. If the defendant was the sole cause of the intoxication he was liable for the damages resulting. 2. If some of the injury was caused by others he was not liable for the results of their illegal sales. 3. If the damages could not be separated, then he was liable for all injuries to which he had contributed by his illegal sales.

In an action by a widow, brought under the Kansas statute, to recover damages for the death of her husband by intoxication, it is no defense that only one of the two drinks causing the intoxication was sold by the defendant. *Werner v. Edmiston*, 24 Kan. 147.

Where the fact of intoxication is in issue it is not error to charge the jury "that it was not necessary on the part of the plaintiffs to prove that the defendant sold all the liquor that may have produced the intoxication," nor to allow counsel for the plaintiff to urge to the jury that, rather than reject the evidence before them of the intoxication of the deceased, they might presume that he obtained liquor elsewhere which also contributed to his intoxication. *Kerkow v. Bauer*, 15 Neb. 150.

Damages under the civil damage law of *Michigan* cannot be lessened, nor can the liability be apportioned, merely because the injury was due in part to the acts of others than the defendant. *Steele v. Thompson*, 42 Mich. 594.

Under the *Massachusetts* statute a defendant who contributed to the intoxication is liable for all damages caused thereby, although during the same period the intoxicated person purchased of others liquor which caused his intoxication in part. *Bryant v. Tidgewell*, 133 Mass. 86.

But the defendant is not liable unless the liquor sold by him has actually contributed to the intoxication which caused the injury. *Welch v. Jugenheimer*, 56 Iowa 11.

Selling to One Already Intoxicated. — One who sells intoxicating liquor to a person already partially intoxicated is liable for the death of the buyer from intoxication a few hours later. *Mayers v. Smith*, 25 Ill. App. 67, *affirmed* 121 Ill. 442.

Negligence — Proof of Unnecessary. — The injury is complete without any positive wrong doing. Mere contribution to the intoxication establishes the liability without proof of negligence. *Barnaby v. Wood*, 50 Ind. 405; *Edwards v. Woodbury*, 156 Mass. 21.

Therefore, a charge to the jury that the defendants are liable for damages resulting from injuries contributed to, rather than caused by, them, is unobjectionable. *Uldrich v. Gilmore*, 35 Neb. 288.

Contributory in Appreciable Degree to the Intoxication. — There is no liability unless the defendant has contributed to the intoxication in an appreciable degree. *Chase v. Kenniston*, 76 Me. 209. And it is error to charge the jury that if the intoxication was caused "in any part" by the defendant, he is liable. *Morley v. Moulton*, 45 Ill. App. 304. But in *New York* it is not error to charge that the defendant is liable if he has contributed to the intoxication in "the slightest degree." *Hall v. Germain*, 131 N. Y. 536.

Question for Jury. — Whether or not the defendant has in fact contributed to the intoxication, is a question for the jury, especially where there is evidence that the buyer drank one glass of whiskey in the defendant's saloon. *Chmelir v. Sawyer*, 42 Neb. 362.

In actions under section 9 of the *Illinois Dram Shop Act* (1 Starr & C. 971), where it is

How Sued — Jointly or Severally. — And, since all contributors are joint tortfeasors, it follows that they may be sued jointly or severally at the option of the injured person, but to this rule there are exceptions in some states.¹

Contributing to Habitual Intoxication — To What Extent Liable. — In some states a contributor to the buyer's habitual intoxication is not liable for all the damages resulting therefrom, and this is the case where habitual intoxication is not recognized as a cause of actionable injuries.² But the general rule is otherwise.³

Only One Satisfaction. — And where each contributor to the intoxication is liable for all the damages resulting therefrom there can, nevertheless, be but one satisfaction for the injury.⁴

shown that the deceased was intoxicated, it is for the jury to say upon the evidence whether such intoxication was caused in whole or in part by liquor sold to him by the defendant. *Brown v. Butler*, 66 Ill. App. 86; *McCarty v. Wells*, 51 Hun (N. Y.) 171.

Selling to Minor — Drinking at Other Places. — In an action for selling intoxicating liquors to a minor, evidence that the minor drank at other places than the defendant's is inadmissible, although the minor as a witness for the plaintiff denies having done so. *Theisen v. Jhns*, 72 Mich. 285.

1. May be Sued Jointly or Severally — Illinois. — *Emory v. Addis*, 71 Ill. 273; *O'Leary v. Frisbey*, 17 Ill. App. 553; *Buckworth v. Crawford*, 24 Ill. App. 603.

Indiana. — *Fountain v. Draper*, 49 Ind. 441. *Iowa.* — *Kearney v. Fitzgerald*, 43 Iowa 580. *Massachusetts.* — *Bryant v. Tidgewell*, 133 Mass. 86.

Nebraska. — *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409; *Wardell v. McConnell*, 23 Neb. 152; *Jones v. Bates*, 26 Neb. 693.

Ohio. — *Boyd v. Watt*, 27 Ohio St. 259.

Pennsylvania. — *Taylor v. Wright*, 126 Pa. St. 617.

In *Illinois* all contributors to the buyer's intoxication are liable jointly and severally, and an action against them jointly may be discontinued as to one defendant and judgment may be rendered against another. *Buckworth v. Crawford*, 24 Ill. App. 603.

And in *Ohio* the recovery in an action against joint defendants may be against all or only a part of them, and the judgment may be reversed as to some and affirmed as to others. *Reugler v. Lilly*, 26 Ohio St. 48.

In *New York* an action against two defendants jointly cannot be maintained by proof of separate sales by each. *Jackson v. Brookins*, 5 Hun (N. Y.) 530; *Morenus v. Crawford*, 15 Hun (N. Y.) 45.

2. In Iowa Contributor Not Liable for All the Damages. — Here the action is not joint but several, and each is liable only for the injury produced by his own acts. *La France v. Krayner*, 42 Iowa 143; *Hitchner v. Ehlers*, 44 Iowa 40; *Ennis v. Shiley*, 47 Iowa 552; *Engleken v. Webber*, 47 Iowa 558; *Huggins v. Kavanagh*, 52 Iowa 368; *Flint v. Gauer*, 66 Iowa 606. And this is not affected by the fact that it may be difficult to separate the damages to which the defendant contributed from those to which he did not contribute. *Huggins v. Kavanagh*, 52 Iowa 368.

A defendant who sells liquor which with liquor sold by others produced "fits of intoxi-

cation" from which the injury results, is not liable for all the damages caused thereby. Such sellers are not joint wrongdoers, but each is severally liable for the damage caused by his own acts. *Richmond v. Shickler*, 57 Iowa 486.

But there may, perhaps, be a joint liability in cases where the successive sales by several have produced a particular intoxication from which the injury sued for has resulted. See the cases just cited.

3. But General Rule Is Otherwise. — Where the damages complained of arise from incapacity for business and loss of estate, caused by habitual intoxication, and it becomes impossible to separate the damages caused by others from those caused by the defendant, the latter is liable for all such damages. *Steele v. Thompson*, 42 Mich. 594.

Two defendants are jointly liable when it appears that they made separate sales to a person known to them to be habitually intoxicated during the period in which such sales were made, and knowing that such sales contributed to keep up the habit of intoxication. *Rantz v. Barnes*, 40 Ohio St. 43.

All contributors to the habitual intoxication are liable though their sales did not commence at the same time nor continue contemporaneously, nor contribute proportionately to the drunkenness. *Lane v. Tippy*, 52 Ill. App. 532.

A defendant who sells only during the first two days of an eighteen days' debauch is liable for all the damages resulting from such debauch. *Johnson v. Johnson*, 100 Mich. 326.

Under the Illinois Statute giving a right of action against any person who shall have caused the intoxication in whole or in part, the words "in whole or in part" refer to the persons selling the liquor and not to the degree of the intoxication. *Neuerberg v. Gaultier*, 4 Ill. App. 348.

4. Only One Satisfaction Allowed. — *Emery v. Addis*, 71 Ill. 273; *Kearney v. Fitzgerald*, 43 Iowa 580; *Putney v. O'Brien*, 53 Iowa 117.

Where Intoxications Separate and Distinct. — But where separate actions were brought against separate defendants, the petitions in form being identical, it was held that a recovery in one case was no defense in the other if in fact the intoxications were separate and distinct. *Miller v. Patterson*, 31 Ohio St. 419. See also *Jackson v. Noble*, 54 Iowa 641.

Where a Joint Action Will Not Lie against several sellers it follows that a settlement with one will not bar an action against another. *Jewett v. Wanshura*, 43 Iowa 574; *Ennis v. Shiley*, 47 Iowa 552; *Engleken v. Webber*, 47 Iowa 558.

7. Proximate Cause. — The General Rule is that there is no liability unless the intoxication resulting from the defendant's sale of liquor is the proximate and effective cause of the injury,¹ though it need not be the immediate cause.

Release of One Contributor. — But in *Massachusetts* it is held that a release of one contributor by the payment of a sum of money is a release of another liable for the same injury, although their liability arose from independent and distinct sales having no connection with each other. *Aldrich v. Parnell*, 147 Mass. 409, *distinguishing Jewett v. Wanshura*, 43 Iowa 574, on the ground that the Iowa statute gave no joint right of action under the circumstances of that case.

Evidence that Another Action Instituted. — Evidence that the plaintiff has commenced another similar action against another liquor dealer for damages accruing during the same period is inadmissible. *Ward v. Thompson*, 48 Iowa 588. See *Engleken v. Webber*, 47 Iowa 558.

1. Proximate Cause — Illinois. — *Brannan v. Adams*, 76 Ill. 331; *Barks v. Woodruff*, 12 Ill. App. 96; *Meyer v. Butterbrodt*, 43 Ill. App. 312, *affirmed* 146 Ill. 131; *Hart v. Duddleson*, 20 Ill. App. 618; *Murphy v. Curran*, 24 Ill. App. 475; *Westphal v. Austin*, 41 Ill. App. 648.

Indiana. — *Krach v. Heilman*, 53 Ind. 517; *Collier v. Early*, 54 Ind. 559; *Backes v. Dant*, 55 Ind. 181; *Ditton v. Morgan*, 56 Ind. 60; *Schwarm v. Osborn*, 59 Ind. 246.

Michigan. — *Steele v. Thompson*, 42 Mich. 594; *Eddy v. Courtwright*, 91 Mich. 264.

New Hampshire. — *Squires v. Young*, 58 N. H. 192.

The Fact that a Man Is an Habitual Drunkard is not the proximate cause of his death, although but for his habit he might not have drunk the liquor that caused the specific intoxication from which the death resulted. *Tetzner v. Naughton*, 12 Ill. App. 148.

Death Caused by Falling Barrel While Intoxicated Person Was Being Driven Home. — Where an intoxicated person while being hauled home in his wagon was killed by a barrel of salt falling upon him, his death was not the proximate result of his purchase of the liquor which caused his intoxication, for the seller of the liquor could not have anticipated such a result. *Krach v. Heilman*, 53 Ind. 517. See *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42.

Killed on Railroad Track. — The death of an intoxicated person by being run over upon a railroad track whither he had gone while insensible because of his intoxication, is not the natural, necessary, or probable result of the sale of liquor to him, and a complaint alleging only such facts is bad on demurrer. *Collier v. Early*, 54 Ind. 559. But this case is *cited* in *Dunlap v. Wagner*, 85 Ind. 533, 44 Am. Rep. 42.

An Assault by an Intoxicated Person gives no cause of action to the person assaulted against the persons who paid for some of the liquor which caused the intoxication. *Swinfin v. Lowry*, 37 Minn. 345.

Injury by Glass Thrown by Barkeeper. — The injury of a person who is hit by a glass thrown by a barkeeper at another person to whom he

has sold liquor is not the proximate result of the sale. *Lueken v. People*, 3 Ill. App. 375.

Injuries Sustained by Wife While Following Her Drunken Husband. — Where the wife followed her intoxicated husband out into the street to see where he obtained his liquor, and the sidewalk being slippery she fell and injured herself, the fall was held to be not the natural and proximate consequence of her husband's intoxication. *Johnson v. Drummond*, 16 Ill. App. 641.

Death from Injuries Sustained by Falling. — The death of a person resulting from injuries received from a fall while intoxicated is not the proximate result of the sale of the liquor which caused the intoxication. *Backes v. Dant*, 55 Ind. 181.

Intoxicated Person Killed for Using Abusive Language. — The death of one who was killed for his abusive language while intoxicated is not the proximate result of the sale of the liquor which caused the intoxication. *Shugart v. Egan*, 83 Ill. 56, 25 Am. Rep. 359.

Wounded in an Affray — Disregard of Physician's Orders — Death. — Where it appeared that the defendant sold the liquor which caused the intoxication, and that the buyer while intoxicated by the liquor was wounded in an affray, and thereafter by his reckless disregard of his surgeon's orders rendered necessary the amputation of his leg, from which his death resulted, it was held, that if the death was occasioned by the disregard of the surgeon's orders, the defendant was not liable; and that if the amputation was in fact unnecessary, and was the immediate cause of the death, the defendant was not liable, although the surgeon acted in good faith and with ordinary skill. *Schmidt v. Mitchell*, 84 Ill. 195, 25 Am. Rep. 446.

Liability for Results That Could Not Have Been Foreseen. — On the other hand, the seller may be held liable for results which would not have been foreseen by a man of ordinary prudence. *Roth v. Eppy*, 80 Ill. 283.

Death by Falling in Carriage While Driving Home. — Where it appeared that a purchaser of liquor from the defendant became so intoxicated thereby that he had to be helped into his buggy when he started for home, and that he was afterwards found dead with his leg caught under the footbar of the buggy, and his head hanging over between the body of the buggy and the wheel, so that it had been beaten by the wheel, it was held that the evidence sufficiently established the fact that intoxication was the proximate cause of the death. *Mead v. Stratton*, 87 N. Y. 493, 41 Am. Rep. 386.

Drowning. — Where there is evidence that one drank a large quantity of liquor at the defendant's bar within a brief period of time, and was shortly thereafter drowned by the capsizing of a boat, although his companion, who was not so good a swimmer, reached the shore safely; and that the liquor was sold under an arrangement that the deceased should go home in the defendant's stage, but

But in Some Cases the seller has been held liable, although the injury was not the proximate result of the intoxication.¹

Assault by Intoxicated Person. — There is a class of cases where the injury consists in an assault or violence suffered at the hands of an intoxicated person. Here the seller is in general liable on the ground that the intoxication is the proximate cause of the injury.²

that the said companion persuaded the deceased to go in the boat, it was held that the jury should find for the plaintiff if the intoxication was the proximate (though not the immediate) cause of the death. *Davis v. Standish*, 26 Hun (N. Y.) 608.

Where a minor child, as a result of the sale of liquor to him, becomes intoxicated, crazed, and helpless, and while in that condition wanders into a river and is drowned, the intoxication is the cause of the injury. *Boos v. State*, 11 Ind. App. 257.

One who was so intoxicated as to be unable to walk was thereafter found drowned in a millrace, in water from two and a half to four feet deep. It was held that the intoxication was the proximate cause of the death. *McCarty v. Wells*, 51 Hun (N. Y.) 171.

So where one who was a good swimmer went into a river while intoxicated, and was drowned, being seen to swim with apparent difficulty and to vomit before he sank, it was held that there was sufficient evidence to prove that the death was caused by the intoxication. *Meyer v. Butterbrodt*, 43 Ill. App. 312, affirmed 146 Ill. 131.

Horse Killed by Intoxicated Driver. — The killing of a horse ordinarily gentle, caused by its running away when its driver was too intoxicated to guide it, is the proximate result of the sale of liquor to him and of putting him in such a state of intoxication into the vehicle, and the seller is liable for such injury both by statute and at common law. *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42.

It Is a Question for the Jury whether intoxication was the proximate cause of the injury where one unable to walk fell into a gutter, saturating his clothing with mud and water, and thereafter died of pneumonia. *Davies v. McKnight*, 146 Pa. St. 610. So where an intoxicated person on a hand car is killed in a collision, and there is evidence to show that the deceased was unable to see the approaching train because of his drunken condition. *Cornelius v. Hultman*, 44 Neb. 441. Or where one was found dead on a railroad track between the town where he lived and that where the defendant's saloon was, and it was apparent that he had been struck by a train. *McMahon v. Dumas*, 96 Mich. 467.

Intoxicated Driver Killed by Horse Running Away. — The intoxication is the proximate cause where an intoxicated driver mismanages his horses, causing them to run away and to run over him and kill him. *Wall v. State*, 10 Ind. App. 530. And also where horses run away, being frightened by the breaking of the harness; for the driver, but for his intoxication, might have prevented the runaway, notwithstanding the fright of the horses. *Smith v. People*, 141 Ill. 447.

Horse Overdriven by Intoxicated Driver. — The killing of a horse by its intoxicated driver's

overdriving it is the proximate result of the intoxication. *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323.

Money Lost at Gaming — Injury to Means of Support. — Where the alleged injury is to a wife's means of support by her intoxicated husband's losing money at gambling, evidence that the husband is in the habit of gambling is admissible. *Gintz v. Bradley*, 53 Ill. App. 597.

Injury as Immediate Consequence. — It is sometimes said that the injury must be the immediate consequence of the intoxication to make the liquor seller liable. *Flynn v. Fogarty*, 106 Ill. 263.

But, in *Davis v. Standish*, 26 Hun (N. Y.) 608, it was held that it is sufficient if the intoxication is the proximate cause.

1. In Nebraska the plaintiff need not allege that the injury resulted from the intoxication. Allegations of the sale, of the intoxication and negligence of the buyer, and of the plaintiff's injury at about the same time, are sufficient. *Nowotny v. Blair*, 32 Neb. 175; *McClay v. Worrall*, 18 Neb. 44; *Cornelius v. Hultman*, 44 Neb. 441; *Sellers v. Foster*, 27 Neb. 118; *Gran v. Houston*, 45 Neb. 813.

Injury to Means of Support. — Where the intoxication caused death whereby the plaintiff was injured in her means of support, it was held that under the statute it was immaterial whether such injury was the natural, reasonable, and probable consequence of the defendant's act, or the remote result thereof; that the statute did not distinguish between the two, it only required it to be established that the injury to support was the result of the intoxication, caused in whole or in part by liquor sold by the defendant. *McCarty v. Wells*, 51 Hun (N. Y.) 171.

And in *Michigan*, where a husband's leg was broken in a scuffle while intoxicated, it was held that the remoteness or indirectness of the sale as a cause of the loss does not arise. *Thomas v. Dansby*, 74 Mich. 398. See also *Brockway v. Patterson*, 72 Mich. 122.

2. Assault by Intoxicated Person — Illinois. — *Pickard v. Teatro*, 34 Ill. App. 398; *King v. Haley*, 86 Ill. 106, 29 Am. Rep. 14.

Indiana. — *English v. Beard*, 51 Ind. 489.

Michigan. — *Brockway v. Patterson*, 72 Mich. 122; *Thomas v. Dansby*, 74 Mich. 398.

Nebraska. — *Scott v. Chope*, 33 Neb. 41.

New Hampshire. — *Bodge v. Hughes*, 53 N. H. 614.

New York. — *Jackson v. Brookins*, 5 Hun (N. Y.) 530.

Instructions — Proximate Cause. — In such a case the court may properly refuse to charge the jury that the defendant is not liable unless the sale of liquor is the proximate cause of the injury. *Bacon v. Jacobs*, 63 Hun (N. Y.) 51. And even though there was ill-feeling between the person who suffered and the person who

Imprisonment or Execution for Crime of Intoxicated Person. — In *Vermont* and *New York*, where the injury consists in the loss of means of support by a wife or other dependent person, caused by the imprisonment or execution of the husband for a crime committed while intoxicated, there may be a recovery.¹ But in *Pennsylvania* and *Michigan* it is otherwise.²

Suicide. — Akin to this is the injury to the plaintiff's means of support resulting from the suicide of a drunken person. Here the seller is held liable.³

IV. THE WRONGDOER — WHAT PERSONS ARE LIABLE — 1. The Seller and His Agent — **The Person Who Sells.** — Of course, the person who actually sells the liquor causing intoxication is himself liable for the resulting injury.⁴

Such Person's Agent. — And he is equally liable when the sale is made by his servant or agent in the line of his employment, even though it be without the authority and against the orders of the principal. And the agent is himself also liable.⁵

committed an assault, the court may properly refuse to charge the jury that if the assaulter was intoxicated, and assaulted the plaintiff not on account of the intoxication but because of an old feud, the plaintiff cannot recover. *Bacon v. Jacobs*, 63 Hun (N. Y.) 51. And in a case of injury by the violence of an intoxicated person it is not error to charge that if the jury find that such person if not intoxicated would not have used violence, then the seller of the liquor is liable. *Scott v. Chope*, 33 Neb. 41. The question who was the aggressor is for the jury to determine. *Doty v. Postal*, 87 Mich. 143.

In *Georgia*, however, it is held that a plaintiff's injury by the death of her husband at the hands of an intoxicated person is too remote. The case did not arise under a civil damage law, but under a general statute relating to negligence. *Belding v. Johnson*, 86 Ga. 177.

Illustration. — It is not the proximate result of intoxication if the clerk of a hotel where the intoxicated person boards is injured in knocking the latter down for assaulting him. *McCandless v. Chicago, etc., R. Co.*, 71 Wis. 41.

1. Crimes Committed by Intoxicated Person — Imprisonment or Execution. — This is the statutory rule in *Vermont*. See *Vt. Laws* 1886, No. 36, p. 30.

In *New York* the wife of one who committed a murder while intoxicated, for which he was sentenced to life imprisonment, was allowed to recover from the seller of the liquor. *Beers v. Walhizer*, 43 Hun (N. Y.) 254. In this state the statute makes no distinction between the cases where the loss of the means of support is the direct result of the intoxication and those in which it is the remote result thereof; it simply requires that it shall be established that the loss of the means of support is the result of such intoxication.

2. But in Pennsylvania, where the statute gives a right of action for injuries to person and property only, and not for injuries to means of support, it is held that imprisonment of the husband for an act committed while intoxicated will not give the wife a right of action against the seller of the liquor; in such case the imprisonment is not the proximate consequence of the unlawful negligence of the defendant, but is the act of the law. *Bradford v. Boley*, 167 Pa. St. 506. See also *Fink v. Garman*, 40 Pa. St. 95.

In *Michigan*, where the plaintiff's husband has been sentenced for burglary, she has no right to recover against the person who sold him liquor, on the ground that the liquor made him drunk and that while in that condition he committed the crime. *Dennison v. Van Wormer*, (Mich. 1895) 65 N. W. Rep. 274.

3. Suicide of Intoxicated Person. — *Blatz v. Rohrbach*, 42 Hun (N. Y.) 402, 60 Hun (N. Y.) 169, 116 N. Y. 450; *New v. McKechnie*, 95 N. Y. 632, 47 Am. Rep. 89.

And in an action of this character for the damages suffered by the plaintiffs in their means of support on account of the suicide of their husband and father, evidence that on the day of the suicide the deceased was charged with embezzlement is inadmissible. *Poffenbarger v. Smith*, 27 Neb. 788.

4. The Seller's Liability on His Bond does not prevent a suit against him personally. *Jones v. Bates*, 26 Neb. 693; *Mulcahy v. Givens*, 115 Ind. 286.

A Retiring Member of a liquor-selling firm is not liable for a sale made by another member after the dissolution of the firm and the surrender of its license. *Scott v. Chope*, 33 Neb. 41.

Nor Is One Who Is Not in Fact a Partner of the seller liable though he permits himself to be held out as such. *Boos v. State*, 11 Ind. App. 257; *Weber v. Wiggins*, 11 Ohio Cir. Ct. Rep. 18.

5. Sales by Agent — Illinois. — *Keedy v. Howe*, 72 Ill. 133; *Fentz v. Meadows*, 72 Ill. 540.

Indiana. — *Barnaby v. Wood*, 50 Ind. 405; *Pelley v. Wills*, 141 Ind. 688, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 258. See also *Fruchey v. Eagleson*, 15 Ind. App. 88, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 258.

Iowa. — *Church v. Higham*, 44 Iowa 482.

Massachusetts. — *George v. Gobey*, 128 Mass. 289, 35 Am. Rep. 376.

Michigan. — *Kreiter v. Nichols*, 28 Mich. 496; *Kehrig v. Peters*, 41 Mich. 478.

New Hampshire. — *Bodge v. Hughes*, 53 N. H. 614.

New York. — *Smith v. Reynolds*, 8 Hun (N. Y.) 128.

Wisconsin. — *Peterson v. Knoble*, 35 Wis. 80.

Saloon-keeper's Son. — A saloon-keeper is liable for a sale by his son. *Worley v. Spurgeon*, 38 Iowa 465.

2. Owner of the Premises. — Many of the statutes make the owner of the premises where intoxicating liquor is sold liable for all resulting injuries, and subject the premises to a lien therefor, if the owner at the time of the lease knows that the lessee intends to sell intoxicating liquors on the premises, or if the owner at any time learns that the lessee is actually making such sales, and takes no steps to prevent it.¹

Sale by Servant Without Knowledge or Consent of Master. — A master is liable if his servant, in the course of the master's business, sells intoxicating liquor, after notice requesting the master not to do so, to a person in the habit of drinking intoxicating liquor to excess, although the master has instructed the servant not to sell to such person, and the sale is without the knowledge and consent of the master. *George v. Gobey*, 128 Mass. 289, 35 Am. Rep. 376; *Keedy v. Howe*, 72 Ill. 133.

Evidence — Instructions of Master. — And evidence that the defendant had instructed his servants not to sell to the person in question is inadmissible. *Houston v. Gran*, 38 Neb. 687.

Where the sale complained of was made by the defendant's servant on Sunday while the defendant was in the same building, upstairs, and knew that the buyer had come into the saloon, the defendant was liable although he had instructed his servant not to open the saloon on Sunday. *Gullikson v. Gjorud*, 82 Mich. 505.

Implied Authority. — The sale or gift of intoxicating liquor by any person, whether regularly employed by the defendant or not, is sufficient, if consented to or subsequently ratified by the defendant, to establish the liability of the latter. *Kennedy v. Sullivan*, 34 Ill. App. 46, *affirmed* 136 Ill. 94.

1. Liability of Owner of Premises. — *Hackett v. Smelsey*, 77 Ill. 109; *Schroder v. Crawford*, 94 Ill. 357, 34 Am. Rep. 236; *English v. Beard*, 51 Ind. 489; *State v. Ballingall*, 42 Iowa 87; *McGee v. McCann*, 69 Me. 79; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Bennett v. Levi*, (C. Pl.) 19 N. Y. Supp. 226; *Bowers v. Pomeroy*, 21 Ohio St. 184; *Granger v. Knipper*, 2 Cinc. Super. Ct. Rep. 480.

Constitutionality. — Nor is this provision concerning the liability of the owner of the premises unconstitutional. *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323.

Knowledge of the Owner. — The provision of the statute which holds the owner of real estate liable for sales of intoxicating liquors does not apply to the owner of property who himself sells liquor therein, but applies to owners who permit others to occupy and use the property for such purposes, and in such case the complaint must show that the owner had knowledge that intoxicating liquors were to be or had been sold therein. *Barnaby v. Wood*, 50 Ind. 405.

To make the owner of the premises liable, it must be proved that liquor was sold and that the sale took place with his knowledge and consent. A failure to find out the facts and mere inactivity to prevent such sales is not sufficient. *Cobleigh v. McBride*, 45 Iowa 116; *Meyers v. Kirt*, 57 Iowa 421.

Where a lease was made under an agreement not to sell, and the lessor went every month to the premises to collect the rent and

saw no selling, but the lessee nevertheless did sell, drawing the liquor from beneath the bar which had been left there by a former tenant, it was held that there was no liability on the part of the lessor. *O'Rourke v. Piatt*, 67 Hun (N. Y.) 71.

Under the *Iowa* statute making the owner of real property liable for the sale of liquor to an habitual drunkard made on such property with the owner's knowledge, it was held where the owner of property on which there was a saloon lived near the saloon and sometimes visited it, and the person to whom the sales complained of were made was a notorious drunkard and was habitually drunk on the streets and in the saloon, that the owner's knowledge of the sales was sufficiently established. *McVey v. Manatt*, 80 Iowa 132.

Knowledge at the Time of the Lease that the lessee intends to use the premises for the sale of intoxicants is enough to charge the owner. *Bennett v. Levi*, (C. Pl.) 19 N. Y. Supp. 226. And this is true, whether the intended and actual sales are lawful or unlawful. *Mullen v. Peck*, 49 Ohio St. 447; *Conklin v. Tice*, (Supreme Ct.) 1 N. Y. Supp. 803; *Campbell v. Schlesinger*, 48 Hun (N. Y.) 428; *Ketcham v. Fox*, 52 Hun (N. Y.) 284.

In Order to Establish a Lien upon the premises the consent of the owner need not be shown by any positive and affirmative act, but may be inferred from circumstances, and from knowledge of the illegal sales under such conditions as properly to call forth a protest, and a failure to make any objection. *Putney v. O'Brien*, 53 Iowa 117; *Loan v. Etzel*, 62 Iowa 429.

A provision in a statute which declares that real estate not owned by the judgment debtor shall be held liable for the payment of the judgment is not designed to create a lien on such property, but to authorize it to be subjected to the payment of the judgment in a suit against the owner instituted for the purpose. Until the commencement of such suit the judgment creditor acquires no interest in the property, and if before the suit is brought the property has been sold and conveyed, it cannot be subjected to the payment of the judgment. *Bellinger v. Griffith*, 23 Ohio St. 619.

A Married Woman Who Owns a Building in which intoxicating liquors are sold by her husband, and who has knowledge of such selling, is liable under the *New York* statute for damages resulting therefrom. Where a married woman had taken title to an hotel and gone into possession with her husband before the passage of the statute, and she had general charge of the house except the bar, and knew that intoxicating liquors were there sold, it was held that she was not exempted from liability because she took possession before the passage of the act; that the presumption was that the possession originally taken was

Owner Chargeable with the Knowledge of His Agent. — And the lessor is chargeable with the knowledge of the intended or actual use of the premises possessed by the agent in charge thereof either at the time of the lease or thereafter.¹

Owner of Steamboat. — This provision of the statutes has no application to the owner of a steamboat on which liquor is sold.²

The Owners of Contingent or Reversionary Interests in real property³ are not included in such provision.

3. Surety on the License Bond. — In general, the surety on the liquor-seller's license bond is liable for all damages arising under these statutes, and his liability is co-extensive with that of his principal and covers all sales during the life of the bond.⁴

continued in view of the laws of the state thereafter enacted; and that the question whether the wife had given permission for the occupation of the building, with knowledge that liquors were to be sold, was properly submitted to the jury. *Mead v. Stratton*, 87 N. Y. 493, 41 Am. Rep. 386.

Covenant Not to Sell — Lease at Will or Sufferance. — It seems that a landlord is not required, in order to escape liability, to insert in the lease a covenant on the part of the tenant not to sell liquor on the premises. And it seems, also, that where a lease is at will or sufferance, or the occupation of the premises is by mere permission of the owner, it would be his duty to interpose, in order to escape liability, on the fact coming to his knowledge that liquor was being sold on the premises. *Hall v. Germain*, 131 N. Y. 536.

1. Knowledge of Agent Imputable to Owner. — The agent's knowledge of the actual use of the premises is imputed to the owner as well as his knowledge of the intended use. Therefore, an understanding at the time of the lease, between the lessee and the lessor's agent, that liquor is not to be sold on the premises, is immaterial if the lessor's agent thereafter knows that the lessee and his assigns do in fact sell on the premises. *Hall v. Jermain*, 59 Hun (N. Y.) 626, 37 N. Y. St. Rep. 320, *affirmed* 131 N. Y. 536.

And a married woman whose husband leases her property for her is chargeable with his knowledge of the use of the property. *Johnson v. Grimminger*, 83 Iowa 10.

2. Owner of Steamboat. — This provision does not make the owner of a steamboat liable for sales of intoxicating liquor made thereon. *Rouse v. Catskill, etc., Steamboat Co.*, 59 Hun (N. Y.) 80.

3. Owners of Contingent or Reversionary Interests. — Where the lease of real property is made by a life tenant the remainderman is not liable. *Mullen v. Peck*, 49 Ohio St. 447; *Dugan v. Neville*, 49 Ohio St. 462. See also *Castle v. Fogerty*, 19 Ill. App. 442.

4. Liability of Sureties on Liquor Seller's Bond. — *Bloedel v. Zimmerman*, 41 Neb. 695. The surety on a liquor dealer's bond conditioned to pay "any damage any person may sustain, or which may result from the drinking of any wine or beer, or any liquor got or procured" on the premises, is liable for exemplary as well as compensatory damages to any amount not exceeding the bond. *Richmond v. Shickler*, 57 Iowa 486.

The penalty of one hundred dollars for every sale of liquor to a minor, prescribed by the

Massachusetts statutes, and recoverable by the parent or guardian of the minor in an action of tort, may be recovered from a surety on the liquor seller's bond, conditioned that the licensee "shall pay all damages which shall be recovered from him under and pursuant to the provisions" of the act. *Day v. Frank*, 127 Mass. 497.

The Surety's Liability Is Coextensive with That of the Principal. — *Gran v. Houston*, 45 Neb. 813. Therefore, the surety is liable for a sale by the principal's agent in the line of the business. *Boos v. State*, 11 Ind. App. 257, *followed* in *Reath v. State*, (Ind. App. 1896) 44 N. E. Rep. 808.

Removal of Surety — Notification to Dealer to Procure Bonds. — The surety is liable for a sale made after he has removed without the limits of the municipal corporation and the county treasurer has notified the seller to close until the necessary bond is furnished. *Wright v. Treat*, 83 Mich. 110.

A New Statute Passed During the Lifetime of the Bond does not avoid the bond so far as the provisions of the old and new statutes are identical, nor is the surety's liability affected by new requirements for the qualification of bondsmen. *Gullickson v. Gjord*, 89 Mich. 8.

Principals and Sureties on Different Dealers' Bonds may be joined in one action. *Franklin v. Frey*, 106 Mich. 76; *Wardell v. McConnell*, 23 Neb. 152.

Approval of Bond. — The certificate of the proper recording officer is competent evidence of the approval of the bond. *Smith v. Anderson*, 82 Mich. 492.

Village Record as Evidence. — And the village record, showing proceedings concerning the granting of licenses, is admissible against both seller and surety. *Scott v. Chope*, 33 Neb. 41.

If the Bond Is Insufficient the principal is nevertheless liable. *Uldrich v. Gilmore*, 35 Neb. 288.

Period of Surety's Liability. — The surety's liability for a sale disqualifying the buyer to support his family extends throughout the period of such disqualification, though it be beyond the time for which the dealer is licensed. *Wardell v. McConnell*, 23 Neb. 152.

A Right of Action at Once Accrues to a wife who is damaged or injured in person, property, or means of support, by the violation of the covenants of a liquor dealer's bond, under Act No. 191, *Michigan* Laws of 1883, and she may sue the principal and sureties jointly, the recovery of a judgment against the principal not being a condition precedent to such suit. *Anthony v. Krey*, 70 Mich. 629.

V. THE INJURY—1. Generally. — The statutes generally provide for the recovery of damages for injuries to person and property. Most of them also specify among actionable wrongs, injury to means of support; and a few add the words "or otherwise," thus giving a right of action for mental suffering and matters of a like kind.¹ Many statutes give a right to recover to any one who shall take charge of and provide for an intoxicated person, generally at a fixed rate *per diem*.²

2. Injuries to the Person — Actual Physical Injury. — Where the injury alleged is to the person of the plaintiff an actual physical injury must be proved. Unless there is actual violence or a positive physical injury to the person or health, there can be no recovery. Mental anguish and distress, disgrace and loss of social position, abusive words, and the loss of the society or companionship of a husband or wife, are not sufficient in the absence of such positive physical injury to maintain an action on the ground of injury to the person.³

3. Injuries to Property. — All loss, destruction, and damage to property caused by the intoxication of any person is also actionable under the provision of the statutes concerning injuries to property.⁴

1. Thus, in *Michigan* an injury to the feelings is in general actionable. *Radley v. Seider*, 99 Mich. 431; *Cramer v. Danielson*, 99 Mich. 531. But not unless the injury counted on properly includes it. *Clinton v. Laning*, 61 Mich. 355; *Johnson v. Schultz*, 74 Mich. 75. Thus, there can be no recovery for injury to the plaintiff's feelings by a sale to one who has been an habitual drunkard for years. *Sissing v. Beach*, 99 Mich. 439.

2. See *infra*, this section, *Care of Intoxicated Person*.

3. **Injuries to the Person — Mental Suffering — Illinois.** — *Freese v. Tripp*, 70 Ill. 496; *Kellerman v. Arnold*, 71 Ill. 632; *Flynn v. Fogarty*, 106 Ill. 263; *Keedy v. Howe*, 72 Ill. 133; *Fentz v. Meadows*, 72 Ill. 540; *Confrey v. Stark*, 73 Ill. 187; *Brantigan v. White*, 73 Ill. 561; *Meidel v. Anthis*, 71 Ill. 241; *McCann v. Roach*, 81 Ill. 213.

Indiana. — *Schlosser v. State*, 55 Ind. 82; *Koerner v. Oberly*, 56 Ind. 284, 26 Am. Rep. 34.

Iowa. — *Jackson v. Noble*, 54 Iowa 641.

Nebraska. — *Kerkow v. Bauer*, 15 Neb. 150.

New York. — *Quain v. Russell*, 8 Hun (N. Y.) 319.

Ohio. — *Mulford v. Clewell*, 21 Ohio St. 191.

Wisconsin. — *Wightman v. Devere*, 33 Wis. 570.

Abuse of a Wife by her husband's cursing her while intoxicated is not an element of damages in the absence of actual personal violence. *Albrecht v. Walker*, 73 Ill. 69; *Welch v. Jugenheimer*, 56 Iowa 11, 41 Am. Rep. 77.

Loss of Social Standing. — Evidence to show the plaintiff's loss of social standing by reason of her husband's habits of intoxication is inadmissible. *Jackson v. Noble*, 54 Iowa 641.

For Wounded Feelings and Disgrace, not resulting from injury to the person, there can be no recovery. Thus, the fact that an intoxicated husband called his wife a prostitute and threatened to kill her, in the absence of proof that his conduct impaired her health does not constitute a ground for the recovery of actual damages in her action against the liquor seller, and evidence thereof is inadmissible as a ground of exemplary damages. *Calloway v. Laydon*, 47 Iowa 456, 29 Am. Rep. 489.

Mental Anguish, Disgrace, and Loss of Companionship are not actionable. *Mulford v. Clewell*, 21 Ohio St. 191.

But any violent interference with one's person is in law an injury, and mental suffering resulting therefrom is a ground for damages.

Thus a wife can recover for her mental suffering resulting from her intoxicated husband's striking her, thrusting her violently out of doors, and compelling her to stay out all night. *Ward v. Thompson*, 48 Iowa 588. See *Pegram v. Stortz*, 31 W. Va. 220.

Where an intoxicated husband, without actual violence, but by threatening and abusive language and intimidation, drove his wife out of the house and kept her out for several hours, it was held that there was a physical injury and suffering sufficient to sustain an action under the statute, and the action being thus sustained, the wife might recover, as a part of her actual damages, for the injury to her feelings, and the indignity suffered by her. *Peterson v. Knoble*, 35 Wis. 80.

Assault upon the Wife. — Damages are recoverable at the suit of a wife against a saloon-keeper for selling liquor to her husband against her protest when he knows the husband to be an habitual drunkard, if the husband, while drunken with the liquor so sold him, commits an assault and battery on the wife. *Wilson v. Booth*, 57 Mich. 249.

Wounding Another. — Where an intoxicated person on board a freight train, in flourishing a pistol, shot and wounded another, such other was held entitled to recover of the persons selling the liquors that caused the intoxication. *King v. Haley*, 86 Ill. 106, 29 Am. Rep. 14. See also *Bodge v. Hughes*, 53 N. H. 614.

Injuries Preventing One from Following His Employment. — An action may be maintained by one prevented from following his usual occupation by being beaten and wounded by an intoxicated person. *English v. Beard*, 51 Ind. 489.

4. **Injuries to Property.** — *McEvoy v. Humphrey*, 77 Ill. 388; *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42; *Woolcheater v. Risley*, 38 Iowa 486; *Hemmens v. Bentley*, 32 Mich. 89; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Mulford v. Clewell*, 21 Ohio St. 197.

4. Injuries to Means of Support — Persons Legally Dependent upon the Intoxicated Person. — Where the statutes give a remedy for injuries to means of support, and any person, as a result of his own intoxication or that of others, is rendered incapable of supporting those legally dependent on him for support, such dependent persons have a right of action against the seller of the liquor which caused the intoxication, for the injury to their means of support.¹

Persons Actually though Not Legally Dependent. — And in some cases this has been held to include those actually, though not in a strict sense legally, dependent on the intoxicated person. This right of action is new, and was unknown to the common law.²

The Term "Means of Support" includes all resources of every kind.³

Diminution of Resources. — But the mere diminution of the plaintiff's resources is not actionable.⁴

Not Limited to Bare Necessaries of Life. — The right to support is not limited to the bare necessities of life, but includes comforts suitable to the plaintiff's condition in life.⁵

The Value of a Horse killed in a runaway caused by the negligence of its drunken driver may be recovered from the seller of the liquor. *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42. So, where a horse is overdriven by its drunken driver and dies in consequence thereof. *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323.

Wife's Chattels Sold by Husband. — In an action under the statute for injury to her property, a wife may recover against the seller of the liquor for the sale of her chattels by her drunken husband, without first demanding the chattels of the vendee or notifying him that she claims them to be her property. *Mulford v. Clewell*, 21 Ohio St. 191.

It will be sufficient that the property for which a wife claims damages is hers as between herself and her husband, no matter what it would have been as between herself and her husband's creditors. So, where a wife has a horse which she claims and uses as her own, with the knowledge of her husband, and he sells it and squanders the proceeds, she may recover the value from the liquor seller. *Woolheather v. Risley*, 38 Iowa 486.

Money Paid for Liquor. — The amount paid out for the liquor may also be recovered. And this is specially the case where sales extending over a long period have produced habits of drunkenness. *Greenlee v. Schoenheit*, 23 Neb. 669; *Hemmens v. Bentley*, 32 Mich. 89.

The Right of Recovery Extends to the Executors or Administrators of the estate of a deceased habitual drunkard. *Kilburn v. Coe*, 48 How. Pr. (N. Y. Supreme Ct.) 144.

A Wife Has No Property in the Earning Power of her husband, and therefore, where the civil damage act extends to injuries to person and property only, the husband's imprisonment for a crime committed while intoxicated gives the wife no right of action. *Bradford v. Boley*, 167 Pa. St. 506, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 261, 262.

An Injury to a Minor Servant of the plaintiff resulting in the loss of his services is not an injury to the plaintiff's property. *Streever v. Birch*, 62 Hun (N. Y.) 298. *Contra*, *Fitzgerald v. Donohoe*, 48 Neb. 852.

1. Injury to Means of Support. — *Elshire v.*

Schuyler, 15 Neb. 561; *Volans v. Owen*, 74 N. Y. 526, 30 Am. Rep. 337; *Hill v. Berry*, 75 N. Y. 229.

2. The civil damage statutes create a new right of action for injury to means of support, and such action may be maintained although the injury complained of was not actionable at common law. *Volans v. Owen*, 74 N. Y. 526, 30 Am. Rep. 337.

3. What is Intended by the Phrase "Means of Support." — In *Wightman v. Devere*, 33 Wis. 578, the court said: "It may not be easy to give a precise definition of the phrase 'means of support,' * * * but we suppose it relates to whatever the husband might have earned or made by his labor and attention to business, and contributed to the support of his family."

The phrase "means of support," in its general sense, embraces all those resources from which the necessities and comforts of living are or may be supplied, such as lands, goods, salaries, wages, and other sources of income. In its limited sense it signifies any resource from which the wants of life may be supplied. *Schneider v. Hosier*, 21 Ohio St. 112; *Keedy v. Howe*, 72 Ill. 133.

4. Diminution of Resources. — An action for injury to means of support cannot be maintained for the plaintiff's loss of his son's services resulting from an injury caused by the intoxication of the son, unless it appears that the services of the son were necessary to the plaintiff's support, or that the plaintiff's means of support were diminished and rendered inadequate by reason of his expenses in caring for his injured son. *Volans v. Owen*, 74 N. Y. 526, 30 Am. Rep. 337.

5. Not Limited to Bare Necessaries — Independent Means of Support. — "The right of support is not limited to the supplying of the bare necessities of life, but embraces comforts, what is suitable to the wife's situation and the husband's condition in life. Because the wife may be able-bodied and can earn a livelihood, it does not follow that she does not suffer injury in means of support by loss of her legal supporter. Nor does it so follow where she may have independent means of support of her own. There are always independent means of support. No one is absolutely dependent on

Cases Illustrating This Kind of Injury will be found in the notes.¹

another for support, for where there is the absence of other means of support it is provided by public authority." *Hackett v. Smelsey*, 77 Ill. 109. See also *Herring v. Ervin*, 48 Ill. App. 369; *Thill v. Polman*, 76 Iowa 638; *McMahon v. Sankey*, 133 Ill. 636.

Rule of Damage.—In order to sustain an action by a wife for injury to her means of support by reason of her husband's intoxication, she need not show that she has been at any time in whole or in part without present means of support. It is enough that the means of her future support have been cut off or diminished below what is reasonable and competent for a person in her station in life, and below what they otherwise would have been. And the rule of damage in such case should be, not the amount of loss occasioned to the husband's estate, but the diminution, if any, thereby resulting to her means of present and future support. *Mulford v. Clewell*, 21 Ohio St. 197; *Confrey v. Stark*, 73 Ill. 187; *McCann v. Roach*, 81 Ill. 213; *Woolheather v. Risley*, 38 Iowa 486.

1. Injuries from Insanity or Sickness Induced by Intoxication.—The liability of the seller in actions under these statutes for injury to means of support is not confined to cases of injury resulting from drunkenness immediately and during its continuance, but extends as well to cases where the injury results from insanity, sickness, or inability induced by intoxication. *Mulford v. Clewell*, 21 Ohio St. 197.

Intoxicated Husband's Absence from Home—Squandering Money—Wife Compelled to Work.—Where a husband, because of his intoxication, remains away from home for several days, obliging his wife to do his work, and spends a large sum of money needed for the support of his wife and children, the wife has a good cause of action under the statutes. *Hill v. Berry*, 75 N. Y. 229.

Husband Testifying to Amount Spent for Liquor.—To show injury to the means of support of a wife by the intoxication of her husband, the latter may testify as to about how much he paid the defendant for liquor during the time for which damages are asked. *Ward v. Thompson*, 48 Iowa 588.

Wife Testifying to Amount Necessary for Her Support.—In an action by a wife for herself and minor children, after testimony tending to show that their means of support have been reduced by her husband's intoxication, she may testify as to the amount necessary to support the family in ordinary comfortable circumstances, suitable for people of her condition. Such testimony would not be competent as establishing the measure of damages, but would be competent as tending to inform the jury as to the value of the means of support of which the plaintiff had been deprived. *Warrick v. Rounds*, 17 Neb. 411. See also *McMahon v. Sankey*, 133 Ill. 636; *Brandt v. McEntee*, 53 Ill. App. 467.

Husband Habitual Drunkard—Wife Object of Public Charity.—In such an action it is competent to offer evidence that the husband is an habitual drunkard, and the jury may consider that fact among others if the wife has been injured in her means of support by the defendant

in selling or giving to her husband intoxicating liquors. Where there is evidence that the husband had no means of support for his family except his own labor, that owing to his intoxication he neglected his business and did not support his wife as he ought to have done and could have done if he had been sober, and that she has become an object of public charity, it is proper to charge the jury that the wife is entitled to recover for any actual damage to her means of support caused in whole or in part by liquor sold to her husband by the defendant, causing the husband's intoxication. *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625.

Capacity for Labor—Proceeds of Labor.—A wife has an interest in the labor of her husband and its proceeds, especially when that labor is necessary to her support, and consequently also in his capacity to labor. Any deprivation of her rights or interest in the proceeds of his labor, or his capacity to labor, is an injury to her in her means of support. *Schneider v. Hosier*, 21 Ohio St. 113.

Loss of Employment.—Evidence that the intoxication of the plaintiff's husband led to the loss of his situation and inability to get other employment is admissible in a suit by his wife for injury to her means of support. *Roth v. Eppy*, 80 Ill. 283.

Habits of Husband When Sober.—But the defendant may show that the husband of the plaintiff when sober is physically incapable of performing any work or labor or of attending to any business or profession, or is of such indolent and shiftless habits that he in fact makes his wife support him. *Wightman v. Devere*, 33 Wis. 579.

Wife Forced by Her Husband's Intoxication to Support Herself.—Evidence that the plaintiff, as a result of her husband's intoxication, was supported by her own labor and by the county, is material. One of the material facts which the plaintiff must establish is that during the period in question she was not supported by her husband, and this evidence tended to establish this fact by showing the sources from which her support came. *Fox v. Wunderlich*, 64 Iowa 187.

When the Action Is for the Benefit of the Children of the Intoxicated Person it is competent to show his physical condition and health, his habits of industry, his vocation, the monthly or annual product of the same, and whether any and all the children are of such tender age as to render them entirely dependent upon their parents for support. *Kerkow v. Bauer*, 15 Neb. 150; *Flynn v. Fogarty*, 106 Ill. 263.

Right of Town to Recover.—Where a person previously self-supporting becomes, under the poor laws, dependent upon a town through injuries sustained in consequence of intoxication, such town cannot recover from the seller of the liquor for the support furnished him. *Hollis v. Davis*, 56 N. H. 74.

Right of Employer to Recover.—The intoxication of certain employees of railroad contractors, rendering such employees unable to work and preventing other employees and teams from working to advantage, is an actionable injury to the property and means of sup-

5. Death. — The question whether there can be a recovery under the civil damage statutes for the death of any person, caused by the intoxication of himself or of another, has not been uniformly decided. In general, if death is the natural and legitimate result of such intoxication, and the plaintiff is thereby injured in his means of support, he may recover for the death. Otherwise, minor and temporary injuries to the plaintiff's means of support would be within the protection of the statutes, and the greatest and most permanent injury of all would be without remedy.¹

port of the contractors. *Duroy v. Blinn*, 11 Ohio St. 331.

Question for Jury. — In an action by a wife for injury to her means of support it appeared that her husband had done work for the defendant amounting to one hundred and forty-five dollars and fifty cents, and that upon a settlement but a small sum was found due, and that the husband was an habitual drunkard and frequently got liquor of the defendant, which contributed to his dissipation, idleness, and waste of time, and that the wife was compelled to mortgage her property to pay taxes, doctor's bills, and for the support of the family. It was held that the jury were warranted in finding that the sale of liquor by the defendant to the husband produced injury to the wife's means of support. *Horn v. Smith*, 77 Ill. 381.

Whether there has been an injury to the plaintiff's means of support, is a question for the jury. *Decker v. Stauring*, 57 How. Pr. (N. Y. Supreme Ct.) 495.

It Is Actionable to Cause the Continuous Loss of Means of Support. — *Lloyd v. Kelly*, 48 Ill. App. 554.

Wages Reduced on Account of Intoxication. — Where there is evidence that the wages of the plaintiff's husband have decreased from eighteen to eight dollars per week by means of his intoxication, it is proper to charge that a wife's right to support is not limited to the bare necessities of life, but includes comforts and whatever is suitable to her condition in life. *McMahon v. Sankey*, 133 Ill. 636.

A Wife Can Testify as to the Amount of Her Husband's Earnings and what her support out of such earnings was worth to her. *Brandt v. McEntee*, 53 Ill. App. 467.

Other Means of Support — Minor Children. — The fact that the plaintiff, suing for injury to her means of support by the intoxication of her husband, has four minor sons living with her who work part of the time and give some of their earnings to the plaintiff, does not justify a charge that the jury should take into consideration any evidence tending to show that the plaintiff was not entirely dependent on her husband for support. *McMahon v. Sankey*, 35 Ill. App. 341, *affirmed* 133 Ill. 636.

In such a case evidence that the plaintiffs' minor children support themselves is admissible, but the law does not preclude recovery to the extent of such past self-support. The duty and probable future necessity to support such minors must also be considered. *Houston v. Gran*, 38 Neb. 687.

Loss of Services of Minor Son — Recovery by Father. — A father may recover for his loss of the services of his minor son who contributed by his earnings to the expenses of his father's family, although the father's earnings are

nevertheless sufficient to keep the family from becoming dependent. *Reath v. State*, (Ind. App. 1896) 44 N. E. Rep. 808.

Widow Paying Debt of Deceased Husband. — In *Illinois* the widow of one killed by a debauch, who is compelled to pay one thousand dollars of his debt secured by a mortgage on her land given in his lifetime, but who nevertheless has abundant means, cannot recover for injury to her means of support. *Keedy v. Howe*, 72 Ill. 133.

Habitual Drunkard Before Injury in Question. — A wife's action for injury to her means of support is not barred by the fact that the husband was a drunkard for years before the sale complained of. *Lane v. Tippy*, 52 Ill. App. 532; *Rouse v. Melsheimer*, 82 Mich. 172; *Ford v. Cheever*, 105 Mich. 679.

In an action for selling to an habitual drunkard, causing his death and injury to his wife's means of support, evidence concerning his habits and concerning sales before the particular sale which caused his death, is admissible. *Smith v. People*, 141 Ill. 447.

Evidence of Destitution of Children — Prejudices of Jury. — In an action by minor children for injury to their means of support by sales to their father, it is error to admit evidence of the destitute condition of the children, nevertheless the judgment should not be reversed unless it appears that the defendant was injured thereby. *Johnson v. McCann*, 61 Ill. App. 110.

1. Death by Intoxication — Illinois. — *Pickard v. Teatro*, 34 Ill. App. 398; *Emory v. Addis*, 71 Ill. 273; *Schmidt v. Mitchell*, 84 Ill. 195, 25 Am. Rep. 446; *Hackett v. Smelsley*, 77 Ill. 109; *Schroder v. Crawford*, 94 Ill. 357, 34 Am. Rep. 236; *Flynn v. Fogarty*, 106 Ill. 263.

Iowa. — *Rafferty v. Buckman*, 46 Iowa 195. *Michigan.* — *Brockway v. Patterson*, 72 Mich. 122.

Nebraska. — *Kerkow v. Bauer*, 15 Neb. 150; *Gran v. Houston*, 45 Neb. 813.

New Hampshire. — *Bedore v. Newton*, 54 N. H. 117.

New York. — *Jackson v. Brookins*, 5 Hun (N. Y.) 530; *Smith v. Reynolds*, 8 Hun (N. Y.) 128; *Quain v. Russell*, 8 Hun (N. Y.) 319; *Davis v. Standish*, 26 Hun (N. Y.) 608; *McCarthy v. Wells*, 51 Hun (N. Y.) 171; *Mead v. Stratton*, 87 N. Y. 493, 41 Am. Rep. 386.

In *Mead v. Stratton*, 87 N. Y. 498, 41 Am. Rep. 386, Miller, J., delivering the opinion of the court, said: "In the state of Illinois it is held that the action will lie when death ensues. See *Schroder v. Crawford*, 94 Ill. 357, 34 Am. Rep. 236; *Hackett v. Smelsley*, 77 Ill. 109. The same rule is upheld in Nebraska, *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409; and in the State of Iowa, *Rafferty v. Buckman*, 46 Iowa

6. Care of Intoxicated Person. — In addition to damages for injuries to person, property, and means of support, it is sometimes provided that any one who, by the sale of intoxicating liquor, causes the intoxication of another, shall pay a reasonable compensation to any one who may take charge of and provide for such intoxicated person, and a stated sum per day in addition thereto for every day such intoxicated person shall be kept in consequence of his intoxication.¹

195. Some exceptions are made by the courts of Illinois when the person intoxicated is killed in an affray, or when death results from exposure. *Shugart v. Egan*, 83 Ill. 56, 25 Am. Rep. 359; *Schmidt v. Mitchell*, 84 Ill. 195, 25 Am. Rep. 446. It is not necessary to decide whether these decisions are based on a sound principle, as no such question arises in the case at bar. Cases are also cited from Indiana which are claimed to be adverse to the views expressed. See *Krach v. Heilman*, 53 Ind. 517; *Collier v. Early*, 54 Ind. 559; *Backes v. Dant*, 55 Ind. 181. In *Krach v. Heilman*, 53 Ind. 517, the person intoxicated was killed in an affray. The last two cases cited are somewhat analogous to the case at bar, but the decision of the court is not, we think, well supported in either of them. It is also held in Ohio that under the act in that state in relation to the sale of intoxicating liquors for injury to the means of support in consequence of intoxication which caused death, no recovery of damages can be had. *Davis v. Justice*, 31 Ohio St. 359, 27 Am. Rep. 514; *Kirchner v. Myers*, 35 Ohio St. 85, 35 Am. Rep. 598. We cannot concur in such an interpretation of the act in question, and for the reasons already stated are of the opinion that, if the death of the deceased was a result necessarily following the intoxication, and was attributable to such intoxication, an action will lie to recover the damages arising to the means of support of the plaintiff by reason thereof."

But see *Davis v. Justice*, 31 Ohio St. 359, 27 Am. Rep. 514, where it was held that in an action under the civil damage act for injury to means of support in consequence of intoxication which caused the death of the intoxicated person, damages resulting from the death cannot be recovered. See also *Kirchner v. Myers*, 35 Ohio St. 85, 35 Am. Rep. 598.

In *Massachusetts* a wife cannot recover for the death of her husband caused by intoxication resulting from the sale of liquor to him by the defendant. *Barrett v. Dolan*, 130 Mass. 366, 39 Am. Rep. 456. See also *Harrington v. McKillop*, 132 Mass. 567.

But in *New York* the wife may recover for her husband's death if injured in her means of support. *Mead v. Stratton*, 87 N. Y. 493, 41 Am. Rep. 386; *Jackson v. Brookins*, 5 Hun (N. Y.) 530; *Smith v. Reynolds*, 8 Hun (N. Y.) 128; *Quain v. Russell*, 8 Hun (N. Y.) 319. But see *Hayes v. Phelan*, 4 Hun (N. Y.) 733; *Brookmire v. Monaghan*, 15 Hun (N. Y.) 16.

The father of the minor plaintiff, while intoxicated by liquor sold him by the defendant, murdered the plaintiff's mother, and committed suicide. The plaintiff was dependent on his father for support. It was held that the defendant was liable. *Neu v. McKechnie*, 95 N. Y. 632, 47 Am. Rep. 89.

In *Nebraska*, in an action for injury to means

of support in consequence of intoxication, a recovery may be had where the intoxication caused the death of the intoxicated person, and in estimating the damages the condition of the family and the estate may be considered. *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409.

In *Illinois*, if upon the trial of such a suit the death of the plaintiff's husband is shown, and that his death was occasioned by intoxication produced by liquors sold or given to him by the defendant, in the absence of any proof to the contrary the jury will be warranted in inferring therefrom an injury to the plaintiff's means of support. That will be sufficient to shift the burden of proof, and entitle the plaintiff to at least nominal damages. *Flynn v. Fogarty*, 106 Ill. 263.

Limit of Recovery. — The recovery for loss of support is limited to the actual injury inflicted; therefore, where the intoxicated person has died as a result of his intoxication, proof of lack of affection, sympathy, or respect for the deceased, on the part of the plaintiff, is inadmissible. *Kerkow v. Bauer*, 15 Neb. 150.

No Other Means of Support but Her Husband. — A widow suing for injury to her means of support by reason of the death of her husband resulting from his intoxication may show that her husband supported her, and that she had no other means of support. *Mayers v. Smith*, 121 Ill. 442.

Remarriage. — But in such a case, on the question of damages it may be shown that the plaintiff has married again. *Sharpley v. Brown*, 43 Hun (N. Y.) 374; *Gran v. Houston*, 45 Neb. 813.

Widow's Expenditures in Business of Late Husband. — But the widow's expenditures since her husband's decease, in the business in which he had been engaged, afford no ground of presumption as to what he would have done had he lived, and evidence on that subject should be rejected, since it has no bearing on the injury to the widow's means of support. *Flynn v. Fogarty*, 106 Ill. 263. See *Huggins v. Kavanagh*, 52 Iowa 368.

1. Care of Intoxicated Person. — *Fountain v. Draper*, 49 Ind. 444; *Confrey v. Stark*, 73 Ill. 187; *Brannan v. Adams*, 76 Ill. 335; *Krach v. Heilman*, 53 Ind. 517; *Werner v. Edmiston*, 24 Kan. 147; *Wightman v. Devere*, 33 Wis. 570.

A Physician who professionally treats a person who is injured while intoxicated does not take charge of and provide for such person within the meaning of the statute. *Sansom v. Greenough*, 55 Iowa 127.

A Husband may recover for the loss of his wife's services and for the expense of medical attendance and nursing consequent upon the breaking of her arm in an accident caused by the intoxication of the driver of the vehicle in which she was riding, which intoxication was produced by liquor sold by the defendant to

VI. THE PERSONS INJURED — WHAT PERSONS MAY SUE. — The right of action created by these statutes extends to all persons who may have suffered actual injuries. There is no distinction between injuries received from the intoxication of strangers and those caused by the intoxication of kinsmen, dependents, children, parents, husbands, and wives.¹

1. Dependents — Legal Dependency. — In general, any one who is legally dependent for support on the person who is injured or incapacitated may maintain a suit for his damages so occasioned.²

Actual Dependency. — And in some states relatives actually though not legally dependent stand on the same footing.³

such driver. *Aldrich v. Sager*, 9 Hun (N. Y.) 537.

In *Wisconsin*, where the wife has taken care of and provided for her intoxicated husband, she may recover under the statute. *Wightman v. Devere*, 33 Wis. 570.

Under the *Michigan Statute* a father may recover for the support of his son who has been rendered helpless by being frozen while intoxicated by liquor purchased from the defendant, for the father may by law be required to support the son. *Clinton v. Laning*, 61 Mich. 355.

In *Pennsylvania*, the father is not a person "aggrieved" within the meaning of the statute, so as to have a right of action for expenditures incurred and loss of time in and about the nursing and care of an unmarried adult son, who did not sustain a family relation or that of a servant to his father; nor can he found a right of recovery, under the statute, upon the ground that the son's injury increased the probability of the father ultimately becoming liable for the son's support under the poor laws. *Veon v. Creaton*, 138 Pa. St. 48.

In *Illinois* the plaintiff has been allowed to recover for taking care of a person while incapacitated by the breaking of his leg caused by intoxication. *Brannan v. Adams*, 76 Ill. 331.

But in *Indiana* it is held that the recovery is limited to the time during which the intoxication continued. *Krach v. Heilman*, 53 Ind. 517.

1. *Gansby v. Perkins*, 30 Mich. 495. See also *Franklin v. Schermerhorn*, 8 Hun (N. Y.) 112.

2. The Widow and Minor Children of one who lost his life by intoxication may sue jointly or severally. *Kerkow v. Bauer*, 15 Neb. 150.

Husband — Wife — Children. — In a *New York* case the right of action was held to extend to the husband or wife and each of their children, and the wife was allowed to recover only a proportionate share of the total loss. *Franklin v. Schermerhorn*, 8 Hun (N. Y.) 112.

Widow as Guardian of Minor Child. — A widow whose husband lost his life by reason of intoxication caused by liquor sold by the defendant, after recovering for her own loss may bring a separate suit in behalf of her infant son, whose general guardian she is, and in such subsequent suit evidence of the prior judgment and its satisfaction is inadmissible. *Secor v. Taylor*, 41 Hun (N. Y.) 123.

Minor Children. — In *Kansas* infant children injured by the sale of intoxicating liquor to their father cannot join, but must bring separate actions. *Durein v. Pontious*, 34 Kan. 353.

Wife — Void Marriage. — If the marriage of an alleged wife claiming damages for loss of support is void because she has another husband living, she cannot claim the benefit of the statute. *Kearney v. Fitzgerald*, 43 Iowa 580.

Validity of Marriage and Legitimacy of Children to Be Proved. — Under a statute giving an action to one "dependent" on an intoxicated person who dies or is disabled, a plaintiff claiming to be his widow must show a lawful marriage, and one claiming to be his child must show his legitimacy. *Good v. Towns*, 56 Vt. 410, 48 Am. Rep. 799.

Foreign Marriage. — Upon proof that the marriage certificate is lost, the plaintiff's marriage in a foreign country can be proved by parol. *Stanton v. Simpson*, 48 Vt. 628.

Wife Killed by Intoxicated Person — Right of Husband to Recover. — Under *New Hampshire* General Laws, c. 109, § 33 (Public Stat., c. 112, § 32), providing, among other things, that any person who shall be in any manner dependent on such injured person for means of support, or any party on whom such injured person may be dependent, may recover, etc., a husband suffers an actionable loss or damage in consequence of the death of his dependent wife, caused by the intoxication of a person brought about by liquor sold by the defendant. *Fortier v. Moore*, (N. H. 1893) 36 Atl. Rep. 369.

Proof of Dependency — Father — Son. — A father cannot recover for the sale of liquor to his son without proving his poverty and dependence on the son. *Stevens v. Cheney*, 36 Hun (N. Y.) 1; *Volans v. Owen*, 74 N. Y. 526, 30 Am. Rep. 337.

Mother Compromising Claims of Children — Rights of Action Distinct. — The wife of a person injured or incapacitated suing for injury to her means of support cannot compromise the claim of her children for the same cause. Her right of action and theirs are distinct. *Johnson v. McCann*, 61 Ill. App. 110. Neither can there be any recovery for them in her action. *Rosecrants v. Shoemaker*, 60 Mich. 4. And evidence that she has children is inadmissible, though not reversible error where the verdict is for a less sum than the damages actually shown. *Thomas v. Dansby*, 74 Mich. 398. And the minor children may themselves sue. *Bloedel v. Zimmerman*, 41 Neb. 695.

Action in Name of the State. — In *Indiana* the action may be brought in the name of the state for the benefit of both widow and children. *Wall v. State*, 10 Ind. App. 530.

3. Actual though Not Legal Dependency. — In *Nebraska* a poor person dependent on a relative may sue for the injury resulting from the

2. Kinsmen. — Kinsmen and relatives, although not strictly dependent for support, may, in some states, maintain the action.¹

3. Strangers. — Strangers having no ties of kindred or dependence upon the intoxicated or injured person may recover when they have suffered actual damage. Many of the cases of injury to the person and to property cited above are of this character, and strangers may be plaintiffs in actions for injury to means of support also.²

4. Contributory Fault. — The rule of contributory fault applies to actions under these statutes as to all other actions sounding in tort. No person who has contributed to the intoxication by furnishing or procuring the liquor, or by voluntarily drinking it with the intoxicated person, or otherwise encouraging his intoxication, can recover from the seller of the liquor for injuries received in consequence of such intoxication.³

death of such relative, without any action by the county commissioners in that behalf. *Fitzgerald v. Donohoe*, 48 Neb. 852, following *McClay v. Worrall*, 18 Neb. 44.

Adult Son Voluntarily Supporting Aged Mother. — In *Du Puy v. Cook*, 90 Hun (N. Y.) 43, the facts were these: A widow sixty-three years of age, without property, was taken care of by her adult son who voluntarily assumed her support. She was unable to maintain herself, and up to the time of her son's death did nothing further than take care of the household. After his death she became almost entirely dependent upon the charity of her friends. It was held that the mother was injured in her means of support by the death of the son in consequence of intoxication. See also *Stevens v. Cheney*, 36 Hun (N. Y.) 1; *McClay v. Worrall*, 18 Neb. 44.

1. Relatives — Husband's Right of Action. — In *Massachusetts* a husband may maintain an action for injury to his means of support by the intoxication of his wife. *Moran v. Goodwin*, 130 Mass. 158, 39 Am. Rep. 443. See also *Aldrich v. Sager*, 9 Hun (N. Y.) 537.

But in *Nebraska*, where the husband does not inherit from the wife, a husband cannot maintain an action for the death of his wife unless as executor, where there are next of kin entitled to the amount to be recovered. *Warren v. Englehart*, 13 Neb. 283.

Right of Action of Adult Son for Father's Intoxication. — A man twenty-four years old, not dependent on his father, is a "child" within the *Massachusetts* statute, and may notify a liquor-seller not to sell to his father, and may recover from the seller if he disregards the notice. *Taylor v. Carroll*, 145 Mass. 95.

Father's Right in Case of Intoxication of Adult Son. — Under the *Michigan* statute a father legally bound to support an indigent adult son may recover for injuries received by his son, if the latter is in consequence thereof thrown on the father for support, though the officers of the poor have never taken the son into their custody. *Clinton v. Laning*, 61 Mich. 355.

But in *Pennsylvania* it is held that the father of an adult son is not "aggrieved," though he voluntarily assumes the expense of the medical care of his son who is incapacitated as a result of intoxication, and the increased probability that the father will be liable to support his injured son is considered too remote for legal remedy. *Veon v. Creaton*, 138 Pa. St. 48.

In *Texas* it is for the jury to decide whether

the father is "aggrieved" by the sale of intoxicants to his son. *Edgett v. Finn*, (Tex. Civ. App. 1896) 36 S. W. Rep. 830.

Parent's Right to Sue for Loss of Services of Minor Child. — In *Nebraska* a parent may sue for the loss of his minor child's services and may prosecute the action without the intervention of the administrator of the decedent. *Fitzgerald v. Donohoe*, 48 Neb. 852.

Under the *Massachusetts* statute giving to the "parent" of a minor to whom liquor has been sold an action against the seller, the mother may recover without proof that the minor has no father. *McNeil v. Collinson*, 130 Mass. 167.

Executors or Administrators. — The right of recovery extends to the executors or administrators of a deceased habitual drunkard. *Kilburn v. Coe*, 48 How. Pr. (N. Y. Supreme Ct.) 144.

An Adult Daughter who has left home because of ill-usage at the hands of her intoxicated father cannot maintain an action against the seller of the liquor for injury to her means of support. *Jury v. Ogden*, 56 Ill. App. 100.

A Child Born After the Decease of Its Father caused by intoxication may sue therefor. *Quinlen v. Welch*, 69 Hun (N. Y.) 584.

2. Strangers. — Where certain employees of railroad contractors by their intoxication prevent the employment of teams and of other laborers in the service of the contractors, the sale of the liquor producing such intoxication is an actionable injury to the contractors' property and means of support. *Duroy v. Blinn*, 11 Ohio St. 331.

A town cannot recover for the support of a resident who, as a result of intoxication, becomes a public charge. *Hollis v. Davis*, 56 N. H. 74.

3. Rule of Contributory Fault. — *Hackett v. Smelsley*, 77 Ill. 109; *Engleken v. Hilger*, 43 Iowa 563; *Kearney v. Fitzgerald*, 43 Iowa 580; *Elliott v. Barry*, 34 Hun (N. Y.) 129.

A Wife Who Encourages or Authorizes the Sale of liquor to her husband, or procures it for him, cannot recover for the unlawful sale to him. In such case, however, the minor children may sue. *Rosecrants v. Shoemaker*, 60 Mich. 4; *Elliott v. Barry*, 34 Hun (N. Y.) 129.

The Intoxicated Person Himself has no right of action against the seller of the liquor producing his intoxication for money stolen from him while drunk. *Brooks v. Cook*, 44 Mich. 617, 38

Encouragement of the Intoxication Coerced. — But such consent or encouragement must be voluntary. If it was induced by coercion or fear, the plaintiff may recover.¹

Proof Must Be Clear. — And the proof of such encouragement must be positive and unequivocal.²

Am. Rep. 282; or lost in gambling, *Seiffer v. McLean*, 7 Tex. Civ. App. 158.

The Seller of Liquor cannot recover from an intoxicated person for injuries committed by the latter while under the influence of such liquor. *Aldrich v. Harvey*, 50 Vt. 162, 28 Am. Rep. 501.

Nor Can One Who "Treats" Another to Liquor, whereby the latter becomes intoxicated and stabs the former, hold the seller liable for his injury. *Hays v. Waite*, 36 Ill. App. 397.

Mental Suffering — Former Intoxication. — Where the mental anguish of the plaintiff caused by the sale of liquor to her minor son is the gist of the action, it is error to exclude the inquiry on the cross-examination of the plaintiff whether she had not seen the son intoxicated within the last six months by liquor furnished by the plaintiff. *Cramer v. Danielson*, 99 Mich. 531.

1. When the Encouragement of Intoxication Is Not Voluntary. — The fact that a wife accompanied her husband to various places and gatherings, and there drank liquors with him, and that the husband kept liquors in his house and drank the same at home with his wife's knowledge and approval, and that all of such drinking on the part of the husband was with her knowledge and consent, is proper to be considered by the jury on the question of damages, especially as the statute allows exemplary damages in such an action. But such facts do not constitute a bar to the action, and it is proper to prove by the wife in rebuttal that the husband compelled her to accompany him to such places. *Hackett v. Smelsley*, 77 Ill. 109.

When a Wife Drinks with Her Husband, either at a saloon or at home, but such drinking is not voluntary on her part, or if she buys and takes to their home intoxicating liquors, not with a view of her own drinking, but for the sole purpose of keeping her husband at home and preventing him from squandering his time and money in saloons, or if she purchases and uses liquors only for medicinal purposes, and gives the same to her husband for that purpose only, she forfeits none of the benefits which the statute gives. *Kearney v. Fitzgerald*, 43 Iowa 580; *Ward v. Thompson*, 48 Iowa 588.

Wife Recalling Previous Notification Not to Sell to Husband. — Where the plaintiff had notified the defendant not to sell liquors to her husband, who was a confirmed drunkard, and a few days afterwards the husband and wife together went to the defendant's saloon and the plaintiff there, in the presence of her husband, countermanded her previous order and told the defendant to sell to her husband whatever the latter wanted, it was held that the jury were justified in concluding that the wife did not act voluntarily in countermanding her first order. *Jewett v. Wanshura*, 43 Iowa 574.

Wife Permitting the Drinking When She Could Have Prevented It. — Where the wife knows the fact that her husband has purchased a jug of

whiskey and is drinking immoderately, and has it in her power to prevent him from doing so by breaking the jug or pouring out its contents, and is not prevented from doing so through fear, but permits him to drink in great excess, from which his death ensues, she must be considered as a willing party to his conduct, and instrumental in bringing the loss upon herself. *Reget v. Bell*, 77 Ill. 593.

Husband's Threats. — A wife's written order to the defendant instructing him to let her husband have liquor does not bar her action if it was extorted by her husband's threats of leaving her and his refusal to let her have money, and these circumstances were known to the defendant. *Thomas v. Dansby*, 74 Mich. 398.

2. Proof of Encouragement and Consent Must Be Clear — Wife Assisting Husband to Open Bottle of Liquor. — It is not contributory negligence for a wife to help her husband to open a bottle of brandy unless it is done knowing that he is going to drink it, or unless she encourages him to drink it. *McDonald v. Casey*, 84 Mich. 505.

Wife Returning Husband His Money Deposited with Her. — Nor for a wife to give her husband money deposited by him with her for safe-keeping, although she knows he is going to get intoxicated with it. *Bradford v. Boley*, 167 Pa. St. 506.

Drinking Together or in One Another's Presence. — Nor for her once to drink beer at home with her husband. *Radley v. Seider*, 99 Mich. 431. And it is immaterial whether she has within five years drank intoxicating liquors with her husband and other persons. *Hanewacker v. Ferman*, 47 Ill. App. 17.

But her habits in the matter of drinking, as well as her objections to her husband's bringing liquor into their home, may be shown. *Lloyd v. Kelly*, 48 Ill. App. 554. And in a suit by a father for selling to his minor son, the fact whether the father drank with the son in saloons other than the defendant's is admissible on the question whether the father is "aggrieved" by the sale complained of. *Edgett v. Finn*, (Tex. Civ. App. 1896) 36 S. W. Rep. 830.

Plaintiff Signing Defendant's Application for License to Sell. — But the fact that the plaintiff signed the application of the defendant for a license to sell intoxicating liquors is no bar to her action for causing the intoxication of her husband, nor is evidence thereof competent in mitigation. *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625.

Consent to Former Sales to Husband — Giving Him Money. — The fact that the wife has upon former occasions consented to the sale of liquor to her husband will not defeat her claim if she did not consent to the sale complained of; and her giving him money to purchase liquor with does not show that she contributed to the intoxication, in the absence of proof that the money was so used. *Rafferty v. Buckman*, 46 Iowa 195.

Rule Not Strictly Enforced in Some States. — In some cases the rule barring recovery by one guilty of contributory fault has either not been recognized at all or been applied with much more lenience.¹

Burden of Proof. — Where the rule is in force the existence of contributory fault is matter of defense, and the burden of alleging and establishing it is upon the defendant.²

VII. DAMAGES RECOVERABLE — 1. Nominal Damages. — As a rule, no right of action arises from relationship to the intoxicated or injured person in the absence of actual damages,³ but a contrary rule prevails in some states.

2. Actual Damages. — As in Other Cases of Actionable Wrongs, "the actual damages should be as nearly commensurate with the actual injury as the nature of the case will permit."⁴

Hypothetical and Contingent Losses should not be considered.⁵

Where a wife has sometimes let her husband have his wages when drunk, he having given them to her when sober, the question whether she voluntarily contributed to the injury is for the jury. *Huff v. Aultman*, 69 Iowa 71, 58 Am. Rep. 213.

1. Under the Nebraska Statute providing that licensed liquor-sellers "shall pay all damages that the community or individuals may sustain" by such traffic, one who voluntarily goes to a licensed saloon and buys and drinks liquor, and is frozen while intoxicated therewith, has a right of action against the seller. *Buckmaster v. McElroy*, 20 Neb. 557, 57 Am. Rep. 843.

In *Nebraska* the wife's consent to the sale of intoxicating liquor to her husband is no defense to an action by her for herself and minor children for the injury to their support resulting from the husband's death. *Gran v. Houston*, 45 Neb. 813; *Warrick v. Rounds*, 17 Neb. 411.

Pennsylvania. — One whose death results from intoxication is not guilty of contributory negligence in drinking the liquor. *Davies v. McKnight*, 146 Pa. St. 610.

Illinois. — Where the injury resulted from the death of a driver by a runaway accident, a charge to the jury that if the death was caused by the negligence of the deceased there could be no recovery, was properly refused, since such negligence might have been caused by the intoxication. *Smith v. People*, 141 Ill. 447.

And in *Illinois* the fact that the plaintiff drank with her husband mitigates the damages, but does not bar the action. *Lloyd v. Kelly*, 48 Ill. App. 554.

2. Burden of Proof. — In a wife's action for an injury to her by an assault made upon her by her drunken husband, she need not allege her freedom from contributory negligence. *Beem v. Chestnut*, 120 Ind. 390.

The wife's consent to the sale to her husband should be specially pleaded on the part of the defense. *Gran v. Houston*, 45 Neb. 813.

2. Nominal Damages — Illinois. — *Freese v. Tripp*, 70 Ill. 496; *Keedy v. Howe*, 72 Ill. 133; *Fentz v. Meadows*, 72 Ill. 540; *Confrey v. Stark*, 73 Ill. 187; *Brantigan v. White*, 73 Ill. 561; *Hackett v. Smelsley*, 77 Ill. 109; *McEvoy v. Humphrey*, 77 Ill. 388; *Roth v. Eppy*, 80 Ill. 283.

Indiana. — *Koerner v. Oberly*, 56 Ind. 284, 26 Am. Rep. 34.

Iowa. — *Fox v. Wunderlich*, 64 Iowa 187.

Kansas. — *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625.

Maine. — *Gilmore v. Mathews*, 67 Me. 517.

Michigan. — *Ganssly v. Perkins*, 30 Mich. 492.

Nebraska. — *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409.

Ohio. — *Duroy v. Blinn*, 11 Ohio St. 331; *Schneider v. Hosier*, 21 Ohio St. 112; *Boyd v. Watt*, 27 Ohio St. 259.

Inference of Injury to Means of Support. — But proof that the plaintiff's husband died as a result of intoxication warrants the jury to infer an injury to her means of support, and entitles her to at least nominal damages. *Flynn v. Fogarty*, 106 Ill. 263.

Loss of Husband's Society — Intemperate Habits Before Passage of Statute. — When the husband was intemperate before the passage of the statute, and his wife supported herself and in part supported him, a charge that the jury should estimate the loss of the sober, intelligent society of the husband is inappropriate, for the defendant's liability must be measured by the effects produced upon the husband and wife as they were, not as they might have been. *Ganssly v. Perkins*, 30 Mich. 492; *Friend v. Dunks*, 39 Mich. 733.

The Mere Selling — Quantity Sold — Instructions. — Where the statute makes one who sells to a minor liable for actual and exemplary damages, it is error to charge that the mere furnishing of liquor is insufficient to establish the defendant's liability, but that such selling must be in such quantity and under such circumstances that the jury may fairly infer that the plaintiff was actually damaged. *Sterling v. Callahan*, 94 Mich. 536.

4. General Rule — Damages Commensurate with Injury. — *Campbell, J.*, in *Ganssly v. Perkins*, 30 Mich. 492; *Friend v. Dunks*, 39 Mich. 733.

Question for Jury. — To what extent the plaintiff has been injured, is a question for the jury, who may take into consideration all the circumstances of the case. *Ludwig v. Sager*, 84 Ill. 99; *Dunlavy v. Watson*, 38 Iowa 400.

Evidence of a Judgment Recovered Against Another Defendant for injuries occurring at the same period is admissible to show the extent of the injury. *Engleken v. Webber*, 47 Iowa 558. *Compare Ennis v. Shiley*, 47 Iowa 552.

5. Hypothetical or Contingent Losses. — Evidence as to the probable conduct of the deceased in any particular transaction, had he

Recovery Limited to the Particular Injury. — And the recovery must be limited to the particular injury, whether to the person, property, or means of support, for which the action is brought, and in the last-named case the expectation of life, both of the deceased person on whom the plaintiff was dependent and of the plaintiff himself, may be considered.¹

Decreased Earnings and Additional Expense (but not counsel fees) may enhance the damages.²

Where Amount Fixed by Statute. — Of course, no question concerning the measure of damages arises in those states where their amount is fixed as a penalty by the statutes. But where there are statutory *maxima* and *minima*, evidence to affect the amount of the verdict is admissible.³

3. Exemplary Damages — Actual Damage Must Be Proved. — Exemplary damages may be awarded in a proper case, but there can be no recovery of exemplary damages until actual damages have first been proved.⁴

Wilful and Wanton Wrong. — And exemplary damages should be given in those cases, and in those cases only, where the plaintiff has some personal right to complain of gross negligence or a wanton and wilful wrong, which the wrong-

lived, is inadmissible on the question of damages. *Karau v. Pease*, 45 Ill. App. 382.

The decrease in the amount which the plaintiff might have inherited from her husband for her future support is no element of damages. *Radley v. Seider*, 99 Mich. 431.

To measure the plaintiff's damages by the death of her husband, his habits of thrift and pecuniary condition at the time of his decease may be shown. *Cleas v. Stanley*, 34 Ill. App. 338.

1. Recovery Limited to the Particular Injury. — The mental and physical suffering of the plaintiff, who has voluntarily assumed the support of his son permanently disabled by intoxication, is no element of damages. Such an action is based upon the legal liability of the plaintiff to support his son, and the damages are therefore limited to the cost of furnishing the necessities of life to him. And since this liability does not survive the plaintiff the damages are further limited to the cost thereof during the plaintiff's lifetime; and if the plaintiff is not a sound and healthy man, the calculation of the probable duration of his life should not be based upon the expectation of life for persons who are sound and healthy. *Clinton v. Laning*, 61 Mich. 355.

The Probable Duration of the Life of the deceased person should be considered in assessing damages for injury to the plaintiff's means of support by his death. *Betting v. Hobbett*, 42 Ill. App. 174, *affirmed* 142 Ill. 72. And if he was a sound and healthy man, standard tables of life expectancy may be considered for that purpose. *Sellers v. Foster*, 27 Neb. 118; *King v. Bell*, 13 Neb. 409; *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409; *Davis v. Standish*, 26 Hun (N. Y.) 608; *Hall v. Germain*, (Supreme Ct.) 14 N. Y. Supp. 5, *affirmed* 131 N. Y. 536.

2. The Following Are Proper Elements of Actual Damages: The additional care and nursing bestowed by the plaintiff upon her injured husband; the difference between the actual earnings of the husband and what he would have earned but for the injury; and the expense for medicine and medical attendance. The fact that the husband gave a note for the expense of medical attendance is immaterial, for the

wife can recover for future as well as present injuries to her means of support. *Thomas v. Dansbury*, 74 Mich. 398.

Agreement for Counsel Fees. — The damages should not be increased because the plaintiff has agreed to give half of them for counsel fees. *Clinton v. Laning*, 61 Mich. 355.

Instances — Verdicts Not Excessive. — A verdict for one hundred dollars is not excessive where the amount drawn from the plaintiff's support and used in the purchase of liquor in the defendant's saloon varied from fifty cents to three dollars per week for thirty-two weeks, and the wife did not have sufficient clothing, and was obliged to furnish, by her own labor, clothing for her child. *Hudson v. Weston*, 23 Ill. App. 487. Nor a verdict for one thousand dollars where the drunkard has been reduced from a prosperous business man to a sot, his property squandered, and his business ruined. *Bunyan v. Loftus*, 90 Iowa 122.

3. Sackett v. Ruder, 152 Mass. 397.

4. Exemplary Damages — Illinois. — *Freese v. Tripp*, 70 Ill. 496; *Keedy v. Howe*, 72 Ill. 133; *Fentz v. Meadows*, 72 Ill. 540; *Confrey v. Stark*, 73 Ill. 187; *Brantigan v. White*, 73 Ill. 561; *Hackett v. Smelsley*, 77 Ill. 109; *McEvoy v. Humphrey*, 77 Ill. 388; *Roth v. Eppy*, 80 Ill. 283.

Indiana. — *Koerner v. Oberly*, 56 Ind. 284, 26 Am. Rep. 34.

Iowa. — *Fox v. Wunderlich*, 64 Iowa 187; *Miller v. Hammers*, 93 Iowa 746; *Thill v. Pohlman*, 76 Iowa 638.

Kansas. — *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625.

Maine. — *Gilmore v. Mathews*, 67 Me. 517.

Michigan. — *Ganssly v. Perkins*, 30 Mich. 492.

Nebraska. — *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409.

Ohio. — *Duroy v. Blinn*, 11 Ohio St. 331; *Schneider v. Hosier*, 21 Ohio St. 112; *Boyd v. Watt*, 27 Ohio St. 259.

In so far as the case of *Pegram v. Stortz*, 31 W. Va. 220, holds that exemplary damages, in a proper case, may not be inflicted by way of punishment in a civil suit upon a wrongdoer, it is *disapproved* and *overruled* by *Mayer v. Frobe*, 40 W. Va. 246.

doer, when he committed it, must be regarded as having committed against the plaintiff individually, in spite of the injury he must have known the plaintiff was likely to suffer thereby.¹

Circumstances of Abuse and Aggravation. — The simple sale of a single glass of liquor under ordinary circumstances is not sufficient. There must be circumstances of abuse or aggravation on the part of the liquor seller.²

As, for Instance, selling to a known habitual drunkard while intoxicated, or with knowledge that the drunkard has a family dependent upon him for support, or after notice not to sell to the purchaser, or selling without a license on Sunday, or otherwise in violation of law.³

1. Gross Negligence — Wilful and Wanton Wrong. — *Kadgin v. Miller*, 13 Ill. App. 474; *Fox v. Wunderlich*, 64 Iowa 187; *Ganssly v. Perkins*, 30 Mich. 492; *Friend v. Dunks*, 39 Mich. 733; *Larzelere v. Kirchgessner*, 73 Mich. 283; *Peacock v. Oaks*, 85 Mich. 578. But see *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409.

2. Circumstances of Abuse and Aggravation. — *Freese v. Tripp*, 70 Ill. 496; *Kellerman v. Arnold*, 71 Ill. 632; *Murphy v. Curran*, 24 Ill. App. 475; *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625; *Goodenough v. McGrew*, 44 Iowa 670; *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409; *Franklin v. Schermerhorn*, 8 Hun (N. Y.) 115; *Rawlins v. Vidvard*, 34 Hun (N. Y.) 205. But see *Thill v. Pohlman*, 76 Iowa 638.

Under the Indiana Statute a wife cannot recover exemplary damages for the intoxication of her husband. If they are allowed, they should be remitted or the judgment will be reversed on appeal. *Schafer v. Smith*, 63 Ind. 226. See also *Koerner v. Oberly*, 56 Ind. 284, 26 Am. Rep. 34.

Question for Jury. — Whether or not there are, in fact, any circumstances of aggravation in the conduct of the defendant which justify exemplary damages, is a question for the jury upon all the proofs of the case. *Schimmelfenig v. Donovan*, 13 Ill. App. 47; *Goodenough v. McGrew*, 44 Iowa 670; *Kreiter v. Nichols*, 28 Mich. 496; *Kehrig v. Peters*, 41 Mich. 480; *Rawlins v. Vidvard*, 34 Hun (N. Y.) 205; *Schneider v. Hosier*, 21 Ohio St. 112; *Wightman v. Devere*, 33 Wis. 581.

Instruction as to Exemplary Damages. — Where the sale was made to the plaintiff's husband against her request, it is proper to charge the jury that they may give exemplary damages if they believe that the defendant's conduct was wanton and in wilful disregard of the plaintiff's rights. *McMahon v. Sankey*, 133 Ill. 636.

And the court must charge the jury that exemplary damages are to be allowed for positive wrong or gross neglect. *Larzelere v. Kirchgessner*, 73 Mich. 276.

A charge that the jury, in case they should find for the plaintiff, might fix the damages at such sum as they think from the evidence the plaintiff ought to have, not to exceed the *ad damnum*, leaves the jury free to determine whether there was wilful or wanton disregard of the plaintiff's rights so as to justify exemplary damages, and is unobjectionable. *Kennedy v. Sullivan*, 34 Ill. App. 46, *affirmed* 136 Ill. 94.

3. Knowledge that Purchaser Was Habitual Drunkard. — Evidence that the seller knew the

purchaser to be an habitual drunkard, and sold to him while intoxicated, justifies a verdict for exemplary damages. *Weitz v. Ewen*, 50 Iowa 34.

And regular selling to one known to the seller to be an habitual drunkard is a wilful violation of the statute and justifies exemplary damages. *Wolfe v. Johnson*, 45 Ill. App. 122, *affirmed* 152 Ill. 280. But not without affirmative proof that the defendant actually had such knowledge of the buyer's habits. *Larzelere v. Kirchgessner*, 73 Mich. 276.

No Notice Not to Sell. — Exemplary damages should not be imposed if there has been no notice or request not to sell to the injured person, or if the seller did not know that the purchaser had a family. *Steele v. Thompson*, 42 Mich. 594. But if such a request not to sell has been made exemplary damages may be allowed. *Brantigam v. While*, 73 Ill. 561; *Schneider v. Hosier*, 21 Ohio St. 103.

Sales in Disregard of Notice Not to Sell. — It is a ground for exemplary damages that the defendant made the sale complained of after notice not to do so. *Rouse v. Melsheimer*, 82 Mich. 172. Especially when the buyer is an habitual drunkard. *Wolfe v. Johnson*, 45 Ill. App. 122, *affirmed* 152 Ill. 280. But in such case the defendant may testify that he himself refused and instructed his servants not to make the sale forbidden by such notice. *Ketcham v. Fox*, 52 Hun (N. Y.) 284.

When the defendant sells in disregard of a notice not to do so given him by the wife of the purchaser, and the actual damages are twenty-nine dollars, a verdict for two hundred dollars is not excessive. *McEvoy v. Humphrey*, 77 Ill. 388.

Proof that the seller was notified not to sell to the purchaser may be given upon the question of exemplary damages, although such notice was given more than two years prior to the commencement of the action. *Kadgin v. Miller*, 13 Ill. App. 474; *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625.

Where the plaintiff's husband had become a confirmed drunkard, had lost a lucrative business in which he was earning five dollars a day, and had squandered valuable property, and the plaintiff had notified the defendant not to sell any more liquor to her husband, and the jury rendered a verdict of two thousand dollars exemplary damages in addition to ten thousand dollars actual damages, it was held that if the verdict had been larger it could not have been disturbed. *Jewett v. Wanshura*, 43 Iowa 574.

The Court May Remit Excessive Damages and affirm the judgment. *Sibila v. Bahnney*, 34 Ohio St. 399.

To Be Awarded But Once. — And since exemplary damages are punitive in their nature, they can be awarded but once.¹

4. Mitigation of Damages. — The defendant may prove all circumstances tending to mitigate his offense, for the purpose of reducing the exemplary but not the actual damages; as, for instance, that he had given strict orders to his servants not to make the sale complained of, or that the buyer obtained the liquor by tricks and artifices; and such circumstances may be sufficient to entirely bar the recovery of exemplary damages.²

VIII. EVIDENCE — Husband as Witness. — In *Illinois*, in an action by a wife for damages sustained in consequence of the intoxication of her husband, caused

In order to establish her right to exemplary damages, the plaintiff may show the number and age of her children, if she also shows that the defendant knew she had such children, and that they were in danger of being injured or compelled to leave home as a result of the defendant's sale of liquor to the plaintiff's husband. *Ward v. Thompson*, 48 Iowa 588. *Contra, Larzelere v. Kirchgessner*, 73 Mich. 276; *Johnson v. Schultz*, 74 Mich. 75.

Sale in Violation of Sunday Law. — The fact that the liquor was sold on a Sunday, in violation of the statute, may be considered by the jury when the question of exemplary damages is submitted. *Sibila v. Bahney*, 34 Ohio St. 410.

Sales Without License. — Where the defendants sold the liquor without a license and had been so selling for a long time, exemplary damages may be allowed. *Davis v. Standish*, 26 Hun (N. Y.) 608; *Neu v. McKechnie*, 95 N. Y. 632, 47 Am. Rep. 89.

Sales Made After the Commencement of the Pending Suit may be considered by the jury for the sake of assessing exemplary damages. *Bean v. Green*, 33 Ohio St. 444. *Contra, Kearney v. Fitzgerald*, 43 Iowa 580.

Evidence of an Assault by an Intoxicated Husband on His Wife is not admissible in the wife's action, unless it appears that the defendant sold the liquor producing such intoxication. *Applegate v. Winebrenner*, 67 Iowa 235.

Sales Made by Servants Against Master's Instructions. — A liquor dealer is liable in exemplary damages for sales made by his employees within the scope of their authority, although against his instructions and without his knowledge. *Keedy v. Howe*, 72 Ill. 133; *Kehrig v. Peters*, 41 Mich. 475; *Smith v. Reynolds*, 8 Hun (N. Y.) 128.

Sales to a Drunken Man are a wanton wrong and a ground for exemplary damages. *Kennedy v. Sullivan*, 34 Ill. App. 46, *affirmed* 136 Ill. 96.

A Seller Who Knows the Drunken and Helpless Condition of the Buyer, and nevertheless places him in his buggy alone at night, is guilty of gross negligence and liable for the resulting injury in exemplary damages. *Kennedy v. Sullivan*, 34 Ill. App. 46, *affirmed* 136 Ill. 96.

Lessor of Premises. — Where the statute provides for exemplary damages against the lessor of the property where the liquor is sold such damages are not justified by the wanton wrong of the seller. *Ketcham v. Fox*, 52 Hun (N. Y.) 284. There must be legitimate evidence as in other cases to prove a wanton wrong committed by the lessor himself. *Reid v. Terwilliger*, 116 N. Y. 550; *Rawlins v. Vidvard*, 34 Hun (N. Y.) 205.

Evidence that the Defendant Believed His License to Justify the Sale complained of is inadmissible on the question of exemplary damages where the plaintiff's evidence to that end has been excluded under the pleadings. *McCarty v. Wells*, 51 Hun (N. Y.) 171.

Instructions — Repeating Proposition. — Where the jury has been charged that the injury must be shown to have resulted from intoxication caused by liquors sold by the defendant, this charge need not be repeated in speaking of exemplary damages. *McMahon v. Sankey*, 133 Ill. 636.

1. When Several Persons Have Claims for Damages against a liquor dealer, resulting from the same sale of intoxicating liquor, there can be an award of exemplary damages in favor of but one of the claimants, and in a suit by any claimant a judgment given in favor of another for actual and exemplary damages, which has been satisfied, may be given in evidence. *Secor v. Taylor*, 41 Hun (N. Y.) 123.

In Indiana exemplary damages cannot be recovered for an act punishable criminally. *Koerner v. Oberly*, 56 Ind. 284, 26 Am. Rep. 34; *Sruble v. Nodwift*, 11 Ind. 65; *Schafer v. Smith*, 63 Ind. 226. See *Murphy v. Hobbs*, 7 Colo. 541, 49 Am. Rep. 366; *Albrecht v. Walker*, 73 Ill. 69. *Contra, Brannon v. Silvernail*, 81 Ill. 434; *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625; *Cook v. Ellis*, 6 Hill (N. Y.) 466, 41 Am. Dec. 757; *Roberts v. Mason*, 10 Ohio St. 277.

2. Evidence in Mitigation of Damages. — *Keedy v. Howe*, 72 Ill. 133; *Fentz v. Meadows*, 72 Ill. 540; *Brantigan v. White*, 73 Ill. 561; *Bates v. Davis*, 76 Ill. 222; *Kreiter v. Nichols*, 28 Mich. 496; *Schneider v. Hosier*, 21 Ohio St. 103.

The Intemperate Habits of the Buyer Before the Sale complained of do not bar the action, but may affect the damages. *Ulrich v. Gilmore*, 35 Neb. 288; *Dunlavy v. Watson*, 38 Iowa 398; *McMahon v. Sankey*, 133 Ill. 636.

The Fact that the Deceased Had Accumulated Property which at his death went to the plaintiff, does not lessen the damages recoverable for his death. *Houston v. Gran*, 38 Neb. 687.

Evidence of Refusal to Sell to the Party When Intoxicated. — Where it is admitted that the defendant sold to the plaintiff's husband notwithstanding her notice, evidence that the defendant refused to sell to the husband when actually drunk is inadmissible. *Wolfe v. Johnson*, 152 Ill. 280.

Evidence of Recovery from Other Persons for sales during the time covered by the complaint is admissible in mitigation of damages. *Jackson v. Noble*, 54 Iowa 641.

by the sale of liquor to him, the husband is a competent witness in behalf of the wife.¹ But the contrary is the rule in *Indiana*.²

The Subsequent Declarations of the husband as to where he obtained the liquor are inadmissible.³

Direct Proof of Violation of Law. — Whenever damages are claimed under these statutes direct proof is necessary to show that their provisions have been violated. But such violation need not be proved beyond a reasonable doubt. A mere preponderance of evidence is sufficient.⁴

Other Matters of Evidence have been set out under appropriate divisions in the article to which reference is made.

1. Husband as Witness for Wife. — *Davenport v. Ryan*, 81 Ill. 218; *Noy v. Creed*, 1 Ill. App. 557. See the title WITNESSES.

2. Jackson v. Reeves, 53 Ind. 231.

3. Subsequent Declaration of Husband. — *Richards v. Moore*, 62 Vt. 217; *Brockway v. Paterson*, 72 Mich. 122; *Kehrig v. Peters*, 41 Mich. 475.

Remarks made by the husband tending to exculpate the liquor seller, but not as part of any transaction in dispute, are inadmissible; they could not bind the plaintiff. *Kehrig v. Peters*, 41 Mich. 475. See also *Judge v. Jordan*, 81 Iowa 519.

4. Hall v. Barnes, 82 Ill. 228; *Proctor v. People*, 24 Ill. App. 599; *Roberge v. Burnham*, 124 Mass. 277; *Lyon v. Fleahmann*, 34 Ohio St. 151. Compare *Com. v. Finnegan*, 124 Mass. 324.

Injury to Means of Support. — Where the injury alleged is to the plaintiff's means of support, the evidence must be confined to such injury. *Hackett v. Smelsley*, 77 Ill. 109; *Elshire v. Schuyler*, 15 Neb. 561.

Habits of Intoxication. — And where the complaint alleges a sale to one who was in the habit of becoming intoxicated, the evidence must show that the buyer had such habit. *Ferrel v. State*, 48 Ind. 118.

In *Doty v. Postal*, 87 Mich. 143, in a suit by a wife against a liquor seller and his sureties, to recover damages for the killing of her husband by a drunken person, who, it was alleged, obtained his liquor of the defendant dealer, evidence showing that the slayer of the husband was a person in the habit of becoming intoxicated was held admissible for the purpose of showing that the sale of the liquor was unlawful.

The Statement of a Physician who was in the

habit of being intoxicated, made at the times of his purchases of liquor, that he wanted it for a patient and for medical purposes, does not, in the absence of proof to the contrary, raise the presumption that it is a sale to the patient. *Boyd v. Watt*, 27 Ohio St. 259.

Prior Habits — Evidence in Rebuttal. — Where the defendant introduced testimony to show that the plaintiff's husband had been a confirmed drunkard for years, and that such condition was in no manner created by the acts of the defendant, evidence of sales more than two years prior to the beginning of the action may be introduced in rebuttal. *Gustafson v. Wind*, 62 Iowa 281.

In an Action Against a Lessor and Lessee for a sale to the plaintiff's husband, evidence of a conversation between the lessee's husband and the plaintiff five years before the trial and before the lease, and not at the leased premises, is inadmissible. *Ketcham v. Fox*, 52 Hun (N. Y.) 284.

Indebtedness of Defendant to Plaintiff's Husband. — Evidence that the defendant owed the plaintiff's deceased husband for work and refused to pay the plaintiff is improper. *Karau v. Pease*, 45 Ill. App. 382.

The Former Conviction of the Defendant for illegal sales may be shown for the purpose of affecting the weight of his testimony. *Morenus v. Crawford*, 51 Hun (N. Y.) 89.

Expert Testimony. — In an action for sales causing suicide, where the evidence is conflicting as to whether or not the deceased was intoxicated for several days before his death, physicians may answer hypothetical questions as to the probable effect of intoxicants as a cause of suicide. *Poffenbarger v. Smith*, 27 Neb. 788.

CIVIL DEATH.

I. ANCIENT DOCTRINE OF CIVIL DEATH FOLLOWING BANISHMENT OR RELIGIOUS PROFESSION, 64.

II. CIVIL DEATH FOLLOWING CONVICTION OF FELONY, 65.

CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* connected with this subject, see *ATTAINDER*, vol. 3, p. 248; *CRIMINAL LAW*; *ESCHEAT*; *FORFEITURE*; *PARDON*.

I. ANCIENT DOCTRINE OF CIVIL DEATH FOLLOWING BANISHMENT OR RELIGIOUS PROFESSION. — In the strict and proper sense of the term, civil death took place at the common law when a man was banished, or abjured the realm, or entered into a monastery and became there a monk professed. A person, under these circumstances, was said to be civilly dead, *civiliter mortuus*, or dead in law, and his estate descended to his heirs as it would have done in the event of his natural death.¹

1. 1 Bl. Com. 133; *Baltimore v. Chester*, 53 Vt. 318, 38 Am. Rep. 677.

"There is a death in deed [natural death], and there is a civil death, or death in law, *mors civilis* and *mors naturalis*." Co. Litt. 132a.

Civil Death by Abjuration of the Realm. — "By the ancient common law of *England*, if a man committed any felony, excepting sacrilege, and fled to a parish church, he might within forty days before the coroner confess the felony, and take an oath to abjure the kingdom forever; and if he thus confessed and took the oath, he was thereby attainted of the felony, and then he had forty days from the coming of the coroner to provide and prepare for his voyage, and the coroner assigned to him such a port as he chose for his departure out of the kingdom; and if he did not go straightway out of the kingdom, or being gone out did return without license, he had judgment to be hanged, except he was a clerk, and then he had his clergy. This practice was what the law called abjuration; and being by several regulations (in the time of H. 8) in effect taken away, the revival thereof was by 35 Eliz., c. 1, § 2, thought to be a wholesome severity, fit to be inflicted on the protestant dissenters of those times; but the toleration act (1 W. & M. Stat. 1, c. 18, § 4) does expressly, and by name, exempt the protestant dissenters from the penalties of 35 Eliz. See Sir Peter King's speech in maintenance of the second article of impeachment, at Dr. Sacheverel's trial, *State Trials*, vol. 5, p. 693." *Newsome v. Bowyer*, 3 P. Wms. 38, note. See also *Avery v. Everett*, 110 N. Y. 328, 6 Am. St. Rep. 368.

Civil Death by Entering into Religion, and Its Consequences. — Members of regular religious houses, "which consisted of such persons as had professed themselves and vowed three

things, that is to say, obedience, voluntary poverty, and perpetual chastity, * * * are called in our law dead persons in law. For after such profession their heirs shall have their lands, and their executors or administrators their goods, and that was called *mors civilis*, which was the reason that when a lease for life was made, always the *habendum* was to have and to hold to him, *durante vita sua naturali*, for it was then taken that if the *habendum* had been *durante vita sua* (without saying *naturali*), the civil death, that is to say, the entry into religion, had determined it." *Canterburie's Case*, 2 Coke 48b.

"A monk was therefore accounted *civiliter mortuus*, and when he entered into religion might, like other dying men, make his testament and executors; or, if he made none, the ordinary might grant administration to his next of kin, as if he were actually dead intestate. And such executors and administrators had the same power, and might bring the same actions for debts due to the religious, and were liable to the same actions for those due from him, as if he were naturally deceased. Nay, so far has this principle been carried, that when one was bound in a bond to an abbot and his successors, and afterwards made executors, and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof; here the law gave him, in the capacity of abbot, an action of debt against his own executors to recover the money due. In short, a monk or religious was so effectually dead in law that a lease made even to a third person during the life (generally) of one who afterwards became a monk, determined by such his entry into religion; for which reason leases and other conveyances for life were usually made to have and to hold for the term

II. CIVIL DEATH FOLLOWING CONVICTION OF FELONY. — But while civil death was properly limited to the three cases mentioned above,¹ a felon convicted of a capital offense or sentenced to imprisonment for life was said to be civilly dead.²

A felon so convicted is, however, only to be regarded as dead *sub modo*, and his position is, in many respects, different from that of one who had been banished or entered into religion.³ Such a convicted felon is disqualified from being a witness,⁴ and is not entitled to bring an action;⁵ but an action may be brought against him,⁶ and, while he can enforce no contract, he may make valid contracts "with those whose consciences bind them to fulfil their engagements."⁷ His property rights, moreover, are unaffected by his civil death,⁸ although they may be lost to himself and his representatives in con-

of one's *natural life*." 1 Bl. Com. 132, *citing* Litt., § 200; Coke on Litt. 132, 133; *Canterburie's Case*, 2 Coke 48.

Dower of Wife. — Even in the case of entry into religion the fiction of civil death was not carried throughout, for the wife of a person who became a monk was not to be endowed until his death, and the monk himself could sue *en autre droit*. *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 129, *per* Kent, Chancellor, *citing* Litt., § 200; Coke on Litt. 132b.

But as to the question of the wife's right of dower the authorities are divided. In *Marsh v. Hutchinson*, 2 B. & P. 231, Lord Eldon said: "The husband being civilly dead, the wife was entitled to dower of his land, in the same manner as if he were actually dead; so she became entitled to the enjoyment and profits of her own land, though if he had not been civilly dead, he would have been seized of the lands in her right."

The rule announced by Lord Eldon seems to have been the rule in cases of banishment and abjuration, while some of the older authorities declare to the contrary in case of religious profession. See note 2 B. & P. 231.

Civil Death of the Husband Gives the Wife Rights of a Feme Sole. — By the common law, when a husband is banished, abjures the realm, or goes into exile, he becomes *civiliter mortuus*, and the wife's power of contracting, suing, and being sued revives. — *v. Wilmore*, 1 Rolle 400; *Deerly v. Mazarine*, 1 Ld. Raym. 147, 1 Salk. 116; *Portland v. Prodgers*, 2 Vern. 104; *Newsome v. Bowyer*, 3 P. Wms. 37; *Sparrow v. Carruthers*, 1 T. R. 6, note *a*, 2 Bl. 1197, *cited* in 2 B. & P. 233. See also *Cornwall v. Hoyt*, 7 Conn. 427; *Cutter v. Butler*, 25 N. H. 353, 57 Am. Dec. 330.

Civil Death Abolished. — Civil death as a consequence of abjuration of the realm was abolished by stat. 21 James I., c. 28, and civil death resulting from entering into religion was not recognized after the Reformation. 1 Bl. Com. 132; *Rex v. Portington*, 1 Salk. 162; *Baltimore v. Chester*, 53 Vt. 318, 38 Am. Rep. 677.

It seems that civil death may still occur in *England* by outlawry or attainder for treason or felony. *Williams on Real Prop.*, 23. As to attainder, note, however, stats. 33 & 34, Vict. c. 23, which wholly abolished attainder, corruption of blood, forfeiture, and escheat for treason or felony, preserving them, however, in the case of outlawry.

An Insolvent Corporation. — When a corpora-

tion becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds which in other circumstances are as much the absolute property of the corporation as any man's property is his. *Graham v. La Crosse, etc.*, R. Co., 102 U. S. 160.

An Habitual Drunkard. — A person found to be an habitual drunkard is not civilly dead so as to transfer his rights and responsibilities to his trustee as administrator. *Steel v. Young*, 4 Watts (Pa.) 459.

A Bankrupt is for many purposes *civiliter mortuus*. After the filing of the petition in bankruptcy, all the property rights of the debtor are *ipso facto* in abeyance until its adjudication. *International Bank v. Sherman*, 101 U. S. 406.

1. *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 129; *Avery v. Everett*, 110 N. Y. 327, 6 Am. St. Rep. 368; *Baltimore v. Chester*, 53 Vt. 318, 38 Am. Rep. 677.

2. Coke on Litt. 130a.

3. *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118. See also *Rankin v. Rankin*, 6 T. B. Mon. (Ky.) 532.

4. See the title WITNESSES.

5. Coke on Litt., § 199, note; 1 Chitty Cr. Law 724; *Cannon v. Windsor*, 1 Houst. (Del.) 144.

6. *Banyster v. Trussell*, Cro. Eliz. 516; *Ramsden v. Macdonald*, 1 Wils. 217; *Coppin v. Gunner*, 2 Ld. Raym. 1572; *Cannon v. Windsor*, 1 Houst. (Del.) 144; *Avery v. Everett*, 110 N. Y. 317, 6 Am. St. Rep. 368; *Davis v. Duffie*, 1 Abb. App. Dec. (N. Y.) 489. But see *Rice County v. Lawrence*, 29 Kan. 158; *O'Brien v. Hagan*, 1 Duer (N. Y.) 664.

7. *Kynnaid v. Leslie*, L. R. 1 C. P. 389, *per* Willes, J.

8. *Rankin v. Rankin*, 6 T. B. Mon. (Ky.) 531; *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118; *Avery v. Everett*, 110 N. Y. 317, 6 Am. St. Rep. 368, *affirming* 36 Hun (N. Y.) 10. See also *Coppin v. Gunner*, 2 Ld. Raym. 1572; 1 *Jarman on Wills* (5th ed., by Bigelow) 44.

Attainted Person Can Devise or Grant, or Take by Devise or Grant. — A person attainted could devise his lands subject only to the right of entry for forfeiture, and could take lands by devise or purchase. He could be grantor or grantee after attainder, and the grant would be good as against all persons except the king. *Avery v. Everett*, 110 N. Y. 325, 6 Am. St.

sequence of the doctrines of escheat and forfeiture.¹ He is himself under the protection of the law, and to kill him without warrant of law is murder.²

Statutes. — It is provided by statute in *New York* that a person sentenced to imprisonment for life is thereafter deemed civilly dead.³ Similar provisions exist in *California* and *Missouri*.⁴

Rep. 368, *per* Andrews, J.; *La Chapelle v. Burpee*, 69 Hun (N. Y.) 436.

Retains Freehold of Lands. — After attainder of treason, and until office found, the freehold and the fee simple are, in fact, in the person attainted as long as he lives, for, as he has capacity to take lands by a new purchase, so he has power to retain his ancient possessions, and shall be tenant to every *præcipe*. Nichols *v.* Nichols, Plowd. 486.

A Person Attainted May Demise His Lands before office found. *Doe v. Pritchard*, 5 B. & Ad. 765, 27 E. C. L. 179. In delivering judgment in this case, Denman, C. J., said: "It is laid down in Perkins' Profitable Book, tit. Grants, § 26, that 'a man attainted of felony or murder, etc., may make a grant of a rent or common or a feoffment, etc., and the same shall bind all persons but the king (for his time) and the lord of whom the land is holden.' This passage is referred to in Comyns' Digest, tit. Capacity, D. 6. The same doctrine is laid down in Sheppard's Touchstone 232. The passage in Co. Litt. 42b, which seems at first sight to be contrary, will, on examination, be found to be consistent with these authorities, for, after stating that persons attainted of felony have no ability to enfeof, etc., he concludes: 'For the feoffments, etc., of these may be avoided,' and doubtless they may by the king."

Personal Property. — By attainder, all the personal property and rights of action with respect to property accruing to the party attainted, either before or after attainder, are vested in the crown without office found. *Bullock v. Dodds*, 2 B. & Ald. 258.

1. See **ATTAINDER**, vol. 3, p. 248; **ESCHEAT**; **FORFEITURE**.

In *Avery v. Everett*, 110 N. Y. 324, 6 Am. St. Rep. 368, Andrews, J., said: "The forfeiture of the estate of the tainted felon to the king or to the lord was not a consequence of the situation in which he was placed of *civilliter mortuus*, but proceeded upon distinct and independent reasons."

2. 3 Inst. 215; Hawk. P. C. 80, c. 31, § 15; Viner's Abr., tit. Attainder (B) 2.

Within Protection of Law. — In *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 130, Kent, Ch., said: "A person attainted is not absolutely at the disposal of the crown. He is so for the ends of public justice, and for no other purpose. Until execution, his creditors have an interest in his person for securing their debts, and he is himself under the protection of the law, and to kill him, without warrant of law, is murder. He was, indeed, disabled to sue in his own name; but if beaten or maimed while under attainder, or if a woman was ravished while under attainder, and a pardon afterwards ensued, the party injured might maintain an action or appeal, as the case might require, for the intermediate injury."

3. **New York.** — New York Penal Code, § 708.

In *Avery v. Everett*, 110 N. Y. 332, 6 Am. St. Rep. 368, Andrews, J., after declaring that the statute did not affect the property rights of convicted felons, proceeded as follows: "The disabilities flowing from the situation of *civilliter mortuus* have a wide scope, without including this incident. The statute, without expressly declaring this result, assumes that a life sentence of the husband *ipso facto* dissolves his marriage. 2 N. Y. Rev. Stat. 687, § 9, subd. 6. The convict cannot sue, although he may be sued, and his property is answerable to his creditors; but he may defend an action brought against him. N. Y. Code of Civ. Pro., § 131; *Davis v. Duffie*, 1 Abb. App. Dec. (N. Y.) 489; *Bowles v. Habermann*, 95 N. Y. 246. He cannot enter into executory contracts and call in aid the courts to enforce them, but he may transfer his property by will or deed. See *Rankin v. Rankin*, 6 T. B. Mon. (Ky.) 531. His political rights are taken from him. His wife and children owe him no fealty or obedience."

The statute is merely declaratory of the common law. *Avery v. Everett*, 110 N. Y. 317, 6 Am. St. Rep. 368, *affirming* 36 Hun (N. Y.) 10.

Administration cannot be granted upon the estate of a felon sentenced to life imprisonment. *Matter of Zeph*, 50 Hun (N. Y.) 524. See also the following cases decided under the provisions of the New York statute: *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118, *overruling* in part *Troup v. Wood*, 4 Johns. Ch. (N. Y.) 228; *Jackson v. Catlin*, 2 Johns. (N. Y.) 252, 3 Am. Dec. 415; *Morris v. Walsh*, 14 Abb. Pr. (N. Y. Super. Ct.) 387; *Bonnell v. Rome*, etc., R. Co., 12 Hun (N. Y.) 218; *Graham v. Adams*, 2 Johns. Cas. (N. Y.) 408; *Matter of Deming*, 10 Johns. (N. Y.) 232.

4. **California.** — Cal. Penal Code, § 674.

In *Matter of Nerac's Estate*, 35 Cal. 396, 95 Am. Dec. 111, the court said: "The forfeitures and disabilities imposed by the common law upon persons attainted of felony are unknown to the laws of this state. No consequences follow, except such as are declared in the section to which we have referred. If the convict be sentenced for life, he becomes *civilliter mortuus*, or dead in law, in respect to his estate, as if he was dead in fact. If, however, he be sentenced for a term less than life, his civil rights are only suspended during the term, and he forfeits only all public offices and private trusts, authority and power."

Missouri. — In *Williams v. Shackleford*, 97 Mo. 322, the court, after referring to the statutes, said: "The effect of these provisions is to preserve the inheritance of a convicted felon from forfeiture through corruption of blood, but to deprive him of the power of alienating or incumbering his property during the term of his sentence of imprisonment. * * * The right of exclusive individual dominion over property is a civil right, the

Civil Death by Sentence Held Not to Exist.—In several states the doctrine of civil death as a consequence of life imprisonment has been held not to exist.¹

CIVILITER.—Civily; opposed to *criminaliter* or criminally.²

CIVILITER MORTUUS.—See the title CIVIL DEATH.

CIVILIZATION.—The art of civilizing or the state of being civilized; refinement; culture.³

creature of organized society, the right of a citizen of an organized government, and this right, under our laws, cannot be forfeited by attainder of felony. In the case of a convict felon for life it is transmitted from him to his heirs or legal representatives. In the case of a felon convict for a term of years it is suspended during the term of his imprisonment, unless transmitted *ad interim* to a trustee under the provisions of the statute, to be exercised for the benefit of his family and creditors, and to be resumed again when he is discharged."

No Civil Death by Sentence in the Federal Courts.—The state statutes suspending the civil rights of a person sentenced to the penitentiary, or declaring one *civiliter mortuus* if sentenced to life imprisonment, apply only to sentence by state courts. There are no similar acts as to sentences by the federal courts, and without such acts there is no like disability. *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118; *Presbury v. Hull*, 34 Mo. 20.

1. Felon Imprisoned for Life Not Civilly Dead.—*Cannon v. Windsor*, 1 Houst. (Del.) 144; *Willingham v. King*, 23 Fla. 478; *Dade Coal Co. v. Haslett*, 83 Ga. 549; *Frazer v. Fulcher*, 17 Ohio 260; *Davis v. Laning*, 85 Tex. 39, 34 Am. St. Rep. 784.

Letters of administration cannot be granted upon the estate of a person sentenced to imprisonment for life. *Frazer v. Fulcher*, 17 Ohio 260; *Davis v. Laning*, 85 Tex. 39, 34 Am. St. Rep. 784.

In *Rhode Island* a person convicted and sentenced to imprisonment is neither civilly dead nor deprived of his rights of property, and he may maintain an action to enforce his property rights. *Kenyon v. Saunders*, 18 R. I. 590. The court said: "Under our law (Pub. Stat. R. I., c. 248, § 34), no conviction or sentence for any offense whatsoever works a forfeiture of estate. The reason for the common-law rule does not here exist, and an enforcement of it might practically work a forfeiture of estate." It was further declared that the Public Statutes of Rhode Island, c. 248, § 52, prohibiting a convict from making a will or any conveyance of his property, or any right thereof, during his imprisonment, did not have the effect of preventing him from taking an appeal in an action brought by him, nor avoid the appeal bond given by him in the proceeding, since such a bond is not to be considered a conveyance of property.

In *Vermont* it has been held that imprisonment for life does not result in civil death, the court declaring that, except in the case of entrance into religion, civil death involved an incapacity to hold property or to sue in the

king's courts, attended with forfeiture of the estate and corruption of blood; that perpetual imprisonment or perpetual banishment, without forfeiture of the estate, did not, in England, produce civil death; and that, as crimes do not in Vermont work a forfeiture of the estate or corruption of blood, there is lacking that taint from crime which is at the common law an essential element of civil death. *Baltimore v. Chester*, 53 Vt. 315, 38 Am. Rep. 677. In this case the court, by Veazey, J., said: "We have statutes providing what shall be the effect of imprisonment for crime in certain respects. A life sentence operates as the natural death of a person so far as it in any way relates to his marriage or to the settlement of his estate. Vt. Gen. Stat., c. 120, § 19. A sentence for three years or more is a cause for divorce. Chapter 70, § 18. For certain purposes, the wife is deemed a *feme sole* while the husband is in state prison. Chapter 71, § 13. These seem to be all based on the principle that a prisoner's legal rights, subject to his personal restraint, are unaffected by the imprisonment, except as specially provided by statute."

2. Bouvier's Law Dict.

The term, with its opposite, *criminaliter*, occurs in the civil law, from which source they were introduced (most probably through Bracton) into the law of every land. *Burrill's Law Dict.* It is used to distinguish civil actions from criminal prosecutions. The distinction between answering *civiliter* and *criminaliter* for acts injurious to others is this: In the latter case the maxim *actus non facit reum nisi mens sit rea* applies; but in the former the intent is immaterial if the act done is injurious to another. *Haycraft v. Creasy*, 2 East 104.

3. Webster's Dict.

Indians.—In *Roche v. Washington*, 19 Ind. 56, *Perkins, J.*, said: "*Civilization* is a term which covers several states of society. It is relative, and has not a fixed sense; but in all its applications it is limited to a state of society above that among the Indians of whom we are speaking [Miami tribe]. It implies an improved and progressive condition of the people living under an organized government, with systematized labor, individual ownership of the soil, individual accumulations of property, humane and somewhat cultivated manners and customs, the institution of the family, with well-defined and respected domestic and social relations, institutions of learning, intellectual activity, etc. We know historically that the North American Indians are classed as savage and not as *civilized* people; and that in fact it is problematical whether they are susceptible of *civilization*."

CIVIL RIGHTS.

BY ARCHIBALD R. WATSON.

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CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* relating to this subject, see the following titles in this work: *ARREST*, vol. 2, p. 832; *CITIZENSHIP*, ante, p. 14; *CONFLICT OF LAWS*, post; *CONSTITUTIONAL LAW*; *DOMICIL*; *DUE PROCESS OF LAW*; *ELECTIONS*; *FOREIGN CORPORATIONS*; *INTERNATIONAL LAW*; *JURY AND JURY TRIALS*; *SCHOOLS*; *THEATRES*; *UNITED STATES COURTS*.

I. DEFINITION. — Civil rights may be broadly defined as those rights which appertain to a person by virtue of his citizenship in a state or community.¹ More specifically, the term has been applied to certain rights created or secured to citizens of the United States by the Thirteenth and Fourteenth Amendments to the Federal Constitution and by various Acts of Congress passed in pursuance thereof.²

Scope of Article. — In the present article, however, the subject of civil rights has been taken to include not only those rights which were created or secured by the Thirteenth and Fourteenth Articles of Amendments to the Constitution of the United States, but also the privileges and immunities of citizens of one state in every other state, as secured by section two of Article IV. of the Federal Constitution, and the political right of immunity from discrimination for stipulated causes in the exercise of the right of suffrage, guaranteed to citizens of the United States by Article XV. of the Amendments to the Constitution.

II. NATURE AND ORIGIN OF CIVIL RIGHTS. — The general statement that civil rights are the rights of the citizen conveys no very definite idea unless coupled with a definition, description, or enumeration of what are the rights of the citizen as such.

1. Civil Rights as Affected by Dual Citizenship. — In this country, where from the form of our government there results a sort of dual citizenship,³ it is conceded that there are certain rights belonging to persons as citizens of the states, and others belonging to the same persons as citizens of the United States.⁴

a. CIVIL RIGHTS OF THE CITIZEN OF THE STATE AS SUCH. — Though neither class of rights, those of the citizen of the state as such, or of the United States, has ever been precisely defined,⁵ it has been declared with reference to the former that they are such rights as are fundamental and belong of right to the citizens of all free governments.⁶

1. See Black's Law Dict., Civil Rights; Abbott's Law Dict., Civil Rights.

Rights Required by the Citizen in Return for Allegiance. — Civil rights may, perhaps, be not inaccurately described as those acquired by the individual when he becomes a citizen, in return for allegiance. See the observations of Mills, J., in a dissenting opinion in *Amy v. Smith*, 1 Litt. (Ky.) 326, quoted in note to title CITIZENSHIP, *ante*, p. 15.

2. See Anderson's Dictionary of Law, title Right, Civil Right; Black's Law Dict., Civil Rights; Bouvier's Law Dict., Civil Rights.

3. See the title CITIZENSHIP, *ante*, p. 14.

4. "We Have in Our Political System," said Mr. Chief Justice Waite, in *U. S. v. Cruikshank*, 92 U. S. 549, "a government of the United States and a government of each of the several states. Each one of these governments is distinct from the others, and each has citizens of its own, who owe it allegiance and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a state, but his rights of citizenship under one of these governments will be different from those he has under the other."

Rights of Inhabitants of Territories. — The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, state and national; their political rights are franchises which they hold as privileges in the

legislative discretion of the Congress of the United States. *Boyd v. Nebraska*, 143 U. S. 135; *People v. De La Guerra*, 40 Cal. 311.

5. The Supreme Court of the United States has declared it to be safer, in general, to leave these privileges and immunities to be determined in each case upon a view of the particular rights asserted and denied, rather than to bind itself by the formulation of a definition. See *Conner v. Elliott*, 18 How. (U. S.) 591; *Ward v. Maryland*, 12 Wall. (U. S.) 418.

6. **Privilege and Immunities of Citizens of Each State in Sister States.** — The civil rights of the citizens of each state in every other state are secured in section 2 of Article IV. of the Constitution of the United States by the provision that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." As to the construction of the words "privileges and immunities," as here used, Mr. Justice Washington, in *Corfield v. Coryell*, 4 Wash. (U. S.) 371, which is referred to in *Slaughter-House Cases*, 16 Wall. (U. S.) 75, as the leading case on the subject, said: "The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental prin-

5. **CIVIL RIGHTS OF THE CITIZEN OF THE UNITED STATES.** — As to the civil rights of the citizen of the United States, they have been described as such as owe their existence to the Federal government, its national character, constitution, or laws.¹ Accordingly, it has been stated to be the right of the citizen of the United States, as such, "to come to the seat of government to assert any claim he may have upon that government or to transact any business he may have with it; to seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its seaports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several states."²

2. Civil as Distinguished from Political Rights. — In this connection it has

ciples are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." And see *Ward v. Maryland*, 12 Wall. (U. S.) 430, where this definition (if it can be so termed) is approved. Mr. Justice Miller, in the *Slaughter-House Cases*, 16 Wall. (U. S.) 76, said, with reference to these observations of Mr. Justice Washington: "The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted." In the case of *Paul v. Virginia*, 8 Wall. (U. S.) 180, the court, in expounding this clause of the Constitution, says that "the privileges and immunities secured to citizens of each state in the several states by the provision in question, are those privileges and immunities which are common to the citizens in the latter states under their constitution and laws by virtue of their being citizens." See also *In re Parrott*, 1 Fed. Rep. 504.

In *Ward v. Maryland*, 12 Wall. (U. S.) 418, Mr. Justice Clifford said: "Beyond doubt, those words [privileges and immunities] are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation, to acquire personal property, to take and hold real estate, to maintain actions in the courts of the state, and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens." See also *Buffington v. Grosvenor*, 46 Kan. 735, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 253.

The phrase "privileges and immunities" which occurs in Article IV., section 2, of the United States Constitution, and in the Fourteenth Amendment, was taken from Article IV. of the Articles of Confederation, which provided that "the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in

the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof," etc. In *Van Valkenburg v. Brown*, 43 Cal. 48, 13 Am. Rep. 136, Wallace, C. J., after quoting the above provision of the Articles of Confederation, declares that, when the phrase was used in the Federal Constitution, it had acquired a distinctive meaning. The words "comprehended the enjoyment of life and liberty and the right to acquire and possess property and to demand and receive the protection of the government in aid of these. They included the right to sue and defend in the courts, to have the benefit of the writ of habeas corpus, and an exemption from higher taxes or heavier impositions than were to be borne by other persons under like conditions and circumstances."

Corporations Not Citizens. — Corporations are not citizens within the meaning of Art. IV., § 2, of the Constitution of the United States. The term "citizens," as there used, applies only to natural persons, members of the body politic, owing allegiance to the state, not to artificial persons created by the legislature and possessing only the attributes which the legislature has prescribed. *Paul v. Virginia*, 8 Wall. (U. S.) 169; *Pembina Consol. Silver Min., etc., Co. v. Pennsylvania*, 125 U. S. 181. See the title FOREIGN CORPORATIONS.

1. Miller, J., in *Slaughter-House Cases*, 16 Wall. (U. S.) 36.

2. *Crandall v. Nevada*, 6 Wall. (U. S.) 36; to which Miller, J., delivering the opinion of the court, in *Slaughter-House Cases*, 16 Wall. (U. S.) 79, adds: "Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property, when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several states, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a state."

been frequently said that the right to vote is not within the purview of the Fourteenth Amendment, prohibiting to the states the abridgment of any of the privileges or immunities of the citizens of the United States;¹ such right being a political and not a civil right.² Thus a woman, though she may be a citizen, is not clothed with the right of suffrage by the provision of the amendment referred to.³

3. Whether Civil Rights of Constitutional Creation—*a. CONSTITUTIONAL GUARANTY OF RIGHTS OF CITIZENS OF SEVERAL STATES.*—It has been held that the provision of the Federal Constitution securing to the citizens of each state the privileges and immunities of citizens in the several states, did not create any right for the citizens of the states, but only secured to the citizens of each state such rights in other states as are granted to the citizens of the latter as such.⁴

b. THIRTEENTH AMENDMENT AS CONFERRING THE CIVIL RIGHT OF LIBERTY.—While the Thirteenth Amendment to the Federal Constitution cannot be said, in the abstract, to have created the civil right of liberty, it conferred this right upon all such persons within the jurisdiction of the United States, as were, at the time of its adoption, living in slavery or involuntary servitude.⁵ But the abolition of slavery and involuntary servitude conferred no other civil right than that of liberty. Enfranchised persons were not thereby made citizens, nor were they, by virtue of the Thirteenth Amendment alone, made capable in any manner of becoming citizens.⁶

c. FOURTEENTH AMENDMENT AS CREATIVE OF CIVIL RIGHTS.—The Fourteenth Amendment created no civil rights, unless the creation of citizens, entitled to civil rights, may be so regarded.⁷

1. *U. S. v. Cruikshank*, 92 U. S. 555; *U. S. v. Reese*, 92 U. S. 214; *Swayne, J.*, in *U. S. v. Rhodes*, 1 Abb. (U. S.) 43; *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136; *Hawley, J.*, in *State v. Ah Chew*, 16 Nev. 59, 40 Am. Rep. 488.

2. "A state may deny all her political rights to an individual, and yet he may be a citizen." *Per Mills, J.*, in dissenting opinion in *Amy v. Smith*, 1 Litt. (Ky.) 326. See also *Lanz v. Randall*, 4 Dill. (U. S.) 425; *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136, where the independence of political and civil rights is discussed and extensively illustrated by an examination of the enactments in several of the United States.

3. *Minor v. Happersett*, 21 Wall. (U. S.) 162; *Hawley, J.*, in *State v. Ah Chew*, 16 Nev. 59, 40 Am. Rep. 488; *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136.

4. **Art. IV., Section 2, of the United States Constitution**, "did not," said *Miller, J.*, in *Slaughter-House Cases*, 16 Wall. (U. S.) 36, "create those rights which it called privileges and immunities of citizens of the states: It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

5. See opinion of Mr. Justice Miller, in *Slaughter-House Cases*, 16 Wall. (U. S.) 80.

6. *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136; *Donnell v. State*, 48 Miss. 661, 12 Am. Rep. 375. And see *Scott v. Sandford*, 19 How. (U. S.) 393; *Marshall v. Donovan*, 10 Bush (Ky.) 681; *State v. Strander*, 11 W. Va. 803, 27 Am. Rep. 606.

"The Thirteenth Amendment," said *Wallace, C. J.*, in *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136, "though conferring the boon of freedom upon native-born persons of African blood, had yet left them under an insuperable bar as to citizenship; and it was mainly to remedy this condition that the Fourteenth Amendment was adopted."

7. **The Fourteenth Amendment Created No New Rights**, but only extended the operation of existing rights and furnished additional protection for such rights. *Barbier v. Connolly*, 113 U. S. 27; *U. S. v. Sanges*, 48 Fed. Rep. 78; *Ex p. Plessy*, 45 La. Ann. 80. And see *Wallace, C. J.*, in *Ward v. Flood*, 48 Cal. 50, 17 Am. Rep. 405.

Right of Citizens of One State to Become Citizens of Another State.—One civil right belonging to the citizen of the United States as such is that he can, of his own volition, become a citizen of any state of the Union by a *bona fide* residence therein, with the same rights as other citizens of that state. This privilege is conferred, if not created, by the Fourteenth Amendment. Mr. Justice Miller, in *Slaughter-House Cases*, 16 Wall. (U. S.) 80.

Fourteenth Amendment as Affecting Mongolian Race.—In the case of *State v. Ah Chew*, 16 Nev. 58, 40 Am. Rep. 488, it was said that the Fourteenth Amendment did not confer the right of citizenship on the Mongolian race, except such as are born within the United States. See also the title **CITIZENSHIP**, *ante*, p. 14.

d. FIFTEENTH AMENDMENT AS CREATIVE OF CIVIL RIGHTS. — Unless immunity from discrimination for certain reasons in the right to exercise a political privilege can be denominated a civil right, the Fifteenth Amendment created no civil rights whatever.¹ It does not confer even the political right of suffrage upon any one, but its effect is to invest citizens of the United States with a new constitutional right, — that of exemption from discrimination in the enjoyment of the elective franchise, on account of race, color, or previous condition of servitude.²

III. SECURITIES FOR THE ENJOYMENT OF CIVIL RIGHTS—1. Provisions of Federal Constitution and Legislation—*a.* ARTICLE FOUR, SECTION TWO OF

The Main Purpose of the Fourteenth Amendment to the Constitution of the United States was to confer the status of citizenship upon a numerous class of persons domiciled within the limits of the United States who could not be brought within the operation of the naturalization laws because native born, and whose birth, though native, had at the same time not invested them with the status of citizenship. Such persons were not white persons, but in the main were of African blood, who had been held in slavery in this country, or, having themselves never been held in slavery, were the native-born descendants of slaves. See *Slaughter-House Cases*, 16 Wall. (U. S.) 36; *Scott v. Sandford*, 19 How. (U. S.) 393; Mr. Justice Strong, in *Strauder v. West Virginia*, 100 U. S. 303; *Slaughter-House Cases*, 16 Wall. (U. S.) 36; *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136; *Marshall v. Donovan*, 10 Bush (Ky.) 688.

Should Be Liberally Construed. — The Fourteenth Amendment, said Mr. Justice Strong, in *Strauder v. West Virginia*, 100 U. S. 307, should be liberally construed to carry out and effectuate its objects.

1. See *supra*, this title, *Civil as Distinguished from Political Rights*. And see *Minor v. Happersett*, 21 Wall. (U. S.) 178.

2. Security Against Discrimination under Fifteenth Amendment. — *Minor v. Happersett*, 21 Wall. (U. S.) 178; *U. S. v. Reese*, 92 U. S. 214; *U. S. v. Cruikshank*, 92 U. S. 555; *U. S. v. Harris*, 106 U. S. 637. See also *Wallace, J.*, in *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136; *Anthony v. Halderman*, 7 Kan. 50; *Wood v. Fitzgerald*, 3 Oregon 568.

In *U. S. v. Cruikshank*, 92 U. S. 555, Waite, C. J., speaking for the court, declared that "the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the states comes from the states; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."

Fifteenth Amendment as Immediate Source of Right to Vote. — In *Ex p. Yarbrough*, 110 U. S. 651, Mr. Justice Miller, delivering the opinion of the court, said that under some circumstances the Fifteenth Amendment "may operate as the immediate source of a right to vote. In all cases where the former slaveholding states had not removed from their constitutions the words 'white man' as a quali-

cation for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the state law, and a part of the state law, it annulled the discriminating word *white*, and thus left him in the enjoyment of the same right as white persons."

State May Limit Suffrage Except on Prohibited Grounds. — While the Fifteenth Amendment took away the power of the state to discriminate against citizens of the United States on account of race, color, or previous condition, the power of exclusion for other causes remains intact. *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136; *U. S. v. Reese*, 92 U. S. 214.

Only Citizens of the United States have any rights under the Fifteenth Amendment. *Elk v. Wilkins*, 112 U. S. 94.

Power of Congress to Enforce by Appropriate Legislation. — The second section of the Fifteenth Amendment, which declares that Congress may "enforce this article by appropriate legislation," only confers on Congress the power to legislate with regard to abridgment or denial of the right of suffrage upon one of the prohibited grounds; and where the national legislature enacts a penal statute which is, in general language, broad enough to cover wrongful acts without, as well as within, the constitutional jurisdiction, the whole Act is unconstitutional and void, because the courts are not able to reject the part which is unconstitutional and retain the remainder, where the separation of the two portions is to be attained, not by striking out or disregarding words in the enactment, but by introducing words of limitation into a penal statute so as to make it specific when, as expressed, it is general only. *U. S. v. Reese*, 92 U. S. 214.

Congress Cannot Direct Enactment Against Individuals Not Acting under Color of Law. — Under the Fifteenth Amendment, Congress may only legislate on the subject of the right to vote at state elections, against discrimination on account of race, color, or previous condition of servitude, by the United States, the states, or their officers, or persons claiming to act under color of laws which come within the prohibition of the amendment. Legislation under this amendment cannot extend to the punishment of individuals, acting upon their own responsibility, and not under color of law. *U. S. v. Amsden*, 10 Biss. (U. S.) 283; *U. S. v. Harris*, 106 U. S. 637, where it is declared that the "sole object" of the amendment "is to protect from denial or abridgment by the United States or states, on account of race," etc.

THE CONSTITUTION. — This provision of the Constitution, as has been heretofore seen, secures to the citizens of each state, when in another state, all the privileges and immunities of the citizens of the latter as such.¹

States May Regulate Use of Common Property. — It does not, however, prevent one state from denying to the citizens of another state rights which inure to its own citizens not by virtue of their citizenship alone, but which result from their citizenship and common interest in state property combined; as where, by the laws of one state, citizens of an adjoining state were forbidden to plant oysters in or take them from the waters of the former.²

Protects Rights of Citizens of States as Such Only. — The provision of the Constitution above referred to was, it is conceded, designed for the purpose of securing the civil rights of the citizens of the states as such, and not such rights as exist as an attribute of national citizenship.³

b. ARTICLE THIRTEEN OF THE AMENDMENTS. — By the Thirteenth Amendment immunity from slavery or involuntary servitude, except as a

1. Meaning of "Privileges and Immunities" as Used in Art. IV., Sect. 2. — The general character of the rights embraced in the phrase "privileges and immunities" as used in this section of the Constitution has been explained in an earlier portion of this article. See *supra*, this title, p. 69.

These words were early the subject of judicial construction in the case of *Campbell v. Morris*, 3 Har. & M. (Md.) 554, decided in 1797. The court there said: "Privilege and immunity are synonymous, or nearly so. Privilege signifies a peculiar advantage, exemption, immunity; immunity signifies exemption, privilege." After tracing the use of the same words in the Articles of Confederation, the following exposition was given: "The court are of opinion it means that the citizens of all the states shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the state, in the same manner as the property of the citizens of the state is protected. It means, such property shall not be liable to any taxes or burdens which the property of the citizens is not subject to. It may also mean, that as creditors, they shall be on the same footing with the state creditor, in the payment of the debts of a deceased debtor. It secures and protects personal rights."

The Right of Passing Through a State by a citizen of the United States is one guaranteed to him by the Constitution. *Crandall v. Nevada*, 6 Wall. (U. S.) 35.

A Wife's Rights of Marital Community in the Husband's Property, as they exist under the laws of *Louisiana*, do not constitute privilege of citizenship within the meaning of Art. IV., section 2 of the Constitution, and, therefore, a law providing that if the domicil of a marriage continues out of *Louisiana* the relative rights of the married persons may be regulated by the laws of the place of domicil, even in respect to property acquired by one of them in *Louisiana*, is not objectionable as discriminating between the citizens of the state and other persons. *Conner v. Elliott*, 18 How. (U. S.) 591. See also *Buffington v. Grosvenor*, 46 Kan. 730; *Jenkins v. Henry*, 52 Kan. 606, holding that a statute which provides that the widow shall not be entitled to an interest in lands

conveyed by the husband when the wife at the time of the conveyance was a non-resident is not repugnant to the Federal Constitution. To the same effect is *Bennett v. Harms*, 51 Wis. 251.

A Statute Dispensing with the Undertaking in Attachment Proceedings where the defendants are all non-residents does not violate the Federal Constitution. *Head v. Daniels*, 38 Kan. 9.

Statute of Limitations—Exemption Accorded Residents. — The clause of the *Wisconsin* statute of limitations providing that when the defendant is out of the state, the statute of limitation shall not run against the plaintiff if the latter resides in the state, but shall if he resides out of the state, is not repugnant to Art. IV., section 2 of the Constitution. *Chemung Canal Bank v. Lowery*, 93 U. S. 72.

Statutes Regulating Taxation and discriminating between residents and non-residents are void within Art. IV., section 2 of the Constitution. *Ward v. Maryland*, 12 Wall. (U. S.) 418; *Ex p. Thornton*, 4 Hughes (U. S.) 220. See the title **OCCUPATION, BUSINESS, AND PRIVILEGE TAXES**.

No Security for the Right of Citizen of State Within His Own State. — The right of attendance upon the public schools belonging to the citizens of a state is not, as to the citizens of such state, a right within the purview of section 2 of Art. IV. of the Federal Constitution. *Buskirk, J., in Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738.

2. McCready v. Virginia, 94 U. S. 391, where it was held that a law of the state of *Virginia* prohibiting the citizens of other states from planting oysters in the waters of *Virginia* was nothing more than a regulation of the use by the people of their common property. "The right which the people of the state thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is in fact a property right, and not a mere privilege or immunity of citizenship." See also *Corfield v. Coryell*, 4 Wash. (U. S.) 371.

3. Slaughter-House Cases, 16 Wall. (U. S.) 74; *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136.

A Law Prohibiting the Marriage of White Citizens and Negroes is not repugnant to Art. IV., section 2 of the Constitution. *Ex p. Kinney*, 3 Hughes (U. S.) 9.

punishment for crime, or, in other words, the civil right of liberty, is secured to all persons within the jurisdiction of the United States.¹

Secures Only Right of Personal Liberty. — But this provision did not, it seems, constitute emancipated persons citizens, or secure any other civil right than that of personal liberty.²

Civil Rights Bill of 1866. — It was acting colorably under the second section of this amendment, giving to Congress the right to enforce the provisions of the amendment by appropriate legislation, that that body passed the first civil rights bill, known as the Civil Rights Act of 1866.³ About the constitutionality of this Act much doubt was expressed,⁴ and it was soon superseded by the Fourteenth Amendment and the legislation thereunder.⁵

Certain Acts of Congress Held Unauthorized by the Thirteenth Amendment. — The Thirteenth Amendment was held not to authorize a Federal statute making it an offense for an individual to deny equal accommodations and privileges of inns, public conveyances, and places of amusement, on account of race, color, or previous condition of servitude.⁶ So, it has been held that the denial of equal accommodations in railway trains would not contravene the Thirteenth Amendment,⁷ nor would the exclusion of a negro child from a school main-

1. *Slaughter-House Cases*, 16 Wall. (U. S.) 36; Swayne, J., in *U. S. v. Rhodes*, 1 Abb. (U. S.) 28; *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136; *State v. Strauder*, 11 W. Va. 803, 27 Am. Rep. 606.

2. **Thirteenth Amendment Did Not Confer Citizenship.** — "Although the Thirteenth Amendment insured perpetual freedom," yet, without further constitutional amendment, "the colored race would have been left under the operation of the rule declared by the Supreme Court of the United States, in *Dred Scott v. Sandford*, 19 How. (U. S.) 393, that none of the colored race could, as the Constitution then was, become citizens of the United States." *Per* Simrall, J., in *Donnell v. State*, 48 Miss. 676, 12 Am. Rep. 375. See also *supra*, this title, *Nature and Origin of Civil Rights — Thirteenth Amendment as Conferring the Civil Right of Liberty*.

In *U. S. v. Rhodes*, 1 Abb. (U. S.) 28, Judge Swayne, associate justice of the United States Supreme Court, held that the Thirteenth Amendment by emancipating the colored race made them citizens, and declared the contrary decision in *Scott v. Sandford*, 19 How. (U. S.) 393, not binding, because not necessarily involved in that case.

But this decision could not be considered to set aside satisfactorily a solemn and well-considered decision of the United States Supreme Court. See *State v. Strauder*, 11 W. Va. 803, 27 Am. Rep. 606. See also *Slaughter-House Cases*, 16 Wall. (U. S.) 36; *Ex p. Virginia*, 100 U. S. 339; *U. S. v. Harris*, 106 U. S. 629; Charge of Circuit Judge Emmons to Grand Jury, 2 Cent. L. J. 215, where the purpose and effect of this constitutional provision are discussed.

Meaning of "Servitude" as Used in Thirteenth Amendment. — The word "servitude" as used in the Thirteenth Amendment has reference only to personal servitude, and not servitudes, which attach under certain circumstances to inanimate property. *Miller, J.*, in *Slaughter-House Cases*, 16 Wall. (U. S.) 69. See also *Ex p. Turner*, Chase's Dec. (U. S.) 157, 1 Abb. (U. S.) 84.

3. **Civil Rights Bill of 1866.** — This enactment declared all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, to be citizens of the United States; and declared "such citizens, of every race and color, without regard to any previous condition of slavery," to be entitled to various rights enumerated in the statute, and made other specific provisions looking to the enforcement of those rights. See *U. S. v. Rhodes*, 1 Abb. (U. S.) 31. This statute was held to be constitutional by Mr. Justice Swayne, in the case just cited, and by Chief Justice Chase in *Ex p. Turner*, Chase's Dec. (U. S.) 157, 1 Abb. (U. S.) 84. See also *U. S. v. Harris*, 106 U. S. 640.

4. See *State v. Strauder*, 11 W. Va. 803, 27 Am. Rep. 606. See also the last two notes, *supra*.

In *State v. Rash*, 1 Houst. Cr. Cas. (Del.) 271, it was held that the Act was unconstitutional so far as it made negroes admissible witnesses in the state courts of Delaware, the statutes of Delaware allowing such persons to give testimony only under certain circumstances. The same provision of the Act was, however, held constitutional and controlling, in spite of a state statute to the contrary in *Kelley v. State*, 25 Ark. 392. See also *People v. Washington*, 36 Cal. 658. And compare *People v. Brady*, 40 Cal. 198, 6 Am. Rep. 604.

5. See *infra*, this section, *Article Fourteen of the Amendments*.

6. **Denial of Equal Accommodations.** — Civil Rights Cases, 109 U. S. 3. The position of the court in this case was that the denial of equal accommodations inflicted upon the person or persons discriminated against no manner of servitude or form of slavery, Mr. Justice Bradley, for the court, saying: "It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business."

7. *Ex p. Plessy*, 45 La. Ann. 80.

A State Statute Requiring Railroad Companies to

tained for the education of white children exclusively.¹

Not Limited to Invasion by State Authority. — The security which the Thirteenth Amendment was designed to secure, the civil right of liberty, is not limited to invasions by state action, as is the case with the rights secured by the Fourteenth Amendment.² Under the former amendment, therefore, legislation by Congress, so far as is necessary or proper to eradicate all forms and incidents of slavery and to secure personal liberty, may be direct and primary, operating upon the acts of individuals, whether such acts are sanctioned by state authority or not.³

C. ARTICLE FOURTEEN OF THE AMENDMENTS — (1) Generally. — The Fourteenth Amendment was designed as a security for the privileges and immunities to which the citizens of the United States, as such, are entitled, in contradistinction to those privileges and immunities to which the same persons might be entitled as citizens of the individual states.⁴ The general nature of the rights sought to be thus secured has been indicated elsewhere.⁵

Security Against State Action Only. — The Fourteenth Amendment, however, affords protection for the rights within its purview, from invasion by the states only and not by the acts of individuals.⁶

Federal Legislation under This Provision. — It has been held, therefore, that the Federal legislation under this amendment must be limited to that of a corrective character, designed to counteract and afford relief against state acts or proceedings.⁷

provide separate but equal accommodations for white and colored passengers, and requiring passengers, under prescribed penalties, to confine themselves to the accommodations set apart for the race to which each belongs, is not in violation of the Thirteenth Amendment. *Plessy v. Ferguson*, 163 U. S. 537.

1. *Ward v. Flood*, 48 Cal. 36, 17 Am. Rep. 405.

2. See *infra*, this section, *Article Fourteen of the Amendments*.

3. *Civil Rights Cases*, 109 U. S. 3.

4. *Slaughter-House Cases*, 16 Wall. (U. S.) 36; *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136.

Right to Maintain Slaughter-houses. — In the year 1869 the legislature of Louisiana passed an Act granting to a corporation created by it the exclusive right, for a period of years, to have and maintain slaughter-houses, landings for cattle, and yards for inclosing cattle intended for sale or slaughter, within a certain territory. The validity of this Act was assailed as in opposition to certain provisions of the Federal Constitution, among others, the Fourteenth Amendment, prohibiting to the states the making or enforcing of any law abridging the privileges or immunities of citizens of the United States. But it was held that the privileges or immunities contended in argument to have been abridged were those belonging to the citizens of the state as such, and not as a citizen of the United States, and, therefore, not within the operation of the constitutional provision referred to. *Slaughter-House Cases*, 16 Wall. (U. S.) 36.

The Right to Sell Intoxicating Liquors is not a right growing out of citizenship of the United States, and is not protected by the Fourteenth Amendment. *Bartemeyer v. Iowa*, 18 Wall. (U. S.) 129; *Giozza v. Tiernan*, 148 U. S. 657.

The Right to Admission to Practice Law in the courts of a state is not one of the privileges

and immunities belonging to citizens of the United States within the purview of the Fourteenth Amendment. *Bradwell v. State*, 16 Wall. (U. S.) 130.

5. See *supra*, this title, *Nature and Origin of Civil Rights*.

6. Fourteenth Amendment Affects State Action Only. — *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Slaughter-House Cases*, 16 Wall. (U. S.) 36; *U. S. v. Cruikshank*, 92 U. S. 542; *Virginia v. Rives*, 100 U. S. 313; *U. S. v. Harris*, 106 U. S. 635; *Civil Rights Cases*, 109 U. S. 23; *Le Grand v. U. S.*, 12 Fed. Rep. 577; *U. S. v. Washington*, 4 Woods (U. S.) 349; *Texas v. Gaines*, 2 Woods (U. S.) 342; *Miller v. New York*, 13 Blatchf. (U. S.) 469; *People v. Chicago, etc.*, R. Co., 6 Biss. (U. S.) 107; *State v. Dubuclet*, 5 Rep. 201; *Younger v. Judah*, 111 Mo. 303, 33 Am. St. Rep. 527.

In *U. S. v. Sanges*, 48 Fed. Rep. 78, Mr. Justice Lamar said that all the authorities agreed that "the Fourteenth Amendment guaranteed immunity from state laws and state acts invading the privileges and rights specified in the amendment, but conferred no rights upon one citizen as against another; that the provision of the Fourteenth Amendment authorizing Congress to enforce its guaranties by legislation means such legislation as is necessary to control and counteract state abridgment."

Proprietors of Theatre. — In *Younger v. Judah*, 111 Mo. 303, 33 Am. St. Rep. 527, it was held that a rule of the proprietors of a theatre providing certain seats for colored patrons and excluding them from all others was not void as in conflict with the Fourteenth Amendment, as it was a mere private regulation in a matter which the state neither directly nor through the municipal government undertook to control.

7. Federal Legislation under Fourteenth Amendment. — *U. S. v. Cruikshank*, 92 U. S. 555,

Action by State Through Any of Its Agencies Within Provision.—The prohibitions of the Fourteenth Amendment have, however, reference to the political body, in whatever modes or by whatever instruments it may act, — whether by its judicial, executive, or legislative departments,¹ as well as the subordinate legislative bodies of counties and cities, exercising delegated powers.²

affirming 1 Woods (U. S.) 308; U. S. v. Harris, 106 U. S. 635; Civil Rights Cases, 109 U. S. 23; Cully v. Baltimore, etc., R. Co., 1 Hughes (U. S.) 536.

In the first case cited Chief Justice Waite said: "The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states, and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty."

In the Civil Rights Cases, 109 U. S. 3, it is held that §§ 1 and 2 of the Civil Rights Act of 1875, which declared all persons within the jurisdiction of the United States to be entitled to the full and equal enjoyment of the accommodations and privileges of inns, public conveyances, theatres and places of amusement, and provided a penalty for violating the rights declared, was unconstitutional, and not authorized by the Fourteenth Amendment, because that amendment does not authorize Congress to adopt legislation creating individual offenses, but merely to provide a remedy to individuals whose rights under this amendment are violated by state laws. See also U. S. v. Washington, 4 Woods (U. S.) 349.

Section 5519 of the U. S. Rev. Stat., which makes penal conspiracies for the purpose of depriving any person of the equal protection of the laws or of equal privileges or immunities under the laws, has been held unconstitutional, as directed exclusively against the action of private persons without reference to the laws of the state or their administration. U. S. v. Harris, 106 U. S. 629; Baldwin v. Franks, 120 U. S. 678. See the title CONSPIRACY, *post*.

Section 5508 of the U. S. Rev. Stat., which makes punishable conspiracies to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or to prevent or hinder his free exercise or enjoyment thereof, is constitutional, and under it persons may be punished for a conspiracy to prevent a citizen from voting at a national election. *Ex p. Yarbrough*, 110 U. S. 651.

Or for a conspiracy to deprive a person of his right to establish his claim to lands of the United States under the Homestead Acts. U. S. v. Waddell, 112 U. S. 76.

In Baldwin v. Franks, 120 U. S. 678, the constitutionality of the Act is conceded upon the authority of the preceding cases, but it is held that it protects "citizens" only, and that, therefore, it cannot be invoked to punish a conspiracy to deprive Chinese alien residents

of their treaty rights by forcibly expelling them from their homes in the town in which they reside.

In *In re Quarles*, 158 U. S. 532, it is held that a conspiracy to injure, etc., any citizen in the free exercise of the right to inform a marshal of the United States, or his deputy, of a violation of the internal revenue laws, was indictable and punishable under section 5508 of the Revised Statutes; the court declaring that "every right created by, arising under, or dependent upon, the Constitution, may be protected and enforced by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may, in its discretion, be most eligible and best adapted to attain the object." *Citing* Logan v. U. S., 144 U. S. 293. See also U. S. v. Sanges, 48 Fed. Rep. 78, where Lamar, J., reconciled the doctrine of U. S. v. Cruikshank, 92 U. S. 542, and other cases cited at the beginning of this note, with that of *Ex p. Yarbrough*, 110 U. S. 651, and the cases following it, upon the ground that the latter were authority only for the position that Congress might legislate affirmatively in the protection and enforcement of rights of constitutional creation.

The Removal into Federal Courts of Causes Where Civil Rights Are Denied is treated elsewhere. See the title REMOVAL OF CAUSES.

1. Fourteenth Amendment Covers All Forms of State Action.—*Ex p. Virginia*, 100 U. S. 347; *Virginia v. Rives*, 100 U. S. 313; *Ah Kow v. Nunan*, 5 Sawy. (U. S.) 562; *In re Parrott*, 1 Fed. Rep. 481; *Murray v. Louisiana*, 163 U. S. 101. In the first case cited the court said: "It was to secure equal rights to all persons; and to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a state, but upon the persons who are the agents of the state in the denial of the rights which were intended to be secured." In this case it was held that the Act of Congress of March 1, 1875, entitled "An Act to Protect All Citizens in their Civil and Legal Rights," was valid and constitutional under the Fourteenth Amendment in so far as it provided a penalty for a state officer, who, in the selection or summoning of jurors, grand or petit, should discriminate against any person on account of race, color, or previous condition of servitude.

The Supervisor of Registration of a State, whose duty it is, under the state laws, to superintend the registration of voters, may, by injunction issuing out of a federal court, be restrained from carrying out the provisions of such statutes, if unconstitutional as denying or abridging the right of citizens of African descent to vote. *Mills v. Green*, 67 Fed. Rep. 818.

2. Ah Kow v. Nunan, 5 Sawy. (U. S.) 562.

(2) *Right to Acquire State Citizenship by Residence Therein.* — It has been said to be a civil right of the citizen of the United States, secured by the Fourteenth Amendment, that he may, of his own volition, become a citizen of any state of the Union, by a *bona fide* residence therein, with the same rights as other citizens of that state.¹

(3) *Right to Vote.* — The Fourteenth Amendment to the Federal Constitution does not afford security for the right of suffrage, this right not being embraced within the term "privileges and immunities" as used therein.² Furthermore, as has been seen heretofore, the right to vote is not a civil but a political right.³

(4) *Right of Trial by Jury in Suits at Law in State Courts.* — The right of trial by jury in suits at common law pending in the state courts is not a privilege or immunity of national citizenship, which the states are forbidden by the Fourteenth Amendment to abridge.⁴

(5) *Right of Attendance at Public Schools.* — The privilege of receiving an education at the expense of the state is not one belonging to those upon whom it is conferred as citizens of the United States, and, therefore, so far as the "privileges and immunities" clause of the Fourteenth Amendment is concerned, might be granted or refused to any individual or class at the pleasure of the state.⁵

(6) *Security for the Equal Protection of the Law* — (a) *Generally.* — The Fourteenth Amendment, in addition to the security afforded for the privileges and immunities of the citizens of the United States, contains also a provision prohibiting to any state a denial to any person within its jurisdiction of the equal protection of its laws. The security afforded by this provision, it will be observed, is not confined to citizens of a state or of the United States, but extends to all persons within the jurisdiction of the state, without distinction as to race, nationality, or station in life.⁶

1. Mr. Justice Miller, in *Slaughter-House Cases*, 16 Wall. (U. S.) 80.

2. *Right of Suffrage.* — U. S. v. Reese, 92 U. S. 214; U. S. v. Cruikshank, 92 U. S. 555; Swayne, J., in U. S. v. Rhodes, 1 Abb. (U. S.) 43; Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136; Hawley, J., in *State v. Ah Chew*, 16 Nev. 59, 40 Am. Rep. 488.

3. See *supra*, this title, *Civil as Distinguished from Political Rights*.

4. *Right of Trial by Jury.* — Walker v. Sauvinet, 92 U. S. 92; Murray v. Hoboken Land, etc., Co., 18 How. (U. S.) 280; Sauvinet v. Walker, 27 La. Ann. 14.

The Provision of the Federal Constitution as to the preservation of jury trial has no application to state courts. Joseph v. Bidwell, 28 La. Ann. 382, 26 Am. Rep. 102.

5. *Education at Public Schools.* — In the case of *People v. Gallagher*, 93 N. Y. 438, 45 Am. Rep. 232, it was held that the privilege of receiving an education at the expense of the state was one belonging to those receiving it as citizens of the state, and not of the United States, and as such might, under the rule of the *Slaughter-House Cases*, 16 Wall. (U. S.) 36, be granted or refused to any individual or class at the pleasure of the state. And see also Wallace, C. J., in *Ward v. Flood*, 48 Cal. 49, 17 Am. Rep. 405; *Marshall v. Donovan*, 10 Bush (Ky.) 681.

In the case of *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738, Buskirk, J., delivering the opinion of the court, said that the state system of common schools had its origin in and was

provided for by the constitution and laws of the state; that it was purely a domestic institution, and subject to the exclusive control of the constituted authorities of the state; that the Federal Constitution did not provide for any general system of education to be conducted and controlled by the National Government, nor was Congress thereby invested with any power to exercise a general or special supervision over the states on the subject of education.

6. *Equality of Protection the Right of All Persons.* — *Ah Kow v. Nunan*, 5 Sawy. (U. S.) 562. And see *In re Ah Fong*, 3 Sawy. (U. S.) 157; Rhodes, J., in *People v. Washington*, 36 Cal. 658.

Equality of Privilege — Equality of Protection. — Equality of privilege is the constitutional right of all citizens, and equality of protection is the constitutional right of all persons. Mr. Justice Field, in *In re Ah Fong*, 3 Sawy. (U. S.) 157.

Chinese Residents in California are within the equal protection clause of the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U. S. 356; *Ah Kow v. Nunan*, 5 Sawy. (U. S.) 562.

Qualified Denial of Right to Testify in State Courts Not a Denial of Equal Protection. — In the case of *People v. Brady*, 40 Cal. 198, 6 Am. Rep. 604, it was held that the Act of the California State Legislature providing that no Mongolian or Chinese should be permitted to give evidence in favor of or against any white man, was not in conflict with the Fourteenth Amendment of the Federal Constitution, as

Corporations "Persons" Within the Equal Protection Clause. — Under the provision of the Fourteenth Amendment above referred to, corporations are "persons," and, as such, entitled to the equal protection of the laws.¹ It has been held, however, that a state statute making railroad companies liable to employees for the negligence of fellow-servants, other corporations and employers not being so liable, could not, nevertheless, be regarded as a denial to railroad corporations of the equal protection of the laws.²

Equal Protection Clause as Prohibitive of Class or Partial Legislation. — Under the Fourteenth Amendment, discriminating or partial legislation, favoring or discriminating against particular persons or classes, or particular persons of the same class, is prohibited.³ And, it has been said, equality of protection implies not only equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemptions with others of the same class from charges or burdens of every kind.⁴

denying to those excluded from testifying the equal protection of the laws.

Equal Protection Clause Created No New Rights. — The clause of the Fourteenth Amendment providing that no state shall deny to any person the equal protection of its laws did not create any new or substantive legal right, or add to or enlarge the general classification of rights of persons or things existing in any state under the laws thereof. It only operated upon such rights as it found already existing and established, and declared in substance that, such as they were in each state, they should be held and enjoyed alike by all persons within its jurisdiction. *Wallace, C. J., in Ward v. Flood*, 48 Cal. 50, 17 Am. Rep. 405.

1. Corporations Protected as Persons. — *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205; *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394; *Pembina Consol. Silver Min., etc., Co. v. Pennsylvania*, 125 U. S. 181. And see *U. S. Bank v. Deveaux*, 5 Cranch (U. S.) 61; *Society, etc., v. New Haven*, 8 Wheat. (U. S.) 464.

2. Missouri Pac. R. Co. v. Mackey, 127 U. S. 205; *Minneapolis, etc., R. Co. v. Herrick*, 127 U. S. 210.

3. State Laws Discriminating Against Classes or Persons Prohibited. — *United States*. — Mr. Justice Field, in *In re Ah Fong*, 3 Sawy. (U. S.) 157; Mr. Justice Field, in *Ah Kow v. Nunan*, 5 Sawy. (U. S.) 562; *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. Rep. 385; *Stockton Laundry Case*, 26 Fed. Rep. 611; *Barthet v. New Orleans*, 24 Fed. Rep. 563; *Wurts v. Hoagland*, 114 U. S. 606; *Barbier v. Connolly*, 113 U. S. 27; *Pace v. Alabama*, 106 U. S. 583; *Claybrook v. Owensboro*, 16 Fed. Rep. 297; *In re Parrott*, 6 Sawy. (U. S.) 349.

Kentucky. — *Dawson v. Lee*, 83 Ky. 56; *Eubank v. Eubank*, (1885) Ky. L. Rep. 295; *Custard v. Poston*, (Ky. 1886) 1 S. W. Rep. 431.

Michigan. — *Atty.-Gen. v. Detroit*, 78 Mich. 545, 18 Am. St. Rep. 458.

Mississippi. — *Donnell v. State*, 48 Miss. 678, 12 Am. Rep. 375.

A Law Which Would Discriminate Injuri-ously against one portion of the citizens, abridging equal civil or political privileges, or which would afford less protection to life, liberty, or property, to one class than another, would

clearly violate the Constitution of the United States, as amended. *Simrall, J., in Donnell v. State*, 48 Miss. 678, 12 Am. Rep. 375.

The Kentucky Homestead Act of 1866, so far as it excluded negroes from its benefits, was held to be void, as in contravention of the Fourteenth Amendment. *Eubank v. Eubank*, (1885) Ky. L. Rep. 295; *Custard v. Poston*, (Ky. 1886) 1 S. W. Rep. 434.

Registration Act — Discrimination Against Naturalized Citizen. — An act for the registration of voters which provided that "if the applicant claims the right to be registered and vote as a naturalized citizen, he must produce the proper certificate of such naturalization, or satisfactory evidence other than by the oath of the applicant must be produced," made an unjust and unlawful discrimination between the rights of naturalized and native-born citizens and electors. *Atty.-Gen. v. Detroit*, 78 Mich. 545, 18 Am. St. Rep. 458. In delivering the opinion of the court, *Morse, J.*, said: "The essence of these requirements is, that the naturalized voter must produce his certificate, or show, by evidence other than his own oath, that such a certificate was issued. * * * Why should a person claiming to be an elector by naturalization be debarred, if he has lost his certificate, from establishing such fact by his own oath? A person may swear that he is native-born, and he is not required also to prove this fact by some one else before he can be registered; but if he wishes to show that he is an elector by naturalization, he is presumed to be unable himself to tell the truth under oath, and must be corroborated by some one. * * * This distinction between native-born and naturalized electors is an unfair one."

State Constitution Prohibiting Employment of Chinese Labor. — Art. XIX., section 2 of the Constitution of *California*, prohibiting to corporations the employment of Chinese labor, and also forbidding the employment of Chinese in any state, county, municipal, or other public work, and the legislation thereunder, was held unconstitutional, as in conflict with the Fourteenth Amendment, and the Acts of Congress thereunder. *In re Parrott*, 6 Sawy. (U. S.) 349.

4. Inequality of Charge or Tax. — Pursuant to the Fourteenth Amendment, Congress, by Act of May 31, 1870 (16 Stat. at Large 144), provided: "No tax or charge shall be imposed or

(c) **Legislation Inflicting Unequal Punishments.** — Legislation subjecting certain persons or classes to severer punishments than is prescribed for other persons or classes for the commission of the same offense, contravenes the clause of the Fourteenth Amendment under consideration.¹ Thus a state law making Chinese residents liable to imprisonment for fishing in state waters, while other aliens under the same circumstances might do so with impunity, was held to be a denial by the state of the equal protection of its laws.²

Laws to Prevent Adultery between Whites and Negroes. — But a statute prescribing a severer punishment for adultery when committed by a white person and a negro than when the offenders are of the same race is not violative of the Federal Constitution, a commission of the offense subjecting both offenders to the same punishment.³

Laws to Prevent Inter-marriage between Whites and Negroes. — Nor is a state law unconstitutional making it a criminal offense to perform the rites of matrimony between a white person and a negro,⁴ or prohibiting the inter-marriage of the two races.⁵

(d) **Legislation General and Equal in Terms, but Unequal in Design or Operation.** — Though a law be not discriminating in terms, yet if it is applied and administered by public authority so as practically to make unjust discriminations between persons similarly circumstanced in law, in matters affecting their substantial rights, the law will be held invalid as being, in operation, such a denial of equal protection as is within the prohibition of the Constitution.⁶

Intent and Operation of Law Considered. — It is immaterial, therefore, that legislation is general in terms, and that the persons at whom it is directed are not particularly designated. If the intent of the law was that it should affect a certain class with unequal harshness, which object is accomplished in its operation, the law contravenes the equal protection clause of the Fourteenth Amendment and is void.⁷

enforced by any state upon any person immigrating thereto from a foreign country, which is not equally imposed and enforced upon every person immigrating to such state from any other foreign country; and any law of any state in conflict with this provision is hereby declared null and void." "By the term 'charge' as here used," said Mr. Justice Field, in *In re Ah Fong*, 3 Sawy. (U. S.) 158, "is meant any onerous condition, it being the evident intention of the Act to prevent any such condition from being imposed upon any person immigrating to the country which is not equally imposed upon all other immigrants, at least upon all others of the same class. It was passed under and accords with the spirit of the Fourteenth Amendment. A condition which makes the right of the immigrant to land depend upon the execution of a bond by a third party, not under his control, and whom he cannot constrain by any legal proceedings, and whose execution of the bond can only be obtained upon such terms as he may exact, is as onerous as any charge which can well be imposed."

1. Mr. Justice Field, in *Pace v. Alabama*, 106 U. S. 584.

2. *In re Ah Chong*, 6 Sawy. (U. S.) 451.

3. **Adultery between Races.** — *Pace v. Alabama*, 106 U. S. 583; *Ellis v. State*, 42 Ala. 525; *Ford v. State*, 53 Ala. 150; *Green v. State*, 58 Ala. 190, 29 Am. Rep. 739.

White Person Playing Cards with Negro — Statute. — In *Wells v. State*, 3 Lea (Tenn.) 70, it was held that a statute making it a misde-

meanor for a white person to play cards with any slave or free negro became obsolete and of no effect upon the emancipation of the blacks.

4. **Inter-marriage of Races.** — *Green v. State*, 58 Ala. 190, 29 Am. Rep. 739. This case overruled that of *Burns v. State*, 48 Ala. 195, 17 Am. Rep. 34.

5. **A Law Prohibiting the Inter-marriage of White Persons and Negroes** is not repugnant to Article IV., section 2, of the Constitution, nor to the Fourteenth Amendment thereof. *Ex p. Kinney*, 3 Hughes (U. S.) 9; *Ex p. Francois*, 3 Woods (U. S.) 367; *Ex p. Hobbs*, 1 Woods (U. S.) 537; *Dodson v. State*, 61 Ark. 57.

6. **Law Framed and Applied So as Practically to Discriminate.** — Mr. Justice Matthews, in *Yick Wo v. Hopkins*, 118 U. S. 356. See also *Henderson v. New York*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *Ex p. Virginia*, 100 U. S. 339; *Neal v. Delaware*, 103 U. S. 370; *Soon Hing v. Crowley*, 113 U. S. 703; *Ah Kow v. Nunan*, 5 Sawy. (U. S.) 552.

7. **City Ordinance in General Terms but Directed Against Class.** — Mr. Justice Field, in *Ah Kow v. Nunan*, 5 Sawy. (U. S.) 562. This case was an action brought by the plaintiff, a subject of the Emperor of China, to recover damages for his alleged maltreatment at the hands of the defendant, a citizen of the state of California and sheriff of the city and county of San Francisco, the maltreatment consisting in the defendant's having, it was alleged, wantonly and maliciously cut off the queue of the plaintiff. The complaint averred that it is the custom of Chinamen to shave the hair from the front

Illustration. — Thus, where it was contended that municipal ordinances regulating the establishment and maintenance of laundries, operated, as administered by the municipal authorities, to discriminate unjustly against Chinese residents, it was held that whatever might have been the intent of the ordinances, if the result alleged was accomplished by the manner in which they were applied by the authorities charged with their administration, and therein representing the state itself, the ordinance would be void.¹

(c) **Laws Limited to Certain Localities.** — State legislation designed to operate only within a limited territory, as in one or more of the political divisions of a state, or to accomplish specific objects in certain localities, is not objectionable for denying the equal protection of the laws, if such laws affect equally and impartially all persons similarly situated.²

of the head, and to wear the remainder of it braided into a queue; that the deprivation of the queue is regarded by them as a mark of disgrace, and attended, according to their religious faith, with misfortune and suffering after death; that the defendant knew of this custom and religious faith of the Chinese, and knew also that the plaintiff venerated the custom and held the faith, and yet the injury complained of was inflicted. The defendant pleaded, among other defenses, an ordinance of the board of health of the city and county of San Francisco, which was that every male person imprisoned in the county jail, under the judgment of any court having jurisdiction in criminal cases in the city and county, should immediately, upon his arrival at the jail, have the hair of his head "cut or clipped to an uniform length of one inch from the scalp thereof," and it was made the duty of the sheriff to have this provision enforced, acting under which ordinance the defendant cut off the queue of the plaintiff. The validity of this defense was demurred to on the ground, first, that it exceeded the authority of the board of health to pass it; second, that it was unconstitutional as in conflict with the Fourteenth Amendment to the Federal Constitution. Leaving out of view the first ground of demurrer, the ordinance was held objectionable for the second reason stated, notwithstanding the general terms in which it was expressed. In this connection, Mr. Justice Field said: "It is special legislation on the part of the supervisors [board of health] against a class of persons who, under the Constitution and laws of the United States, are entitled to the equal protection of the laws. The ordinance was intended only for the Chinese in San Francisco. This was avowed by the supervisors on its passage, and was so understood by every one. The ordinance is known in the community as the 'queue ordinance,' being so designated from its purpose to reach the queues of the Chinese, and it is not enforced against any other persons. The reason advanced for its adoption, and now urged for its continuance, is, that only the dread of the loss of his queue will induce a Chinaman to pay his fine. * * * The class character of this legislation is none the less manifest because of the general terms in which it is expressed."

1. *Yick Wo v. Hopkins*, 118 U. S. 373.

2. *Wurts v. Hoagland*, 114 U. S. 606; *Richmond, etc., R. Co. v. Richmond*, 96 U. S. 529; *Missouri v. Lewis*, 101 U. S. 22; *Hayes v. Missouri*, 120 U. S. 68.

Laws Limited in Application to Carry Out Public Purpose. — In the case of *Barbier v. Connolly*, 113 U. S. 27, the court, speaking of the Fourteenth Amendment, said: "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Different Courts — Diversity of Jurisdiction and Procedure. — In the case of *Missouri v. Lewis*, 101 U. S. 22, it was held that the clause of the Fourteenth Amendment with reference to the equal protection of the laws was not violated by any diversity in the jurisdiction of the several courts which the state might establish, as to subject-matter, amount, or finality of their decisions, if all persons within the territorial limits of their respective jurisdictions have an equal right in like cases, and under like circumstances, to resort to them for redress; that the state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government; and that, as respects the administration of justice, it may establish one system of courts for cities and another for rural districts. "And we may add," said Mr. Justice Field, in *Hayes v. Missouri*, 120 U. S. 68, "that the systems of procedure in them may be different without violating any provision of the Fourteenth Amendment."

Unequal Laws as to Number of Peremptory Challenges by State in Criminal Prosecutions. — A statute providing that the state, in all capital cases, except in cities having a population of over a hundred thousand persons, shall be allowed eight peremptory challenges to jurors, but in such cities shall be allowed fifteen, is not unconstitutional as denying to defendants in the latter case the equal protection of its laws. *Hayes v. Missouri*, 120 U. S. 68.

Law Imposing Tax on Property in Particular Locality. — In the case of *Walston v. Nevin*, 128 U. S. 578, it was contended that the Act of the Kentucky Legislature, passed in 1882, entitled "An Act to Amend the Charter of the City of Louisville," was unconstitutional, as amounting to a deprivation of property without due process of law and a denial of the equal protection of the laws, in so far as it authorized the cost of the improvements of streets to be assessed against the owners of lots and gave a lien thereon therefor. But the objection was not sustained, as the law provided a regular mode for contesting the charges imposed, and

(f) **Equal Protection Clause as Affecting the Selection of Jurors.** — It may be stated as a general principle that no citizen has a right to serve on a grand or petit jury.¹ But all citizens, it has been said, have a right, that if legally qualified they shall not be discriminated against in the selection of jurors.² Though the words of the amendment, as has been seen, secure to all persons the equal protection of the laws, and though it has been held that to compel a negro to submit to a trial before a jury in the formation of which the members of his own race had been excluded, would be a denial of equal protection,³ yet it has also been held that, looking to the object of this amendment, the equal protection clause, as affecting jury service, only prevents discrimination on account of race, color, or previous condition,⁴ the states being left free to prescribe the qualifications of their jurors in all other respects.⁵

Right of Parties to Jury Impaneled Without Discrimination on Account of Race or Color. — According to the principles above stated, while it cannot be regarded as the right of a colored person that a jury to determine issues involving his life, liberty, or property shall be composed in whole or in part of others of his race, it is essential under the Federal Constitution that there should have been no discrimination in the selection of such jurors on account of race, color, or previous condition.⁶ But the fact that a jury is composed entirely of white persons is not of itself a denial to a negro defendant of any civil or constitutional right, nor sufficient to show discrimination against the negro race in the selection of jurors.⁷ And, *a fortiori*, the mere circumstance that all the

for enforcing the lien, appropriate to the nature of the case, and operated alike upon all persons similarly situated. See the title SPECIAL ASSESSMENTS.

1. Haggard *v.* Com., 79 Ky. 366.

2. Virginia *v.* Rives, 100 U. S. 313; Haggard *v.* Com., 79 Ky. 366; State *v.* Ah Chew, 16 Nev. 50, 40 Am. Rep. 488.

3. Neal *v.* Delaware, 103 U. S. 370. And see Gibson *v.* Mississippi, 162 U. S. 565; Smith *v.* Mississippi, 162 U. S. 592.

A State Statute Which Denies to Negro Citizens the right to serve on grand or petit juries on the sole ground of their race or color is unconstitutional. Green *v.* State, 73 Ala. 26; Com. *v.* Johnson, 78 Ky. 509; Cavitt *v.* State, 15 Tex. App. 190; Neal *v.* Delaware, 103 U. S. 370; Strauder *v.* West Virginia, 100 U. S. 303.

4. Only Discrimination on Account of Race, Color, etc., Prohibited. — Strauder *v.* West Virginia, 100 U. S. 303; State *v.* Ah Chew, 16 Nev. 59, 40 Am. Rep. 488.

All persons, whether male or female, old or young, citizens or aliens, white, black, or yellow, are equally protected in the right of trial by a fair and impartial jury, selected without discrimination because of their race or color. State *v.* Ah Chew, 16 Nev. 59, 40 Am. Rep. 488.

Discrimination on Account of Alienage. — A discrimination against a person in the matter of jury service on account of alienage is not such a discrimination on account of race or color as is inhibited by the Fourteenth Amendment. State *v.* Ah Chew, 16 Nev. 59, 40 Am. Rep. 488.

5. State May Determine Qualifications in Other Respects. — Strauder *v.* West Virginia, 100 U. S. 310; Haggard *v.* Com., 79 Ky. 366; State *v.* Ah Chew, 16 Nev. 59, 40 Am. Rep. 488. And see McKay *v.* Campbell, 2 Abb. (U. S.) 127; Gibson *v.* Mississippi, 162 U. S. 565; Smith *v.* Mississippi, 162 U. S. 592.

"We do not say that within the limits from

which it is not excluded by the [Fourteenth] amendment, a state may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear that it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it." Mr. Justice Strong, in Strauder *v.* West Virginia, 100 U. S. 303.

6. Strauder *v.* West Virginia, 100 U. S. 305; Virginia *v.* Rives, 100 U. S. 314; Neal *v.* Delaware, 103 U. S. 394; Bush *v.* Kentucky, 107 U. S. 110; Gibson *v.* Mississippi, 162 U. S. 565; Smith *v.* Mississippi, 162 U. S. 592; Green *v.* State, 73 Ala. 26; Com. *v.* Johnson, 78 Ky. 509; State *v.* Murray, 47 La. Ann. 1424; State *v.* Joseph, 45 La. Ann. 903; Cooper *v.* State, 64 Md. 41; Cavitt *v.* State, 15 Tex. App. 190.

Jury Commissioners Are Not Bound to select negro jurors. All that the accused can claim is that no citizen otherwise competent shall be excluded by law on account of race or color. Haggard *v.* Com., 79 Ky. 366.

Person of One Race Cannot Object for Discrimination Against the Other. — A white person against whom an indictment is found cannot complain because negroes were excluded from the grand jury, the reason being, it was said, that only those who are prejudiced by an unconstitutional law can complain of it. Com. *v.* Wright, 79 Ky. 22, 42 Am. Rep. 203; Marshall *v.* Donovan, 10 Bush (Ky.) 681; Cooley's Const. Lim. 164.

7. Fact That Jury to Try Negro Is Composed of Whites No Denial of Right. — Bush *v.* Kentucky,

names drawn out of a venire box, containing three hundred in all, were those of white persons, no evidence being offered to show that the box contained no names of negroes, did not, it was held, establish a discrimination against the latter race.¹

Waiver of Right to Indiscriminate Selection of Jurors. — The right of a person to be tried by a jury selected without discrimination on account of race or color is a right which may be waived.²

Waiver by Failure to Object. — And where a defendant did not avail himself of the methods afforded by law for objecting to discrimination in the selection of grand or petit jurors, it was held that he should be deemed to have waived the right to do so, and, therefore, concluded from subsequently raising the question in habeas corpus proceedings.³

(g) **Equality of Protection as Implying Identity or Community of Rights** — *aa.* **RULE IN THE CASE OF COMMON CARRIERS** — May Provide Separate if Equal Accommodations for Races. — It is, however, only equality of rights and not identity or community of rights which the Fourteenth Amendment is designed to secure.⁴ This amendment, therefore, does not prohibit a state statute requiring common carriers to furnish separate but equal accommodations for its white and colored passengers,⁵ and the same may be said of a law requiring passengers under prescribed penalties to confine themselves to the separate but equal accommodations

107 U. S. 110; *Green v. State*, 73 Ala. 26; *State v. Murray*, 47 La. Ann. 1424; *State v. Joseph*, 45 La. Ann. 903; *State v. Brown*, 119 Mo. 527; *Cooper v. State*, 64 Md. 41; *State v. Ah Chew*, 16 Nev. 50, 40 Am. Rep. 488; *State v. Sloan*, 97 N. Car. 499; *Covitt v. State*, 15 Tex. App. 190; *Lawrence v. Com.*, 81 Va. 484.

Refusal of State Court to Modify Venire. — The refusal of a state court to allow a modification of the venire by which one third of the jury, or a portion of it, should be composed of persons of a negro defendant's own race, does not amount to any denial of a right secured by any law providing for the equal civil rights of citizens of the United States. *Virginia v. Rives*, 100 U. S. 313.

1. *State v. Joseph*, 45 La. Ann. 903. See also *Cooper v. State*, 64 Md. 41.

2. *Haggard v. Com.*, 79 Ky. 366.

3. *Haggard v. Com.*, 79 Ky. 366.

4. **Equality, Not Community, of Rights Guaranteed.** — *Black, J.*, in *Younger v. Judah*, 111 Mo. 303, 33 Am. St. Rep. 527; *Ruger, C. J.*, in *People v. Gallagher*, 93 N. Y. 438, 45 Am. Rep. 232; *Ex p. Plessy*, 45 La. Ann. 80; *Anderson v. Louisville, etc.*, R. Co., 62 Fed. Rep. 46.

5. **Carriers May Furnish Separate if Equal Accommodations** — *United States*. — *Louisville, etc.*, R. Co. *v. Mississippi*, 133 U. S. 587; *Plessy v. Ferguson*, 163 U. S. 537; *The Sue*, 22 Fed. Rep. 843; *Logwood v. Memphis, etc.*, R. Co., 23 Fed. Rep. 318; *Murphy v. Western, etc.*, R. Co., 23 Fed. Rep. 637; *McGuinn v. Forbes*, 37 Fed. Rep. 639; *Houck v. Southern Pac. R. Co.*, 38 Fed. Rep. 226; *Anderson v. Louisville, etc.*, R. Co., 62 Fed. Rep. 46.

Louisiana. — *Ex p. Plessy*, 45 La. Ann. 80; *State v. Judge*, 44 La. Ann. 770.

Mississippi. — *Louisville, etc.*, R. Co. *v. State*, 66 Miss. 662, 14 Am. St. Rep. 599.

Missouri. — *Chilton v. St. Louis, etc.*, R. Co., 114 Mo. 88.

South Carolina. — *Smith v. Chamberlain*, 38 S. Car. 529.

Tennessee. — *Memphis, etc.*, R. Co. *v. Benson*, 85 Tenn. 627, 4 Am. St. Rep. 776; *Chesapeake, etc.*, R. Co. *v. Wells*, 85 Tenn. 613.

Ejection of Negro Woman Refusing to Occupy Separate Accommodations or Surrender Ticket. — Under a statute providing for separate but requiring carriers to furnish equal accommodations for colored passengers, it was held that a negro woman, ejected from a train, had no ground for damages against a railroad company, where she was offered a seat in a car equally as comfortable as any in the train, but refused to surrender her ticket unless admitted to a car reserved for white women either alone or accompanied by men. *Chesapeake, etc.*, R. Co. *v. Wells*, 85 Tenn. 613. And see *West Chester, etc.*, R. Co. *v. Miles*, 55 Pa. St. 209, 93 Am. Dec. 744.

Construction of Act of Congress Granting Certain Privileges, on Condition, to Railroad Company. — In the case of *Washington, etc.*, R. Co. *v. Brown*, 17 Wall. (U. S.) 446, in which the Supreme Court of the United States construed an Act of Congress granting certain privileges to a railroad company in the District of Columbia, and also enacting that "no person shall be excluded from the cars on account of color," the court held that this meant that persons of color should travel in the same cars that white ones did, and along with them in such cars; and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively to white persons.

Refusal to Exchange Accommodations Not a Denial of Equal Rights. — A refusal by a common carrier to exchange for a colored passenger, staterooms for berths, upon request, and offer to pay an additional amount (the berths having already been paid for) equal to the difference in price between staterooms and berths, does not constitute a denial of equal accommodations. *Miller v. New Jersey Steamboat Co.*, 58 Hun (N. Y.) 424.

provided for the race to which they belong.¹

Right of Carrier to Make Reasonable Rules.—In the absence of statute, or some manner of state governmental regulation, the right of a common carrier to make and enforce rules providing for the separation, classification, and accommodation of its passengers, depends simply on the reasonableness of such rules, without reference to the question of discrimination against one race and in favor of another as affected by the Fourteenth Amendment.²

Proprietors of Places of Public Amusement, conducted by license of public authority, have, it would seem, the same right to make and enforce reasonable regulations with reference to the accommodations of their patrons as have common carriers as to their passengers, and are subject, it seems, to the same restrictions.³ But where a negro was, on account of his race, excluded from a skating rink owned, operated, and conducted by private individuals as a private business enterprise, not under license or privilege of public authority, it was held that he had no right of recovery in damages.⁴

bb. RIGHT OF STATE TO ESTABLISH AND MAINTAIN SEPARATE SCHOOLS.—An exclusion of negro children from the public schools would be, it has been declared, a denial to them of the equal protection of the laws, and within the prohibition of the Fourteenth Amendment.⁵

1. *Plessy v. Ferguson*, 163 U. S. 537; *Ex p. Plessy*, 45 La. Ann. 80.

Mere Recognition of Natural Differences No Discrimination.—In connection with the right of a state to maintain separate but equally advantageous schools for white and colored children, *Ruger, C. J.*, delivering the opinion of the court in *People v. Gallagher*, 93 N. Y. 438, 45 Am. Rep. 232, said: "A natural distinction exists between these races, which was not created, neither can it be abrogated, by law, and legislation which recognizes this distinction and provides for the peculiar wants or conditions of the particular race can in no just sense be called a discrimination against such race or an abridgment of its civil rights."

2. **Reasonable Regulations.**—*Black, J.*, in *Younger v. Judah*, 111 Mo. 303, 33 Am. St. Rep. 527; *West Chester, etc., R. Co. v. Miles*, 55 Pa. St. 209, 93 Am. Dec. 744. And see *Hall v. De Cuir*, 95 U. S. 485.

No Right to Discriminate Capriciously at Common Law.—At common law a railroad company, as a common carrier of passengers, could not capriciously discriminate between passengers on account of their nativity, color, race, social position, or their political or religious beliefs. *Chicago, etc., R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641; *West Chester, etc., R. Co. v. Miles*, 55 Pa. St. 209, 93 Am. Dec. 744. And see also opinion of *Andrews, J.*, in *People v. King*, 110 N. Y. 418, 6 Am. St. Rep. 389, where it is said that, independent of constitutional or statutory provisions, innkeepers and common carriers are bound to furnish equal facilities to all without discrimination, because public policy requires them to do so.

Separation of Races a Reasonable Regulation.—A rule providing for the separation of white and colored passengers in cars in all respects equal in comfort is reasonable. *Chesapeake, etc., R. Co. v. Wells*, 85 Tenn. 613; *West Chester, etc., R. Co. v. Miles*, 55 Pa. St. 209, 93 Am. Dec. 744; *Chicago, etc., R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641.

3. **Theatres and Places of Amusement.**—*Black, J.*, in *Younger v. Judah*, 111 Mo. 303, 33 Am.

St. Rep. 527; *Bowlin v. Lyon*, 67 Iowa 536, 56 Am. Rep. 355.

A State Law Excluding Negroes from places of public amusement would doubtless be void as unconstitutional. See opinion of *Andrews, J.*, in *People v. King*, 110 N. Y. 418, 6 Am. St. Rep. 389.

4. *Bowlin v. Lyon*, 67 Iowa 536, 56 Am. Rep. 355. In this case it did not appear that the skating rink was operated under a license or privilege granted by the state, or by the city in which it was conducted, or that it was ever regulated or governed in any manner by the police regulations of the city. The court seemed to incline to the opinion that a different conclusion would have been reached had not such been the case, upon the theory that the same rules would be applicable to the proprietor of a place of amusement carried on under public authority, as to innkeepers and common carriers, who, it was observed, while they have the right to make reasonable and proper rules for the conduct of the business in which they are engaged, are not permitted to discriminate in favor of or against any class.

5. *Claybrook v. Owensboro*, 16 Fed. Rep. 297; *Ward v. Flood*, 48 Cal. 50, 17 Am. Rep. 405; *People v. Board of Education*, 18 Mich. 400; *State v. Duggan*, 15 R. I. 403.

A State Statute Excluding Colored Children from the benefit of the public school system denies them the equal protection of its laws. *Claybrook v. Owensboro*, 16 Fed. Rep. 297.

Exclusion from Share of Proceeds of "Common School Fund."—In *Dawson v. Lee*, 83 Ky. 49, it was held that an Act of the legislature to create a uniform system of schools for the education of the colored children of the state, the fund for that purpose to be provided for by taxation upon the property and persons of the negro race exclusively, was unconstitutional, as, said the court, "It was obviously the intention of the legislature, and such is the proper construction of the Act, to exclude the negro children of the state from any share of the proceeds of the 'common school fund' set apart by the Constitution, as well as from

Separate Schools Allowed. — But there is nothing in this constitutional provision preventing the establishment of separate but equally advantageous schools for the education of the children of the two races,¹ and where such separate schools are maintained for the education of colored children, affording equal advantages and conducted under the same rules as those provided for the education of white children, the exclusion of the former from the schools provided for the latter is not in conflict with the Fourteenth Amendment.²

That School for Other Race Nearer Child's Home Immaterial. — And the fact that, on account of the maintenance of separate schools, colored children are, in some cases, required to go further to reach their place of instruction than white children living in the same school district, affords no substantial ground for complaint.³

2. State Constitutions and Laws — *a.* **STATE CONSTITUTIONAL PROVISIONS.** — The constitutions of several of the states contain provisions for the enjoyment of civil rights and the right to vote, and against discrimination in the matter of rights, privileges, or immunities, or exemptions from burdens or duties on account of race, color, or previous condition.⁴

the annual tax levied under general laws on the property of white persons for school purposes, and to give them the benefit of only the fund provided for in the special Act. In this respect, as well as regards the partial and discriminating taxation provided for, the act is, in our opinion, in violation of the Fourteenth Amendment to the Constitution of the United States, as interpreted by the Supreme Court."

Apportionment of School Fund According to Proportions Paid by the Whites and Blacks Respectively. — A state law which requires that such proportion of the school fund as is raised by taxes paid upon the property of white citizens shall be devoted to schools exclusively for white children, and that only such portion as is raised by taxation upon the property of negroes shall be applied to schools for the children of the latter race, is unconstitutional. *Markham v. Manning*, 96 N. Car. 132; *Davenport v. Cloverport*, 72 Fed. Rep. 689.

1. Separate but Equal School — *United States.* — *U. S. v. Buntin*, 10 Fed. Rep. 730; *Bertonneau v. City Schools*, 3 Woods (U. S.) 177. *Arkansas.* — *Union County v. Robinson*, 27 Ark. 116.

California. — *Ward v. Flood*, 48 Cal. 56, 17 Am. Rep. 405.

Indiana. — *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738.

Michigan. — *People v. Board of Education*, 18 Mich. 400.

Mississippi. — *Chrisman v. Brookhaven*, 70 Miss. 477.

Missouri. — *Lehew v. Brummell*, 103 Mo. 546, 23 Am. St. Rep. 895; *Black, J.*, in *Younger v. Judah*, 111 Mo. 303, 33 Am. St. Rep. 527.

Nevada. — *State v. Duffy*, 7 Nev. 342, 8 Am. Rep. 713.

New York. — *People v. Gallagher*, 11 Abb. N. Cas. (Brooklyn City Ct.) 187; *People v. Easton*, 13 Abb. Pr. N. S. (N. Y. Supreme Ct.) 159; *Dallas v. Fosdick*, 40 How. Pr. (N. Y. Supreme Ct.) 249.

Ohio. — *State v. Cincinnati*, 19 Ohio 178; *Van Camp v. Board of Education*, 9 Ohio St. 407; *State v. McCann*, 21 Ohio St. 198.

Establishment of Exclusive White School in Ad-

dition to Regular Public Schools. — It is no violation of the Fourteenth Amendment for the legislature to authorize the issuing of bonds by a town for the building of a school, in addition to the regular public schools, the school so to be established, however, to be exclusively for whites. *Chrisman v. Brookhaven*, 70 Miss. 477.

2. Exclusion of Colored Children from White Schools. — *Ward v. Flood*, 48 Cal. 51, 17 Am. Rep. 405. In this case it is freely conceded that a state law denying to the negro youth of a state equal educational privileges would be a denial of "equal protection" within the intent and meaning of the Federal Constitution; for, said Wallace, C. J., "the education of youth is emphatically their protection; ignorance, the lack of mental and moral culture in earlier life, is the recognized parent of vice and crime in after years." But the mere separation of the races was, it was held, obnoxious to no considerations of a constitutional character. See also the cases cited in foregoing note.

Classification of Pupils Properly Within Power of State. — The classification of scholars on the basis of race or color, and their education in separate schools, involve questions of domestic policy which are within the legislative discretion and control of the state; and such classification, where schools of equal educational advantages are provided, is not a discrimination against either class. *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738.

3. Colored Children Required to Go Further than if to White School. — *Ward v. Flood*, 48 Cal. 52, 17 Am. Rep. 405; *Lehew v. Brummell*, 103 Mo. 546, 23 Am. St. Rep. 895; *People v. Gallagher*, 93 N. Y. 451, 45 Am. Rep. 232. And see *Roberts v. Boston*, 5 Cush. (Mass.) 198.

4. See Constitution of Alabama, art. 1, § 38; Constitution of *Arkansas*, art. 2, § 3; Constitution of *Florida*, art. 14, § 1, and art. 16, § 28; Constitution of *Louisiana*, art. 13, § 188; Constitution of *South Carolina*, art. 1, § 39; Constitution of *Virginia*, art. 12, § 2.

Exclusion of Negroes from Places of Public Amusement. — Article 13 of the Constitution of *Louisiana* declares that "all persons shall

b. EQUAL RIGHTS STATUTES.—In many of the states, also, there are statutory provisions against discrimination on account of race, color, or previous condition, in the enjoyment of the accommodations and privileges of common carriers, inns, hotels and restaurants, theatres and other places of public amusement, and in the right of attendance upon the public schools.¹ Such statutes, though prohibited to Congress,² are valid as state legislation, as an exercise of the police power of the state.³

enjoy equal rights and privileges upon any conveyance of a public character; and all places of business or of public resort * * * shall be open to the accommodation and patronage of all persons, without distinction or discrimination on account of race or color." Under this provision it was held, in the case of *Joseph v. Bidwell*, 28 La. Ann. 382, 26 Am. Rep. 102, that a negro man, excluded from a theatre on account of his color, might maintain an action of damages therefor. See also *Baylies v. Curry*, 128 Ill. 287, which was an action for damages for refusal to admit a negro to a theatre, under the *Illinois* Civil Rights Act.

1. *Arkansas*.—Statutes of 1894 (S. & H.), § 555 *et seq.*

Florida.—Digest of 1881, c. 19, § 2.

Illinois.—Laws of 1885, p. 64.

Indiana.—Laws of 1885, p. 76; Stat. 1896, § 1291a.

Massachusetts.—Laws of 1885, p. 316.

New Jersey.—Laws of 1884, p. 339.

New York.—Laws of 1895, c. 1042, § 1.

Ohio.—Laws of 1884, pp. 15, 90; Rev. Stat., § 7876.

Rhode Island.—Laws of 1885, c. 508, § 1.

Example of Equal Rights Statutes.—Section 1 of c. 1042 of the Laws of *New York* of 1895, provides "that all persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, hotels, eating houses, bath houses, barber shops, theatres, music halls, public conveyances on land and water, and all other places of public accommodation and amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens."

Right to Serve on Juries.—In *New Jersey* (P. L. 1884, p. 339) it is provided "that no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of this state on account of race, color, or previous condition of servitude." See also *Indiana* Statutes of 1896 (Horner's Anno. ed.), § 1291c; Revised Statutes of *Ohio*, § 7878.

Rule that Substantially Similar Accommodations Is Not Compliance with Statute.—Under a state statute which declares that all persons shall be entitled to the full and equal accommodations, advantages, facilities, and privileges of restaurants, eating houses, barber shops, public conveyances, and places of amusement, it has been held that no discrimination on account of color can be made by a restaurant keeper in serving customers; offering negroes substantially the same accommodations as those provided for white patrons not being a sufficient compliance with the

statute. *Ferguson v. Gies*, 82 Mich. 358, 21 Am. St. Rep. 576.

Under a statute, one of the provisions of which was that all persons should be entitled to the full and equal privileges and accommodations of inns and hotels, it was held that an innkeeper was, nevertheless, liable to the penalties prescribed, though he offered to permit the person applying for entertainment to eat in the "ordinary," separate and apart from the other guests. And this is true though the demand for accommodations was not made by the would-be guest personally, but only by his agent. *Fruchey v. Eagleson*, 15 Ind. App. 88.

Equal Rights in Barber Shops.—Under the *Nevada* Civil Rights Act passed in 1885, it was held that a barber shop was a place of public resort within the statute, and as such its proprietors could not discriminate against a negro on account of race, in denying him any rights therein to which a white person would be entitled if requiring the services of a barber. *Messenger v. State*, 25 Neb. 674.

Drug Store Not Place of Public Accommodation.—Under the *Illinois* Civil Rights Act of June 10, 1885, it was held that a drug store in which soda water is sold is not a "place of public accommodation and amusement," within the Act, but was to be classed with other mercantile shops, and a proprietor thereof might refuse, with impunity, to sell soda water to a colored person. *Cecil v. Green*, 161 Ill. 265.

Civil Liability to Person Discriminated Against.—Where, by law, it is made a misdemeanor for a restaurant keeper to discriminate against colored persons in serving customers, one who violates the law becomes liable to an action for civil damages at the suit of the person discriminated against. The right of a person so injured is not confined to a criminal prosecution. *Ferguson v. Gies*, 82 Mich. 358, 21 Am. St. Rep. 576. And see *Joseph v. Bidwell*, 28 La. Ann. 382, 26 Am. Rep. 102; *Coger v. North West Union Packet Co.*, 37 Iowa 145; *Baylies v. Curry*, 128 Ill. 287.

Necessity for Actual Damage.—Under the *Texas* Separate Coach Act, a negro, though a railroad company may have failed to furnish him accommodations in "a coach equal in all points of comfort and convenience to the one provided for white passengers on the same train," cannot recover in a civil action for damages against the railroad company, unless he can show actual damage resulting from such failure. *Norwood v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1896) 34 S. W. Rep. 180.

2. Civil Rights Cases, 109 U. S. 3.

3. *Barbier v. Connolly*, 113 U. S. 27; *Baylies v. Curry*, 128 Ill. 287; *Donnell v. State*, 48 Miss. 661, 12 Am. Rep. 375; *Messenger v. State*, 25 Neb. 674; *People v. King*, 110 N. Y. 418, 6 Am. St. Rep. 389. And see *Louisville*,

(1) *Rule in the Case of Common Carriers.* — A state statute requiring common carriers within the state to furnish separate but equal accommodations for the white and colored races is not in conflict with the Fourteenth Amendment.¹

But Such a Statute Cannot Apply to Interstate Passengers, as if so applied it would constitute a regulation of interstate commerce — a matter exclusively within the power of Congress.²

(2) *Establishment of Separate Schools* — Separate School System Prohibited by State Statutes. — Although, as has been seen, the establishment and maintenance of separate schools for white and colored children, and the exclusion of the children of one race from the schools established for the children of the other, is not in conflict with the Federal Constitution,³ yet the separate school system may be prohibited by state law, and this has been done in some of the states.⁴

In Illinois, for instance, where a statute exists prohibiting the exclusion directly or indirectly of any child from a public school on account of race or color, it was held that a city board of education had no right or authority to establish separate schools for colored children, and exclude such persons from the schools provided for the whites.⁵

etc., *R. Co. v. Mississippi*, 133 U. S. 587; *Ex p. Plessy*, 45 La. Ann. 80; *State v. Judge*, 44 La. Ann. 770.

A State Statute Making It an Offense to Exclude any citizen from any public place of amusement on account of his race, color, or previous condition of servitude, is not in conflict with that provision of the Federal Constitution preserving property from deprivation without due process of law. *People v. King*, 110 N. Y. 418, 6 Am. St. Rep. 389.

1. *Ex p. Plessy*, 45 La. Ann. 80. And see *Louisville, etc., R. Co. v. Mississippi*, 133 U. S. 587; *State v. Judge*, 44 La. Ann. 770.

2. State Statutes as Affecting Interstate Commerce. — *State v. Judge*, 44 La. Ann. 770. In *Hall v. De Cuir*, 95 U. S. 485, a state statute providing that common carriers should make no discrimination on account of color was held invalid so far as it applied to interstate commerce. In this case, the defendant was the master and owner of a steamboat enrolled and licensed under the laws of the United States. The plaintiff, a negro woman, being refused accommodations on account of her race, in the cabin specially set apart for white persons, brought suit for damages. She based her cause of action upon a statute of *Louisiana*, which provided that the rules prescribed by common carriers should make no discrimination on account of color. The state court construed the law as applying to those engaged in interstate commerce; but the Supreme Court of the United States held the Act unconstitutional so far as it applied to foreign and interstate commerce. Said the court: "Congressional inaction left Benson [the defendant] at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana, or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the state court, seeks to take away from him that power so long as he is within Louisiana. * * * We think this statute, to the extent that it requires those engaged in the transportation of passengers among the states to carry colored passen-

gers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation, it must come from Congress, and not from the states." See also *The Sue*, 22 Fed. Rep. 843.

3. See *supra*, this title, *Right of State to Establish and Maintain Separate Schools*.

4. In Michigan there is a statute providing that "all residents of any district shall have an equal right to attend any school therein," the effect of which was held in *People v. Board of Education*, 18 Mich. 400, to prevent the exclusion of a negro child, on account of race, from a school designed by the board of education for white pupils only.

5. The Legislature of Illinois, in 1874, passed an act entitled "An Act to protect colored children in their rights to attend public schools," which provided, "that all directors of schools, boards of education, or other school officers, whose duty it now is, or may be hereafter, to provide, in their respective jurisdictions, schools for the education of all children between the ages of six and twenty-one years, are prohibited from excluding, directly or indirectly, any such child from such school on account of the color of such child." It appeared, however, in the case of *People v. Board of Education*, 101 Ill. 308, 40 Am. Rep. 196, that the board of education of the city of Quincy had established separate schools for the education of white and colored children, and excluded the latter from the schools designed for the former, compelling in some cases negro children to travel out of the school district in which they resided, in order to reach a school set apart for them. Such a separation and exclusion was, the court held, unauthorized and illegal under the statute. See also *People v. Board of Education*, 127 Ill. 613.

School Directors May Not Discriminate on Account of Color or Race. — While the school directors have, properly, large discretionary powers in regard to the management and control of schools, they have no power to make class distinctions, nor can they discriminate between pupils on account of color or race. *Chase v. Stephenson*, 71 Ill. 383.

In Indiana, however, where there was a constitutional provision for a "general and uniform system of common schools, equally open to all," it was held, nevertheless, that a state statute providing for the establishment of separate schools for the whites and blacks was not invalid.¹

Right of School Boards to Establish Separate Schools in the Absence of Express Legislative Authority. — In some of the states the doctrine has been declared that unless the authority to establish separate schools has been clearly conferred by the legislature, the school boards have no right to do so and exclude pupils of one race from the schools designed for others.² On the other hand, the correct rule has been said to be that in the absence of specific legislation a school board is vested with discretion as to the classification and distribution of the pupils, and that the establishment of separate but equally advantageous schools for the children of the two races, and the excluding of the children of each race from the schools designed for the other, is a proper exercise of such discretion.³

1. An Act of the Indiana Legislature in 1869 provided that a school tax should be levied without regard to the race or color of the owner of the property taxed; that all children, without regard to race or color, should be included in the enumeration for school purposes, the colored children to be enumerated in separate lists from those in which the other children were enumerated, and to be organized into separate schools, having all the rights and privileges of other schools; or, if there should be not a sufficient number of colored children within attending distance to form a separate school for each district, it was provided that the trustees might consolidate several districts into one; or, if there should be not a sufficient number of colored children to thus consolidate, the trustees were directed to provide such other means of education for colored children as might be proper. This statute was held to be not in conflict with section 1 of article 8 of the state constitution, making it the duty of the general assembly "to provide by law for a general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all." *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738.

2. Right of School Board to Establish Separate Schools. — See *Smith v. Independent School Dist.*, 40 Iowa 518; *Dove v. Independent School Dist.*, 41 Iowa 689; *Board of Education v. Tinnon*, 26 Kan. 1. In *Clark v. Board of Directors*, 24 Iowa 266, the court said: "All the youths are equal before the law, and there is no discretion vested in the board of directors or elsewhere, to interfere with or disturb that equality. The board of directors may exercise a uniform discretion, equally operative upon all, as to the residence, or qualifications, or freedom from contagious disease, or the like, of children, to entitle them to admission to each particular school; but the board cannot, in their discretion or otherwise, deny a youth admission to any particular school because of his or her nationality, religion, color, clothing, or the like."

3. See *Roberts v. Boston*, 5 Cush. (Mass.) 193. This was an action on the case brought by a negro child against the city to recover damages claimed by reason of her exclu-

sion from a public school as a pupil. It appeared that primary schools to the number of about one hundred and sixty were maintained for the instruction of children of both sexes, between five and seven years of age, and that of these schools two were appropriated to the exclusive use of colored children, and the residue to the exclusive instruction of white children. It also appeared that the plaintiff had been excluded from the primary school nearest her father's residence, which was a school devoted exclusively to the instruction of white children, and that the school appropriated to the education of colored children nearest her father's residence, and where she might have attended, was about a fifth of a mile further than was the school from which she had been excluded. The court held that it was the rightful authority of the school committee to separate the colored children from the white in the public schools in the city of Boston. In the course of the opinion it was observed: "The great principle advanced by the learned and eloquent advocate of the plaintiff is that by the constitution and laws of Massachusetts all persons, without distinction of age or sex, birth or color, origin or condition, are equal before the law. This, as a broad general principle, such as ought to appear in a declaration of rights, is perfectly sound; it is not only expressed in terms, but pervades and animates the whole spirit of our constitution of free government. But when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security. What those rights are, to which individuals in the infinite variety of circumstances by which they are surrounded in society are entitled, must depend on laws adapted to their respective relations and conditions." And see *Cory v. Carter*, 48 Ind. 327, 17 Am. St. Rep. 738.

CIVIL SERVICE.

BY SAMUEL H. WANDELL.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW related to this subject, see the following titles: AMOTION, vol. 2, p. 310; APPOINTMENT, vol. 2, p. 474; CONSTITUTIONAL LAW; COUNTIES; INJUNCTIONS; MANDAMUS; MUNICIPAL CORPORATIONS; PUBLIC OFFICERS; QUO WARRANTO; STATES; TOWNS AND TOWNSHIPS; UNITED STATES.

I. DEFINITION. — *Civil Service* is defined as the executive branch of the public service as distinguished from the military, naval, legislative, and judicial.¹ In England it is a general name applied to all duties paid for by the state other than those relating to military or naval matters.²

Civil Service Statutes. — In former times appointments to public office were obtained usually by favoritism and political influence. The evils of the "spoils system" led to the enactment of statutes having for their object the ascertaining of the qualifications of the candidates for official positions and the continuance in the public service of persons who had been found competent to discharge the duties thereof.³

1. Century Dictionary.

2. **British Civil Service.** — At the head of the British civil service, which numbers about fifty thousand officials of all grades, are placed the officers of the Royal Household, under several departments. Then come the officers of the House of Lords and the House of Commons. Then a vast number of officers in departments, of which the following are the most important: Treasury, Home Office, Foreign Office, Colonial Office, India Office, Tax Office, Admiralty, Board of Trade, Post Office, Customs, Inland Revenue (including stamps, taxes, and excise), Exchequer and Audit Office, Office of Woods and Forest, Office of Works, etc. International Encyclopedia, vol. 4, p. 24.

3. **Civil Service Act, Its Purpose and Necessity.** — "It is the main purpose of the act to establish a system of examinations for ascertaining the fitness of applicants for doing the public work. The new system is to take the place of that vast machinery of patronage, largely based on official form and social and political influence, which, though materially curtailed in recent years, has long been the most

effective means of entering the executive service. In other words, a merit system of office is substituted for a spoils system." From First Annual Report of U. S. Civil Service Commission, p. 11. See also *People v. Poillon*, 16 Abb. N. Cas. (N. Y. Supreme Ct.) 119.

In *Rogers v. Common Council*, 123 N. Y. 173, Peckham, J., says: "Long prior to the passage of the first so-called Civil Service Reform Act by the Federal Congress, the condition of that service and the method of appointment thereto had become the subject of most anxious thought on the part of many upright, intelligent, and experienced men. The semi-barbarous maxim that 'To the victors belong the spoils' had been the foundation stone upon which the system of appointments to the civil service of the nation had been placed for a number of years. The system had grown to such proportions under the necessary enlargement of the service, and it had become in practice so entirely the creature of political chiefs, that the appointing power was regarded merely as a formal means of registering and legalizing the appointments to office which had

II. STATUTORY PROVISIONS. — By act of Congress it is provided that the President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service.¹

The Civil Service Act, providing for the appointment of commissioners to constitute the United States Civil Service Commission and regulating the duties of such commissioners, was approved January 16, 1883.² Similar statutes exist in some of the states of the Union.³

already been substantially made by them. Such a system took from the officer who was to make the appointment all sense of personal or official responsibility to the people of the country and substituted in its stead the feeling that he was responsible only to his party to make such appointments to office as the leading men therein should choose to ask for. * * * The chief reason for an appointment was the political work done by the applicant and his supposed power to do more, and thus an appointment to an office in the civil list was regarded as a fit and proper reward for purely political and partisan service."

1. U. S. Rev. Stat., § 1753.

2. 22 U. S. Stat. L. 403; Supp. U. S. Rev. Stat., vol. 1, p. 392.

3. See, for example, N. Y. Laws 1883, c. 354; 3 N. Y. Rev. Stat. (Banks' 9th ed.) 2575.

The New York civil service statutes (N. Y. Laws 1883, c. 354, as amended by Laws 1894, c. 681) constitute a general system of statute law applicable to appointments and promotions in every department of the civil service of the state, with such exceptions only as are specified in the statutes themselves. *People v. Roberts*, 148 N. Y. 363.

The provision of the constitution, art. 5, § 9, requiring appointments and promotions in the civil service of the state and of all the civil divisions thereof, including cities and villages, to be made according to merit and fitness, is mandatory; but the execution of the subsequent provision, "to be ascertained so far as practicable by examinations, which, so far as practicable, shall be competitive," is, as to the machinery necessary for the conducting of competitive examinations, dependent upon statute. The Civil Service Law (Laws of New York, 1883, c. 354, as amended) provides the necessary machinery for carrying into effect the provisions of the constitution in the states and in cities, but in the absence of legislation providing the machinery for conducting competitive examinations for the civil service of counties, towns, and villages, the constitutional provision remains ineffectual. *Chittenden v. Wurster*, 152 N. Y. 345, reversing 14 N. Y. App. Div. 483.

Construction of Statutes — Amendments. — In the construction of civil service statutes, amendments of the original act are to be read as parts of the act itself. The presumption is that a later statute, dealing in general terms with a subject, and not expressly contradicting

the provisions of a prior act, was not intended to affect the more particular provisions of such prior act, unless it is necessary to infer such a design in order to give meaning to the words employed. When an amendment to the Civil Service Act provided that election officers now in office and inspectors of election and poll-clerks should be exempt from examination, and a later amendment provided that no officer or clerk should be appointed or promoted until he had passed an examination, it was held that the two amendments should be construed as *in pari materia*, and that a person who was an election officer in office when the first amendatory act went into effect was eligible to reappointment without examination. *People v. French*, 51 Hun (N. Y.) 345.

Municipal Service Board — Mere Practice Does Not Have Effect of Rule. — While the courts give full force and effect to all rules made by a municipal service board in the discharge of its duty, a mere practice, unsanctioned by any express resolution or rule of the board, should not have the force and effect of such a rule or resolution. *People v. Civil Service Board*, 5 N. Y. App. Div. 164.

Compensation of Commissioners. — The provision of the New York Civil Service Act making mandatory the employment of suitable persons to conduct the inquiries and make the examinations necessary for the regulation of the civil service implies that compensation is to be made for services rendered by the commissioners so employed. Persons rendering services for a municipal corporation pursuant to law are entitled to be compensated for the value thereof, although no specific provision of law exists declaratory of the rights or of the extent of the compensation, and the common council of a city may be compelled by mandamus to consider and act upon the estimate made by the mayor for salaries and expenses of executing the civil service law. *People v. Common Council*, 16 Abb. N. Cas. (N. Y. Supreme Ct.) 96. In this case the court said: "What the mayor has been required to do is to employ suitable persons, and the power to employ others to render services on behalf of the municipality includes the obligation to provide for their compensation. The employment can usually be expected to be secured in no other way, and when a person or persons are employed, it is a reasonable as well as a natural implication that the services rendered in the course of the employment shall be reason-

In England formerly all offices were considered to be the absolute personal property of the sovereign, to be disposed of at his pleasure.¹ The common law, however, at an early period, seems to have recognized the principle of examination of a candidate for an official position in order to ascertain his fitness to discharge the duties thereof,² and under the present English system candidates are in most cases appointed after open competitive examination.³

III. CONSTITUTIONALITY OF STATUTES — **Legislature May Create Civil Service Commission with Power to Make Rules.** — The legislature of a state has the constitutional right to provide for the appointment of civil service commissioners, and to delegate to them the power to make rules, not inconsistent with existing laws, to control their discretion and that of the officers of the state or the

ably or correspondingly rewarded. * * * In no other way can the services of others be ordinarily secured."

Compensation of Clerk to Commission. — When the mayor of a city, pursuant to the civil service regulations, upon recommendation of the commissioners employs a secretary or clerk to the commission at a fixed salary, the city is liable for an amount which would be a reasonable compensation for such services not exceeding the amount so fixed, and the right to maintain an action for recovery thereof does not depend upon a prior appropriation by the common council. The person so employed is not confined to mandamus proceedings to compel the council to agree to the amount fixed by the mayor or to decide on some other reasonable sum, nor is he required to resort to indictment to punish members of the common council for wilfully or maliciously refusing to make the necessary appropriation, but he may maintain an action against the city to recover for services rendered. *Kip v. Buffalo*, 123 N. Y. 152.

1. "It was not until the thirteenth century that ministerial office in England ceased even partially to be considered the personal property of the sovereign, to be bestowed as he pleased, without regard to the fitness of the appointee for the duties of his place. During the whole Norman period, properly so called, the offices were freely sold to supply the needs of the royal treasury. In the thirteenth century the growing powers of the people compelled some attention to fitness and restricted the practice of selling, but this practice did not wholly disappear from the civil service until the expulsion of the Stewarts, and a survival of it was found in the military service until 1870, and is still to be found in the Church in the right of selling the next presentation to livings not actually vacant. As the share of Parliament in the government increased, the division of the patronage with members of both houses gradually became to the minister of the day a potent means of influencing votes, until at the accession of Queen Victoria the form of securing appointments of followers and dependents was one of the well-recognized perquisites of parliamentary supporters of the government." *Encyclopedia Americana*, vol. 2, p. 119.

2. **Ancient English Customs.** — In *Peck v. Rochester*, (Supreme Ct.) 3 N. Y. Supp. 872, Angle, J., says: "Civil service examinations, as a prerequisite to entering upon the duties of office, appear to have been known to the common law of England more than five hundred

years ago. In the city of London, in a tower which is thought to have been one of the earliest portions of Westminster Abbey, is a room where there are six horseshoes and sixty-one nails, which, by ancient custom, the sheriffs of London were compelled to count when they were sworn in. In the time of Edward II., when this custom was established (1308-1327), it was a proof of education, as only well-instructed men could count up to sixty-one. At the same time it was ordained that the sheriff, in proof of his strength, should cut a bundle of sticks. This custom (the abolition of which has been vainly attempted) still exists, but a bundle of matches is now provided. The original knife is always used. 2 Hare, *Walks in London* (N. Y. ed. 1878) 272, 273. To secure the theological qualifications of the sheriffs, they were required not only to take the oaths of allegiance and supremacy, as well as the statutory oath of office, but to make a declaration against transubstantiation, and to receive the sacrament within three months after entering upon office, in the presence of two witnesses and one churchwarden, and get a certificate that they had done so, signed by the minister and one churchwarden, and the two witnesses must also make affidavit of the fact. 14 Petersd. Abr. (N. Y. ed. 1831), 429, note."

3. **Present English System.** — Appointments to subordinate offices in the British civil service, until comparatively recent times, were made by the heads of the departments, and, as a rule, without examination of any kind. By a series of Orders in Council, beginning in 1855, a system of appointment upon examination was instituted and a Civil Service Commission organized. Offices are held nominally during pleasure, but, in practice, dismissals are made only for incompetence or misbehavior. Superannuation allowances or pensions are granted upon retirement. See 4 and 5 Wm. IV., c. 24; stat. 22 Vict., c. 25, and amendatory acts.

England — New South Wales. — The Crown has, by the law, whether in England or New South Wales, power to dismiss at pleasure either its civil or military officers, a condition to that effect being an implied term of the contract of service, except where it is otherwise expressly provided. But certain provisions of the New South Wales Civil Service Act of 1884, being manifestly intended for the protection and benefit of the officers, are inconsistent with such a condition, and consequently restrict the power of the Crown in that respect. *Gould v. Stuart*, (1896) App. 575.

cities where the appointing power is vested. Such action is merely a delegation of administrative powers and duties, and not of the power to enact laws.¹

Bipartisan Commission Constitutional. — It may also limit the selection of civil service commissioners by prescribing that not more than two shall be adherents of the same political party, as such legislation does not amount to an arbitrary exclusion from office.²

Making Municipal Civil Service Regulations Subordinate to State Regulations. — It may require that all regulations prescribed by the mayor of a city be submitted to the state civil service board for approval.³

Requirement that Candidate Shall Show Fitness. — A requirement that a candidate for office shall show his fitness therefor before appointment does not create any illegal test for office.⁴

Prescribing Penalties. — The legislature may also prescribe a penalty for the violation of established civil service regulations.⁵

Exemption of Certain Class from Competitive Examination. — It has been held that a statute exempting one class of citizens from competitive examination was unconstitutional.⁶

IV. APPLICATIONS AND APPOINTMENTS — 1. General Principles — Applications for Appointment. — All persons are required to make a proper application for appointment under civil service laws. The examination is not the only statutory requirement.⁷

1. Opinion of Justices, 138 Mass. 601.

2. **Civil Service Commissioners — Adherents of Same Party.** — A statute providing for the appointing of three civil service commissioners, not more than two to be adherents of the same party, is not violative of a constitutional provision declaring that no member of the state shall be disfranchised or deprived of the rights or privileges of a citizen unless by law of the land or judgment of his peers, or deprived of life, liberty, or property without due process of law. Such legislation does not amount to an arbitrary exclusion from office nor to a general regulation regarding qualifications not mentioned in the state constitution. *Rogers v. Common Council*, 123 N. Y. 173.

3. **Approval of Municipal Regulations by State Authorities.** — A statutory provision requiring the civil service regulations prescribed by the mayor of the city to be approved by the State Civil Service Commissioners upon taking effect does not violate a provision of the state constitution requiring all appointive officers of a municipality to be appointed by such authorities thereof as the legislature may designate for that purpose. The submission to the state board does not interfere with the general power of local authorities to appoint to office. *Rogers v. Common Council*, 123 N. Y. 173.

4. **A Statute Requiring a Person Appointed to Office to Show His Fitness Therefor** at the time of application is not in violation of a constitutional provision that "no other oath, declaration, or test shall be required as a qualification for any office of public trust," save as specified therein; such requirement is not an illegal test within such provision. *Rogers v. Common Council*, 123 N. Y. 173.

5. **Application of Civil Service Rules — Penalties.** — Civil service rules may be given a general or a limited application. Their limitation may be geographical or subjective. The rules may be applied to certain cities and to certain classes of officers. A penalty for violation of

the rules may be provided by the legislature. Opinion of Justices, 138 Mass. 601.

Soliciting Political Contributions. — Section 12 of the Act of Congress passed January 16, 1883, prohibiting persons from soliciting or receiving political contributions in any room or building officially occupied by any United States officer or employee, or in any navy yard, fort, or arsenal, applies to private citizens as well as public officers, and is not an unconstitutional abridgment of the former's speech and action; government having a right to prescribe office rules for its own employees. *U. S. v. Newton*, 20 D. C. 226.

6. **Exempting Certain Classes of Applicants from Examination.** — The power of the legislature to determine in what cases competitive examinations are practicable does not include the power to exempt or relieve any class of citizens from such examinations, and exact them from others. Veteran soldiers and sailors have the preference which the constitution gives them. The legislature can give them no more. All applicants for the same office, in reference to the manner of examination, must be treated alike. Chapter 344 of the Laws of New York, 1895, is therefore unconstitutional. *Matter of Keymer*, 89 Hun (N. Y.) 292, *affirmed* 148 N. Y. 219; *Matter of Sweeley*, 12 Misc. Rep. (N. Y. Supreme Ct.) 174, *affirmed* 146 N. Y. 401. See Opinion of Justices, 145 Mass. 587; *Brown v. Russell*, 166 Mass. 14.

7. It has been held in *Massachusetts*, under a statute providing that all persons honorably discharged from United States service in time of the Rebellion may be preferred for appointment without having passed any examinations, that such persons are required to make application for appointment under the rules of the civil service commission. The examination is not the only requirement of the statute and rules. Opinion of Justices, 145 Mass. 587.

Libel — False Statements in Application. — In an action against a newspaper to recover dam-

Verification of Applications. — The authorities may require all applicants to verify such applications, and perjury may be committed in making oath to the same.¹

Failure to Appoint Within Time Prescribed. — The failure of a civil service board to make an appointment within the time prescribed by law does not deprive it of the power to make it thereafter in the absence of any prohibition to the contrary.²

Municipal Appointment of Police Officers Held Not Judicial. — The appointment of police officers by municipal authorities has been held to be administrative, not judicial, in character, and therefore not to be reviewable upon certiorari.³

Civil Service Statutes Not Retroactive. — The civil service statutes do not apply to appointments made before the enactment thereof.⁴

Transferring Position to New Schedule. — Where there is a change made by the civil service commissioners by transferring a position from one schedule to another, thereafter the name must be certified for appointment to such position from the latter schedule.⁵

Decisions with Regard to Various Other Points connected with the scope and application of civil service statutes regulating appointments to office will be found collected in the note.⁶

ages for an alleged libelous article charging plaintiff with making false statements in his sworn application for examination presented to the civil service commission of a city, evidence to prove the falsity of such statements in the application should be submitted to the jury. *Foreman v. Union, etc., Co.*, 83 Hun (N. Y.) 385.

1. Application Must Be Verified if Required. — Under a statute of the state of *New York* requiring the mayor of each city to prescribe proper rules and regulations for governing examinations for admission to the civil service of the city, the mayor is authorized to require the applicants to verify all applications for office. The court said: "It is important that the examining boards should be informed as to moral character as well as the intellectual qualifications of candidates for positions in the civil service of their cities. It would probably aid them in arriving at the facts as to the character of the applicants if they would be subjected to the ordeal of a verification of their written applications by their oaths." *Foreman v. Union, etc., Co.*, 83 Hun (N. Y.) 385.

Perjury in Verifying Application. — Where rules require the verification of all applications, the oath attached to such application is not extrajudicial, and if the same be false it would justify a conviction for the crime of perjury, although the act conferring power to prescribe regulations does not in terms enforce as a condition of the examination that the written application papers shall be sworn to. *Foreman v. Union, etc., Co.*, 83 Hun (N. Y.) 385.

2. People v. Board of Police, 46 Hun (N. Y.) 296.

3. Atty.-Gen. v. Northampton, 143 Mass. 589.

Determination of Fitness by Civil Service Commission is Judicial Act. — When, pursuant to the *New York Civil Service Law*, the mayor of the city has prescribed regulations for the admission of persons into the civil service of the city, which are designed to promote the efficiency of the service and to ascertain by examination and inquiry the fitness of candidates in respect to character, knowledge, and ability

for the positions which they seek, the civil service commission of the city is made the sole judge of the candidate's character, fitness, and qualifications, and the commission's act in granting a certificate to an applicant who has passed the examination prescribed by the regulation is judicial in its nature, and cannot be impeached collaterally, but only by direct proceedings instituted for that purpose, and the board of aldermen of the city cannot question the legality of the appointment of such an applicant upon the ground that he is not legally qualified for his position. *People v. Buffalo*, 18 Misc. Rep. (N. Y. Supreme Ct.) 533.

4. Sargent v. Gorman, (Supreme Ct.) 38 N. Y. St. Rep. 780, 14 N. Y. Supp. 481.

5. People v. Civil Service Board, 5 N. Y. App. Div. 164.

6. When Municipal Authorities May Create Civil Service Commission. — Under a statute which provides that the mayor and heads of the departments of the city shall adopt rules and regulations providing for appointments in the civil service of the city by competitive examination, it has been held that it is competent for the authorities to create a board of civil service examiners in order to effectuate the purposes of the statute. *Newcomb v. Indianapolis*, 141 Ind. 451.

Disqualification — City Cannot Employ Unqualified Person. — A disqualification under civil service laws for appointment in the public service of a city applies not only to the individual who has not passed the requisite examination, but also to the city itself, which cannot employ or receive into service a person who is not eligible. *Peck v. Belknap*, 130 N. Y. 394.

Department of Public Works. — The effect of the civil service section of the *New York* constitution of 1894 is to bring all positions in the civil service not excepted by the statute within the operation of the Civil Service Act of 1883 as amended, including appointments of persons in the department of public works of the state, to be employed in the care and management

2. Preference to Veterans. — Veteran soldiers and sailors who have been honorably discharged are by constitutional or statutory provision in some states given preference for employment in the public service in consideration of the services previously rendered to the state.¹

of canals. The law as laid down in *People v. Angle*, 109 N. Y. 564, is superseded by the civil service section of the constitution. *People v. Roberts*, 148 N. Y. 360.

Confidential Positions. — Under an act giving preference to veterans, but providing that the same shall not be construed to apply to any strictly confidential position, an application for mandamus to compel appointment cannot be granted where it states that the position to which appointment is sought has been entered upon the schedule of confidential positions in the civil service. *Matter of Ostrander*, 12 Misc. Rep. (N. Y. Supreme Ct.) 476.

Whether the duties of a subordinate are confidential is a question to be determined by the appointing officer, and the action of a surrogate in dismissing his confidential court messenger is not subject to review by the court, under a statute providing that no persons holding position by appointment shall be removed, except for cause shown, after a hearing had, but expressly providing that such provision "shall not be construed to apply to the position of private secretary." *People v. Ransom*, (Supreme Ct.) 37 N. Y. St. Rep. 50, 13 N. Y. Supp. 370.

The civil service section of the constitution of *New York* (art. 5, § 9), which provides that appointments and promotions in the civil service of the state and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained so far as practicable by examinations, which, so far as practicable, shall be competitive, contemplates the existence of positions for which a competitive examination is not practicable. Under this provision the question of exemption from examination becomes one of law when the nature and character of the duties of the position have been ascertained; and a competitive examination is not practicable for positions of a confidential relation to the appointing power; and a position is confidential where its duties are not merely clerical, and are such as specially devolve upon the head of the office, which, by reason of his numerous duties, he is compelled to delegate to others, and the performance of which requires skill, judgment, trust, and confidence, and involves responsibility of the officer or of the municipality which he represents. *Chittenden v. Wurster*, 152 N. Y. 345, *reversing* 14 N. Y. App. Div. 483.

The relator, who was a veteran fireman holding the position of assistant warrant clerk in the office of the comptroller of Brooklyn, upon his removal from that position by the comptroller without any cause shown or hearing had, instituted a mandamus proceeding to procure his reinstatement. It was held that he was entitled to be reinstated; that his position did not bear a confidential relation to the appointing officer, and was not, therefore, within the exception of the statute; and that a determination by the civil service commissioner of Brooklyn that the relator's position

was a confidential one was not binding upon the court in the construction of the Veteran Act, whose protection was invoked by the relator. *People v. Palmer*, 9 N. Y. App. Div. 58.

Professional Expert. — Under the *Pennsylvania* act of June 1, 1895, which provides for the appointment in the civil service of "cities of the first class" by competitive examination, but which excepts the appointment of "professional experts" from such requirement, it has been held that visiting physicians of the Philadelphia Hospital may be appointed without a competitive examination. *Com. v. Fitter*, 147 Pa. St. 288.

Assistant District Attorney. — It is not practicable to ascertain the merit and fitness of an assistant district attorney by civil service examination, and the office does not come within the civil service provisions of the *New York* state constitution. A district attorney is a county officer, and notwithstanding the fact that the salaries of himself and assistants are paid from the treasury of a city within said county, they are not, within the intent of the Civil Service Act, officers of the city, nor subject to municipal regulations applicable to places under the city government. *People v. Taylor*, 17 Misc. Rep. (N. Y. Supreme Ct.) 505.

The Clerk of the Police Justice of the city of Syracuse is a person in the civil service of that city, within the meaning of art. 5, § 9, of the constitution of *New York*, and the appointment of such a clerk must be made according to the civil service rules as to examination. Such a person is not a confidential employee or a deputy of the police justice. *People v. Tobey*, 8 N. Y. App. Div. 468.

Day Laborer. — A day laborer in the department of public works of a city, receiving a *per diem* compensation, does not hold a position by appointment on salary under the civil service laws. *Meyers v. New York*, 69 Hun (N. Y.) 291; *Matter of Sullivan*, 55 Hun (N. Y.) 285; *People v. Brookfield*, 13 Misc. Rep. (N. Y. Super. Ct.) 566; *Wagner v. Collis*, 7 N. Y. App. Div. 203.

The fact that the salary of one holding a continuous position is fixed at a specific rate per day, payable monthly, does not make him a mere day laborer. *Matter of Murray*, 17 Misc. Rep. (N. Y. Supreme Ct.) 185.

1. Const. of *New York*, art. 5, § 9; *Matter of Keymer*, 89 Hun (N. Y.) 202, 148 N. Y. 219; *Chittenden v. Wurster*, 152 N. Y. 345, *reversing* 14 N. Y. App. Div. 483; *Brown v. Russell*, 166 Mass. 14.

The Massachusetts Act of 1896, c. 517, which authorizes veterans to apply for examination for any position in the public service classified under the civil service statutes and rules, and provides that, if such veterans pass the examination, they shall be preferred in appointment to all male persons not veterans, is constitutional; and the effect of the provision is, that the veterans must first be found qualified, by an examination in accordance with the civil service statutes and rules, to perform the

Appointment of Veterans — Examinations. — It is held that a civil service statute giving preference to veterans in appointments should be so construed as to require that when one of several equally qualified applicants is an honorably discharged soldier he should be preferred, but the soldier should not be appointed when he is not so well qualified as any of the other applicants.¹ It is also held that such discharged soldiers and sailors have not, because found qualified, an absolute right of preference over all others having an equal or lower standing. If their standing is equal to or better than that of competitors, they have the absolute right to the appointment, which is not the case with other persons.² The legislature of a state has no power to exempt soldiers and sailors, as a class, from competitive civil service examinations exacted from others, nor to declare that the practicability of an examination is to be determined solely by the amount of the compensation attached to an office.³

Discharge from Office. — A statute giving preference for an employment in the service of the state to honorably discharged soldiers and sailors, and imposing upon public officers having the power of appointment the duty of faithful compliance with the terms thereof both in letter and spirit, does not abrogate or repeal the power to discharge which exists before its passage. In the observance of constitutional or statutory restraints, the power of appointment to office implies the power of removal when the law fixes no definite term for the office.⁴

A Veteran Whose Office is Abolished on the ground of economy is not entitled to displace another officer to whose duties the duties of the former office have been added.⁵

Various Cases Applying the Regulations of Civil Service Statutes with regard to the appointment of veterans are collected in the note.⁶

duties of the office or employment which they seek, and if they are found so qualified they are to be preferred in appointment to all other persons except women. Opinion of Justices, 166 Mass. 589. But a statute which purports to give to veterans absolutely privileges distinct from those of the community in obtaining public office is not constitutional. *Brown v. Russell*, 166 Mass. 14.

The U. S. Statutes Provide that persons honorably discharged from the military or naval service, by reason of disability resulting from wounds or sickness incurred in the line of duty, shall be preferred for appointments to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices; and that in making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors. U. S. Rev. Stat., § 1754; 19 U. S. Stat. L. 169. See also 22 U. S. Stat. L. 406, § 7.

1. *People v. Saratoga Springs*, 54 Hun (N. Y.) 16; *Matter of Keymer*, 148 N. Y. 219, affirming 89 Hun (N. Y.) 292; *Matter of Sweeley*, 12 Misc. Rep. (N. Y. Supreme Ct.) 174, affirmed 146 N. Y. 401. See also *Brown v. Russell*, 166 Mass. 14.

2. *People v. Poillon*, 16 Abb. N. Cas. (N. Y. Supreme Ct.) 119.

3. *Matter of Keymer*, 89 Hun (N. Y.) 292.

4. *People v. Lathrop*, 142 N. Y. 113.

5. *People v. Adams*, 51 Hun (N. Y.) 583.

6. Mistake as to Placing Name on Eligible List After Examination. — When a veteran has passed the required civil service examination he is entitled to have his name placed upon the eligible list, and his rights cannot be prejudiced by the omission of the officer whose duty it is to prepare the eligible list to place his name thereon. *People v. Civil Service Board*, 13 N. Y. App. Div. 309.

When a veteran has appeared before the civil service commissioners and submitted to the examination required, and his name has been placed upon the list of persons eligible for appointment, he becomes legally entitled to a preference for appointment in accordance with the civil service acts, and commissioners cannot arbitrarily deprive him thereof by striking his name off the list of eligibles. In case an error or mistake has been made by the commissioners, arising from an insufficient examination or otherwise, the statute apparently contemplates a probationary appointment, and not an arbitrary rescission by the commissioners of their former determination. *People v. Cobb*, 13 N. Y. App. Div. 56.

Loss in Height by Veteran. — In the case of an applicant for appointment in the public force who had served in the late war, and who fell below the standard for height, it appeared by army measurements at the time of his enlistment that he was of the required height; but through hardships and advancing age he measured three-quarters of an inch less at the time of application for the desired position; it was held by the Civil Service Commissioners of Massachusetts (Fourth Annual Report, 1888, p. 96) that under the provisions of the rule

Hearing Before Discharge. — Certain statutes provide that veterans appointed to office shall be removable only upon cause shown after a hearing.¹

giving preference to persons who had served in the army or navy in time of war, the physical disability referred to did not render the applicant incompetent to perform duties, and was no bar to his admission to the service.

Proof of Competency Required. — A discharged Union sailor, applying for appointment to public office, is required to establish by sufficient proof from reliable sources his competency for such position, when such fact of competency is denied by the appointing officers, before he is entitled to relief by mandamus. The unsupported affidavit of the applicant is not such proof of competency as is required. *People v. Knapp*, (Supreme Ct.) 22 N. Y. St. Rep. 468, 4 N. Y. Supp. 825.

Veterans in Office. — A civil service statute giving preference in appointment to veterans, and providing they shall not be disqualified on account of age or physical disability, unless thereby rendered incompetent to discharge duties, applies to veterans in office at the time of passage of the act, as well as those appointed under it. *People v. French*, 52 Hun (N. Y.) 464.

Court Crier. — Where a county judge has appointed a civilian to the office of crier of the court, a veteran soldier cannot maintain a mandamus to compel the removal of such appointee and his own appointment to be made, even though the original appointment should have been vacated. The civilian in possession of the office, not being a party to mandamus proceedings, cannot be removed without his day in court. *People v. Wendell*, 57 Hun (N. Y.) 363.

Employee on Public Works. — An employee of the commissioner of public works of a city, as inspector on the works of a private corporation which is engaged in laying gas mains in the streets, who is paid by the said corporation, is not engaged in public, but in special work, and on the completion thereof is not entitled to be continued in the service of the department under a statute giving preference in employment to veterans. *People v. Gilroy*, 60 Hun (N. Y.) 507.

Employee of Sheriff. — A chief clerk, private secretary, or deputy of a sheriff may be dismissed at the volition of the employer, notwithstanding a statutory provision against the removal of an honorably discharged Union soldier from office and preference of soldiers for employment in the public service. *Sargent v. Gorman*, (Supreme Ct.) 38 N. Y. St. Rep. 780, 14 N. Y. Supp. 481.

Health Officer of City. — It was held that chapter 464, Laws of *New York*, 1887, providing for preference of honorably discharged Union soldiers and sailors in every public department and upon all public works of the state of New York, and of the cities, towns, and villages thereof, did not apply to the office of health officer of Yonkers, the same being distinct and independent and not subordinate to any other office or department under the charter. *People v. Yonkers*, (Supreme Ct.) 39 N. Y. St. Rep. 11, 14 N. Y. Supp. 455.

Lamp Inspector. — A lamp inspector, whose

duties were to keep a record of the number and location of the street lamps within a certain city, the number unlighted and the reason therefor, to investigate complaints relating to lamps, and to report monthly to the common council, was held to come within the provisions of a municipal civil service classification, which included officers and members of police and fire departments, and all other subordinate officers, clerks, and assistants, and he cannot be employed except by passing the required examination. *Peck v. Rochester*, (Supreme Ct.) 3 N. Y. Supp. 872, *affirmed sub nom.* *Peck v. Belknap*, 130 N. Y. 394.

Veteran Cannot Compel Appointment Where No Vacancy Exists. — A veteran who has successfully passed his civil service examination cannot, by a mandamus proceeding, compel his appointment to fill a vacancy which exists in a position in a municipal department, and to which his examination makes him eligible. The head of such department has authority to determine the number of his subordinates, and if a vacancy exists it is discretionary with him whether he will fill the same or leave it vacant. *People v. Palmer*, 9 N. Y. App. Div. 252.

The Veteran Act gives no title to a veteran to any office or position until actual appointment, and where no vacancy exists a veteran cannot, in a mandamus proceeding, test the question whether the occupants of positions to which he is eligible have been rightfully or wrongfully appointed. *People v. Palmer*, 9 N. Y. App. Div. 253; *People v. Rupp*, 90 Hun (N. Y.) 145.

1. *State v. Newark*, (N. J. 1896) 33 Atl. Rep. 853; *State v. Chosen Freeholders*, (N. J. 1896) 33 Atl. Rep. 943; *Matter of Murray*, 17 Misc. Rep. (N. Y. Supreme Ct.) 185; *People v. Brookfield*, 6 N. Y. App. Div. 445, *affirmed* 151 N. Y. 674; *Wagner v. Collis*, 7 N. Y. App. Div. 203; *People v. Cruger*, 12 N. Y. App. Div. 536; *People v. Waring*, (Supreme Ct.) 36 N. Y. Supp. 1119.

Deserter Furnishing Substitute. — A soldier of the war of the Rebellion, who deserted from his regiment, and who afterwards received his discharge under an order of the war department, which authorized such discharge to be issued to him upon his furnishing a substitute, is not an honorably discharged Union soldier within the meaning of the New Jersey Act of 1895, prohibiting the removal of such soldiers from office except for cause shown and after a hearing. *State v. Newark*, (N. J. 1896) 33 Atl. Rep. 853.

A Veteran Sailor, Holding the Position of Dockmaster in the Department of Docks in the city of New York, is within the protection of the Veteran Act, and cannot be removed without cause shown and a hearing had, and his position is not rendered a confidential one by reason of the fact that he is intrusted with the collection of certain moneys of the board of dock commissioners. *People v. O'Brien*, 9 N. Y. App. Div. 428.

Policeman — Hearing Before Removal. — A roundsman in the police force of the city of

CIVIL SUIT, ACTION, CASE, ETC. (See also ACTION, vol. 1, p. 577; CASE; CRIMINAL PROCEEDING; PROCESS; SUIT.)—The terms "civil" and "criminal," when used whether in reference to jurisdiction or judicial proceedings generally, have respect to the nature and form of the remedy, and the cause of action or occasion for instituting legal proceedings. "Civil" stands for the opposite of "criminal," and hence we have courts known as courts of civil jurisdiction and of criminal jurisdiction, distinguished by the character of the prosecutions in each. A civil action is brought to recover some civil right, or to obtain redress for some wrong, not being a crime or misdemeanor, and is thus distinguished from a criminal action or prosecution. A criminal action is a prosecution in a competent court of justice, in the name of the government, for the punishment of a crime, and a civil action is one prosecuted for the redress of an injury or the prevention of a wrong.¹

New York does not hold a position "by appointment" within the statute providing that "no person holding a position by appointment * * * who is an honorably discharged soldier * * * shall be removed from such position, except for cause shown after a hearing had;" he is merely a patrolman assigned to special duty, and may be remanded to patrol duty by the chief of police of that city. *People v. Roosevelt*, 5 N. Y. App. Div. 168. See also *People v. Wright*, 150 N. Y. 444, *affirming* 7 N. Y. App. Div. 185.

School Teacher.—It has recently been held that the teacher of a public school in the city of Brooklyn is an employee, not of the city, but of the board of education, which is a corporation distinct from the city, and is not protected by the statute providing that no veteran of the civil war holding a position by appointment shall be removed except for cause shown after a hearing. *Ridenour v. Board of Education*, 15 Misc. Rep. (N. Y. Supreme Ct.) 418.

Dismissing Supernumerary Employee Without Hearing.—The head of a municipal department may, in the interests of economy, dismiss without presenting charges, and without a hearing, an employee whose services are unnecessary, where there is no intention to fill the position occupied by such employee by the appointment of another person. *People v. Waring*, 7 N. Y. App. Div. 204. See also *Wagner v. Collis*, 7 N. Y. App. Div. 203.

The *New York* statute does not preclude the discharge of veterans when made in good faith and for lack of work for them to do. *People v. Squier*, 10 N. Y. App. Div. 415. See also *People v. King*, 13 N. Y. App. Div. 400.

Appointment for Definite Term—End of Term Creates Vacancy.—Where an honorably discharged Union soldier has been appointed to a position for a definite period of time, his right to occupy the place ceases when the definite term fixed by the contract expires. The place thereupon becomes vacant, and the appointment of another person thereto is not a violation of the statute which forbids the removal of such an honorably discharged soldier except for cause shown and after hearing. *State v. Board of Education*, (N. J. 1896) 33 Atl. Rep. 944.

Laches—Estoppel.—A veteran who allows more than four months to elapse, after his discharge from office, before bringing proceedings to test the legality of his discharge and to procure his reinstatement is guilty of laches

which will bar his success in such proceeding. *People v. Collis*, 6 N. Y. App. Div. 467.

1. Bouvier's Inst., pl. 2462-2643; Bacon's Abr., Actions, *a*; *Landers v. Staten Island R. Co.*, 53 N. Y. 456.

Other Definitions.—In *McPike v. McPike*, 10 Ill. App. 334, it is said: "A civil action is one prosecuted for the establishment or recovery of a right, or the prevention of a wrong, or the redress of an injury."

A civil action has been defined to be an action which has for its object the recovery of private or civil rights, or compensation for their infraction. *Farnum's Petition*, 51 N. H. 353.

Civil cases are essentially those in which the defendant, or party against whom relief is sought, is a natural person or corporation other than the state. *State v. Judge*, 15 La. 192.

Civil cases are those which involve disputes or contests between man and man, and which only terminate in the adjustment of the rights of plaintiffs and defendants. They include all cases which cannot legally be denominated criminal cases. *Grimball v. Ross*, T. U. P. Charlt. (Ga.) 175.

In *Cancemi v. People*, 18 N. Y. 136, the court said: "*Civil suits* relate to and affect, as to the parties against whom they are brought, only individual rights which are within their individual control and which they may part with at their pleasure. The design of such suits is the enforcement of merely private obligations and duties. * * * Criminal prosecutions involve public wrongs, 'a breach and violation of public rights and duties, which affect the whole community, considered as a community, in its social and aggregate capacity.' 3 Bl. Com. 2; *id.* 4, 5. The end they have in view is the prevention of similar offenses, not atonement or expiation for crime committed."

A civil action is a demand of a civil right by a person in a court of justice. *State v. Bottle of Brandy*, 43 Vt. 297.

Suit in Equity.—The term *civil action* may include either an action at law, or a suit in equity. *Livingston v. Story*, 9 Pet. (U. S.) 632; *Fenstermacher v. State*, 19 Oregon 506; *U. S. v. 10,000 Cigars*, 1 Woolw. (U. S.) 125. See *infra*, this note, *Witnesses*.

Special Proceedings—Cases in Equity.—In *Powell v. Powell*, 104 Ind. 18, it was held that the term *civil cases* did not include cases in

CLAIM. (See also DEBT; DEMAND. And as to land claims, see the titles PUBLIC LANDS; STATE LANDS. As to claim or demand within the statute of

equity, nor special statutory proceedings, and that the term *civil action* was a term of broader signification. And so, in *Converse v. Grand Rapids*, 18 Mich. 459, it was held that the statute allowing two peremptory challenges in *civil cases* did not apply to special proceedings not in the ordinary course of law.

Code Pleading.—Under the codes, all proceedings are divided into actions and special proceedings; and further, actions are divided into civil and criminal actions. For the distinction, under this division, between civil actions and special proceedings, reference may be had to the title ACTIONS, 1 ENCYC. OF PLEADING AND PRACTICE, 108, 112. See also that work under the title SPECIAL PROCEEDINGS; and see this work under SPECIAL.

Contradistinguished from Criminal Prosecution.—The term *civil action* is employed in contradistinction to criminal prosecution. *Wiscart v. D'Auchy*, 3 Dall. (U. S.) 328; *Livingston v. Story*, 9 Pet. (U. S.) 632; *U. S. v. 10,000 Cigars*, 1 Woolw. (U. S.) 123; *Rison v. Cribbs*, 1 Dill. (U. S.) 181; *Fenstermacher v. State*, 19 Oregon 504.

Complaint for Flowing or Flooding Land under Massachusetts Statute.—In *Howard v. Merriam River Locks*, etc., 12 Cush. (Mass.) 259, it was held that a complaint for flowing or flooding land, under Rev. Stat. Mass., c. 116, was a *civil action* within the Massachusetts statute abolishing special pleading in *civil actions*. The court said: "We are of opinion that the term *civil action* in this provision is used, as it often is, in contradistinction to criminal proceedings, manifestly not intended to be affected by the Act."

Same—Witnesses.—And in *Hosmer v. Warner*, 15 Gray (Mass.) 48, it was held that a complaint for flowing land being a *civil action* or proceeding, the complainant was a competent witness. See also the title WITNESSES.

Witnesses. (See also the title WITNESSES.)—Statutes of several states provide that in all *civil actions* any party thereto may be sworn and examined as a witness, except that this privilege shall not be extended so as to permit testimony to be given as to any transaction with a deceased person represented in the action. It has been held that the term *civil action* in this connection extended to all proceedings which are not criminal, and included suits in chancery as well as actions at law. *U. S. v. 10,000 Cigars*, 1 Woolw. (U. S.) 123; *Rison v. Cribbs*, 1 Dill. (U. S.) 181; *Green v. U. S.*, 9 Wall. (U. S.) 655; *Smith v. Burnet*, 35 N. J. Eq. 320. See also *McBride's Appeal*, 72 Pa. St. 480.

Divorce.—A statute conferred jurisdiction upon a court in all *civil cases* both at law and in equity. It was held that this included suits for divorce. The court said: "This language is broad enough, in our opinion, to include cases for divorce, which have always been regarded as *civil proceedings* in this state, inasmuch as no ecclesiastical tribunals have ever been established here." *Ellis v. Hatfield*, 20 Ind. 101. See also *Herron v. Herron*, 16 Ind. 129; *Ewing v. Ewing*, 24 Ind. 468.

But, in *Lucas v. Lucas*, 3 Gray (Mass.) 136, it was held that a writ of review did not lie to revise a decree dismissing a libel for divorce. *Shaw, C. J.*, who delivered the opinion of the court, admitted that in some respects the term *civil action* might be held to include proceedings for divorce. But he said: "Looking then beyond the mere philological sense of the term *civil action*, as used in this clause of the Revised Statutes, we find that a process for divorce is in a certain sense a judicial proceeding; but that originally this jurisdiction was not vested in the courts of common law; that the trial and proceedings were not according to the course of common law; that, though in a certain sense the object of a libellant is to obtain redress for a grievance or private injury, yet that it is not by way of recovery of damages or obtaining property, real or personal, but rather for the purpose of ascertaining and declaring authoritatively the status or civil and social condition of a party, upon which numerous and most important personal and social rights and duties are made by law dependent." See also *Chase v. Ingalls*, 97 Mass. 530.

Quo Warranto. (See also the title QUO WARRANTO; and see ENCYC. OF PL. AND PR., title QUO WARRANTO.)—A remedy by information in the nature of quo warranto, though criminal in form, is in effect a civil proceeding. *Ames v. Kansas*, 111 U. S. 460.

But, in *Capital City Water Co. v. State*, 105 Ala. 406, it was held that a proceeding for the dissolution of a corporation by filing a petition setting forth the facts, and praying a writ of quo warranto, was not a *civil action* within the code of Ala., § 2561, requiring *civil actions* in courts of record to be commenced by service of summons. The court said: "Moreover, quo warranto was not even a civil proceeding at the common law, but criminal in its nature, involving severe pains and penalties; and now that it has been shorn of these consequences, it still cannot be said to be a *civil action*, within statutes like section 2561 of the code, which is defined, 'An action which has for its object the recovery of private or civil rights, or compensation for their infraction.' *Bouv. Law Dict.*; 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) p. 257."

Contempt. (See also ENCYC. OF PL. AND PR., title CONTEMPT.)—In *Matter of Eggington*, 2 El. & Bl. 717, 75 E. C. L. 717, Lord Campbell said: "Whether a commitment for contempt be in the nature of a criminal proceeding, depends upon the subject-matter of the contempt." And see *Reg. v. Newgate*, 6 B. & S. 394, 118 E. C. L. 394, where Blackburn, J., says: "*Civil process* is not defined in the Act; but there can be little doubt that *civil process* is process for enforcing a civil liability to pay a sum of money or costs, as much as that which is for enforcing payment of a debt. Where a person is attached for contempt in nonpayment of a sum of money or costs, and is sent to prison for the purpose of enforcing payment, it would be *civil process*; and where a person is committed by way of punishment for something

limitations, see the title LIMITATION OF ACTIONS. As to claims against the government, see the titles STATES; UNITED STATES. As to claim of title, see

in the nature of a crime, that is not *civil process*."

Forcible Entry and Detainer.—In *Bowers v. Cherokee Bob*, 45 Cal. 496, an action of forcible entry and detainer was held a *civil action*.

A statute conferred jurisdiction upon the court of appeals from the judgments of justices in both civil and criminal cases. It was held that an action for forcible entry and unlawful detainer was a *civil case*. The court said: "A criminal action is one prosecuted by the state as a party against a person charged with a public offense, for the punishment thereof; and every other action is a *civil action*. This action is not prosecuted by the state, and, within the definition of actions, is a *civil action*." *Taylor v. De Camp*, 68 Wis. 164.

Habeas Corpus. (See also the title HABEAS CORPUS; and see ENCYC. OF PLEADING AND PRACTICE, title ACTIONS, vol. 1, p. 114.)—Proceedings under a petition for habeas corpus have been held to be *civil proceedings*, even when instituted to arrest a criminal prosecution, and secure personal freedom. *Ex p. Tom Tong*, 108 U. S. 556. The court in that case said: "The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are *civil proceedings*, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process."

But, in *Garner v. Gordon*, 41 Ind. 92, a proceeding by habeas corpus was held not to be a *civil action* nor a *civil case*, within the meaning of the *Indiana Code* authorizing a change of venue, nor within the Bill of Rights providing for a trial by jury.

Process in Rem for a Forfeiture.—It has been held that a libel in a proceeding *in rem* for a forfeiture is in the nature of a *civil action*. *Barnacoat v. Six Quarter Casks of Gunpowder*, 1 Met. (Mass.) 230. See also *Com. v. Certain Intoxicating Liquors*, 14 Gray (Mass.) 376.

Penalties. (See also ENCYC. OF PL. AND PR., title PENALTIES.)—An action brought by a municipal corporation to enforce a penalty for the violation of an ordinance has been held a *civil action*. *Greensburgh v. Corwin*, 58 Ind. 519; *Hammond v. New York, etc., R. Co.*, 5 Ind. App. 526. See also *Ambrose v. State*, 6 Ind. 351; *Williams v. Warsaw*, 60 Ind. 457; *Indianapolis v. Huegele*, 115 Ind. 581.

In *Ives v. Jefferson County*, 18 Wis. 166, a

statute provided that when a prosecution should fail, or the defendant, upon conviction, prove insolvent, the fees should be paid out of the county treasury. It was held that this applied only to purely criminal cases, and not to cases which, though in form criminal, yet are really *civil actions*, and that an action to recover a penalty is a *civil action*, and not a criminal prosecution. See also *State v. Smith*, 52 Wis. 135.

It has been held that penal actions for such violations of municipal ordinances as are not also misdemeanors are *civil actions*. *Oshkosh v. Schwartz*, 55 Wis. 487; *Platteville v. Bell*, 43 Wis. 488.

And it has been held that an action to recover a penalty for the unlawful obstruction of a highway is a *civil action*. *State v. Smith*, 52 Wis. 134; *State v. Hayden*, 32 Wis. 663.

In *Dow v. Norris*, 4 N. H. 16, it was held that where a statute gives a penalty incurred under it to an individual, the right of an individual to the penalty is a *civil cause* within the meaning of the *New Hampshire Bill of Rights* which prohibited the passing of retrospective laws for the decision of *civil causes*. The court said: "The next inquiry then is, was the right of this defendant to the said forfeiture, a *civil cause* within the meaning of the clause in the Bill of Rights which we are now considering? As to this question we think there can be no diversity of opinion. The word *civil* is used in this article of the Bill of Rights to denote causes in which private rights are involved, and to distinguish such cases from criminal causes, in which the public alone is concerned. 3 Bl. Com. 2. This is very apparent from the language used. 'No such laws, therefore, should be made either for the decision of *civil causes* or the punishment of offenses.' In addition to this, it seems to be well settled that an action of debt, or an information brought to recover a penalty is a *civil proceeding*. U. S. v. Mann, 1 Gall. (U. S.) 179; *Atty.-Gen. v. Bowman*, 2 B. & P. 532, note *a*, 6 Johns. (N. Y.) 101."

Same—Ordinances.—The Bill of Rights of *Alabama* declared that no person should be debarred from prosecuting or defending any *civil cause* by himself or counsel. It was held that a proceeding for an alleged violation of a municipal ordinance was not within this provision. The court said: "The *civil causes* here spoken of are those which deal with private wrongs; that is, with acts which constitute an infringement or privation of the private or civil rights belonging to individuals. These terms, therefore, include only those legal proceedings which seek redress for civil injuries. But city ordinances are punitive regulations; and the object of a proceeding for the violation of them is not redress for a civil injury, but the punishment of an offender against the peace and good order of society. Hence, they are termed quasi-criminal proceedings." *Withers v. State*, 36 Ala. 262.

Jury and Jury Trial. (See also the title JURY AND JURY TRIALS.)—In *Lake Erie, etc., R.*

the title ADVERSE POSSESSION, vol. 1, p. 846.) — A claim is a challenge by a man of the propriety or ownership of a thing which he has not in possession, but which is wrongfully detained from him.¹

Co. v. Heath, 9 Ind. 559, Perkins, J., says of the constitutional provision that in all *civil cases* the right of trial by jury shall remain inviolate: "The above provision in our own constitution applies in terms but to *civil cases*. What, then, within its meaning, is a *civil case*? Not every case which is not a criminal, is a civil one. *Civil case* had a definition, a meaning, at common law, when the early constitutions of this country were formed; and it has been held that the term was used in these constitutions in the common-law sense. See *Willyard v. Hamilton*, 7 Ohio pt. 2, 112; *Livingston v. New York*, 8 Wend. (N. Y.) 85; *Beekman v. Saratoga*, etc., R. Co., 3 Paige (N. Y.) 45; *Gold v. Vermont Cent. R. Co.*, 19 Vt. 478; *Wells v. Caldwell*, 1 A. K. Marsh. (Ky.) 441; *Harris v. Wood*, 6 T. B. Mon. (Ky.) 641." He then goes on to enumerate some of the cases not criminal which nevertheless have not in *Indiana* been classed as *civil cases*; for example, chancery cases, contested election cases, assessment of damages and laying out highways, etc.

This was quoted with approval in *Norristown*, etc., *Turnpike Co. v. Burket*, 26 Ind. 62.

Special Jury — Intoxicating Liquors. (See also the titles ELECTIONS; INTOXICATING LIQUORS.) — The code of *West Virginia* allows a special jury in *civil cases* only. It was held that a prosecution under a statute prohibiting the distribution of intoxicating liquor to voters on election day did not come within the term *civil cases*. *State v. Pearis*, 35 W. Va. 320.

Damages for Land — Jury. — In *Massachusetts* a statute gives either party dissatisfied with the estimate of the county commissioners of damages, for land taken for railroad purposes, the right to apply for a jury. It has been held that the judgment entered on the verdict of a jury in such a case is a judgment on a *civil action*, within the statute providing for review by the supreme judicial court of judgments rendered in *civil actions*. *Nantasket Beach R. Co. v. Ransom*, 147 Mass. 240.

A *Connecticut* statute provided for two peremptory challenges upon the trial of every *civil action*. It was held that a party to a proceeding for the re-assessment of damages for land taken for a public highway had the right of peremptory challenge under the statute. The court said: "A *civil action* is defined to be the legal demand of one's right. Sometimes it is called the form of a suit given by law for the recovery of what is due. Now, every demand of a right regularly pending before a court, by which a party seeks to recover his right against another who is depriving him of it, and which is of a civil as distinguished from a criminal character, comes directly within this definition, and, as such, comes of course within the terms of the statute giving the right of peremptory challenge." *Pettis v. Pomfret*, 28 Conn. 569. See also the title JURY AND JURY TRIAL.

Bastardy. (See also the title BASTARDY, 3 ENCYC. OF PL. AND PR. 267.) — A bastardy prosecution has been held a *civil suit*. *Hol-*

comb v. Stimpson, 8 Vt. 141. See also *Coomes v. Knapp*, 11 Vt. 543; *Robie v. McNiece*, 7 Vt. 419; *Chandler v. Com.*, 4 Metc. (Ky.) 69.

In *Mann v. People*, 35 Ill. 467, a prosecution for bastardy was held a civil and not a criminal proceeding. To the same effect see *Maloney v. People*, 38 Ill. 62; *Allison v. People*, 45 Ill. 37; *Walker v. State*, 6 Blackf. (Ind.) 1.

"A bastardy case, under our statute, in its inception, partakes of the nature of a criminal case, but in its latter stages, after it has reached the circuit court, becomes a *civil action*." *Bond v. State*, 34 Fla. 45.

In *Hodgson v. Nickell*, 69 Wis. 308, it was held that a person committed to jail in a bastardy proceeding for non-compliance with the judgment against him, was not entitled to the jail liberties, as the proceeding is not a *civil action*, but is a special proceeding and *quasi* criminal.

In *Hill v. Wells*, 6 Pick. (Mass.) 104; *Hyde v. Chapin*, 2 Cush. (Mass.) 77; and *Cummings v. Hodgdon*, 13 Met. (Mass.) 248, it was held that bastardy proceedings belonged to the class of criminal proceedings.

But, in *Wilbur v. Crane*, 13 Pick. (Mass.) 284, it was held that a complaint by a woman under the Act of 1785, though in some respects in the form of a criminal prosecution was in substance and effect a *civil suit*. See also *Young v. Makepeace*, 103 Mass. 50.

An Action of Trespass *qu. cl. fr.* has been held to be included in a constitutional provision that "all *civil cases* shall be tried in the county where the defendant resides." *Osmond v. Flournoy*, 34 Ga. 509.

1. *Stowell v. Zouch*, Plowd. 359; *Vulcan Iron Works v. Edwards*, 27 Oregon 563, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 273; *Jackson v. Losee*, 4 Sandf. Ch. (N. Y.) 381; *Kneedler v. Sternbergh*, 10 How. Pr. (N. Y. Supreme Ct.) 67.

Other Definitions. — In *Prigg v. Com.*, 16 Pet. (U. S.) 539, Story, J., said: "A *claim* is to be made. What is a *claim*? It is, in a just juridical sense, a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty. A more limited but at the same time an equally expressive definition was given by Lord Dyer, as cited in *Stowell v. Zouch*, Plowd. 359, and it is equally applicable to the present case: that a *claim* is a challenge by a man of the propriety or ownership of a thing, which he has not in possession, but which is wrongfully detained from him."

In *Coster v. Albany*, 43 N. Y. 413, the court cited with approval the definition of *claim* given in *Prigg v. Com.*, 16 Pet. (U. S.) 615.

In *U. S. v. Spaulding*, 3 Dakota 93, it is said: "What is a *claim*? It is, in a just, judicial sense, a demand of some matter as of right, made by one person upon another, to do or to forbear to do some act or thing as a matter of duty." *Prigg v. Com.*, 16 Pet. (U. S.) 615; Noah Webster defines *claim* as, 'To call for; to ask or seek to obtain by virtue of author-

ity, right, or supposed right; to challenge as a right; to demand as due; to be entitled to anything as a right; a demand of a right or supposed right; a right to *claim* or demand; a title to any debt, privilege, or other thing in possession of another; that to which any one has a right; as, a settler's *claim*."

In *Lopez v. U. S.*, 24 Ct. of Cl. 95, the court quotes from a circular of the first comptroller of the treasury, which was indorsed by Mr. Justice Strong: "A *claim* is defined in Jacob's Law Dictionary, title *Claim*: '*Claim*, a challenge of interest in anything that is in the possession of another, or at least out of a man's own possession, as *claim* by charter, by descent, etc. In Plowden's Com. 359, Dyer, C. J., is said to have defined *claim* to be a challenge of the ownership of property that one hath not in possession, but which is detained from him by wrong.'" The same definition is quoted in *Robinson v. Wiley*, 15 N. Y. 491.

In *Howell v. Buffalo*, 15 N. Y. 523, Denio, C. J., says: "'Demands or *claims*' are the largest words of that class, and clearly embrace a cause of action founded upon a trespass to personal property. Littleton says that the most beneficial release which a man can have is a release from all demands (section 508); and Lord Coke declares that a release of all *claims* extends to all demands. Co. Litt. 291 b.'" Quoted in *Kansas City v. Ridenour*, 84 Mo. 253.

A *claim* is a demand or the making known of the demand to the person who is subject to it. *Pea v. Waggoner*, 5 Hayw. (Tenn.) 1.

Claim is a demand of a right or of a supposed right. *Bourland v. Hildreth*, 26 Cal. 205.

Counterclaim. (See COUNTERCLAIM.)—The word *claim* is defined to be the demand of anything that is in the possession of another; to demand, to require, etc. But, in its legal use, it has been understood in its somewhat enlarged sense, and that is, the right to demand of another. Thus we say, we have a *claim* against another, when in fact we only mean that we have a right to make such *claim*, or demand.

This definition was given by the court in defining "Counterclaim." *Great Western Ins. Co. v. Pierce*, 1 Wyoming 50.

Admission of Claim.—In *Dowell v. Cardwell*, 4 Sawy. (U. S.) 228, Deady, J., said: "In my judgment, a '*claim* upon the United States' is something in the nature of a demand for damages arising out of some alleged act or omission of the government, not yet provided for or acknowledged by law. As the term imports, it is something asked for or demanded on the one hand and not admitted or allowed on the other. *Worcester and Bouvier, verbo Claim*. When the demand is admitted, authorized, or provided for by law it is not a mere *claim*, but a debt. It no longer rests in mere clamor or petition, but is something due upon which an action may be maintained."

Distinguished from Debt. (See also DEBT.)—A statute provided that where one obtained a judgment before a justice of the peace for a sum less than one hundred dollars, he should not recover costs unless he had filed an affidavit that he "did truly believe the debt due or damages sustained" exceeded one hundred

dollars. It was held that an affidavit by the complainant "that his *claim* and demand exceeded one hundred dollars" was not a sufficient compliance with the statute. The court said: "Here, the plaintiff in his affidavit says 'that his *claim* and demand' exceed one hundred dollars. This positive assertion may be as strong as if he said he truly believed they exceeded that sum, or even stronger. Hence the departure from the statute is noticeable, and it is at once seen that the words '*claim* and demand' are not necessarily equivalent to the words 'debt due or damages sustained.' *Claim* is often used to signify the right or title to a debt or to damages, and quite as often means 'a demand of a right or supposed right, a calling on another for something due or supposed to be due.' So 'demand' may signify the amount claimed to be due, or 'the asking or seeking for what is due or claimed to be due.' The affiant, if questioned after the verdict for less than fifty dollars, could well respond that he claimed in his statement more than one hundred dollars. But if it be doubtful that he could fairly make such response—if his affidavit could be construed to mean the debt itself, or to mean the *claim* for the debt or the supposed debt—the statute was not complied with. This evasive affidavit should have been treated as a nullity." *Kelley v. Dodge Mfg. Co.*, 86 Pa. St. 467.

Partnership — Compromise Debt.—A *California* statute provided that a partner might compromise or release any debts due to the partnership; pay or compromise any *claims* against, and dispose of, the partnership property. Upon the construction of this statute, the court, in *Berson v. Ewing*, 84 Cal. 94, said: "This they claim is the measure of the surviving partner's power; under it he may collect debts only, but may release or compromise *claims* against the partnership. Now, while the word 'debt,' in its legal sense, does not, like the word *claim*, include a demand for damages arising from a tort, still we think they were used in the above section synonymously, and probably to avoid repetition, and that the term 'debt' was intended to have an application as broad as that of the word *claim*. It would indeed be strange if a surviving partner could compromise any *claim* against the firm, but could neither compromise nor enforce one in favor of it. By section 1585 of the Code of Civil Procedure, a 'surviving partner has the right to continue in possession of the partnership and to settle its business * * * without delay.'"

The Thing Claimed.—In *Fordyce v. Godman*, 20 Ohio St. 14, Scott, J., said: "In its ordinary sense a *claim* imports the assertion, demand, or challenge of something as a right, or it means the thing thus demanded or challenged."

A *claim* is the means by or through which the claimant obtains the possession or enjoyment of the thing sought. It is the means to an end, and not the end itself. It is true the word may sometimes stand for the subject *claimed*, and so may cause for effect. The distinction between the two is somewhat important, notwithstanding. Therefore, before

assignment of dower a widow has no estate in the lands of her husband; her right is a mere chose in action or *claim*, which cannot be sold upon execution at law. Until that time it is strictly a *claim*. *Lawrence v. Miller*, 2 N. Y. 254. See also *Benoist v. Murrin*, 47 Mo. 537; and see the title DOWER.

Assumed in the Sense of Claimed. — An instruction that "circumstantial evidence is a species of presumptive evidence, and it consists in this, that where there is no satisfactory evidence of the direct fact, certain facts which are assumed to have stood around, or been attendant on, the direct fact, are proved, from the existence of which the direct fact may be inferred" (1 Bish. Crim. Proc., 2d ed., § 1069), is correct. The word "assumed" is used in the sense of *claimed*; and the plain meaning of the instruction is that the assumed or *claimed* facts therein mentioned must be proved before the main fact can be inferred therefrom. *Jenkins v. State*, 62 Wis. 49.

Estates of Decedents. (See also the title DEBTS OF DECEDENTS for a complete treatment of the claims and demands that must be presented.) — In *Swain's Estate*, 67 Cal. 641, the court said: "The term *claim*, as used in connection with the estates of deceased persons, has reference, says Mr. Justice Field, in *Fallon v. Butler*, 21 Cal. 25, to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal actions for the recovery of money, and upon which a money judgment could have been rendered."

In *Gray v. Palmer*, 9 Cal. 636, it is said that the words "claimant" and *claim* in the statute are used as synonymous with "creditor" and "legal demand" for money to be paid out of the estate.

Same — Liens. — In *Ellissen v. Halleck*, 6 Cal. 393, it was held that a mortgage *claim* must be presented for approval. The court said: "The word *claim*, employed by the statute, is sufficiently comprehensive to include every species of charge or account against an estate, whether the same be recorded or not." This was affirmed in *Ellis v. Polhemus*, 27 Cal. 355, *overruling Fallon v. Butler*, 21 Cal. 24. See also *Pitte v. Shipley*, 46 Cal. 161.

But, in *Booth v. Pendola*, 88 Cal. 36, it was held that an action to enforce a mechanic's lien, being in the nature of a proceeding *in rem*, in which no judgment could be recovered, was not a *claim* within the statute; citing *Myers v. Reinstein*, 67 Cal. 89, in support of this decision. The latter case was an action to enforce a resulting trust against an administrator.

A statute prescribed that a representative should not allow any *claim* for money against the deceased, unless the same was accompanied by an affidavit in writing. Another section of the statute provided that when such *claim* for money should be rejected, suit might be brought in any court having jurisdiction. Upon the question whether the refusal by a representative to allow a lien fell within the purview of this statute, the court, in *Western Mortg., etc., Co. v. Jackman*, 77 Tex. 622, said: "If the words '*claim* for money' mean not only the debt, but also any lien

that may exist for securing its payment, then it would seem that the rejection of the lien either in whole or in part would authorize the bringing of an ordinary action for its establishment in any court having jurisdiction under the constitution. But, to our minds, these terms exclude the idea that the lien was intended to be embraced. A *claim* for money means literally the *claim* that a debt exists. A *claim* for a lien is something more — a *claim* not only that there is a debt, but also that a lien exists for its enforcement. The lien is no part of the debt, it is a mere incident of the *claim* for the money. In *Cannon v. McDaniel*, 46 Tex. 306, it is said to be the better practice to present a mortgage with the *claim* to the administrator, but the purpose suggested for that course is merely 'to apprise the administrator and the court of its existence.' That case is authority for the proposition that it is not necessary to make such presentation in order to give the county court jurisdiction to enforce the lien." See also *Cunningham v. Taylor*, 20 Tex. 127.

Same — Assignments. — Where H., W., and C. purchased real estate, and caused it to be conveyed in trust to secure the repayment of advances made by W. and C. on the purchase, and of subsequent expenses, by sale of the property, the residue to be conveyed to all three of the parties in certain proportions; and C., for a valuable consideration, assigned to H. a certain amount of *claims* for such advances, and died without having received any portion thereof, and while such trust remained wholly unexecuted; it was held that H. had no *claim* against C.'s estate which his administrator could properly allow. The court said: "Hogg's demand is not a *claim* against Clark's estate within the meaning of our statute conferring power upon administrators, with license from the proper county court, to sell the real estate of decedents to pay *claims* against their estates, in the event of a deficiency of personal assets. *Walker v. Diehl*, 79 Ill. 473. The word *claim* means 'a legal demand for money to be paid out of the estate.' *Gray v. Palmer*, 9 Cal. 616. It is based upon the personal obligation or liability of the decedent, and must have accrued against him during life, or be of such a nature that it would have accrued against him if he had continued to live. *Godding v. Porter*, 17 Abb. Pr. (N. Y. Supreme Ct.) 374. If this *claim* of Hogg's could not have been recovered from Clark before his death, nor since, if he had continued to live, it seems very plain that it cannot be a *claim* against his estate in the hands of his personal representative, which the latter can either properly allow or make the basis of an application for the sale of the real property belonging to the decedent, under the power conferred by our statute." *Weill v. Clark*, 9 Oregon 387.

Same — Liquidated Claims. — In *Ferrill v. Mooney*, 33 Tex. 224, it was held that the words "*claim* for money," in a statute requiring such *claims* to be presented to a personal representative, meant liquidated *claims*. See also *Hall v. McCormick*, 7 Tex. 275.

Same — Contingent Claim. — An action may be lawfully brought against an administrator upon a contingent *claim* where the amount

cannot be ascertained and determined by calculation or computation by the probate court, so as to become absolute prior to the time limited for presenting *claims*; and, upon the presentation to the probate court of a properly authenticated copy of the judgment record, it may be allowed and paid in the same manner as other *claims* of the same class. *Oswald v. Pillsbury*, 61 Minn. 520.

Same — Claims Distinguished from Liabilities — Garnishment. — The plaintiffs garnished one Peters, who denied that he owed their debtors anything. Pending a determination of this issue, Peters died. It was held that the plaintiff's *claim* against Peters, being for a garnishment of the assets, and not yet sanctioned by judgment, did not come within the purview of the statute requiring that all *claims* against the estate of a deceased person shall be registered in the court in which the letters testamentary or of administration were granted. The court said: "There is a distinction between *claims* and liabilities. All *claims* must be registered, but not all liabilities. The *claims* required to be registered are those for the proof and registration of which provision is made by section 207 of the Code, those which might be paid by the personal representative when proved and registered. If the decedent was liable in damages for a trespass or the like, or to account as a partner, there could not be any registration of a *claim* against his estate. This shows the distinction between liabilities and *claims*, which latter are required to be registered — a distinction pointed out by *Sharkey, C. J.*, in *Gordon v. Gibbs, 3 Smed. & M. (Miss.) 473*; *Harris v. Hutcheson, 65 Miss. 9*.

Same — Claim or Demand. — In *McCausland's Estate, 52 Cal. 576*, the court said: "The words '*claim* or demand' against the estate of the deceased" ought to receive the same interpretation as they do when found in the several provisions of the Code of Civil Procedure respecting the settlement of the estates of deceased persons. In that connection the words *claim* and '*demand*' are used synonymously."

Torts — Demands. — In *Howell v. Buffalo, 15 N. Y. 523*, *Denio, C. J.*, says: "'Demands or *claims*' are the largest words of that class, and clearly embrace a cause of action founded upon a trespass to personal property. Littleton says that the most beneficial release which a man can have is a release from all demands (§ 508); and Lord Coke declares that a release of all *claims* extends to all demands. *Co. Litt., 291 b.*" See also *Stringham v. Winnebago County, 24 Wis. 594*; *Kellogg v. Winnebago County, 42 Wis. 97*; *Ruggles v. Fond du Lac, 53 Wis. 436*.

Torts — Witnesses. — A statute provided that if in a justice's court the defendant denied any part of the plaintiff's *claim*, it should be lawful for the plaintiff to require the defendant to answer on oath as to such *claim*. It was held that *claim* in this sense applied only to actions *ex contractu*. The court said: "It is not to be denied that the statute does not in very clear language distinguish as to the class of cases in which one of the parties to a suit may be called as a witness by the adverse party. We must, therefore, apply to it those maxims by which courts are guided in the in-

terpretation of statutes. The word *claim* is sufficiently comprehensive to embrace actions sounding in tort as those founded upon contract; and we are at liberty to give to it an enlarged or restricted meaning, according as the intention of the legislature can be best carried into effect. In its popular sense the word *claim* is usually applied to a demand founded in agreement or contract, and is seldom used when referring to a demand for damages a party may sustain in consequence of a wrong or injury done to his person or property. I am inclined to think, from a careful reading of the section, that this popular meaning of the word was the sense in which it was understood by the legislature. This opinion is strengthened by the fact that the *claim* contemplated by the statute is such an one as that 'payment or set-off' may be pleaded; such a *claim* as arises upon the breach of a contract express or implied." *Carne v. Litchfield, 2 Mich. 342*.

Torts — Attachment. — *Claim*, as used in the *New York Code*, authorizing an attachment, does not apply to a tort. *Saddlesvene v. Arms, 32 How. Pr. (N. Y. Supreme Ct.) 280*.

Torts — Presentation of Claims Against Municipality. (See also the title MUNICIPAL CORPORATIONS; and see 4 ENCYC. OF PL. & PR. 658.) — A charter provided that no action should be maintained against the city upon any *claim* or demand, unless it should first have been presented to the common council for allowance. It was held that this provision did not apply to actions for personal torts. *Kelley v. Madison, 43 Wis. 638*. The court in this case admitted that the term *claim* was broad enough to include an action for a personal tort; but besides that, from the connection in which the term was used in the charter in question, it did not include a *claim* growing out of a personal tort. To the same effect were the cases of *Bradley v. Eau Claire, 56 Wis. 168*; *Jung v. Stevens Point, 74 Wis. 550*; *Hill v. Fond du Lac, 56 Wis. 242*; *Vogel v. Antigo, 81 Wis. 642*; *Somers v. Marshfield, 90 Wis. 59*. But in *Van Frachen v. Fort Howard, 88 Wis. 570*, it was held that where the provision was that any *claim* or demand, of whatsoever nature, shall be presented, *claims* arising out of torts were included. The words "of whatsoever nature" expanded the terms "*claim* and demand." So, in *Hoch v. Ashland, 83 Wis. 361*, it was held that the term "any *claim* of any character" included causes of actions arising out of torts.

In *Nance v. Falls City, 16 Neb. 87*, it was held that *claims*, as used in the statute requiring all *claims* to be presented to the city council, must be confined to *claims* arising upon contract.

The provisions of the amended charter of Buffalo (N. Y. Laws of 1853, 472), making it a bar to any action for the collection of any demand or *claim* that it has never been presented to the council for audit or allowance, or, if on contract, that it was presented without affidavit verifying the *claim*, were held not to extend to a demand arising out of tort. *Denio, C. J., dissenting. Howell v. Buffalo, 15 N. Y. 512*.

In *In re Dasent, (Supreme Ct.) 2 N. Y. Supp. 609*, it was held, where a statute provided that the comptroller might require any person pre-

senting for settlement an account or *claim* against the corporation, to be sworn before him as to any facts relative to its justness, that the word *claim* included *claims* for damages for personal injuries. The court distinguished the case of *Howell v. Buffalo*, 15 N. Y. 513.

In *Reining v. Buffalo*, 102 N. Y. 308, the term *claim* in a similar statute was held to apply to torts.

Same — Taxes.—In *Ruggles v. Fond du Lac*, 53 Wis. 436, it was held that an action for the recovery of taxes wrongfully collected was not an action on contract within the meaning of a charter requiring presentation of *claims* to the city council.

Claims Against County — Sale of Land for Taxes. (See also the title *COUNTIES*.)—In *Fuller v. Colfax County*, 33 Neb. 716, it was held, where land was wrongfully sold for taxes by a county treasurer, that the county was liable to the purchaser, and that his right of action against the county was a *claim* which should be presented to the county board.

Fees — Claims Against State. (See also the title *STATES*.)—Under the *Missouri* statute barring *claims* against the state when not presented to the state auditor within two years, it has been held that the term *claims* applies to fees of the circuit attorneys, omitted in original bills of cost. *State v. Draper*, 48 Mo. 56.

Claim to a Patent to Lands.—Congress has jurisdiction, through the Court of Claims, over all *claims* founded upon the Constitution of the United States, etc. It has been held that the word *claims* embraces a claim to a patent to lands. The court said: "The word *claim* is very broad and comprehensive in its signification; quite as comprehensive as any of its synonyms—demand, pretension, right, privilege, title. That the construction is not to be limited to money demands is evident from other expressions in the Act." *Southern Pac. R. Co. v. U. S.*, 38 Fed. Rep. 56.

Iowa Land Law.—In *Doolittle v. Harrington*, 1 Morr. (Iowa) 226, the court says that the term *claim* had a legal significance given to it by the Statute of January 25, 1839. In that Act. says the court, "the word *claim* is frequently used, and it refers to a portion of the public lands settled upon by an individual, to which he has no other right or title than that which arises from his settlement upon said lands." See also *Bowman v. Torr*, 3 Iowa 571.

Claim and Claim Committee.—In *Rogan v. Walker*, 1 Wis. 586, the court said: "To those not familiar with the terms *claim* and '*claim* committee,' used in the evidence in this case, a few words may be proper in explanation. It is well known to the early settlers of the country that its settlement and cultivation outstripped the government in its survey and sale of the public lands. For some three or four years or more previous to the government sales the immigrants to and settlers in the eastern portion of the territory had entered upon tracts of land of greater or less extent, in most instances erected tenements thereon, intending to purchase the lands whenever the general government should bring them into market. Sometimes extensive and costly improvements were made, and sometimes barely sufficient to answer the requirements of the general regulations adopted by the settlers.

These regulations were drawn up by the settlers, and committees were appointed in different localities, and for convenient districts, to settle and determine all disputes in regard to the *claims* which might arise. The *claims* thus made were respected by the settlers and citizens generally, and held by such title only, until the public sale, when, by common consent, each claimant was permitted to bid off the land *claimed* by him, and no one was permitted to bid against him, or, what was more commonly the case, some one or more of their number was appointed to bid off all the lands, each tract being bid in the name of the claimant thereof. The general and local governments have rather encouraged this kind of settlement of the public lands, and so strictly have these *claims* of the settlers been regarded, that immense money and property have been laid out upon them, and they have passed from one to another, by deeds of bargain and sale, [with] scarcely an infringement upon the rights thus acknowledged."

Claim as Locator.—In *Hollingsworth v. Barbour*, 4 Pet. (U. S.) 474, the court said: "The *claim* as locator, and the terms in which it is expressed, are peculiar terms in *Kentucky*. In early times many contracts were made between warrant holders and others, by which those others agreed to locate the warrants for a portion of the land secured by location; and in many other cases one man located the warrants of another without any special agreement as to compensation, but with an expectation of receiving as compensation the portion of land usually given for such services. The phrase '*claim* as locator' grew out of this state of things, and has been universally understood by the people of the country to signify the compensation of a portion of the land located agreed to be given by the owner of the warrant to the locator of it for his services. The term is believed never to have been used in any other sense, or as signifying the acquisition of property by any other species of contract, than a contract to locate for a portion of the land. According to well-settled rules of construction, the language of the statute must be understood in this its popular acceptance."

Land or Real Estate.—In *De Cordova v. Knowles*, 37 Tex. 19, it was held that a power of attorney to sell *claims* and effects could not be construed to authorize the sale of land or real estate. See also *EFFECTS*.

Claim Compared with Grant. (See also *GRANT*.)—In *McGarrahan v. Maxwell*, 28 Cal. 96, the court said: "In the Act of Congress of 1851, to ascertain and settle private land *claims* in the state of California, the word *claim* is used as comprehending every species of right, title or interest, legal or equitable, in or to lands derived from the Spanish or Mexican government. The words *claim* and '*grant*' are not entirely synonymous, but a *claim* will include a grant, and also a right or interest that did not pass by grant, but is based upon some equity possessed by the claimant, entitling him to have his right perfected by the government, by a conveyance of the legal title. A mere naked assertion of right or title does not constitute a *claim* within the meaning of the Acts to ascertain and settle private land *claims*, or of the Act of 1862; and we do not

understand that the plaintiff relies upon anything else than his title, as constituting his *claim* to the land."

Averment of Ownership. (See also ENCYC. OF PL. AND PR., title TITLE, OWNERSHIP, AND POSSESSION.)—In *Marshall v. Shafter*, 32 Cal. 191, it was held that an allegation in a complaint in ejectment, that the plaintiff was possessed of certain land, which said premises the plaintiff *claimed* in fee simple absolute, was an allegation of title in the plaintiff to the premises in fee simple absolute. The court said: "It is therein alleged that the plaintiff, on a day named, 'was possessed of certain lands therein described, which said premises the said plaintiff *claims* in fee simple absolute.' The plaintiff insists that this is not an allegation of ownership in fee, but amounts only to this, that the plaintiff *claims* such title, without saying that he in fact holds it; that a denial of that branch of the allegation would amount only to a denial that the plaintiff *claimed* such title, which of course would be an immaterial issue in the action of ejectment. The defendant argues that the word *claims* is equivalent to says, avers, states, or shows. But substituting each of those words for *claims*, it would be necessary to interpolate the words 'he owns,' or others of the same import, in order to make the sentence sufficient by itself to present the issue of title. *Claim*, when used as a noun and in relation to land, has, in most of the states, a signification beyond that of a mere demand—a right not reduced to enjoyment, but to be enforced against another; but it is used as well to express all the rights which a person holds and enjoys in the land. Pre-emption *claims*, homestead *claims*, and mining *claims* are familiar instances. A conveyance of the grantor's *claim* to the land passes all the title he holds. And so of the verb *claim*. In common speech, a person says he *claims* the land to which he has the title, and in a contest for the possession each party, relying on title alone, would perhaps as frequently say that he *claimed* title, as that he held the title."

Same — Note.—In *Douglas v. Beasley*, 40 Ala. 142, it was held that in an action by an assignee upon a note against the maker, the complaint must contain some averment showing the plaintiff's ownership. The court said: "It is contended that the assertion in the complaint that the plaintiff *claimed* the sum due on the note, and interest, involves, or is equivalent to, an averment of property in the plaintiff; and that therefore the complaint really contained an allegation that the plaintiff was the owner of the note. The obvious import of the word *claims*, in the connection in which it occurs, is that the plaintiff seeks to recover, or demands; and such, I think, is the general acceptance of the word. Besides, it is expressly decided in *Crimm v. Crawford*, 29 Ala. 623, that the phrase 'the plaintiff *claims*,' in a complaint for the recovery of chattels *in specie*, does not imply an assertion of title, but that all averment of title in that action was dispensed with. See also *George v. English*, 30 Ala. 582. The word *claims*, in the prescribed forms, has therefore a construction established by a decision of this court, and that decision would be overruled by holding that it includes an averment of title."

Homestead Exemption.—In *Robinson v. Wiley*, 15 N. Y. 489, it was held that the representation by the owner of a house that there was no *claim* or incumbrance thereon was not shown to be false by proving that he had previously taken steps to exempt such house as his homestead from sale or execution.

Covenants — Incumbrances. (See also the title COVENANTS.)—Incumbrances are within the term *claims*, and a covenant against all *claims* has been held to embrace incumbrances. *Johnson v. Hollensworth*, 48 Mich. 143.

Same — Claims and Demands.—Where a deed contained a covenant to save harmless certain premises against all actions, suits, *claims*, and demands whatsoever, both in law and equity, which might be made, etc., by H. W. P. or T. B. W. P.; and breaches were assigned, first, that H. P. P. *claimed* to have a right and title to the premises, entered and cut trees, etc., and, second, that certain title-deeds relating to the premises were witholden by A. W. at the instance and through the claim and demand of T. B. W. B.; it was held that the acts upon which the breaches were assigned were claims in law within the meaning of the covenant. *Fowle v. Welsh*, 1 B. & C. 29, 8 E. C. L. 14.

Whether "Claim" Implies a Lawful Claim. (See also the titles COVENANTS; INDEMNITY CONTRACTS.)—A covenant against *claims* has been held to extend only to lawful *claims*. *Kent, C. J.*, said: "The law will never presume that the covenant applied to the wrongful *claims* of others, unless it be so expressed, because the law gives full protection against all such *claims*." *Folliard v. Wallace*, 2 Johns. (N. Y.) 402.

A bond reciting a conveyance of land and covenanting to indemnify and save harmless the obligee against all actions brought for the recovery of the land, and against all costs and expenses in consequence, is an indemnity only against all lawful *claims*, and the breach assigning the bringing of a suit, and without alleging title in the party prosecuting, will not give a right to recover. *Luddington v. Pulver*, 6 Wend. (N. Y.) 404.

A grant of public lands to a railroad excepted lands to which a pre-emption or homestead *claim* had attached. It was held that by the word *claim* were not meant such *claims* as should afterwards ripen into perfect titles. The court said: "If by the use of this word Congress intended that such an interest must have attached as should afterwards ripen into a perfect title or right to a patent from the United States, then the company was entitled to the land, under the grant; for no such *claim* is shown. But, on the other hand, if it were intended to include all *claims* to pre-emption or homestead, formally entered and recognized by the land department, without regard to their continuance, or final perfection, as against the government, then the company was not entitled to the land, for it is abundantly proved that such a pre-emption *claim* had attached at the time of the definite location of the line of the road. We regard the latter of these views as the correct one, and in taking it we believe we are supported by the ruling of the Supreme Court of the United States upon similar questions, especially by the decision in *Newhall v. Sanger*, 92 U. S.

751, where, in construing the word *claimed* in a statute which, in terms, excluded from pre-emption and sale all lands *claimed* under any foreign grant or title, this language was used: 'It is said this means lawfully *claimed*; but there is no authority to import a word into a statute to change its meaning. Congress did not prejudice any *claim* to be unlawful.' See also *Wood v. Burlington, etc., R. Co.*, 104 U. S. 329. So, too, here in the statute we are considering, Congress, by using the word *claim* simply, not 'lawful *claim*,' must have intended it to be taken in its ordinary sense, and as implying 'a demand of a right or supposed right; a thing *claimed* or demanded * * * as, a settler's *claim* (Webster).'" *Burlington, etc., R. Co. v. Abink*, 14 Neb. 95.

In *People v. Fields*, 58 N. Y. 491, it was held that, by a provision authorizing the comptroller of the state of New York to audit, adjust, and pay *claims* of certain fire companies, the legislature did not mean to declare the legality of the *claims*. The court said: "When, then, that Act used the word *claims*, it did not mean that which was due of right, and could be maintained as such. It meant no more than something which was asked for, or asserted to be due, for which a pretense was set up."

That *claim* implies a legal *claim*, see *Fellows v. Clay*, 4 Q. B. 319, 45 E. C. L. 319.

Legal Claim. — In *Cowan v. New York*, 3 Hun (N. Y.) 633, it is said: "A legal *claim* is one which the party asserting it may enforce by action, or by some proceeding at law or in equity."

Honest Claim. — See HONEST.

Unassigned Dower. — An unassigned dower interest in land is neither a title nor an estate in the scientific sense of those terms, but is an adverse *claim*, which the holder may be called upon to defend under the statute relating to the quieting of titles. *Benoist v. Murrin*, 47 Mo. 537. See also *Lawrence v. Miller*, 2 N. Y. 254.

Taxation — Title or Possession. — A *Nevada* statute provided that all real estate including the ownership or *claim* to any land or improvement should be subject to assessment. In construing this statute the court, in *State v. Central Pac. R. Co.*, 21 Nev. 259, said: "While the language of the statute is quite broad, it must be remembered that it is always property, and not a mere *claim* to it, that is to be assessed. The terms used must be considered as largely convertible and synonymous. This is the view that seems to have been taken by the courts. Thus, in *People v. Frisbie*, 31 Cal. 146, it is said: 'The term *claim*, as used in this provision, means something more than the mere assertion of the party assessed that he owns the property described in the list. While the word carries with it the idea of such assertion, it involves also the idea of an actual possession of the land claimed.' It is 'possession *claiming* the land' that is liable to be taxed. *Barrett v. Amerein*, 36 Cal. 322. *State v. Moore*, 12 Cal. 56; *People v. Shearer*, 30 Cal. 645; *Hale, etc., Gold, etc., Min. Co. v. Storey County*, 1 Nev. 104, are to the same effect."

Mining Claim. (See also title MINES AND MINING.) — In *Northern Pac. R. Co. v. Sanders*, 7 U. S. App. 59, the court said: "Just here

seems to be a good place to remark that in the common parlance of the mining districts the word *claim*, used as a noun, has a definite and particular meaning, denoting, when coupled with the name of a miner, a particular piece of ground to which that miner has a recognized, vested, and exclusive right of possession for the purpose of extracting precious metals therefrom; and there is reason to suppose that, in framing the reservation clause of this grant, Congress selected the word *claims* for the express purpose of excluding from the grant lands held in possession of, and *claimed* by, miners according to local customs."

The Act referred to reserves from lands granted to the Northern Pacific Railroad Company lands subject to certain *claims*.

Forgery — Claims Against Government. (See the titles FORGERY; UNITED STATES.) — The Revised Statutes of the *United States*, § 5421, provided for the punishment of any one who presents to any officer of the United States any deed, power of attorney, order, certificate, writ, receipt, or any other writing in support of or in relation to any account or *claim*, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited. In *U. S. v. Spaulding*, 3 Dakota 85, it was held that the word *claim* included the *claim* of exercising the right of pre-emption and the *claim* to thereby acquire from the United States Government title to public land. And so a *claim* for bounty land was held to be included in the same statute. The court said: "In respect to each [of the papers described] it was argued that the word *claim* as used in the statute can have reference only to a demand for money, and does not embrace a *claim* for bounty land. * * * The careful addition after the word 'account' of a term of a much broader signification, and the use of the very comprehensive language which immediately precedes those terms, satisfy me that it was the intention of Congress to embrace all *claims*, whether for land or money, and that the construction insisted upon by the defendant cannot be maintained." *U. S. v. Wilcox*, 4 Blatchf. (U. S.) 389. See also *U. S. v. Bickford*, 4 Blatchf. (U. S.) 341.

Same — Pension Claim. (See also the title PENSIONS.) — In *U. S. v. Rhodes*, 30 Fed. Rep. 433, *Brewer, J.*, said: "Two offenses, as heretofore stated, are provided for. Whoever makes or presents, for payment or approval, a false *claim* is denounced by one part of the section. Clearly, the word *claim* is not here used in the sense of a demand already heretofore presented. It implies only a demand then existing, and known to be wrongful, and the act of presenting it in the first instance is denounced as a crime. And the further language of the section is, 'such *claim*,' and denounces the making of a false deposition for the purpose of obtaining the payment or approval of such a *claim*. Is the word *claim* used in the same sense in this part of the section, or is it narrowed and limited so as to refer only to such claims as have been already presented, and are pending for action? Grammatically and ordinarily the same meaning would be understood."

Salary. — In *Lopez v. U. S.*, 24 Ct. of Cl. 96, the court quotes from a circular of the First

Comptroller of the Treasury, which was indorsed by Mr. Justice Strong: "A salary account is not, strictly and correctly speaking, a *claim*; it is a demand of a higher nature and of a more definite and certain character than a mere *claim*; it constitutes a debt. So also an account for any other services rendered in pursuance of law, or rendered under a contract made in pursuance of law, constitutes a debt and not a mere *claim*."

Stale Claim. (See also the titles LACHES; LIMITATION OF ACTIONS.)—In *Waddell v. U. S.*, 25 Ct. of Cl. 323, the court said: "A *stale claim* is one that has not been presented for payment for a long period of time; during which the claimant has slept upon his rights and thus created a presumption that the *claim* was never an honest and just one, and that he has been waiting until it was forgotten by the alleged debtor, and all evidence against it is lost or destroyed. Courts of equity usually follow the law, and adopt the statutes of limitation as fixing the period beyond which delay requires explanation, and which, unless satisfactorily accounted for, will constitute a bar to demands. We see no reason why the accounting officers may not rightly adopt the same rule." This definition was, in that case, applied to *claims* against the United States.

Synonymous with Cause of Action. (See also CAUSE OF ACTION, vol. 5, p. 776.)—The word *claim* and the phrase "cause of action" relate to the same thing and have one meaning. When the plaintiff has a *claim* for damages (under a right given in a city charter), when it is stated in a complaint, it is technically a "cause of action." *Minick v. Troy*, 83 N. Y. 516.

But in *Coster v. Albany*, 43 N. Y. 399, it was held that the fact that the state was not subject to an action on behalf of a citizen does not establish that the citizen has no *claim* against the state.

Elections. (See also the title ELECTIONS.)—The constitution of *Iowa* provided that every citizen of the United States of the age of twenty-one who should have been a resident of the state for a certain period, and "of the county in which he *claims* his vote" sixty days, should be entitled to vote. In construing this provision the court, in *Morrison v. Springer*, 15 *Iowa* 346, said: "What weight should be given, then, to the word *claims*? Does the assertion of this right, or a *claim* to exercise it, constitute any part of the qualifications of the voter? In other words, if he is of the right age, sex, and color, and has the requisite residence, is he not a qualified voter, though he may not *claim* to exercise that right? If so, then how can the *claim* of a right, already perfect, add to its completeness? * * * Not only so, but to *claim* a thing is to demand a right, or a supposed right. When the right is asserted, it is *claimed*, though it may not be granted. It may be asserted by words, or other means. Etymologically, it by no means implies that place or presence are essential to its potency or completeness. On the other hand, to 'offer' to do a thing is to bring to or before, to present for acceptance or rejection, to exhibit something that may be taken or received or not. And hence the argument drawn from the case in *Pennsylvania* is

not by any means conclusive; for while, in the language of Woodward, J., it may be true that to 'offer' to vote by ballot is to present one's self, with proper qualifications, at the time and place appointed, and make manual delivery of the ballot to the officers appointed by law to receive it, it by no means necessarily follows that the same would be the meaning of the word *claims* as used in our Constitution. The one does not imply so conclusively as the other the idea of a personal presence in order to assert the right. But aside from this, we must not forget that the language is not that the voter must *claim* his vote in the county, but, in speaking of residence, says that it must be in the county sixty days. And the person cannot *claim* to be an elector in any other county than where he has such residence. This, in substance, is what is meant by the word *claims*. If more had been meant, or intended, it seems to us that other and different language would have been used." The *Pennsylvania* case referred to by the court is that of *Chase v. Miller*, 2 *Am. L. Reg. N. S.* 146.

Claim Distinguished from Belief.—In *Grube v. Wells*, 34 *Iowa* 148, it was held that a mere belief that the lot which the defendant *claimed* extended to the limits of the inclosure was not equivalent to a *claim* of title or right, and therefore not sufficient to constitute adverse possession. The court said: "The term 'belief' implies an assent of the mind to the alleged fact, and is not supported by knowledge. One may believe a proposition without making it known, or without possessing any knowledge upon the subject. It is, or may be, a passive condition of the mind, prompting in neither action nor declaration. The term *claim* implies an active assertion of right—the demand for its recognition. This assertion and demand need not be made in words; the party may speak by his acts in their support, as by the payment of taxes, erection of improvements, etc. One may 'believe' that he has a right to land, without asserting or demanding it."

Amount.—In *Marsh v. Benton County*, 75 *Iowa* 470, it is said: "What is a *claim*? It is a 'demand made of a right or supposed right; a calling on another for something due or supposed to be due, as a *claim* for wages or services,' as defined by Webster. A *claim* for wages or services, which failed to state the amount of money *claimed*, would be a nullity where the person upon whom the demand is made has the right to pay, or refuse to do so, before an action can be maintained to recover it."

Account and Claim.—In *Stringham v. Winnebago County*, 24 *Wis.* 600, the terms *claim* and "demand" were held to have been used synonymously with "account," and to convey the same idea. This construction, however, was derived from a consideration of the context of the whole statute. And for other instances in which *claim* was used synonymously with "account," see *Kellev v. Madison*, 43 *Wis.* 645; *Bradley v. Eau Claire*, 56 *Wis.* 170.

Same—Arbitration.—Where by the terms of a submission to arbitrators they were to hear proofs and allegations of and concerning all *claims* arising out of the partnership, and for a final settlement of all differences between the

CLAIM AND DELIVERY.—See the title REPLEVIN.

CLAIMANTS. (See *ante*, CLAIM.)—Claimants are voluntary applicants for justice.¹

parties, an award will not be set aside, although the arbitrators open an account which had been settled as an account stated twenty-three years previous to the submission, notwithstanding the opening of such account was objected to on the hearing. *Emmet v. Hoyt*, 17 Wend. (N. Y.) 410.

Allowance.—The Constitution of *Ohio* provides that no money shall "be paid on any *claim*, the subject-matter of which shall not have been provided for by pre-existing law, unless such * * * *claim* be allowed by two-thirds of the members elected to each branch of the general assembly." The Act of March 30, 1864, providing for the appointment of commissioners to examine *claims* growing out of the "Morgan raid," and prescribing their duties, was not passed by a two-thirds vote. The commissioners having allowed the plaintiff's claim on mandamus by him against the auditor of the state to compel payment, it was held that under the provisions of the constitution the *claim* could not be paid out of the state treasury till allowed by the concurrent votes of two-thirds of the members elected to each branch of the general assembly. The court said: "The word as here used [in the constitution] is by implication limited to *claims* against the state, and of a pecuniary character. * * * *Claims* for the payment of money may be preferred against the state on various grounds. They may be either of a legal or of an equitable character. * * * All such demands against the state for the payment of money, whatever be their character or origin, are, we think, *claims* within the meaning of the constitution." *Fordyce v. Godman*, 20 Ohio St. 1.

Release or Compromise of Claims.—The Act of the legislature of *New York*, passed December 14, 1847, to release the prior lien of the state on the Hudson & Berkshire Railroad, does not violate the fourth section of the seventh article of the Constitution of *New York* of 1846, which forbids the release or compromise of the *claims* of the state against any incorporated company, to pay the interest and redeem the principal of the stock of the state theretofore loaned or advanced to such company, and provides that such *claims* shall be fairly enforced. The constitution only requires that *claims* originating in loans of state credit, made before its adoption, and the securities taken on such loans shall be held as the property of the state, and be managed for its direct pecuniary benefit, and shall not be released, reduced, or surrendered for the benefit of the borrowing corporations, in disregard of the pecuniary interest of the state in its distinct and single character of a creditor of the corporation. With these restrictions the exercise of the ordinary legislative discretion in the management of the *claims* is not prohibited. *Darby v. Wright*, 3 Blatchf. (U. S.) 170. See also the title RELEASE.

"Claims" Include Notes.—Where an agreement stipulated that "neither party would take any advantage of the statute of limitations

having run, or being about to run, upon the other's *claims*, but would thereafter settle without any objection on that account," and a party to the agreement sought to recover on two notes, against which the statute had run, it was held the notes were included in the term *claims*, and were clearly within the agreement of the parties excepting them from the effect of the statute of limitations. *Noyes v. Hall*, 28 Vt. 645.

In a Will—Bank Stock Not Embraced.—Where a testator, after several legacies of bank stock and other stock and money, concluded his will: "The remainder of my worldly substance, consisting of furniture, bedding, etc., I give to my two daughters, to be divided between them. * * * These, with all money of mine that may remain in bank at the time of my death, with all *claims* or demands of whatever nature, I give to my two daughters;" and the testator had several shares of bank stock and other stock not specifically bequeathed, it was held that they did not pass under the above bequest. *Delamater's Estate*, 1 Whart. (Pa.) 362.

Under Whom They Claim.—A covenant in a deed by the grantors that the land is free from all incumbrances done or suffered by "those under whom they *claim*," refers to those from whom they derive title, while a similar covenant against the acts of "all *claiming* under him" would probably be construed to have a different signification, and would not be held to include a vendee of the entire estate of the grantor. *Williamson v. Hall*, 62 Mo. 405; *Fellowes v. Clay*, 4 Q. B. 319, 45 E. C. L. 319.

"Claiming Under."—On a purchase of lands which were under mortgage the purchaser paid the principal and interest due on the mortgage and took a conveyance, in which mortgagor and mortgagee joined, of the premises, and of the mortgagor's equity of redemption and all the residue of his interest. It was held that the purchaser was a person "*claiming under*" a mortgage within Stat. 7 Wm. IV. and 1 Vict., c. 28; and that the twenty years' limitation under Stat. 3 and 4 Wm. IV., c. 27, § 2, ran from the paying off of the mortgage and interest. *Doe v. Massey*, 17 Q. B. 374, 79 E. C. L. 374.

Claims for Damages to Live Stock.—It is usual for carriers to insert in a contract for the shipment of live stock that *claims* for damage to the stock shall be made by the shipper or consignee before the stock is removed. For the validity and effect of such contracts, see the title CARRIERS OF LIVE STOCK, vol. 5, p. 427.

Pre-emption Claim.—See the title PUBLIC LANDS.

Claim of Title.—See the titles ADVERSE POSSESSION, vol. 1, p. 846; CLOUD ON TITLE, *post*.

Placer Claim.—See PLACER; and see the title MINES AND MINING.

1. *Talbot v. Three Brigs*, 1 Dall. (Pa.) 108, in which case it was held that the trespassers compelled to answer for their wrong could not be termed *claimants*.

CLAMBER. — To “clamber” is defined to mean, to climb with difficulty, as with both hands and feet.¹

CLANDESTINE. — Withdrawn from public notice for an evil purpose; kept secret; hidden; private.²

CLASS. (See also the titles CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 004; LEGACIES AND DEVISES; WILLS.) — A class is a number of persons or things arranged collectively under one head and designated by some general name; as, children, creditors, etc.³

CLAUSE. (See also the titles STATUTES; WILLS.) — A clause is a subdivision of a written or printed document.⁴

Public Lands — Pre-emptioner Not a Claimant. — A *claimant* of public land within the meaning of the third section of the Act of Congress granting a right of way over the public lands to the Union and Central Pacific railroad companies is one who has an interest in the land recognized by the laws of the United States. One who is a pre-emptioner, but has not paid for the land, is not such *claimant*. Western Pac. R. Co. v. Tevis, 41 Cal. 489. See also the title PUBLIC LANDS.

Pension Acts. — Where the offense described in an Act of Congress is “withholding from a pensioner or other *claimant* the whole or any part of the claim allowed or due said pensioner or *claimant*,” an indictment thereunder charging the defendant with withholding certain money which he as agent had received from the United States by the collection of claims for “pay and bounty” and “arrears of pay and bounty,” cannot be sustained. The word *claimant* in the Act means a person who under the Act of July 4, 1864, has a claim before the Pension Office. U. S. v. Benecke, 98 U. S. 447. See also the title PENSIONS.

Executions. (See also the titles EXECUTIONS; SHERIFFS.) — Under a claim for property Act, the person of whose claim the sheriff is notified (in accordance with the Act) is “the *claimant*,” and none other is permitted to sue on the bond in the name of the sheriff. Stewart v. Ball, 35 Mo. 209.

To make one a *claimant* of property within the meaning of an Act giving the *claimant* the same right to attack a *fi. fa.* for want of payment of taxes as the defendant had, so as to file the counter-affidavit there provided for, he must put in a claim to the property as the law requires. Adams v. Worrill, 46 Ga. 295.

1. Moore v. Sharkey, 26 New Bruns. 7. In this case it was held, where a by-law prohibited persons from *clambering* over, or stepping over, or standing upon the seats in the city hall, that a conviction for *clambering* over and stepping on the seats was not sustained by evidence that the defendant, being seated in the hall, stepped over the back of the seat in front of him and upon that seat, but did not remain standing there. Stepping over a seat is not *clambering* over, nor does the mere stepping on a seat while in the act of moving from one seat to another, come within the words of the by-law, “standing up on a seat.”

2. Webster's Dict.

Clandestine Mortgages. — The Statute of 4 and 5 Wm. and Mary, c. 16, enacted that if any person having once mortgaged his lands for a valuable consideration shall again mortgage the same lands or any part thereof to any per-

son, the former mortgage being in force, and shall not discover in writing to the second mortgagee the first mortgage, such mortgagor so again mortgaging his lands shall have no relief or equity of redemption against the second mortgagee. But this Act is not to bar of her dower any widow who does not legally join her husband in such second mortgage. Wharton's Law Dict. See also the titles EQUITY OF REDEMPTION; FRAUDULENT SALES AND CONVEYANCES; MORTGAGES.

In Statute — “Clandestinely Provided.” — For the construction of a statute to prevent parish officers from *clandestinely* providing a premium, to bind out poor children without the sanction of the justices, see Rex v. St. Paul, 10 B. & C. 12, 21 E. C. L. 15.

3. **Libel.** — An action for libel does not lie for a publication alleged to affect the individual characters of persons and the trade or business carried on by them, if on its face it does not point at the individuals intended otherwise than that they pursue a particular trade or business in a specified section of a city; the publication affecting a *class* of persons, no individual of that *class* is entitled to sustain an action for the publication. White v. Delavan, 17 Wend. (N. Y.) 49. See also the title LIBEL AND SLANDER.

Class of Persons. — Where a section of a statute extends the word “person” to a *class* of persons as well as to individuals, the poor of a parish are a *class* of persons within the meaning of that section. St. Mary Magdalen College v. Atty.-Gen., 6 H. L. Cas. 189. See also PERSON.

Statutes. (See the titles CONSTITUTIONAL LAW; STATUTES.) — A statute relating to persons or things as a *class* is a general law; one relating to particular persons or things of a *class* is special. Wheeler v. Philadelphia, 77 Pa. St. 338; Ingram v. Foot, 1 Ld. Raym. 708; Dive v. Maningham, Plowd. 60.

4. Eschbach v. Collins, 61 Md. 499.

In the Sense of Part. — “It has been suggested that a *clause* must mean something self-contained and independent, which when presented on paper would have a meaning by itself, without reference to the context. I do not know any law which says that that is the necessary meaning of the word *clause*. When I read an enactment speaking of a devise, that is to say, speaking of a will or any *clause* in a will, I naturally infer that the word *clause* there means some collocation of words in the will which, when removed out of the will, will leave the rest of the will intelligible. I know no rule which says that the *clause* itself must be capable of being read as a document by

CLAY.—See note 1.

CLEAN BILL OF HEALTH.—See the titles **BOARDS OF HEALTH**, vol. 4, p. 596; **HEALTH**; **QUARANTINE**; **SHIPS AND SHIPPING**.

CLEAN BILL OF LADING.—See the title **BILLS OF LADING**, vol. 4, pp. 510, 541.

CLEANSE.—To render clean; to free from filth, pollution, infection, guilt, or the like; to clean.²

CLEAR.—Free from indistinctness or uncertainty; easily understood; perspicuous; plain. Without diminution; in full; net. Free from impediment, obstacle, embarrassment, or accusation.³

itself if taken alone. The main object is to see if that which you obliterate, which you claim the right to obliterate *de jure* under the statute, is something in the first place which you can obliterate *de facto*; because if the obliteration cannot be made *de facto*, then of course the statute allowing it to be made must be inoperative." Earl Cairns, Lord Chancellor, in *Swinton v. Bailey*, L. R. 4 App. 77, where it was held that, J. E. having made a will in which he devised his house, lands, and tenements to his mother, "Elizabeth E., her heirs and assigns forever," and he having afterwards struck his pen through the words "her heirs and assigns forever," this was, under the seventh section of the statute of frauds (29 Car. II., c. 3), a valid revocation by obliteration of a *clause* in his will, and that the word *clause* in the first part of said section might properly be read "part."

Statutes.—As to the meaning of the term when applied to a statute, and for definitions of particular *clauses*, as "interpolation *clause*," "repealing *clause*," etc., see the title **STATUTES**.

Clause Irritant.—By this *clause* in a deed or settlement the acts of deeds of a tenant for life or other proprietor, contrary to the conditions of his right, become null and void; and by the resolute *clause* such right becomes resolved and extinguished. Bell Dict.

1. Clay Pits and Mines.—Appellants were rated to the poor for *clay-pits*, which were excavations under ground from which glass-house *pot-clay* and fire-brick *clay* were extracted. A perpendicular shaft was sunk from the surface of the land for the purpose of raising the *clay* out of the strata, which was done by a steam-engine and other mining apparatus; the excavations were like those that are made for working coal and metallic mines, and the mode of raising the *clay* was the same as that used in a coal-mine. It was held that the pits so assessed were *clay-mines*, and therefore not rateable. *Rex v. Brettell*, 3 B. & Ad. 424, 23 E. C. L. 110.

2. Webster's Dict.

River.—An Act of Parliament authorizing persons to repair and *cleanse* a navigable river does not authorize them to make a passage to a new wharf on the river. *Partheriche v. Mason*, 2 Chit. Rep. 658, 18 E. C. L. 446.

3. Webster's Dict.

Clear Proceeds in the Sense of Net Proceeds.—In *State v. De Lano*, 80 Wis. 259, it was held that the term "*clear proceeds*," in the Constitution of *Wisconsin*, providing that the *clear proceeds* of all fines shall be set aside as a school fund, meant the net proceeds. The

court said: "Really the question simply is, What is the meaning of the words '*clear proceeds*,' as used in the constitution? That it does not mean entire proceeds, is, we think, too clear for argument. *Clear* implies that something is to be or may be deducted, so that the balance is *clear* from all charges or demands. It seems to us that the word *clear* is here used in the sense that it is frequently used colloquially when we speak of the '*clear profit*' in a business transaction, meaning the net profit after all expenses or losses are deducted." See also **NET**.

Where a constitution makes "the *clear proceeds* of all fines collected * * * for any breach of the penal law" a part of the school fund, in a suit for their recovery it is not necessary to allege in the declaration that the fines had been determined or set apart by any tribunal or law of the state. *State v. Casey*, 5 Wis. 322.

Clear Annuity.—It has been held that a bequest of a *clear annuity* means a bequest clear of income tax. *In re Cole's Will*, L. R. 8 Eq. 271. See also *Haynes v. Haynes*, 3 De G. M. & G. 590; *Banks v. Baithwaite*, 32 L. J. Ch. 35; *Baily v. Boulton*, 14 Beav. 595; *Hodgworth v. Crawley*, 2 Atk. 376; *Dawkins v. Tatham*, 2 Sim. 492; *Courtroy v. Vincent*, T. & R. 433; *In re Robins*, W. N. (88) 41; *Lethbridge v. Thurlow*, 15 Beav. 334. And see the titles **LEGACIES AND DEVICES**; **SUCCESSION TAXES**; **WILLS**.

In Reference to Lands and Estates—Clear Yearly Rent.—(See the titles **COVENANTS**; **TITLE (REAL PROPERTY)**; **VENDOR AND PURCHASER**.—In asserting an estate to be of any *clear* yearly rent, the parties should attend to the meaning of the word *clear* in an agreement between buyer and seller which is free from all outgoing, incumbrances, and extraordinary charges not according to the custom of the country, as tithes, poor-rates, church-rates, etc., as these are natural charges on the tenant, but subject nevertheless to the land tax and all other outgoing, which, according to such custom, ought to be paid by the landlord. Sugden on Vendor and Purchaser (14th ed.) 222.

Same—Clear Annual Value.—If a message recovered on a writ of entry was, at and after the time when the demandant's title accrued, subject to a right of homestead in the demandant's grantor and his family, and occupied in part by such grantor's wife under a claim of the homestead right, without the same being set off, the rentable value of that part during her said occupation is not to be included in estimating, under the Mass. Gen. Stat., c. 134, § 15, "the *clear* annual value of

CLEARANCE. (See also the titles QUARANTINE; SHIPS AND SHIPPING.) — A document given by the collector of customs to the master of a vessel

the premises" for which the tenant in the action is liable as rents and profits. *Marsh v. Hammond*, 103 Mass. 140.

Same — Clear Yearly Value. — In *Tyrconnell v. Lancaster*, Ambler, 237, the court had to construe a power to jointure lands of a *clear* yearly value. Lord Hardwicke, Chancellor, said: "The word *clear* should be construed in the power as it would in an agreement between buyer and seller; that is, *clear* of all outgoing, incumbrances, and extraordinary charges, not according to the custom of the country, as tithes, poor-rates, church-rates, etc., which are natural charges on the tenant. If in the country where these estates lie it had been the custom for the landlord to pay those rates, I should have thought this jointure ought to be subject to them, for they would in such case be only ordinary charges; but the contrary is proved, that it is not the custom of the country." See also *Blandford v. Marlborough*, 2 Atk. 542. *Arran v. Crisp*, 12 Mod. 54.

Same — Settlement — Elections. — (See also the titles ELECTIONS; POOR AND POOR LAWS.) — Where a statute provides that "any person * * * having an estate of inheritance or freehold in the town where he dwells of the *clear* yearly value of ten dollars, and taking the rents and profits thereof three years successively, * * * shall thereby gain a settlement therein;" and one who has such an estate mortgages it in fee to secure a sum, the interest of which being deducted from the annual income reduces it below ten dollars within the three years, he gains no settlement. *Groton v. Boxborough*, 6 Mass. 50.

So it has been held that the term "*clear* yearly value," within a like statute, meant the annual amount at which a tenement would ordinarily let, deducting such rates, taxes, and charges as may be payable by the landlord, but which generally are payable by a tenant, but without deducting landlord's insurance or repairs. *Coogan v. Luckett*, 2 C. B. 182, 52 E. C. L. 182; *Colvill v. Wood*, 2 C. B. 210, 52 E. C. L. 210.

On the other hand, it has been held that the repairs should be deducted. *Hamilton v. Bass*, 12 C. B. 631, 74 E. C. L. 631; *Dobbs v. Grand Junction Waterworks Co.*, 53 L. J. Q. B. 50.

Same — Clear Title. — A contract to convey "by a good and sufficient deed, conveying a *clear* title thereto. * * * that parcel of land situated on the corner of A. and B. streets, * * * and owned by the vendors," is not satisfied by the tender of a warranty deed conveying "that parcel of land situated on the corner of A. street and B. street * * * now owned by the grantors," if there is an incumbrance on the land. *Roberts v. Bassett*, 105 Mass. 409.

A contract of executors not in pursuance of their official duty to sell and convey, with a *clear* and satisfactory title, land of the testator's estate the title to which is in the heir, subject to the payment of the testator's debts and legacies and charges of the administra-

tion, is not necessarily void, but binds them individually; and if the terms of the contract imply that the title is to come from more than one source, and may require more than one deed of conveyance, and the executors sell the land under license of the Probate Court, and then, to pass the title, tender to the other party a quit-claim deed of it from the purchaser at the sale, with a warranty deed from the heir, such party cannot avoid the contract either on the ground of its original execution by the executors in their official name or on the ground of his dissatisfaction with the form of their making title in its fulfilment. *Dresel v. Jordan*, 104 Mass. 407.

Same — Clear of All Incumbrances. — If there be a contract for the sale of lands, and the bargainor agree to make "a warranty deed free and *clear* of all incumbrances," this agreement is not satisfied by the making of a deed with covenants of general warranty and freedom from incumbrances unless the grantor had the absolute, entire, and unencumbered estate in the land at the time of the conveyance. *Porter v. Noyes*, 2 Me. 22, 11 Am. Dec. 30.

Same — Clear Deed. — A covenant to make a *clear* deed when the title is equally well known by the vendor and the vendee is performed by the delivery of a deed conveying such title as the vendor has, although it may be but a life estate; for he who purchases a tract of land knowing the title to be defective takes the risk upon himself. *Rohr v. Kindt*, 3 W. & S. (Pa.) 563.

Same — Clear of Assessments. — Where there is a covenant on the part of the grantees to pay the ground rent free and *clear* of all assessments, they are not allowed to deduct the same from the rent due to the ground landlord. *Peart v. Phipps*, 4 Yeates (Pa.) 386. See the title GROUND RENTS.

Same — Clear of Expense. — Where a vendor proposed a price for land *clear* of all expenses, it was held that the purchaser should bear the expense of making out the title, the law imposing on him the expense of the conveyance. *Stratford v. Bosworth*, 2 Ves. & B. 341.

Clearing Land — Contract. — "*Clearing* land" in a contract has been held to mean removing therefrom all the timber of every size, but not to include taking out the stumps. *Harper v. Pound*, 10 Ind. 32; *Seavey v. Shurick*, 110 Ind. 494.

Where a contract requires that a party shall "*clear*, grub, and pile the brush, all to be done in good order, on all" the described piece of land, through which was a ravine, it is erroneous to admit evidence that it was not usual in the neighborhood to grub such ravines, or that a farm would be better without having them grubbed, especially when the party insists upon his right under the contract to have such grubbing done. The word *clear* in such connection applies to brush too small to be grubbed, and not to large trees. *Holmes v. Stummel*, 15 Ill. 412.

Cleared Lands. — In *Hathaway v. Elsbree*, 54 Pa. St. 505, the court said: "To return a tract

about to sail, certifying that the vessel has complied with all the regulations

as having so many acres *cleared* or improved, or so many acres unimproved, describes seated land; *cleared* and 'unimproved' express opposite conditions in the same tract. The former conveys the idea of cultivation, while the latter the absence of that; a state of nature." See also the title STATE LANDS; and see SEATED.

To **Clear Out a Highway** means nothing more than to *clear* it out for all the purposes to which it is dedicated. The public have the easement, the right of free passage; that they have a right to perfect and maintain. All obstructions to it may lawfully be removed; but beyond this the rights of the owner of the soil remain unimpaired. *Winter v. Peterson*, 24 N. J. L. 528. See the title HIGHWAYS.

"In the Clear." — A city owning a passageway, a lot on one side of it, and another lot in the rear, conveyed to B. the lot on the side, bounding it on the "passageway * * * reserved by said city exclusively for a back passageway" to the lot in the rear, "or for any other purpose said city may hereafter choose to appropriate said passageway to." The deed also gave the grantee the right to build over the passageway, leaving it five feet wide in the *clear*. The city then quit-claimed to A., the owner of the land on the other side of the passageway, the right to pass over it, describing it as five feet wide, as appurtenant to his estate; and afterwards conveyed to B. the lot in the rear, and quit-claimed to him all the rights of the city in the passageway. It was held that A. could maintain a bill in equity against B. to restrain him from building over the passageway by placing a wall in it, whereby its width was made less than five feet, it appearing that the passageway could be built over without such wall at an expense not much larger than by the mode proposed. *Tucker v. Howard*, 122 Mass. 529.

Clear Days. (See also DAY; TIME, COMPUTATION OF.) — The term "*clear days*" means that the time is to be reckoned exclusive of both the first and the last days. *Liffin v. Pitcher*, 1 Dowl. N. S. 767.

By 49 Geo. III., c. 68, § 5, ten *clear days'* notice of the intention to appeal is required. It was held that the ten days are to be taken exclusively both of the day of serving the notice and the day of holding the sessions. *Rex v. Herefordshire*, 3 B. & Ald. 581, 5 E. C. L. 385.

A statute provided that three *clear days* be allowed the defendant between the verdict of the jury and the rendition of the judgment. In construing the term "*clear days*," the court, in *State v. Marvin*, 12 Iowa 502, said: "*Clear days*, as here used, are days exclusive of the day the verdict was rendered and the day upon which judgment should be pronounced."

Same — Charter Party. — See the titles CONTRACTS OF AFFREIGHTMENT AND CHARTER PARTY; DEMURRAGE.

Same — Sunday. — Where a rule of court provided for the delivery of paper books four *clear days* before the day appointed for argument, it was held that Sunday is to be counted as one of the four days between the

delivery of paper books and the day of argument, unless it is the last day. *Hodgins v. Hancock*, 14 M. & W. 120. See also the titles TIME, COMPUTATION OF; SUNDAY.

Usage. (See the title USAGES AND CUSTOMS.) — Where a party agreed to deliver so many bushels of "first quality *clear* barley," the contract not stating whether the barley was to be delivered in sacks or bulk, *i. e.*, loose, it was held that evidence was properly admitted to show a usage of trade to deliver in sacks. *Robinson v. U. S.*, 13 Wall. (U. S.) 363.

An Auction Catalogue stating that all small remnants must be *cleared* means "taken away." *Pettitt v. Mitchell*, 4 M. & G. 838, 43 E. C. L. 432.

In Defining Proof. (See also the titles EVIDENCE; REASONABLE DOUBT. And see generally ENCYC. OF PL. AND PR., title INSTRUCTIONS.) — When such terms as *clear*, "precise," "explicit," "unequivocal," and "indubitable" are used by the courts in defining the requisite proof of a particular fact to be made out by verbal testimony, it is meant that a conviction shall be fastened in the minds of jurors as strong as verbal testimony is able to convey. It is meant that witnesses shall be found to be credible; that the facts to which they testify are distinctly remembered; that details are narrated exactly and in due order, and that their statements are true. Absolute certainty is, of course, out of the question. The court below charged, in regard to an alleged parol agreement to reform a written instrument, that said agreement should be made out by "*clear, precise, and indubitable proof*." It was held that these words, restrained by their inherent limitations, could do no harm. *Spencer v. Colt*, 89 Pa. St. 314.

Same — "Clearly Convinced." — In *Wilcox v. Henderson*, 64 Ala. 535, it is said: "Reasonable conviction or satisfaction of the mind is the proper measure of proof in civil causes. '*Clearly* convinced' lays down too exacting a rule."

Same — "Clearly Established." — The words "*clearly* established by satisfactory proof," are equivalent to the expression "established by satisfactory proof beyond a reasonable doubt." *People v. Wreden*, 59 Cal. 392, where the court said: "How can a fact be said to be *clearly* established so long as there is a reasonable doubt whether it has been established at all? There can be no 'reasonable doubt' of a fact after it has been clearly established by satisfactory proof. *Clearly*, according to Webster's definition of it, means 'in a *clear* manner; without obscurity; without obstruction; without entanglement or confusion; without uncertainty,' etc. And that is doubtless the sense in which it is popularly understood. The definition of 'a reasonable doubt,' given by Mr. Chief Justice Shaw, which has been generally approved by the courts, is as follows: 'It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge; * * * a certainty that convinces and directs the

prescribed by law, and is at liberty to sail. A certificate of the discharge of obligations or dues.¹

understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it.' *Com. v. Webster*, 5 Cush. (Mass.) 320. A juror would have no excuse for saying that he did not 'feel an abiding conviction to a moral certainty' of the truth of a fact which had been '*clearly* established by satisfactory proof.' Such proof, if any could, would convince and direct the understanding and satisfy the reason and judgment of a conscientious juror." In that case the court charged the jury that where insanity is relied upon as a defense, it must be *clearly* established by satisfactory proof. It was held that this was in effect to instruct the jury that the defense of insanity should at least be proved beyond a reasonable doubt, and was error. See the title *INSANITY*.

Same — Clearly Preponderates. — An instruction that evidence should *clearly* preponderate is practically to require proof beyond reasonable doubt. It is not equivalent to saying that the fact must be proved by evidence which fairly preponderates. *Coyle v. Com.*, 100 Pa. St. 580.

Same — Clearly Proved. — The trial court charged that if the plaintiffs relied on fraud to destroy the deed to D., the fraud must be *clearly* proved. The appellate court said: "It is not easy to say precisely what is meant by the words '*clearly* proved.' If anything more is intended than that the jury must be satisfied by the proof of the existence of the fraud, then the instruction is too broad. The plaintiff's testimony must be sufficient to produce belief in the jury that there was fraud in the transaction; this may be done by circumstantial as well as by positive proof. The law only requires such proof as will convince the jury of the truth of the allegation." *Doe v. Dignowitty*, 4 Smed. & M. (Miss.) 74.

Same — Testamentary Compensation. — In *Bash v. Bash*, 9 Pa. St. 262, Gibson, C. J., said: "A

majority of us concur that there is error in the instruction on the defendant's second and seventh points. It is settled by the decisions quoted that a contract for testamentary compensation of work done for a father by a son after his majority can be proved only by direct and positive evidence of it; yet for 'direct and positive' the judge substituted in his charge '*clear* and satisfactory,' and thus put such a contract, as to proof of it, on the footing of a contract between strangers unaffected by any personal relation." See also the title *LEGACIES AND DEVISES*.

1. Forgery. (See also the title *FORGERY*). — Section 23 of 24 and 25 Vict., c. 98, enacts that "whosoever shall forge * * * any * * * acquittance or receipt for money * * * shall be guilty of felony." A. was secretary of a friendly society which had branches in various towns. Any member who had paid all his dues, on going from one of these towns to another, was entitled to a document called a *clearance*, which admitted him to membership at any place where a branch of the society existed. The qualifications for membership were the payment of an entrance fee, a time of probation, and certain general payments which were made to the secretary, whose duty it was at once to hand them over to the treasurer. A *clearance* had to be signed by the secretary and by two other officers of the society. A. gave a *clearance* to C., to which he was entitled, but to which A. had forged the names of the two officers whose signatures besides his own were necessary for the validity of the *clearance*. The *clearance* certified that the bearer, C., was a member of the branch society granting it, and had paid all dues and demands, and then it authorized any other branch to receive C. as a *clearance* member. It was held that the *clearance* was not an "acquittance or receipt" for money within the *Act. Reg. v. French*, L. R. 1 C. C. 217.

CLEARING HOUSE.

BY ARCHIBALD R. WATSON.

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CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles: *BANKS AND BANKING*, vol. 3, p. 787; *BY-LAWS*, vol. 5, p. 86; *CERTIFICATES OF DEPOSIT*, vol. 5, p. 801; *CHECKS*, vol. 5, p. 1028; *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*; *STOCK AND PRODUCE EXCHANGES*; *STOCK BROKERS*; *USAGES AND CUSTOMS*.

I. DEFINITION.—The most approved definition of “clearing house” is “a place or institution where the settlement of mutual claims, especially of banks, is effected by the payment of differences called balances.”¹

1. Definition.—Cent. Dict., Clearing House. This is said to be the “most approved” definition, because the definitions given by other authorities, when analyzed, convey some inaccurate notions, sufficient to warrant a preference for the definition given, unimportant, perhaps, though the inaccuracies may be. The definitions given by Abbott, Anderson, Black, and Bouvier, all indirectly confine “clearing house” to an institution of associated banks, and all, inferentially, require that the balances shall be adjusted daily. Thus Abbott says of a clearing house that it is “an office organized by the banks of a city, where their representatives may meet daily, adjust balances of accounts, and receive and pay differences.” Abbott’s Law Dict., Clearing House.

The definition given in Black’s Law Dictionary is almost identical with this (see Black’s Law Dict., title Clearing House); and Bouvier differs not at all in the two particulars referred to, in the statement that “clearing house, in commercial law, is an office where bankers settle daily with each other the balance of their accounts.” Bouvier’s Law Dict., Clearing House.

In Anderson’s Law Dictionary, title Clearing House, it is said: “The object of a clearing-house association is to effect at one time and place the daily exchanges between the banks which are members of the association, and the payment of the balances resulting from such exchanges.”

It is true that the clearing house which figures principally in the commercial world is

II. GENERAL SCHEME AND MODE OF OPERATION — **Object.** — The clearing-house system as existing among banking institutions is a method adopted for the common exchange of checks, drafts, or other obligations payable on demand, held by each member of the association against every other member, and a settlement of the resulting differences, the object being to avoid the inconvenience and labor involved of each bank sending to all the others to make presentment of the paper it may hold.¹

The **Mode of Operation** of a clearing house has thus been stated: "Clerks from each bank attend the clearing house with checks and drafts, usually called exchanges, on the other banks belonging to the clearing house. These exchanges are distributed by messengers among the clerks of the banks that must pay them. Each bank, in turn, receives from all the other banks the exchanges they have received drawn on it, and which it must pay. The exchanges which a bank takes to the clearing house are called creditor exchanges; the exchanges which it receives from the other banks represented there are called debtor exchanges. If the creditor exchanges of a bank exceed its debtor exchanges, it is a 'creditor bank,' and must be paid the balance; if the reverse is the case, it is a 'debtor bank,' and must pay the balance. The balances are paid by the debtor banks to the clearing house

that constituted by an association of banks and bankers, and it is to such an association that this article will, therefore, be chiefly devoted; but it is not amiss to note at the outset that a clearing house is not necessarily an association of banking institutions, nor is there anything in the term or the principle of the operation of the clearing house which requires daily exchanges. As will be seen hereafter, there have been organized at different times, besides banking clearing-house associations, a railway clearing house, a stock exchange clearing house, and a clearing house for the clearance of contracts for the purchase and sale of gold. And in the case of the stock exchange clearing house it seems that accounts are settled only once a fortnight.

1. See Abbott's Law Dict., titles Clearing; Clearing House.

Ludlow, P. J., in *Dutton v. Merchants' Nat. Bank*, 16 Phila. (Pa.) 94.

"The **General Nature of the System** is that clerks from the several banking houses in the association, generally all the recognized banks of the city, attend at a fixed hour towards the close of each business day, each bringing with him all drafts which his house has received during the day, payable by any other house. These are then exchanged and balances struck; and each house pays or receives only the balance shown due, instead of having to pay all checks upon it and take payment of all it holds." Abbott's Law Dict., Clearing.

The **Object of the New York Clearing-House Association** is, as stated in its constitution, "the effecting at one place of the daily exchanges between the several associate banks, and the payment at the same place of balances resulting from such exchanges." See O'Brien *v. Grant*, 146 N. Y. 166.

The New York Clearing House, established in 1853, only admits, it is stated in Bouvier's Law Dictionary, incorporated banks, private bankers not being admitted as in London. Perhaps it was upon the authority of this statement that the authors of Rapalje & Lawrence's Law Dictionary (title Clearing House) made

the observation that "the English and American clearing-house systems are virtually the same, except that private bankers are admitted to the privileges of the clearing house in England, and not in America." But it is erroneous to suppose that there is an American or English clearing-house system, the one as distinguished from the other. What the qualifications for membership are is solely referable to the requirements of the particular association, as determined arbitrarily by the association itself.

Origin and History. — Arnold, J., in delivering the opinion of the court in *Crane v. Clearing-House Assoc.*, 2 Pa. Dist. Rep. 509, said, upon it seems, the authority of Bolles on Practical Banking: "The clearing-house system appears to have been originated in Edinburgh; at least the bankers of that place claim the credit of establishing the first clearing house; but the earliest one of whose transactions we have any record is that of London, which was founded in 1775, or perhaps earlier, as the record is not altogether clear on the subject. The alehouse was in those times, as it still is, the general resort of persons about starting new enterprises, and it was there that the messengers or clerks first held their meetings; but as the system grew to be of such utility as to make it indispensable, the association procured rooms in Lombard street, for the convenience of exchanging checks and other securities, and reducing the amount of actual money used in the settlement of their accounts. This was the beginning of the clearing-house system. The New York Clearing House was established in 1853, Boston established one in 1856, Philadelphia, Baltimore, and Cleveland in 1858, Worcester in 1861, Chicago in 1865, and since that date the system has spread throughout the country, so that it is said by Mr. Bolles, in his book on Practical Banking, published in 1884, page 217, there were then thirty-one clearing houses known to exist in this country; and they also exist in Australia, France, Germany, Switzerland, Italy, and generally throughout the continent of Europe."

for the creditor banks.”¹

Medium of Settlements. — The payment of balances in settlement of the clearing-house accounts may be made in cash, or by such form of acknowledgment or certificate as the associated banks may agree to use in their dealings with each other as the equivalent or representative of cash,² and when so paid in, the fund resulting is distributed among the creditor banks in the proper amounts.

It Is Not Usual to Examine the Checks or Drafts Presented at the clearing house until they are taken to the banks on which they are drawn. Then, if any are found not good, they are returned to the bank which presented them, and the matter adjusted directly between the banks.³

System Not Confined to Banks. — The utility and convenience of the clearing-house system have led to its adoption in commercial transactions other than those between banks. In London there is a railroad clearing house, by means of which distribution is made, among the different companies associated, of the proceeds of through traffic over the several railways,⁴ and there has also been established in the same city a stock exchange clearing house, which undertakes to adjust exchanges consisting not of money or money demands, but of quantities of stock.⁵ And in New York there appears to have been

1. Century Dictionary, Clearing House.

Mode of Operation — New York Clearing House. — The *modus operandi* of the New York Clearing House is as follows: Two clerks from each bank attend at the clearing house every morning, where one takes a position inside of an elliptical counter at a desk bearing the number of his bank, the other standing outside the counter and holding in his hand separate parcels containing the checks on each of the other banks received the previous day. At the sound of a bell the outside men begin to move, and at each desk they deposit the proper parcel, with an account of its contents, until, having walked around the ellipse, they find themselves at their own desk again. At the end of this process the representative of each bank has handed to the representatives of every other bank the demands against them, and received from each of the other banks their demands on his bank. A comparison of the amounts tells him at once whether he is to pay into or receive from the clearing house a balance in money. The clearing house is under the charge of a superintendent and several clerks. Balances are paid in coin daily. Bouvier's Law Dict., Clearing House.

Philadelphia Clearing House. — The Philadelphia Clearing-House Association is thus referred to and its operations described by Acheson, J., in the case of *Philler v. Yardley*, 17 U. S. App. 647, 62 Fed. Rep. 645: “The Clearing-House Association of the Banks of Philadelphia is a voluntary, unincorporated association composed of the national banks of that city; its main object being to effect at one common meeting place called the ‘clearing house’ the daily exchanges between the associated banks. Its affairs are under the general supervision of a committee of seven bank presidents, selected by a majority of the associated banks, and serving without compensation. This committee appoints a manager, who has immediate charge of the conduct of the business at the clearing house. All exchanges, however, are made directly between the banks themselves, through clerks repre-

senting them respectively. All the checks, drafts, and other evidences of indebtedness to be exchanged are brought to the clearing house in sealed packages, which are never opened there. The gross amount of the alleged contents of each package is indorsed upon the envelope, but not the items. The clerk of each sending bank delivers directly to the clerk of the receiving bank the sealed package of checks and other obligations held by the former against the latter bank. Receipts pass directly between the clerks of the sending and receiving banks. After the exchanges are thus made, the gross totals only are reported to the clearing-house manager, who, upon this information, makes up a sheet of differences to be adjusted and settled between the various banks. Upon this sheet each debtor bank settles the amount due by it to the creditor banks by paying the same to the clearing-house manager, who immediately distributes it to and among the creditor banks.”

In Practical Operation, said Williams, J., in *Crane v. Fourth St. Nat. Bank*, 173 Pa. St. 566, a clearing house is a place where the representatives of the banks which are members meet, and, under the supervision of a committee or officer selected by the members, settle their accounts with each other, and make and receive payment of balances, and so “clear” the transactions of the day for which the settlement is made.

2. How Balances Paid — Cash — Certificates. — Williams, J., in *Crane v. Fourth St. Nat. Bank*, 173 Pa. St. 566.

3. Bouvier's Law Dict., Clearing House.

4. Railroad Clearing House. — Century Dictionary, Clearing; Clearing House.

5. Stock Exchange Clearing House. — In *Dos Passos on Stock Brokers and Stock Exchanges*, note, page 277, it is said, quoting from *Jevons' Money and the Mechanism of Exchange*, pp. 281, 282: “An important extension of the clearing principle was effected by the establishment in 1874 of the London Stock Exchange Clearing House, which undertakes to clear, not sums of money, but quantities of

organized and operated by a single banking corporation a department, known as the "clearing house," for the general clearance of contracts for the purchase and sale of gold.¹

III. EFFECT OF CLEARING-HOUSE ASSOCIATION UPON MEMBERS INTER SESE —

1. In General. — As, it has been said, it is perfectly competent for banks to form themselves into a clearing-house association, and agree that they shall be governed by a constitution and rules, such constitution and rules, when adopted, express the contract by which each member is bound, and by which the rights, duties, and liabilities of the members are measured; and, if not in conflict with rules of law, the compact must be accorded that effect which is always attributed to the deliberate engagements of parties.²

Rule as to Inability of Member to Settle — Notice. — Thus, where the rules of the clearing house required that if, when a debtor bank was notified of its balance

stock. As stock brokers settle their transactions only once a fortnight, or in consols once a month, it naturally arises that in the intervals the same broker will usually have bought the same kind of stock for one client and sold it for another. The very same stock may have passed through several different hands, and the same brokers may have had reciprocal dealings with each other. Instead, then, of actually making transfers of stock for each transaction and paying by checks, which greatly swell the business of the Lombard street clearing house on settling days, a plan has been arranged according to which each member of the clearing house prepares a statement of the net amount of each stock which he has to receive from or deliver to each other member. The manager of the house, after verifying these accounts, which should balance in the aggregate, directs the debtor members to transfer quantities of stock to the creditor members in such a way as to close all the transactions. It will be noticed that, for pretty obvious reasons, the transfers are made in the stock exchange directly from broker to broker, and not to the manager of the clearing house as in banking transactions. A separate clearing has, of course, to be made in each kind of stock. It is found that the quantities actually transferred do not exceed ten per cent. of the whole transactions cleared, and the checks drawn are diminished on settling days as much as ten millions sterling."

1. Clearance of Contracts for Purchase and Sale of Gold. — See the case of *National City Bank v. New York Gold Exch. Bank*, 101 N. Y. 595. This was an action for an alleged balance due upon adjustment of accounts in the operations of a department conducted by the defendant, a banking corporation, for the general clearance of contracts for the purchase and sale of gold, known as the "clearing house." So much of the report of the case as describes the operations of the department is as follows: "These clearances were made among those who dealt with the defendant, and were members of the clearing house, each day by means of statements of purchases and sales of gold made by them being delivered to the defendant. The defendant, in these transactions, acted as the common agent of the dealers in gold in the settlement of the contracts made between them. It received the gold sold from the seller, as his agent, and delivered it to the buyer for whom it was received, in the same

capacity, and received from him the amount of the price thereof in currency, and paid the same over to the party entitled thereto. This was accomplished by means of the statements delivered to defendant by the members dealing with it, the defendant from these statements determining the balance due it or the members on each day's transactions, and paying over to or receiving from the members such balance. * * * The defendant * * * determined the balance due between contracting parties, and as their mutual agent delivered the gold or currency found due, upon receipt thereof, in settlement of their statements." See also the case of *Fowler v. New York Gold Exch. Bank*, 67 N. Y. 138.

In the former case it was held that to entitle the plaintiff to maintain its action it was necessary for it to establish that there had been a clearance of accounts and balance struck in its favor or in favor of its assignor, creating a liability in the nature of an account stated.

2. See opinion of Gray, J., in *O'Brien v. Grant*, 146 N. Y. 173.

Clearing-House Rules and Usages Binding if Not Illegal. — The rules and usages of a clearing-house association, "if not in conflict with law, may, by the implication of tacit adoption in the contracts of members, bind them in the same way that a general usage in trade may bind those who deal with reference to it, and are therefore held impliedly to adopt it." *Overman v. Hoboken City Bank*, 30 N. J. L. 61; *People v. Saint Nicholas Bank*, 77 Hun (N. Y.) 160; *O'Brien v. Grant*, 146 N. Y. 173.

Sending Checks to Clearing House Not an "Appropriation" to Pay Checks Drawn Previous Day. — In the case of *People v. Saint Nicholas Bank*, 77 Hun (N. Y.) 160, the singular contention was made that the sending, by a bank, of checks through the clearing house on a certain day for collection amounted to an appropriation of such checks as a specific fund for the payment of checks, certified and uncertified, drawn by the bank's customers on the previous day. The trial court ruled in accordance therewith, in so far as the certified checks were concerned; but it was held, on appeal, that by no known law or custom could such a position be maintained, and that it was, in fact, quite evident that the checks so treated were sent for the purposes of collection merely, and not for appropriation without distinction between certified and uncertified checks.

due the clearing house, it found itself unable to make payment, it should give notice of such inability to the manager of the clearing house and the other member banks by a certain hour, but an insolvent and failing member omitted to give the notice required, it was held that the settlement made between such bank and another member in ignorance of the condition of the former was final and conclusive, and could not be revoked to the detriment of the latter.¹

2. Presentment for Payment through Clearing House. — There would seem no reason to doubt that a presentment, through the clearing house, of a check or draft drawn on a member, is a valid presentment for payment.² And it has been held in London, where a bill of exchange is accepted payable at a certain banker's, that a presentment of the bill for payment to the banker's clerks at the clearing house is sufficient.³ In a case arising under the rules of the Boston Clearing-House Association it was held that in the absence of a uniform custom among the banks of the clearing house to treat notes as checks, the receipt by a bank, through the clearing house, of a note made payable at

1. Rule as to Insolvency of Member. — *Blaffer v. Louisiana Nat. Bank*, 35 La. Ann. 251. In this case it was held that a settlement made by two banks through the clearing house, in which checks are presented and exchanged and a balance struck, was final and conclusive, and the mutual credits given could not be revoked by one to the detriment of the other, where the former failed to give notice, as required by the rules of the clearing house, of its inability to meet the balance against it on the general adjustment, before the hour when banks usually pass checks to the credit of their depositors. The facts of this case were that at nine o'clock in the morning, which was at the hour appointed by the rules of the New Orleans Clearing House for making the exchanges, the Mechanics' Bank produced a certain amount of checks against the Louisiana National Bank, exceeding by over a thousand dollars the checks of the latter on the former. But though it appeared to the Mechanics' Bank from the result of the exchanges that it could not pay the balance against it, at least when the balance was struck, the Mechanics' Bank, hoping to be able to meet the manager's check for the balance when it should be drawn later in the day, did not give the notice as required by the clearing-house rules; and acting on its silence, the Louisiana National Bank placed the checks on the Mechanics' Bank received the day before to the credit of its depositors, subject to the drafts of each respectively. And the court held, in an action by the receiver of the Mechanics' Bank, that, independently of clearing-house rules, the Louisiana National Bank was only liable for the difference, in favor of the Mechanics' Bank, between the amounts of the checks of each of the two banks on the other, and not for the entire amount of the checks which the Mechanics' Bank held on the Louisiana National Bank, without deduction by the amount of checks held by the latter on the former.

2. Presentment for Payment — Practice of London Bankers. — By the practice of the London bankers, if one banker holds a check drawn on another banker, and presents it for payment after four o'clock in the afternoon, it is not then paid; but, if the drawer has assets, a mark is put on it to show the fact, and that it

will be paid, the course being to present the check for payment or exchange at the clearing house the following day. A check so presented and marked according to the custom, and carried to the clearing house next day, but not paid, no clerk from the drawee's house attending, need not be presented for payment at the banking house of the drawee, as such a marking, under this practice, amounts to an acceptance, payable next day, at the clearing house. *Robson v. Bennett*, 2 Taunt. 388.

3. Reynolds v. Chettle, 2 Campb. 596.

In *Bouvier's Law Dictionary*, title Clearing House, it is said: "In this country, when a check is returned 'not good' through the clearing house, it is usually again presented at the bank, and no case has arisen to test the validity of a presentment through the clearing house only." Just what the learned author means by this is not altogether clear. In the first place, checks "not good" are not returned through the clearing house, according to the constitutions and rules of all the clearing-house associations which we have ever seen or heard of. Although the details of clearing differ somewhat in different clearing houses (see *Cent. Dict.*, title Clearing House), they are uniform, so far as we know, in requiring readjustments of exchanges arising from checks "not good" to be made directly between the bank refusing the check and the bank sending it to the clearing house. Perhaps the statement intended is that no case has arisen to test the validity of a presentment of a bill of exchange accepted payable at a bank, or a note made payable there. In neither case is such an instrument a direct obligation of the bank, and there is considerable doubt whether such a clause is even a direction to the bank to pay the bill or note out of the funds of the acceptor or maker, if any. Indeed, the practice is common of making a note or accepting a bill payable at a certain bank simply for the convenience of the holder, the maker or acceptor not intending or expecting to have funds on deposit there. According to the customs and rules generally prevailing, we believe that only such instruments are sent through the clearing house as constitute, in form at least, direct obligations of a member bank to pay.

such bank, did not constitute a formal demand for the immediate payment of the note, made during business hours, but was only equivalent to leaving the note at the bank, for collection from the maker, on or before the close of banking hours.¹

3. No Priority Among Checks Presented through Clearing House. — There is, it has been said, no priority among checks presented through the clearing house, and where there are insufficient funds to the credit of an account to pay all of several checks drawn against it, received through the clearing house at the same time, the bank cannot discriminate between them, but must refuse the entire lot.²

Practice of London Bankers. — But where, it has been held, one London banker holds a check drawn on another, and presents it for payment after four o'clock in the afternoon, and, according to the practice of London bankers, it is not then paid, but a mark is put on it to show that the drawer has assets, and that it will be paid, such a check has priority, when presented for exchange or payment the next day at the clearing house.³

4. Rules Limiting Time for Readjustment of Exchanges Between Members —
α. IN GENERAL. — As has been before stated, when a bank receives through the clearing house a check or draft drawn on it which it desires not to pay, the usual course is for the receiving bank to send the dishonored check or draft directly to the bank which sent it to the clearing house, and receive credit for it there, and demand payment.⁴

1. Rules of Boston Clearing House Association — Notes. — These announcements of principle were made by the court in the case of *National Exch. Bank v. National Bank of North America*, 132 Mass. 147, in connection with the holding that a rule of the clearing house to the effect that whenever checks which were not good should be sent through the clearing house, the banks receiving them should not be permitted to demand payment of them from the banks sending them to the clearing house, after one o'clock on the day of receipt, did not, in the absence of a uniform custom to that effect, apply to notes sent through the clearing house. In order to show the inapplicability of the one-o'clock limit to notes sent through the clearing house, the court argued that in the absence of formal demand for immediate payment the maker of the note was not in default if the note was paid at any time during business hours of the last day of grace; and that, as stated, the sending of a note through the clearing house was not equivalent to such demand for immediate payment. It was held, therefore, that the allowance of notes in clearing-house accounts amounted, as between the banks, to a provisional payment only, which became final and absolute, not, as in the case of checks, after one o'clock, if not returned sooner, but only upon payment of the note by the maker in the ordinary course of business.

2. No Priority Among Checks. — Morse on Banks and Banking, § 354, where it is said: "The payment of checks may be affected by the use of the clearing house in one important particular. Checks, as has been seen, must be paid in the order of presentment. But when the deputy of the bank takes from its drawer in the clearing house all the checks which it has to pay, he may receive a considerable number of checks of the same depositor. It is clear that there can be no priority between these. They are all received at pre-

cisely the same moment. For the order in which they are placed in the drawer has nothing to do with the presentment of them to or receipt of them by the bank; indeed, is in nearly all cases unknown to the bank. The bank cannot look at their dates; for priority of presentment, not of date, secures priority of payment. So, if the bank cannot pay all the checks of any individual depositor then coming through clearing, it must pay none of them. It has no legal power or right to select or choose from among them certain ones which it will honor, or certain ones which it will dishonor. All or none must be paid. Any other course would render the bank liable to the holders of the dishonored paper. A check presented at the counter for payment must be paid at once if there are funds enough to the drawer's credit to pay it alone; but if it is sent through clearing it must take its chance that his funds shall be sufficient to pay not only it, but all his other checks which shall be sent through clearing on the same day; and failing this, it must be dishonored. It might seem advisable to incorporate in clearing-house transfers a rule that, if the funds of a depositor are insufficient to pay the whole of a mass of checks coming against it at one clearing, the bank should pay those of earlier date so far as the funds will go. Such a rule, though leaving some checks out in the cold, would seem better, as creating less disturbance of business calculations than to refuse payment of the whole group."

3. Robson v. Bennett, 2 Taunt. 388.

4. Dishonored Checks. — See case of *Stuyvesant Bank v. National Mechanics' Banking Assoc.*, 7 Lans. (N. Y.) 197, where the rule of the New York Clearing-House Association in this respect is referred to. And see case of *Crane v. Clearing-House Assoc.*, 2 Pa. Dist. Rep. 509, with reference to a similar rule of the Philadelphia Clearing-House Association.

Time for Examination of Checks — Presumption. — But by the rule or custom of, it is believed, all clearing-house associations, there is a limit for such action, usually an hour fixed on the day of receipt, the theory being to allow the receiving bank only a reasonable time to examine the checks or drafts presented, at the expiration of which, without demand for payment, the sending bank is warranted in presuming an irrevocable payment, and, therefore, in paying out the amounts of checks or drafts sent to the clearing house to its depositors.¹

Nature of Payment Before Expiration of Time. — Before the expiration of the period allowed for examination and readjustment by payments between the banks, payment through the clearing house, if indeed it can be termed payment, is regarded as provisional only.²

Nature of Payment After Expiration of Time. — But after the expiration of the time, it is absolute and irrevocable, the validity of such provisions being maintained on strict contractual principles.³

This rule, as contained in the articles of association of the Boston Clearing-House Association, is expressed as follows: "Errors in the exchanges, and claims arising from the returns of checks or other cause, are to be adjusted directly between the banks which are parties therein, and not through the clearing house." See *Case of Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281, 100 Am. Dec. 120.

1. See the cases cited in the following notes to this subdivision.

2. **Payment Regarded as Provisional.** — *Fernandey v. Glynn*, 1 Campb. 426, note; *Preston v. Canadian Bank*, 23 Fed. Rep. 179; *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281, 100 Am. Dec. 120; *Merchants' Nat. Bank v. National Bank*, 139 Mass. 523. And see *National Exch. Bank v. National Bank of North America*, 132 Mass. 149.

In the case of *Fernandey v. Glynn*, 1 Campb. 426, note, it appeared that the plaintiff had paid into the house of Vere & Co., bankers in London, a check upon the defendant's house. Vere's clerk took it to the clearing house to be paid and put it into the defendant's drawer. The time for putting in the checks, according to the clearing-house rules, was from three to four o'clock, and the course was for clerks to take the checks to the respective bankers, and those which were refused were sent back before five o'clock. The check in question was returned before five o'clock, canceled, but marked "Canceled by mistake," and the right of the defendant to so return and repudiate it was maintained.

3. **Payment Regarded as Absolute.** — The case of *Preston v. Canadian Bank*, 23 Fed. Rep. 179, was an action between two members of the Chicago Clearing House, the one seeking to recover from the other the amount of a check paid through the clearing house, which had, however, not been demanded of the bank sending it in, until after the time prescribed by the articles of association for such transactions between its members. The circumstances of the case, as stated by Blodgett, J., who delivered the opinion of the court, were, that an arrangement was made by one Comstock with a firm of bankers, Preston, Kean & Co. by name, by which the former deposited with the latter certain collaterals, with the

understanding that the former should have the right to draw checks on the latter to within ten per cent. of the market value of the securities. Pursuant to this agreement, the depositor of the collaterals drew his check for four thousand dollars, which was deposited to his credit with the defendant bank and went into its exchanges for collection through the clearing house. Under the rules of the clearing house each member was required to pay its balances to the clearing house by twelve o'clock, and any check which was found not to be good, when returned from the clearing house to the bank on which it was drawn, was to be returned to the bank which collected it through the clearing house by half-past one o'clock of the same day. When the check in question came from the clearing house to the plaintiffs, the drawer's account was examined and the collaterals deemed sufficient to warrant the payment of that check and others drawn by him, and they were handed over to the bookkeeper to be charged into his account. At about forty-two minutes past one o'clock information came to the plaintiffs' bank that their customer had failed to make good his margins on the board of trade, when the assistant cashier was directed to again look over the securities deposited, and it was found that a mistake had been made the first time, and the collaterals were not sufficient to meet the checks which had been drawn, whereupon the check in litigation was sent to the defendant bank and payment demanded, at fifteen minutes before two o'clock, and refused. The plaintiffs relied upon the principle that the money had been paid by reason of a mistake in the first examination of the collaterals by the cashier, declaring that they would have returned the check to the defendant before half-past one o'clock but for this circumstance, the mistake made being the counting of one item of the securities twice in the first computation; but the court said, conceding the general principle that money paid under a mistake of fact might be recovered back, that it was equally a fundamental proposition of law that parties who are competent to make a contract may agree within what time they may correct mistakes, if they are made. "Every one," continued the court, "at all familiar with banking business knows that in the dis-

Waiver. — But there may, of course, be a waiver of the effect of such a provision.¹

patch and haste, or apparent haste, with which large sums of money and complicated accounts are handled and business transacted during banking hours, mistakes are liable to occur; and the rapidity with which the different accounts are adjusted at the clearing house is such as to make it possible, if not probable, that mistakes will occur; and it is therefore entirely competent for parties who are dealing with each other through an agency like the Chicago Clearing House to make an agreement as to the time within which such mistakes shall be rectified. I cannot construe this rule of the Chicago Clearing House as anything else than an agreement that checks shall be returned by half-past one o'clock to the bank from which they come, when they are found not good; that is, it is a contract stipulation to that purport and effect between the members of the clearing house. * * * If parties competent to contract within what time they may correct mistakes in their dealings with each other have so contracted, it seems to me the courts have no right to override or disregard such an agreement."

1. Waiver. — See *Stuyvesant Bank v. National Mechanics' Banking Assoc.*, 7 Lans. (N. Y.) 197. In this case it appeared that the plaintiff, an incorporated bank of New York City, received on deposit on the 28th and 29th of June, and the 1st and 2d of July, 1867, four different checks, one on each day, and respectively bearing date on the day preceding that of their respective deposits. The checks purported to be drawn by White, Morris & Co., a well-known firm of bankers in the city, upon the defendant, the National Mechanics' Banking Association, and were made payable to the order of one Definganiere, also known as a merchant in the city, in whose name they purported to be indorsed, and to whose credit they were deposited. The plaintiff was not a member of the New York Clearing-House Association, but employed one of its members, the Manufacturers and Merchants' Bank, to send its exchanges through the clearing house; and the course of business was for the plaintiff to put up its checks and vouchers, demandable at banking houses in the city, in packages, with slips indicating the amount of each separate item, and to send them, so put up, to the Manufacturers and Merchants' Bank. The latter gave credit for the gross amount to the plaintiff, and made up a new slip, incorporating that of the plaintiff, which it sent with the package and its own exchanges to the clearing house. The plaintiff kept a regular account with the Manufacturers and Merchants' Bank, and the latter rendered a daily account and sent its vouchers to the plaintiff. On the days upon which, respectively, the plaintiff received the checks for the deposit and credit of the supposed indorsee, it forwarded them in the usual manner to the Manufacturers and Merchants' Bank, where it received credit for the several amounts of the checks, in the aggregate of something over ten thousand dollars, whence the checks were

sent to the clearing house in the usual manner. At the clearing house the checks were charged to the defendant, and the amount of them was allowed to the Manufacturers and Merchants' Bank. It also appeared that the defendant was a member of the Clearing-House Association, and that the business of the association was carried on under a written constitution and code of rules, by which each of its members agreed to be bound, of which the rules, so far as material to the present controversy, were: "Errors in exchanges and claims arising from the return of checks, or from any other cause, are to be adjusted directly between the banks who are parties to them, and not through the clearing house;" and that "All checks, drafts, notes, or other items in the exchanges returned as 'not good' or missent shall be returned the same day directly to the bank from which they were received; and the said bank shall immediately refund to the bank returning the same the amount which it had received through the clearing house for the said checks, drafts, notes, or other items so returned to it, in specie or legal tender notes." The first three checks received by the defendant were charged to the account of the drawers without question, but on the third of July, when the last of the four checks was received, it was discovered that it was a forgery, together with the three checks previously received; whereupon the defendant sent its messenger with all the forged checks to the Manufacturers and Merchants' Bank, and demanded payment of them. The messenger was there directed to ask payment of the plaintiff, with the promise, by the Manufacturers and Merchants' Bank, of payment of the last check in case of the plaintiff's refusal. The plaintiff, however, who had already cashed the drafts of the depositor to the full amount of the forged checks, refused payment, whereupon the Manufacturers and Merchants' Bank gave its check for the last of the forged checks, the one which had been returned to it on the day of presentation at the clearing house. The defendant then, without authority, sent the remaining forged checks, together with the check of the Manufacturers and Merchants' Bank in payment of the forged check, through the clearing house to the latter, which paid them all and charged the amounts to the plaintiff's account, sending to the plaintiff the four forged checks. The plaintiff retained the checks and tendered them the next day to the defendant with a demand of payment, which was refused. Some twenty days after, the plaintiff sent the forged checks through the Manufacturers and Merchants' Bank, but in the usual sealed package, to the clearing house, as liabilities of the defendant, which paid them, but at once returned them to the Manufacturers and Merchants' Bank through the clearing house, and gave notice to such bank that if returned again to the defendant through the clearing house, exchanges between the defendant and the Manufacturers and Merchants' Bank would be broken off. The Manufacturers and Merchants' Bank paid

Mistake of Fact.—Some authorities have, however, held that while, after the expiration of the time for readjusting balances among the banks, the payment of checks becomes absolute, yet, if the period is allowed to elapse by reason of a mistake of fact, payment may be required of the sending bank if the latter has not, by reason of the delay, altered its relations with the depositor or person from whom it received the instrument, treating a payment under the clearing-house rules which has become absolute by lapse of the time prescribed, simply as a payment made in cash over its counter.¹

the checks when returned from the clearing house, and took them into its possession again, charging the plaintiff with them, and returning them to the plaintiff. The plaintiff then obtained an assignment of its claim against the defendant from the Manufacturers and Merchants' Bank, and, after demanding the money from the defendant, brought suit, which at the trial was dismissed on the plaintiff's own testimony, and upon appeal it was held that the trial judge had acted rightly. Gilbert, J., delivering the opinion of the court, discussed the attitude of the Manufacturers and Merchants' Bank, both in the respect of principal and agent. In the first aspect, treating the Manufacturers and Merchants' Bank as principal, the court said there was no valid objection to the defendant's demanding and receiving the amounts of the forged checks; that if, as to the three forged checks which went through the clearing house and were charged up to the drawer without suspicion, such circumstances, together with the fact that payment was not demanded until several days afterwards, constituted a payment of them, under the rules of the clearing house, certainly it was competent for the Manufacturers and Merchants' Bank to waive the rule. And on the score of agency, it was held that the actions of the Manufacturers and Merchants' Bank, in the premises, would, as to third persons, bind the plaintiff, though if the former had acted without authority there might be a liability to the plaintiff. Compare, in connection with the principles involved, the cases of *Commercial, etc., Nat. Bank v. Baltimore First Nat. Bank*, 30 Md. 11, and *Overman v. Hoboken City Bank*, 30 N. J. L. 61.

1. Mistake of Fact.—Where a check, the drawer of which had no funds to meet it, was presented to the drawee bank through the clearing house, but, owing to a mistake of such bank's messenger, was not presented to the bank from which it had come and payment demanded until a few minutes after the time within which such return and demand might, according to clearing-house regulations, have been made, it was held that the amount might, nevertheless, be recovered from the latter bank, on the principle that money paid to the holder of a check or draft drawn without funds could be recovered back, if paid by the drawee under a mistake of fact; a rule, however, subject to the qualification that there has been no laches on the part of the payer by which the payee has suffered damage, or changed his situation in respect to his debtor. *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281, 100 Am. Dec. 120.

In the case of *Merchants' Nat. Bank v. National Bank*, 139 Mass. 523, where demand for payment was made by a bank on which a

check had been drawn and received through the clearing house, upon the bank which had sent the check to the clearing house, from seven to twelve minutes after the time had passed within which, according to the clearing-house rules, this might be done, the delay, however, being due to a mistake in fact, and resulting in no injurious consequences to the bank on which the demand for payment was made, the court held, in maintaining the liability of the defendant, that, under the same circumstances, it could not be perceived why the plaintiff might not have returned the check, even the next day, with the same right of recovery.

Blodgett, J., in *Preston v. Canadian Bank*, 23 Fed. Rep. 179, referring to the case of *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281, 100 Am. Dec. 120, said, after laying down a contrary rule: "The Massachusetts court puts its decision on the ground that you may correct a mistake of this kind at any time after it is discovered, if it places the party to whom the check is returned in no worse condition than it would have been if it had been returned within the stipulated time; thus overlooking the rule that parties may agree that they shall not have the right to correct mistakes unless done within a limited time." To which Devens, J., in *Merchants' Nat. Bank v. National Bank*, 139 Mass. 517, replied: "But we have not overlooked the right of parties to make such agreement as they choose. The question is as to the interpretation of the rule which they, as members of the clearing house, have adopted. The rule is, 'Whenever checks which are not good are sent through the clearing house, they shall be returned by the banks receiving the same to the banks from which they were received as soon as it shall be found that said checks are not good; and in no case shall they be retained after one o'clock.' If it were intended that mistakes should never be corrected unless discovered by one o'clock, this should in terms explicitly appear. As it does not, it seems to us the more correct interpretation to hold that the rule authorizes the bank receiving the check, after one o'clock arrives and the check is not returned, to treat it in all transactions as if it were good. If, therefore, the bank changes its position it will suffer no loss by reason of it. On the other hand, if the mistake is discovered after one o'clock, and the bank receiving the check has not changed its position by reason of the expiration of the time, it should rectify the mistake when reasonable care has been exercised by the bank on which it was drawn." It may be well to observe, in this connection, the difference in phraseology between the clearing-house rule construed in the Massachusetts cases and that

Illustrations. — Thus where, by the mistake of a bank's messenger in taking a check to the wrong bank first, he was delayed in demanding payment of the bank through which the check had come, until from five to seven minutes after the expiration of the period for making such a demand under the letter of the clearing-house rules, during which interval of delay, however, there had been no change of relations between the sending bank and its depositor, it was held that the sending bank was liable.¹

of the Chicago Clearing House, involved in *Preston v. Canadian Bank*, 23 Fed. Rep. 179. The former has been already set forth. In the latter case the provision was that "all checks received in the morning exchanges not found good are to be returned the same day received, before one and a half P. M., to the member from whom received, who shall immediately reimburse the holder of the same."

Payment of Forged Check through Clearing House. — In the case of *Commercial, etc., Nat. Bank v. Baltimore First Nat. Bank*, 30 Md. 11, the defendant, in the due course of business, received a check on the plaintiff bank and sent it through the clearing house for collection. According to the "custom and usage" of all the banks of the city of Baltimore, in which the plaintiff and defendant banks were located, if a check is sent through the clearing house to the bank on which it is drawn, and not heard from before eleven o'clock on the day on which it is so sent, the bank sending it has the right to assume the check good and paid, and to act accordingly. A week after the check had been received by the bank on which it was drawn, and several days after the proceeds of the check, save a trifling sum, had been paid to the person who had deposited the check by the bank in which the check had been deposited, it was discovered that the check was a forgery, and the bank on which the check was drawn subsequently brought suit against the bank which had received the check in the first instance and sent it through the clearing house. But it was held that the plaintiffs could not recover. Not, however, specifically on the ground that the time within which payment of the defendant bank had, according to the usage and custom of the clearing house, elapsed, but pursuant to the principle that as between the two parties, equally innocent and equally deceived, the loss should be upon the bank upon which the forged check was drawn, whose duty it was to know the signature of its own depositor. Indeed, it seems to be intimated that if the defendant had been guilty of negligence, or negligence in a certain degree, in receiving the check, there might have been a recovery.

1. Illustrations. — In the case of *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281, 100 Am. Dec. 120, it appeared that the plaintiffs and defendants were members of the Boston Clearing-House Association, which was formed by the banks of Boston, for the purpose, as expressed in their articles of association, "of effecting a more perfect and satisfactory settlement of the daily balances between them." In the second section of the articles signed by the banks constituting the association it was set forth that "the objects of the association are the effecting, at one place and one time, of the daily exchanges between

the several associated banks, and the payment, at the same place, of the balances resulting from such exchanges." By the eleventh section it was provided that "the hour for making the exchanges at the clearing house shall be ten o'clock, before noon, each day;" that "at twelve o'clock, noon, the debtor banks shall pay to the manager at the clearing house the balances due from them respectively;" and "at half-past twelve o'clock, afternoon, the creditor banks shall receive from the manager, at the same place, the balances due to them respectively, provided all the balances due from the debtor banks shall then have been paid to him." The thirteenth section provided that "errors in the exchanges, and claims arising from the returns of checks or other cause, are to be adjusted directly between the banks which are parties therein, and not through the clearing house;" and a subsequent section was, "Whenever checks are sent through the clearing house which are not good, they shall be returned by the banks receiving the same to the banks from which they were received, as soon as it shall be found that said checks are not good; and in no case shall they be retained after one o'clock." The plaintiffs' evidence showed that the check drawn on them had been deposited with the defendants on a Saturday preceding a Monday holiday, and that the check had not, therefore, reached the clearing house before Tuesday. In the forenoon of the last-named day the defendants sent it to the clearing house in their bundle of demands against the plaintiffs, and the amount of it was allowed them in their settlement with the clearing house later in the day. About a quarter past ten o'clock the plaintiffs' messenger returned from the clearing house and delivered to the paying teller the various packages of demands against them, which were opened and examined in the regular course of business; the teller, with an assistant, ascertaining whether the contents of each bundle corresponded with the ticket, whether each check was in fact drawn upon the plaintiffs, and whether, if so, it was properly signed and indorsed, marking the checks with the numbers by which the banks were known as members of the clearing house, and finally assorting them into three piles, and giving each pile to a bookkeeper to examine whether the drawers of the checks had funds deposited to meet the amount drawn for. It was nearly twelve o'clock when the teller finished his examination so far as to deliver the piles of checks to the bookkeepers; and at half-past twelve o'clock the check upon which the litigation arose, with three others drawn by the same person, each sent to the clearing house by a different bank, was returned to the teller by the bookkeepers as not good, there being no funds to meet them. At a quarter

And where a director and debtor of a bank was permitted, as agent of the bank, to sell goods pledged as collateral security for a specific debt which he owed the bank, but instead of having the proceeds so applied they were fraudulently placed to the credit, on general account, of such person, who drew checks against the balance created, which were presented to the clearing house, and paid by permitting the prescribed time for demand of payment of the sending bank to elapse, but the fraud being discovered and payment demanded from seven to twelve minutes late, but before any change of relations had occurred, the demanding bank was held entitled to recover.¹

Measure of Damages in Actions Between Banks. — The authorities maintaining the right of one bank to recover back the amount of a check paid through the clearing house, notwithstanding the lapse of the period within which readjustment of exchanges between the banks, according to clearing-house rules, could be effected, where the time has been allowed to pass by reason of mistake of fact, no change of relations between the sending bank and its depositor, injurious to the former, having occurred, declare the measure of damages to be, not necessarily the amount of the check, but the difference between the amount of the check and the amount for which the depositor was entitled to draw, and this notwithstanding the custom, where there is not enough money

before one o'clock the teller of the plaintiff bank handed the checks to the bank's messenger, with directions to return them to the banks, as indicated by the numbers marked on them, and to collect the respective amounts from the banks from which the checks had come. The messenger made a mistake as to the number on the check sued on, and went to the wrong bank with it, returning then to the plaintiff bank in order to ascertain what the number was. In consequence of the delay resulting from this mistake, it was from five to seven minutes after one o'clock when the check was returned to the defendants' banking house and payment demanded, which was refused on the ground that it had not been presented before one o'clock. On the trial the defendants asked the judge to rule that the plaintiffs could not maintain their action for the reason that on their own showing the check was not presented to the defendants until after one o'clock of the day on which it was left at the clearing house, and by the articles of association the defendants were not liable to refund the amount of a check not good unless it was presented to them at or before one o'clock on that day; but the judge ruled that the failure of the bank to return the check by one o'clock would be a defense to the depositing bank only to the extent which such bank was injured by the delay, and that unless it could be shown that such bank had, in consequence of the delay, altered its position with reference to the check after one o'clock, and before the check was returned, it would be liable to refund the amount of it. On appeal the position of the trial court was maintained, the appellate tribunal observing, with reference to the limit, according to clearing-house regulations, within which checks might be returned, that it was only intended to fix a time at which the banks could safely treat the checks sent to the clearing house as paid, and so regulate with safety its dealings with the persons from whom the checks were obtained. And it was held, as no suggestion was made that there had been any

change of circumstances after the time when the defendants had a right to treat the check as paid, and before it was returned, which subjected the defendants to damage or loss, the plaintiffs were entitled to recover.

1. In the case of *Merchants' Nat. Bank v. National Bank*, 139 Mass. 513, one Burgess, a director and also a debtor of the plaintiff bank, was permitted by the bank to sell as its agent goods pledged to the bank as collateral security for the payment of his promissory note. Instead of paying the proceeds of the sale on account of the note for which the goods sold were security, Burgess deposited the money received to his own account in the bank, and against the balance thus produced drew a check on the bank, which came to it through the clearing house from another bank. The check was received by the plaintiff bank about noon, and actually charged to Burgess's account, but shortly thereafter the president of the bank, receiving information which led him to suspect that Burgess was financially embarrassed, and discovering that no payment of the proceeds of the property sold had been made by Burgess, ordered the entry on the books of the bank to be erased and the check returned to the bank from which it had come with a demand of payment. The messenger started from the plaintiff's bank two or three minutes after one o'clock, the limit fixed by the clearing house for the return of checks not good, reaching the defendant bank from seven to twelve minutes after one o'clock, and demanded payment on the ground that the check was not good. Payment was refused on the ground that the demand therefor came too late. But it appearing that the defendant had not changed its position towards the depositor from whom it had received the check during the interval between one o'clock and the time when payment was demanded, the court held that recovery might be had, the provisional payment becoming absolute upon such a mistake of fact as gave the right of recovery back in the absence of injury or prejudice to the defendant.

on deposit to pay a check in full, to return the check.¹

b. INSTANCES OF JUDICIAL CONSTRUCTION OF SUCH RULES. — Where the provision was, "Whenever checks are sent through the clearing house which are not good, they shall be returned by the banks receiving the same, to the banks from which they were received, as soon as it shall be found that said checks are not good; and in no case shall they be retained after one o'clock," it was said that if necessary to save a penalty or forfeiture, it might be held that the delivery of a check to a messenger before one o'clock, to be returned to the sending bank, in sufficient time, in the absence of accident or mistake, to reach the sending bank before that hour, was a sufficient compliance, although demand of the sending bank for payment was not in fact made until a few minutes after one o'clock.²

And it has been held that, in the absence of a uniform custom to that effect, such a provision, referable in terms to checks, did not apply to notes made payable at the place of business of a member bank, and recovery was permitted where demand on the sending bank had not been made until about two o'clock of the day of receipt.³

5. Use of Clearing-House Certificates. — The use, among banks organized into a clearing-house association, in transactions among themselves, of certificates, or other representatives of money, as a device to save inconvenience and labor, is not a violation of the law against the issuing of currency;⁴ nor is the clearing-house association, by such usage, converted into a bank of any sort.⁵ And a clearing-house certificate has been held a "negotiable instrument" within the rule requiring an indemnity bond, where suit was brought upon such a certificate which had been lost.⁶

1. Merchants' Nat. Bank v. National Bank, 139 Mass. 513.

2. Merchants' Nat. Bank v. National Eagle Bank, 101 Mass. 281, 100 Am. Dec. 120.

3. National Exch. Bank v. National Bank of North America, 132 Mass. 147.

4. Use of Clearing-House Certificates. — Philler v. Patterson, 168 Pa. St. 468, 47 Am. St. Rep. 896; Williams, J., in Crane v. Fourth St. Nat. Bank, 173 Pa. St. 578. See Philler v. Yardley, 17 U. S. App. 647, 62 Fed. Rep. 645.

After outlining the objects, purposes, and organization of the Philadelphia Clearing-House Association, Williams, J., delivering the opinion of the court in Philler v. Patterson, 168 Pa. St. 468, 47 Am. St. Rep. 896, said: "The entire plan on which the settlements are made is, therefore, a device adopted by the banks to facilitate their legitimate business as banks, and involves no element of speculation, and no business undertaking by or on behalf of the associated banks. We are unable, therefore, to see in what respect these banks have violated the statutes of the United States relating to national banks or have transcended the limits which these statutes have drawn about the business of banking. They have diverted none of their funds, embarked in no new undertaking, entered into no business alliance, but devised and adopted what seems to be an improved method for doing a portion of their own necessary work. This same method, or one identical in general outline, has been adopted by the banks in every great city in the United States, and by many in other lands; and, as far as I am aware, it has nowhere been held that the method is illegal. On the contrary, it has recommended itself by its economy of time and labor to the several banks,

and, by its incidental results in promoting mutual helpfulness and confidence, has come to be regarded with favor by the general public."

5. Williams, J., in Crane v. Fourth St. Nat. Bank, 173 Pa. St. 578.

6. In What Sense a Negotiable Instrument. — In the case of Dutton v. Merchants' Nat. Bank, 16 Phila. (Pa.) 94, it appeared that in Philadelphia the practice of issuing certificates known as "clearing-house due bills" was in vogue among the members of the association. These due bills would be issued, instead of money paid, for use in transactions with the members of the association. For instance, where a depositor in one bank held a draft on another, the proceeds of which he desired to deposit, he might receive therefor a clearing-house due bill, which would be treated as cash by the bank in which he wished to make the deposit. In the case in question a draft had been presented and paid in this manner, the person to whom the due bill was issued losing it from his pocket the same day. The only question involved was, whether the defendant had the right to demand an indemnifying bond from the plaintiff before paying it, liability on the due bill not being denied, the determination of which involved a decision as to whether or not such an instrument was negotiable. Upon consideration, the court held that it was, the due bill being in form as follows:

Clearing-House Due Bill.

Merchants' National Bank.

No. 6474.

Phila., Oct. 24, 1882.

Due by the Merchants' National Bank to banks one thousand nine hundred dollars. This due bill is good only when signed by one

6. Clearing-House Association as a Distinct Entity — a. RIGHT TO SUE AND BE SUED. — It has been held that a clearing-house association may, in the individual names of the members of its "clearing-house committee," sue to recover upon a promissory note deposited with it;¹ and where it was alleged that a clearing-house association had, after the closing by the comptroller of currency of a member bank, for insolvency, made an unauthorized disposition of the assets of the bank, direct liability was held to have been incurred to the receiver of the bank, and that the latter need not sue the individual members of the association among whom the distribution was made.²

A clearing-house association need not, however, be incorporated.³

b. MAY BE HOLDER FOR VALUE OF NEGOTIABLE SECURITIES. — A clearing-house association may be a holder for value of collaterals deposited with it by its members, to secure the payment of their daily balances or clearing-house certificates issued.⁴

Equities. — As such holder it is not affected by equities existing between the original parties to the promissory notes or other mercantile securities so held.⁵

Accommodation Paper. — It is no defense, therefore, to an action on a promissory note against the maker, by a clearing-house committee, that it was made for the accommodation of a party,⁶ and the fact is immaterial whether the committee had knowledge of this circumstance when they took the note, or not.⁷

Set Off. — Nor can the maker of a promissory note so held by a clearing-house committee, when sued thereon, set off an indebtedness to him of the bank which deposited the collateral, and to which the note had been given.⁸

Draft Indorsed "For Collection for Account of" the Indorsers. — But a clearing-house association does not become a holder for value of a draft sent in with exchanges, indorsed to the sender, "for collection for account of" the indorsers, so that, upon the suspension of the sending bank before the completion of the exchanges of the day on which the draft is received, the clearing house may, while refusing to "clear" the accounts of the member so suspending, collect the check and apply the proceeds to the payment of a

and countersigned by another authorized person, and is payable only in the exchange through the clearing house the day after issue. \$1,900. (Signed) Hartman Baker, Teller. (Countersigned by) Chas. H. Biles, Cashier.

1. Right to Sue and Be Sued. — *Philler v. Patterson*, 168 Pa. St. 468, 47 Am. St. Rep. 896; *Philler v. Jewett*, 166 Pa. St. 456.

2. Yardley v. Philler, 58 Fed. Rep. 746. This case was reversed on grounds other than those involved in the above text proposition. *Philler v. Yardley*, 17 U. S. App. 647, 62 Fed. Rep. 645.

3. See *Philler v. Yardley*, 17 U. S. App. 647, 62 Fed. Rep. 645; opinion of Acheson, J.

4. Philler v. Patterson, 168 Pa. St. 468, 47 Am. St. Rep. 896; *Philler v. Jewett*, 166 Pa. St. 456.

5. Philler v. Patterson, 168 Pa. St. 468, 47 Am. St. Rep. 896; *Philler v. Jewett*, 166 Pa. St. 456.

6. Philler v. Patterson, 168 Pa. St. 468, 47 Am. St. Rep. 896.

7. Philler v. Patterson, 168 Pa. St. 468, 47 Am. St. Rep. 896.

8. Set-off. — Certain banks, constituting a clearing-house association, placed in the hands of the clearing-house committee money and securities pledged, first, for the payment of daily balances; second, for "other indebtedness due to members of the association."

One of the defendants' notes was pledged by their bank with the clearing-house committee. The bank had received aid from the committee in excess of the amount of its securities deposited to provide for daily balances, and to secure this additional securities had been deposited. Subsequently the bank failed, and the current daily balance was paid out of the proceeds of the securities deposited for that purpose, leaving a surplus remaining. The additional securities were insufficient to pay the additional loan. The defendants' note was among the collaterals deposited to secure the daily balance, but upon suit brought to collect it they sought to set off what the bank owed them as depositors. But the court said: "The defendants have a claim against the * * * bank which they would be entitled to set off upon the note if the bank was still the holder, but it is not. It parted with the note before its maturity and for full value. It could not reclaim it from the clearing house without the payment of its entire indebtedness to that institution, and the defendants stand in no better position than the bank. Their set-off cannot be made available unless the bank is the owner. But, as we have seen, the title to the instrument passed from the bank to the plaintiffs, who are *bona fide* holders, and their right to recover upon it is clear." *Philler v. Jewett*, 166 Pa. St. 456.

pre-existing indebtedness to the clearing-house committee;¹ and a payment to the clearing house by the drawee, under such circumstances, with knowledge of the insolvency of the bank through which the draft had come, was held to be no defense in an action of assumpsit by the indorsers of the draft for collection for their credit.²

1. Draft Indorsed "For Collection for Account of" the Indorsers. — *Crane v. Fourth St. Nat. Bank*, 173 Pa. St. 566.

The case of *Crane v. Clearing-House Assoc.*, 2 Pa. Dist. Rep. 509, depended upon the same set of facts as *Crane v. Fourth St. Nat. Bank*, 173 Pa. St. 566, only in the former case the suit was brought against the Clearing-House Association, where the plaintiff relied on the following facts: The Keystone National Bank of Philadelphia was a member of the Clearing-House Association. It failed on March 20, 1891. On that day, about half-past eight o'clock A. M., the messenger of that bank appeared at the clearing house and presented sealed envelopes, purporting to contain checks and drafts upon the other banks, amounting to \$70,005.46. These he presented directly to the clerks of the other banks, and received receipts from them for the various amounts which the indorsements on the packages called for. The messengers of the other banks presented to the messenger of the Keystone National Bank packages of checks and drafts purporting to contain \$117,035.21, thereby making the Keystone National Bank a debtor in the exchanges to the other banks of \$147,029.75. These packages of checks and drafts he left with the manager of the clearing house, and went back to his own bank to get the balance due by it; but about ten o'clock that day the Keystone National Bank failed. It did not pay the \$147,029.75 differences in exchanges, which it owed to the other banks, whereupon the manager of the clearing house called upon the other banks to make up the whole sum of \$117,035.21, for which they had received credit upon checks and drafts on the Keystone National Bank, and handed back to those banks the packages containing said checks and drafts. Among the packages presented by the clerk of the Keystone National Bank for payment on that day was one upon the Fourth Street National Bank, purporting to contain checks and drafts amounting to \$3,728.77, among which was a draft for \$1,990 which the plaintiffs alleged they had sent to the Keystone National Bank for collection. The sum total of checks and drafts upon the Fourth Street National Bank in the exchanges that morning was \$188,075.01, while the sum total of checks and drafts held by it upon other banks was \$361,727.41, making the Fourth Street National Bank a debtor to the extent of \$126,347.60, which amount that bank paid to the manager of the clearing house to be paid to and distributed among the creditor banks. The draft of \$1,990 which the plaintiffs alleged they sent to the Keystone National Bank for collection was therefore part of the sum of \$3,728.77 due to the Keystone National Bank, and was included in the payment by the Fourth Street National Bank of \$126,347.60, which was received by the manager of the clearing house and distributed

among the banks entitled thereto. But because the manager of the Clearing-House Association required the other banks not merely to make up the sum of \$147,029.75, the difference in the exchange due by the Keystone National Bank that day, but demanded the whole \$117,035.21 claimed by the other banks, the plaintiff brought suit against the clearing-house committee to compel it to pay the amount of their draft, which, said Arnold, J., delivering the opinion of the court, "the clearing-house manager never saw or knew that it existed, which he was not employed to collect, and never did collect, and the ear-marked amount of which was never in his possession. Their claim rests altogether upon the fact that inasmuch as the clearing-house manager required the other banks to contribute not only the balance of \$147,029.75, but also the \$70,005.46 which the Keystone Bank claimed from other banks, although he had the right to call for all or any part of the amount due by the other banks; therefore, because of the identity of these figures, the clearing-house committee ought to be held responsible for the payment of this draft, although it never had the draft in its possession, or the proceeds thereof, or any knowledge of or control whatever over the same. The statement of this proposition seems to me to be its own refutation." Compare this case with that of *Crane v. Fourth St. Nat. Bank*, 173 Pa. St. 566, which is also cited and set forth in the next note.

2. The plaintiffs, the owners of a draft on the Fourth Street National Bank, indorsed the draft specially to the Keystone National Bank for collection, stating in the indorsement that its purpose was the collection of the amount for their own credit. Both the Fourth Street National Bank and the Keystone National Bank were members of the Clearing-House Association. The draft in question was sent, with other checks and drafts held by the Keystone National Bank against the other members of the clearing house, to the clearing house for exchange at the morning clearing. Upon the ascertainment of the balances due, it was found that the Keystone National Bank was a debtor bank to a large amount, to be paid in cash; and under a special arrangement between the Keystone National Bank and the Clearing-House Association, the former, which had procured loans on its deposit of collaterals for the payment of daily balances, was required to settle any balance against it immediately, the exchanges due from it to the clearing house being retained as security therefor. At half-past ten o'clock, before the balance was paid, the Keystone National Bank was closed by the United States bank examiner, the clearing house demanding and receiving the amount of the draft from the Fourth Street National Bank, and appropriating it to the payment of the indebtedness of the Keystone National Bank to the clearing-house commit-

c. APPLICATION OF COLLATERALS AFTER INSOLVENCY OF DEBTOR. — The payment, by a clearing-house association, out of securities left for the purpose, of the daily balance of a member debtor in the day's exchanges, after such member bank has been closed by the comptroller of the currency, is a valid appropriation of the assets of such bank, and not illegal as operating to give preference among creditors.¹

IV. EFFECT OF CLEARING-HOUSE ASSOCIATION UPON NON-MEMBERS OR STRANGERS — 1. In General. — A clearing house, it has been said, furnishes but a convenient method to banks of making their collections and payments between each other, and an outsider, not a member thereof, is not to be benefited or injured by the action of such banks as between themselves.²

Or, as it may be otherwise expressed, a clearing-house association has not the power to make rules or adopt usages which will bind those who are not parties to its organization,³ and an outsider has not the right to avail himself of such rules or usages to affect his relations with members.⁴

tee. Upon assumpsit brought by the plaintiffs against the Fourth Street National Bank, it was held that the effect of the indorsement was to make the Keystone National Bank the agent of the indorsers (plaintiffs) for the single purpose named, and that the title to the draft passed only so far as was necessary for the purposes of the agency created by the indorsement, the ownership of the proceeds remaining all the while in the indorsers; that as the balance due to the clearing house from the Keystone National Bank had not been paid, that bank, according to the agreement with the clearing house, could not clear, and what had been done provisionally for that purpose became ineffectual; that the payment by the Fourth Street National Bank to the clearing house was, under the circumstances, payment to one who was a stranger to the draft, who had neither interest in the proceeds nor authority to act as agent for the owners; and finally, that such a payment, made as it was, with notice by the indorsement of the lack of title of the clearing house, was no defense to the action brought. *Crane v. Fourth St. Nat. Bank*, 173 Pa. St. 566. Compare *Crane v. Clearing House Assoc.*, 2 Pa. Dist. Rep. 509, cited and set forth in the preceding note.

1. *Insolvency of Debtor — Application of Collaterals.* — *Philler v. Yardley*, 17 U. S. App. 647, 62 Fed. Rep. 645. With reference to the exchange at the clearing house, out of which the balance arose, Acheson, J., delivering the opinion of the court, said: "The morning exchange, on March 20th, between the Keystone National Bank and its clearing-house associates, in itself was unimpeachable. It took place before the bank examiner acted. The Clearing-House Association had no reason to suspect the impending failure. On the part of the bank itself, the transaction was in the regular course of its business, and with a view to continued operations. It did not act in contemplation of insolvency, nor with a purpose to give one creditor a preference over another, or to prevent the application of its assets in the manner prescribed by law in case of insolvency." This case overruled that of *Yardley v. Philler*, 58 Fed. Rep. 746.

2. *Effect upon Strangers.* — *People v. Saint Nicholas Bank*, 77 Hun (N. Y.) 171; *Mer-*

chants' Nat. Bank v. National Eagle Bank, 101 Mass. 281, 100 Am. Dec. 120; *National Bank v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349; *Manufacturers' Nat. Bank v. Thompson*, 129 Mass. 438, 37 Am. Rep. 376; *National Exch. Bank v. National Bank of North America*, 132 Mass. 147; *Merchants' Nat. Bank v. National Bank*, 139 Mass. 513.

3. *People v. Saint Nicholas Bank*, 77 Hun (N. Y.) 173; *Overman v. Hoboken City Bank*, 30 N. J. L. 63.

Quoting from the case of *Overman v. Hoboken City Bank*, 30 N. J. L. 61, *Danforth, J.*, in *People v. Saint Nicholas Bank*, 77 Hun (N. Y.) 173, said: "Where there is no claim [that the association called the 'clearing house'] is an institution authorized by special legislation, or any authority existing in such association, in any way, to alter or modify the law merchant in regard to checks or commercial paper, such association cannot be held to have power to make usages or rules to bind those who are not parties to its organization."

4. *Manufacturers' Nat. Bank v. Thompson*, 129 Mass. 438, 37 Am. Rep. 376; *Overman v. Hoboken City Bank*, 30 N. J. L. 61.

Clearing-House Usages and Rules, adopted by the associated banks for their own convenience, to facilitate the transaction of business and avoid the trouble and expense of special messengers to demand payment of checks, bills, and notes, cannot operate to enlarge the rights of the owners of commercial paper who are not members of the association. *Overman v. Hoboken City Bank*, 30 N. J. L. 61.

The case of *Manufacturers' Nat. Bank v. Thompson*, 129 Mass. 438, 37 Am. Rep. 376, was an action against the indorsers of a promissory note, payable at the plaintiff bank, but discounted by the Faneuil Hall Bank, of Boston. When the note became due the last-named bank charged it to the plaintiff bank, and sent it through the clearing house for payment. The plaintiff's teller, by mistake, thinking that the makers were in funds at his bank, stamped the word "paid" on the face of the note; but the mistake was soon discovered, and before the close of banking hours on the same day, both the other bank and the indorsers were notified of it, and the note was duly protested. There was then a dispute be-

Principles of Mercantile Law. — The relations between a bank and the holders of checks drawn thereon are controlled by the settled principles of mercantile law, and the rules of and customs prevailing in the clearing house can in no way alter or modify the law in regard thereto.¹

Forged Checks. — The fact, therefore, that a forgery was not discovered until after the time had elapsed within which payment might, according to the rules of the clearing house, have been demanded of the bank through which the check had come, was held to be no bar to a proceeding against an indorser, the depositor of the check.²

2. Effect upon Non-member Bank, Clearing through Member — Not Bound by the Regulations. — The fact that by an engagement between a bank, a member of the clearing house, and a non-member bank, checks on the latter are treated in the clearing-house accounts as demands on the former, or, in other words, that the latter "clears" through the former, does not render the latter bound by the clearing-house regulations.³

Not Entitled to Benefit of Regulations. — Nor does such an engagement entitle the latter to the benefit of the compact between the members of the association.⁴

Special Provision for Non-members. — But where the constitution of a clearing-house association contained a special provision for non-members making exchanges through members, the former paying an annual sum to the clearing-

tween the two banks as to whether, under the rules of the clearing house, the plaintiff was not bound to return the note if not paid by a given hour of the day on which it was due, which was terminated by a payment to the Faneuil Hall Bank of the amount of the note, which was made, however, by the plaintiff, expressly without any waiver of its legal rights, and at the trial the Faneuil Hall Bank disclaimed all title or interest in the note. The judge, who tried the case without a jury, found that the note was stamped "paid" by mistake; that such act, with the failure to return it, did not amount to a payment of the note, and was not intended as such; that the money paid by the plaintiff to the other bank was not intended and did not operate as a payment of the note; and that the plaintiff had sufficient title and ownership of the note to enable it to maintain the action as instituted. It was held that the trial judge had ruled properly.

1. *People v. Saint Nicholas Bank*, 77 Hun (N. Y.) 160; *Overman v. Hoboken City Bank*, 30 N. J. L. 66.

2. *National Bank v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349.

3. **Non-member Clearing through a Member — Not Bound by the Rules.** — *Overman v. Hoboken City Bank*, 30 N. J. L. 61. The facts of this case were, briefly, that the plaintiff, the payee in a check drawn on the defendant by Andre & Brother, deposited it in the Bank of Commerce of New York City, a member of the Clearing-House Association. This bank sent the check through the clearing house to the Ocean Bank of New York City, also a member of the Clearing-House Association, the latter bank, as charged in the declaration, having been "appointed and was the agent of the defendant to redeem its bills and pay drafts on it at the banking house of the Ocean Bank in New York, and to receive and return through the clearing house drafts and checks drawn on the defendant." The plaintiff deposited for collection the check in question on the 29th of October, 1859, with the Bank of

Commerce, which bank, on the 31st of October, the intervening day being Sunday, sent the check through the clearing house to the Ocean Bank, the latter sending it on to the defendant, which returned it to the Bank of Commerce some time on the 2d of November, with notice of non-payment. Andre & Brother failed on the 1st of November. There was a rule of the New York Clearing House to the effect that any check drawn upon any one of the members, and presented by the bank receiving it through the clearing house to the bank against which it was drawn, should be returned, if not paid, to the bank presenting the same for payment on the same day on which it was so presented, or, at furthest, early on the morning of the day after the presentation for payment and before the commencement of business hours on that day, or in default thereof the bank so failing to return the check should be liable to the holder thereof to pay the amount of the check at all events. This provision was relied upon by the plaintiff as rendering the defendant liable, under the facts. But the court held that such provision did not cover a case of presentation to an agent, such as was the Ocean Bank in the transaction set forth. According to the very terms of the rule, the presentation must be to the bank on which the check was drawn. There is, it was held, an essential difference between the two. For such a purpose the agent does not represent the principal.

4. **Not Entitled to Benefit of Rules.** — Such a fact, said the court in *Overman v. Hoboken City Bank*, 30 N. J. L. 61, "would not bring the case within the operation of the rule that the principal is entitled to the benefit of the contract of the agent, while transacting the business of the principal. This is undoubtedly true as to all the legal rights acquired by the agent for the benefit of the principal; but we have already said that this was a mere labor-saving usage, designed for the exclusive benefit of the agent, the adoption of which could not affect the principal without his assent."

house association, and making its contract with the member through whom its exchanges were to be made with reference to such special provision, the arrangement was held to constitute a tripartite agreement between the two banks and the clearing-house association, binding upon all within the terms of the constitutional provision referred to.¹

It was held also, in this case, that the relation of principal and agent, such as it was between the non-member and member banks, was subordinate to and controlled by the larger contractual relation into which both banks had entered with the clearing house.²

3. Relations of Member Bank and Drawers of Checks on Non-member.—A contract between two banks by which one, a member of the clearing house, agrees to pay the checks of the other, a non-member, when presented through the clearing house, does not, as between the drawers of the checks on the latter, substitute the former as drawee, or create the same liabilities with reference to such checks as affect the bank on which they are drawn.³

1. *O'Brien v. Grant*, 146 N. Y. 163.

2. **Relation of Principal and Agent.**—*O'Brien v. Grant*, 146 N. Y. 163. This case arose upon the right of the clearing-house member to pay the checks on the bank represented, and reimburse itself out of collateral securities, notwithstanding the insolvency of the latter, in accordance with section 25 of the constitution of the Clearing-House Association, providing that "whenever exchanges shall have been made at the clearing house by previous arrangements between members of the association through one of their number, and banks in the city and vicinity who are not members, the receiving bank at the clearing house shall in no case discontinue the arrangement without giving previous notice, which notice shall not take effect until the exchanges of the morning following the receipt of such notice shall have been completed." Acting under this provision, the clearing-house bank paid the checks on the non-member presented through the clearing house the morning after the required notice had been given, and after the fact of insolvency of the non-member became notorious, and sought to apply collateral securities deposited by such non-member in its own reimbursement, the receiver of the insolvent bank, subsequently appointed, denying the right. "For the plaintiffs," said Gray, J., delivering the opinion of the court, "it is argued that, as between the Madison Square Bank and the Saint Nicholas Bank, the relation simply of principal and agent was created, and, therefore, upon the insolvency of the former becoming known, on the morning of the day when clearances of the previous day's checks were to be effected, that the latter bank was not entitled to pay checks drawn upon the former bank. But I think to view the relation as such is altogether incorrect and unwarranted by the facts. In a certain and limited sense the Saint Nicholas Bank, of course, would act as an agent in clearing and paying checks drawn upon the Madison Square Bank. That, however, was a mere feature of that larger contractual relation into which the two banks had entered with the Clearing-House Association, and which characterized their dealings. The agreement of January, 1891 [by which the Saint Nicholas Bank undertook to act as clearing-house agent for the Madison Square Bank],

was one to which there were three parties, each of which was moved to enter into it by a legitimate consideration."

3. **Relations of Member Bank and Drawers of Checks on Non-member Bank.**—*Grant v. MacNutt*, 12 Misc. Rep. (N. Y. C. Pl.) 20. In this case the defendant drew her check for four hundred and fifty dollars on the Madison Square Bank, where she had an account, payable to her own order, and indorsed it, receiving the amount called for thereby from the Hoffman House, to the credit of whose account the check was deposited in the Seaboard National Bank, and paid to the latter the same day by the Saint Nicholas Bank as clearing-house agent for the Madison Square Bank. On the day following, the check was sent by the Saint Nicholas Bank to the Madison Square Bank for collection, but was not presented for payment, owing to the fact that the Madison Square Bank was on that day placed in the hands of the State Banking Department as insolvent. Notice of the fact that the check was unpaid was sent to the defendant by the Saint Nicholas Bank about three weeks thereafter, and upon her subsequent failure to pay the amount suit was brought to recover the amount, and a verdict for the plaintiff rendered, subject to a review of exceptions at the General Term. It appeared in evidence that upon the day when the check in suit was drawn the defendant's account with the Madison Square Bank had a credit balance of only \$440.63, an amount insufficient to meet the check, and that the Madison Square Bank had suspended payment within the time allowable to a holder for presentment, according to the rules of commercial law. After disposing of the objection that prompt notice of dishonor had not been given to the defendant, by the statement that the facts of the case dispensed with the operation of the rule, the court said: "The only other point raised by the defendant and presented in support of the exception to the denial of the motion for dismissal of the complaint is that the Saint Nicholas Bank, by reason of the contract made with the Madison Square Bank to pay its depositors' checks when presented at the clearing house, practically stood in the shoes of the latter, and that the most which it could demand from the defendant upon this check would be the differ-

A bank receiving, through the clearing house, checks on another bank which it has assumed to pay, becomes merely the legal holder for value of such checks.¹

4. Right of Member Bank to Apply Collateral Securities. — Where one bank, not a member of the clearing-house association, but clearing through a member, deposited with the latter collaterals to secure the payment of any balances accruing against it, it was held that the member bank might apply such collaterals to reimburse itself for checks on the non-member paid through the clearing house after the insolvency of the latter, but according to the requirements of the clearing-house rules.²

ence between her deposit with the Madison Square Bank and the amount paid. This position is not tenable. The evidence utterly fails to support the assumption that by the contract between the two banks the Saint Nicholas Bank assumed the relation held by the Madison Square Bank to its depositors, or had any claim to funds on deposit with the latter, otherwise than as holder of checks drawn against it, which checks in no way effected an assignment to the holder of the depositor's funds in bank."

1. No Special or Peculiar Obligations Toward Drawers of Checks on Non-member Bank. — The mere fact that one bank undertakes to act as the agent of another in the clearing house does not change its relation to the checks on the latter presented to it through the clearing house from that of a simple holder for value, nor impose any special or peculiar obligations upon it toward the drawers of such checks or intervening parties. *Grant v. MacNutt*, 12 Misc. Rep. (N. Y. C. Pl.) 20.

Transfer by Stamp Indorsement, "Paid through Clearing House." — A bank, receiving through the clearing house checks on another bank which it has assumed to pay, becomes the legal holder of such checks, and an indorsement by stamp, "Paid through clearing house," with the name of the bank sending it to the clearing house, is sufficient to transfer title to the bank receiving it. *Zinner v. National Bank*, 54 Ill. App. 602.

2. Insolvency of Non-member — Application of Collaterals. — *O'Brien v. Grant*, 146 N. Y. 163. In this case it appeared that the Madison Square Bank and the Saint Nicholas Bank entered into an agreement by which the latter, which was a member of the New York Clearing-House Association, agreed to act as agent of the former in handling its checks through the clearing house. By the constitution of said association it was provided that whenever exchanges were made through the clearing house pursuant to an arrangement between members through one of them, and banks not members, the receiving bank at the clearing house should in no case discontinue the arrangement without giving previous notice, which notice should not, however, take effect until the exchanges of the morning following the receipt thereof should have been completed. On August 8, 1893, the Saint Nicholas Bank desired to terminate its arrangement with the Madison Square Bank because of the failure of the latter in the matter of maintaining its fund of collateral security to the stipulated amount, and gave the notice required by the constitution of the Clearing-House Association, which was duly served upon the mem-

bers thereof. At this time the Madison Square Bank was insolvent, though the fact did not become known to the officers of the Saint Nicholas Bank until the next day, the morning of the 9th, before exchanges were made. Notwithstanding this, however, the Saint Nicholas Bank paid all checks presented through the clearing house on the Madison Square Bank, where the drawers had funds to their credit sufficient to meet them. In an action by the receivers of the Madison Square Bank to recover the securities deposited with the Saint Nicholas Bank, in which the defense was the right of the latter to apply them in payment of the checks drawn on the former, and paid by the former, pursuant to the provision of the constitution of the clearing house, even after notice of the insolvency of the former was known, it was contended on the part of the plaintiffs that such provision was void for illegality, as in conflict with a provision of the State Corporation Law (§ 48, c. 687, Laws of 1892), forbidding the assignment or transfer of property by an insolvent banking corporation with the view of giving a creditor a preference. But the court held that the insolvency of the Madison Square Bank did not excuse the Saint Nicholas Bank from the performance of its obligations to the clearing-house banks, and that being so, it was entitled to hold and apply the securities in repayment of the amount so paid by it. "The plaintiffs say," said Gray, J., delivering the opinion of the court, "that the effect is to give an illegal preference under the statute; which, it is meant, would be accomplished by the payment of checks after the insolvency of the non-member bank is known, and by the use by the clearing bank of the deposited securities in reimbursement thereof. To that I cannot agree." Then, after quoting the provision of the statute above referred to, said: "This provision has no application to such a case as this; where at the time when the arrangement was made with the Saint Nicholas Bank, the Madison Square Bank was solvent. It would be absurd to speak of the agreement of January, 1891 [when the Saint Nicholas Bank undertook to act as clearing-house agent for the Madison Square Bank], as having been made in contemplation of future insolvency, or with the intent to give a preference to any creditor of the Madison Square Bank. If there is any presumption respecting the business engagements of going concerns, it is that they will be fulfilled; and, when security is exacted, it is as a business precaution to compel exact and prompt performance, rather than a provision in contemplation of insolvency. If it were otherwise, business transactions which have

CLERGY. — See BENEFIT OF CLERGY, vol. 3, p. 1035. And see the titles PRIVILEGED COMMUNICATIONS; RELIGIOUS SOCIETIES.

CLERICAL. — See note 1.

CLERK. (See also the titles CLERKS OF COURTS, *post*; MASTER AND SERVANT; and see BOOKKEEPING, vol. 4, p. 705; CIVIL SERVICE, *ante*.) — A clerk is one employed in an office, public or private, for keeping records and accounts, whose business is to write or register, in proper form, the transactions of the person, tribunal, or body for which he is clerk.²

for their subject the accommodation of one corporation by another, in the loan of money or the extension of credit, would be seriously embarrassed, if not checked. The statute recognizes the right of a banking corporation to transfer promissory notes, or evidences of debt, received in the transaction of its ordinary business, to purchasers for a valuable consideration, and it may lawfully do so in pledge to secure its creditor when it is in a condition of solvency. The deposit of securities made by the Madison Square Bank with the Saint Nicholas Bank constituted a lawful pledge of its assets, to protect the former against any possible loss in undertaking to clear and pay all checks drawn upon the latter and sent through the clearing house. The invalidity of a transfer or assignment of property by a banking corporation under the banking law is where it has been made while in a condition of insolvency, or in contemplation of it, and with the 'intent' of giving a preference. The intent must exist and be inferable to vitiate the transaction."

1. **Clerical Assistance.** — A statute allowed the secretary of state two thousand dollars for clerical assistance. In construing the term "*clerical* assistance," the court, in *Beam v. Jennings*, 96 N. Car. 82, said: "By *clerical* assistance is meant, not official assistance, but such as aids in the execution of official authority by the secretary himself; such as writing letters; making entries of record, copying grants, and the like service. The word *clerical*, as employed in the statute to designate a kind of help, has no very definite meaning — is not a very apt word for the purpose intended — but it is obvious the legislature did not intend to extend its meaning so as to imply official aid; if so, it would have desig-

nated the person to render such aid as deputy, assistant, clerk, or by some such designation, with a term of office, and required the incumbent to take an oath of office. Nor did it intend that any person whom the secretary might employ to render such assistance should have authority to use the seal of the department of state, and certify copies of records, grants, and other important documents and papers deposited and kept in the secretary's office, under his name, written by such person or otherwise. It cannot be presumed or inferred that the legislature contemplated so loose and hazardous a practice. It would practically dispense with official sanction."

Clerical Service. — In *Post v. U. S.*, 27 Ct. of Cl., 254, it is said that the term "*clerical* service" strictly means a service that involves writing.

Clerical Errors. (See the title AMENDMENTS, I ENCYC. OF PL. AND PR., 458, for full treatment.) — In *Marsh v. Nichols*, 128 U. S. 615, the court said: "A *clerical* error, as its designation imports, is an error of a clerk or a subordinate officer in transcribing or entering an official proceeding ordered by another."

2. *Bouvier's Law Dict.*, quoted in *People v. Fire Com'rs*, 73 N. Y. 442, in which case it was held that the term *clerk*, in a statute providing for the appointment and removal of *clerks*, did not include every employee and subordinate of the department.

Book Entries. (See also the title DOCUMENTARY EVIDENCE.) — In *Sickles v. Mather*, 20 Wend. (N. Y.) 72, it was held that an employee who attended to the sales no further than merely delivering goods manufactured, and keeping a memorandum of the delivery for a temporary purpose, was not a *clerk* within the meaning of the rule requiring proof of the original entries.

CLERKS OF COURTS.

BY LOMAX PITTMAN.

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CROSS-REFERENCES.

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For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ABSTRACT OF TITLE*, vol. 1, p. 210; *AMOTION*, vol. 2, p. 310; *COSTS*; *COURTS*; *DE FACTO OFFICERS*; *DEPUTY*; *OFFICIAL BONDS*; *PUBLIC OFFICERS*.

I. DEFINITION. — A clerk is the officer of a court of justice who has the custody of its records and seals. Other of his primary duties are to open and adjourn the court; to keep the minutes thereof; to certify to the correctness of transcripts from the records of the court; to docket all cases for trial; to file all papers forming part of the record in a case presented to him for that purpose; to issue proper process or writs at the inception, during the pendency, and after the determination of the suit; to enter up all judgments which may be rendered by the court; and to preserve property and money of which the court as such has the custody.¹ His specific duties as such officer are

1. Definition. — The clerk of court is the officer who keeps its minutes and records its proceedings and has the custody of its records and seals. Burrill's Law Dictionary.

An officer of a court whose duty generally is to keep the records and perform the routine business. Century Dictionary.

The Title Prothonotary is sometimes given to an officer who officiates as principal clerk of court. Viner's Abridgment.

He is called a prothonotary in *Pennsylvania*.

Property In Custodia Legis. — As to the clerk's duty to preserve property and money in *custodia legis*, see *Murray v. Charles*, 5 Ala. 678; *Prewett v. Marsh*, 1 Stew. & P. (Ala.) 17, 21 Am. Dec. 645; *State v. Watson*, 38 Ark. 96; *Elliott v. Jones*, 47 Iowa 124; *Davis v. Bell*, 57 Miss. 320; *Mott v. Pettit*, 1 N. J. L. 344; *In re Kellinger*, 9 Paige (N. Y.) 62; *State v. Connelly*, 104 N. Car. 794; *Mazyck v. M'Ewen*, 2 Bailey L. (S. Car.) 28; *Waters v. Carroll*, 9 Verg. (Tenn.) 102.

Obtaining Approval of Bonds. — Where an

appellant had intrusted the clerk with getting his bond approved and obtaining the indorsement of the judge, such service was held to be no part of the official duty of the clerk and entirely gratuitous. *Warner v. Texas*, etc., R. Co., 2 U. S. App. 647.

Clerk's Certificate Evidence Only of Records of His Office. — The clerk of the court is competent, and it is one of his duties, to certify copies of the records properly made in his office, and of all original papers of which he may have the legal custody. He is a certifying officer to that extent, but no further. Beyond that, his certifying, as matter of evidence, is no better than that of any other individual. Accordingly, where a deposition was taken, and there was appended to it what purported to be the certificate of the clerk, with the seal of the court affixed thereto, that the person who signed the caption was a justice of the peace, it was held that the clerk's certificate furnished no evidence of the fact in proof of which it was offered. *Boardman v. Paige*, 11 N. H. 431.

defined in some measure by legislation, and his authority finds regulation in the nature of the jurisdiction of the court of which he is an officer.¹

II. ELIGIBILITY OF CLERK — WHEN HE MAY HOLD TWO OFFICES. — Where there is no incompatibility between the office of clerk of the court and some other office, a person holding the former may also hold the latter at the same time.²

III. TENURE AND DURATION — 1. In General. — The tenure and duration of the office are fixed by legislation. The incumbent holds by appointment of the court, and very frequently, in the United States, by election.³

2. Term of Office by Appointment. — Where the term of office for which the clerk may be appointed by the judge is fixed, his term may continue after that of the judge has expired.⁴

3. By Appointment by Judge De Facto. — All acts performed by a judge *de facto* being valid so far as third persons are concerned, the appointment of the clerk by him makes the clerk an officer *de jure*, and he may hold office for the full term. The subsequent appointment by the judge *de jure* of a clerk does not make the latter an officer *de jure*, and the first appointee cannot be ousted by him.⁵

IV. NATURE OF DUTIES — 1. In General. — The duties of a clerk of court are in general purely ministerial, but some of the functions imposed upon him by statutory enactment are *quasi*-judicial, such as the taxation of costs,⁶ the approval of bonds,⁷ and the assessment of damages in case of default.⁸

Exercise of Judicial Functions — Subject to Approval of Court. — The performance of some of these functions, being of a *quasi*-judicial nature, is in some jurisdictions subject to the supervision and approval of the judge.⁹

1. For Other of the Specific Duties of clerks and liabilities, see appropriate sections, *infra*.

2. Clerk Holding Another Office. — U. S. v. McCandless, 147 U. S. 692; U. S. v. Harsha, 16 U. S. App. 13.

See U. S. v. Saunders, 120 U. S. 126, affirming the same general principle, and deciding that the clerkship of a committee of Congress was not incompatible with a clerkship in the office of President, and that the incumbent was eligible to both offices.

Office of Clerk of Court and That of U. S. Commissioner Compatible. — The office of clerk of the district court of the United States and the office of U. S. commissioner are not incompatible and may be held by the same person, and the person so holding them is entitled to the fees and emoluments of both. U. S. v. McCandless, 147 U. S. 692.

Office of Clerk of U. S. Circuit Court and Court of Appeals Compatible. — Where a clerk of the circuit court of the United States accepts the office of clerk of the circuit court of appeals, which embraces the district in which he is clerk of a circuit court, he does not, by the acceptance of the office of clerk of the court of appeals, vacate his office as circuit clerk. The two offices are not incompatible. U. S. v. Harsha, 16 U. S. App. 13.

3. The clerks of appellate and supreme courts usually hold by appointment or by election of the members of the court. The office of clerk of circuit or district courts is in most of the states elective.

Statutory Construction of Right of Court to Appoint. — Where a statute provided that the justices of inferior courts might continue in office for four years and until their successors were elected and qualified, it was held that an elec-

tion of the clerk of the court by the old justices, between the election and qualification of their successors in office, was a good and valid election. Bonner v. State, 7 Ga. 473.

Time at Which Court May Rescind Appointment. — A clerk of court must in Ohio be appointed by the act of the judge in open court, and the order must be entered on the minutes; but the order appointing a clerk may be rescinded before his bond is accepted, the oath administered, etc. State v. Este, 7 Ohio, pt. i, 143.

4. Tenure by Appointment. — Where a statute declares that justices shall hold office for six years, and their clerks for the same period as the justices, and the clerk was appointed by a justice after the expiration of one-third of the term of the latter, it was held that the clerk's term was six years and not four. People v. Leask, 6 Daly (N. Y.) 517.

5. Norfolk v. Staton, 73 N. Car. 546.

6. Quasi-Judicial Duties — Taxation of Costs. — Hair v. Logan, 10 Ala. 431; Court Officers v. Fisk, 7 How. (Miss.) 403; Williams v. Jones, 2 Hill L. (S. Car.) 555; Ellison v. Stevenson, 6 T. B. Mon. (Ky.) 271.

There may be cases where, by the direction of the court, extraordinary costs may be allowed, but the clerk has no power to tax any not regulated by statute. Hair v. Logan, 10 Ala. 431.

7. Approval of Bonds. — *Ex p.* Thompson, 52 Ala. 98; *Ex p.* Harris, 52 Ala. 87, 23 Am. Rep. 559; Swan v. Gray, 44 Miss. 397; Shotwell v. Covington, 69 Miss. 735.

8. Prentiss v. Spalding, 2 Dougl. (Mich.) 84.

9. Baltimore v. Baltimore County, 19 Md. 554; Prentiss v. Spalding, 2 Dougl. (Mich.) 84.

Assessment of Damages. — The assessment of

Effect of Failure to File Papers. — No paper is filed unless it contains the proper indorsement of the clerk. If it does not contain such indorsement, it will not be considered on trial or on appeal of the cause as forming part of the record.¹

No Authority to Change Date Indorsed Thereon. — A clerk of a court cannot change a writ of error or appeal after it has been allowed by the court, by erasing and inserting a date; nor can he without a special order of the court erase his own file mark on a paper which the parties have procured to be filed.²

2. Performance of Unauthorized Judicial Functions — *a.* IN GENERAL. — Without constitutional or statutory authority a clerk of court cannot exercise judicial powers.³

b. ATTEMPTED DELEGATION OF POWER BY JUDGE. — Where a court attempts to delegate to its clerk the performance of one of its judicial functions, the performance of such function by the clerk is invalid and of no effect.⁴

c. PERFORMANCE OF EXCLUSIVE FUNCTION OF JUDGE. — An indispensable requisite for the existence of a court is the presence of a judge,⁵ and the

damages by the clerk is considered as made by the court, and should appear to have been so made in the judgment record; although the journal entry, from which such record is made up, properly shows that the damages were assessed by the clerk. *Prentiss v. Spalding*, 2 Dougl. (Mich.) 84.

Taxation of Costs. — The awarding of costs is the act of the court; their taxation or computation, according to the list of fees prescribed by law, is a duty imposed by the law upon the clerk, but he must profess to act by the authority of the judge to give them validity. *Baltimore v. Baltimore County*, 19 Md. 554.

1. Filing Papers. — *Amy v. Shelby County*, 1 Flipp. (U. S.) 104; *Peltret v. Frank*, 66 Cal. 34; *White v. Longmire*, 63 Cal. 232; *Baker v. Snyder*, 58 Cal. 618.

2. No Authority to Change Date. — A judgment was rendered in May, 1892. On August 29, 1892, a writ of error was allowed by the presiding judge, and on August 31 it was filed, and on the same day a writ of error attested by the clerk and sealed, but lacking the necessary signature of the judge, was filed by the clerk in court. When the papers were sent to the judge he signed the memorandum of the allowance of the writ, and returned them to the clerk by mail, accompanied by a letter dated November 16, 1892; and thereupon the clerk erased the date originally written in said writ and the date originally indorsed on it, showing that it had been issued and filed on August 31, 1892, and inserted November 16, 1892, as the date of issuing said writ, and November 17, 1892, as the date of filing. The court refused to sustain a motion made by the defendant in error to dismiss the appeal. *Warner v. Texas, etc., R. Co.*, 2 U. S. App. 647.

3. Judicial Powers. — *Johnson v. Com.*, 80 Ky. 377; *State v. Judge, etc.*, 22 La. Ann. 90; *Casby v. Thompson*, 42 Mo. 133; *Neda v. Fontenot*, 2 La. Ann. 782; *Frierson v. Harris*, 5 Coldw. (Tenn.) 146, 94 Am. Dec. 220.

Minutes in Vacation. — In *Johnson v. Com.*, 80 Ky. 377, it was held that the practice of permitting the clerk, after the adjournment of a circuit court, to write out from the minutes of the last day the apparent orders of court, and to allow him from these minutes to insert what he chooses, constitutes him *pro tanto* a judicial

officer in vacation, and should not be tolerated.

Issuance of Scire Facias on Judgment Against Decedent. — The issuance of a *scire facias* to subject real estate in the hands of heirs to the payment of a judgment against the ancestor is a judicial act, and its performance by a clerk of court is void. *Frierson v. Harris*, 5 Coldw. (Tenn.) 146, 94 Am. Dec. 220.

Issuance of Writ of Prohibition. — Under the *Missouri* statute the clerk of a circuit court has no power to issue a writ of prohibition. The issuance of such writ is as much a judicial act as the issuing of a writ of injunction. *Casby v. Thompson*, 42 Mo. 133.

Constitutional Limitation of Clerk's Authority. — Under the constitution of *Louisiana* prohibiting clerks from exercising any judicial powers whatever, the order of a clerk admitting a will to probate is an absolute nullity. *State v. Judge, etc.*, 22 La. Ann. 90.

Nor have clerks the power to homologate the deliberations of creditors touching the sale of insolvent successions. The homologation is a judicial act. *Neda v. Fontenot*, 2 La. Ann. 782.

4. Court Delegating Judicial Functions. — *Oliphant v. Whitney*, 34 Cal. 25; *Wight v. Wallbaum*, 39 Ill. 554; *Matter of McClasky's Petition*, 52 Kan. 34; *Matter of Terrill's Petition*, 52 Kan. 29, 39 Am. St. Rep. 327; *Strickland v. Cox*, 102 N. Car. 411; *Matter of McClaskey*, 2 Okla. 568.

Illustrations. — A court cannot delegate its judicial functions to a clerk so that he may set aside a judgment on the performance of a condition. Hence, where the judge granted a judgment in an action for the possession of land, to be stricken out if the defendant filed a proper bond in thirty days after adjournment of court, the judgment was void, and the clerk had the power to make an order allowing the defendant to answer without bond. *Strickland v. Cox*, 102 N. Car. 411.

The court cannot, by rule, confer upon the clerk authority to hear evidence and try the question whether a pleading has been served upon the opposite attorney. *Oliphant v. Whitney*, 34 Cal. 25.

5. Bacon's Abr., tit. Court, vol. 2, p. 616; 3 Bl. Com. 24; Wight v. Wallbaum, 39 Ill. 554; Hobart v. Hobart, 45 Iowa 503.

attempted performance by the clerk of any function of the judge during his absence, even though done by his direction, is void.¹

V. POWER OF COURT TO SUSPEND OR REMOVE CLERK. — When or whether a clerk of court may be removed by the court depends, of course, upon the tenure of his office.²

Where Court Cannot Remove. — The right to hold and exercise the functions of any office to which a person may be elected is regarded both as property and privilege, and he can be deprived of that office only in some manner provided by the constitution.³ Hence the judge of a court does not possess an inherent power either to remove or suspend from office a clerk of court.⁴

VI. WHEN VACANCY OCCURS — HOW FILLED. — When a vacancy occurs in the office of a clerk of court it may be filled by appointment of the court,⁵ the governor,⁶ the county commissioners,⁷ or by whomsoever may have the appointive power to fill the particular office.⁸

VII. COMPENSATION OF CLERK — 1. In General. — Clerks of courts were formerly invariably compensated for their services by fees fixed and allowed by law. This is still the general rule, though in some jurisdictions, and particularly as relating to the compensation of clerks of inferior courts, the salary is fixed by law.

2. Where Compensation by Fees — a. IN GENERAL. — There frequently arises, sometimes in direct litigation between the clerk and the person from whom the fee is claimed, and sometimes by motion for a retaxation of the costs of suit in which the fee was charged, a question as to the amount of fees

Presence or Existence of Clerk Unnecessary. — But neither the presence nor the existence of a clerk is necessary to give validity to the acts of the judge. He may open court, perform all the duties of the clerk, and adjourn it without a clerk. *Mealing v. Pace*, 14 Ga. 596.

Where Authority Conferred by Legislation. — Under section 3242 of the *Georgia* code the clerk of the superior court is authorized to adjourn an adjourned term of court from day to day for two days when the absence of the judge may be caused by an unavoidable accident. *Norrie v. McCullough*, 74 Ga. 602.

1. Adjournment of Court. — The petitioners for writs of habeas corpus were indicted for murder. The presiding judge did not attend court on the day when the term should have begun, but appeared fourteen days afterwards, in pursuance of the clerk's adjournment of court, under directions from him, to that time, and the trial of the petitioners was thus attempted at what purported to be a regular term of court, and resulted in their conviction and sentence to imprisonment. It was held that the failure of the judge to appear in open court on the day appointed by law resulted in the loss of the term, and that, under the supposed conviction, the petitioners were unlawfully imprisoned. *Matter of Terrill's Petition*, 52 Kan. 29, 39 Am. St. Rep. 327; *Matter of McClasky's Petition*, 52 Kan. 34, followed in *Matter of McClaskey*, 2 Okla. 568.

2. Suspension or Removal. — In those cases where the clerk holds by appointment and at the will of the court he may, of course, be removed at any time without assigned cause. The tenure of a clerk is rarely of this character in the United States now. The clerk of the United States supreme court holds by appointment and at the will of the court. § 677, U. S. Rev. Stat.

3. *Lowe v. Com.*, 3 Metc. (Ky.) 241; *State v. Baird*, 47 Mo. 303; *State v. McClinton*, 5 Nev. 329; *Honey v. Graham*, 39 Tex. 11. See title PUBLIC OFFICERS.

4. *Ex p. Lehman*, 60 Miss. 967. In this case the judge of a circuit had undertaken to suspend from office the clerk. Chalmers, J., speaking for the court, observes: "Certainly in the absence of legislation no such power can reside in the circuit court. It is true that the clerk is in many respects the arm of the court, the instrument by which it evidences its will and perpetuates a memorial of its proceedings, but he is an arm created and an instrument furnished by the common master of both, who has provided the appropriate and exclusive method by which each shall be dismissed from his service, and it is no more within the power of the judge to remove the clerk in violation of that method than it is within the power of the clerk to remove the judge."

5. By the Court. — In *Texas* where a vacancy occurred in the office of clerk of the district court, under the Act of 1849, it could only be filled by the appointment of the district judge, until the next regular election of such officers. *Carolan v. McDonald*, 15 Tex. 327.

6. By the Governor. — In *Missouri* the governor has the power to appoint a clerk of court in the event of a vacancy. See *State v. Matthews*, 94 Mo. 117.

7. By the County Commissioners. — Under section 37, article 5 of the constitution of *South Dakota*, the county commissioners can legally fill a vacancy in the office of the clerk of a circuit court. *Driscoll v. Jones*, 1 S. Dak. 8.

8. In the majority of cases the court has the power to fill a vacancy by appointment. In all cases where the clerk's tenure is by appointment of the court, the office, of course, can only be filled by his appointee.

legally chargeable. The legislation in each state differs radically as to the amount of compensation allowed for the same acts, and also, in many cases, as to the allowance of any compensation for the particular act. The cases generally present purely questions of statutory construction.¹

b. STATUTES AWARDED COSTS STRICTLY CONSTRUED.—A clerk of court can demand only such fees as the law has fixed as compensation for the performance of his official duties, and statutes awarding to him costs are strictly construed.²

c. CONTRACT FOR UNAUTHORIZED FEES.—Hence an express contract to pay to a clerk of court greater fees than he may be allowed by law to collect is without consideration and void.³

d. WHERE NO COSTS ARE ALLOWED BY LAW.—Where no costs are allowed him by law for the performance of a particular duty enjoined, it is one of the burdens devolving upon the clerk as incident to his office to perform such duty without compensation.⁴

e. NATURALIZATION FEES.—Under the existing laws clerks of the United States district courts do not have to account for the fees for the naturalization of foreigners.⁵

1. It would be impracticable here to set out many of the decisions of the various states touching this matter. The statutes are so diverse that only few of the cases would be of value outside of the jurisdiction in which they were rendered. See the title *COSTS*, in this work; and the same title, vol. 5, p. 100, *ENCYC. PL. AND PR.* See also the references under the heading *FEES*, 8 *ENCYC. PL. AND PR.* 919.

Fees of Clerks of Circuit and District Courts.—For the fees to which the clerks of the circuit and district courts are entitled, see *U. S. v. Van Duzee*, 10 *U. S. App.* 395; *U. S. v. King*, 147 *U. S.* 676; *U. S. v. Jones*, 147 *U. S.* 672; *U. S. v. Payne*, 147 *U. S.* 687; *U. S. Rev. Stat.*, § 628.

2. *Statutes Awarding Costs Strictly Construed.*—*Dent v. State*, 42 *Ala.* 514; *Crittenden County v. Crump*, 25 *Ark.* 235; *Jackson v. Siglin*, 10 *Oregon* 93; *Ex p. Plitt*, 2 *Wall. Jr. (C. C.)* 433; *Hallman v. Campbell*, 57 *Tex.* 54. See also *Preston v. Bacon*, 4 *Conn.* 471; *State v. Merritt*, 5 *Sneed. (Tenn.)* 67. And see generally the title *STATUTES*.

3. *Contract for Unauthorized Fees.*—Where a judgment was obtained, execution issued, and property of the judgment debtor bought in by the creditor, a note given to the clerk by the creditor for the amount of commissions to which the former would have been entitled had the money passed through his hands, is void, however freely and voluntarily made. *Jackson v. Siglin*, 10 *Oregon* 93.

Where Clerk Designated Depositary—Entitled to Fees.—A master in chancery is an officer of the court, and where money is received by him in payment of property sold by him upon the foreclosure of a mortgage, he ought, in pursuance of section 995, *Rev. Stat. U. S.*, to deposit it with a designated depositary of the United States, and the clerk is entitled to his commission thereon. *Thomas v. Chicago, etc., R. Co.*, 37 *Fed. Rep.* 548.

The clerk is not entitled to this statutory commission unless the money has either actually or constructively passed through his hands. *Northwestern Mut. L. Ins. Co. v. Quinn*, 69 *Fed. Rep.* 462; *In re Goodrich*, 4

Dill. (U. S.) 230; *Leech v. Kay*, 4 *Fed. Rep.* 72; *Blake v. Hawkins*, 19 *Fed. Rep.* 204; *Fagan v. Cullen*, 28 *Fed. Rep.* 843; *The Serapis*, 37 *Fed. Rep.* 437; *Smith v. The Morgan City*, 39 *Fed. Rep.* 572; *Easton v. Houston, etc., R. Co.*, 44 *Fed. Rep.* 719.

4. *Where No Compensation Allowed.*—*Hallman v. Campbell*, 57 *Tex.* 54. The rendition of service by any public officer is gratuitous, unless by express statutory provision compensation is fixed, and an express liability for its payment imposed. Where no such provision is made, a promise on the part of the public is not implied from the fact of his election or appointment and the rendition of the particular service. See generally *Pollard v. Brewer*, 59 *Ala.* 130; *Bicknell v. Amador County*, 30 *Cal.* 237; *Perry v. Cheboygan*, 55 *Mich.* 250; *Talbot v. East Machias*, 76 *Me.* 476.

It has been held in *Erwin v. U. S.*, 37 *Fed. Rep.* 470, that, while the general rule is otherwise, when a statute is silent as to compensation, if additional labor is imposed upon the clerk, not in the line of the duties ordinarily appertaining to such an office, and if contemporaneous construction of the statute by the attorney-general, and analogous provisions of other statutes subsequently passed, indicate an intention to pay for such services, the officer is entitled to compensation.

5. *Naturalization Proceedings.*—It was the custom in the United States courts in *Massachusetts*, known and approved by the judges, for the clerk to charge three dollars as fees in naturalization proceedings. The clerk of the district court never included those fees in his returns. That fact was known to the judges to whom his accounts were semi-annually exhibited, and by whom they were passed without objection in that particular. Relying on that custom, and believing that those fees formed no part of the emoluments to be returned, the clerk of the district court did not include those fees in his accounts. This was known to the district judge when he examined and certified the accounts, and his accounts so made out were examined and adjusted by the accounting officers of the treasury. Under a

3. Right of Clerk to Maintain Action for Fees—*a.* IN GENERAL. — Though the fees of the clerk are taxed as costs of the suit, and in most cases execution may issue thereon, thus relieving the clerk of the necessity of bringing suit, he may, in the absence of statutory prohibition, maintain an action therefor against the party from whom they are due.¹

b. AGAINST SUCCESSFUL PARTY. — And this is true though the party be the successful one in the suit in which the costs accrued.²

c. CLERK DE FACTO. — It is a doctrine of the common law, founded in public policy, that although the right to the possession of an office carries with it the right to emoluments pertaining to the place, an officer seeking to recover these emoluments must show his right to the possession of the office.³ Hence a *de facto* clerk of court cannot recover the salary annexed to the office, as the salary is incident to the title to the office and not to its occupation and exercise.⁴

VIII. PERSONAL LIABILITY FOR NONFEASANCE OR MISFEASANCE — **1. In General.** — As a public officer, the clerk of a court must properly perform those duties which are incident to his office, and for his refusal or failure to do so, or for his attempted performance of them in an improper or illegal manner, he is liable in damages to the person injured by such default.⁵

rule made by the district court in 1855, the clerk had charged and received three dollars as a gross sum for examining, in advance of their presentation to the court, the application papers, and reporting to the court whether they were in conformity with law; and had made no provision for specific services, according to any items of the fee bill in section 823 *et seq.* of the Revised Statutes. In a suit brought on the official bond of the clerk, against him and his surety, to recover the amount of the naturalization fees, it was held: (1) The provision in section 823, taken from section 1 of the Act of February 26, 1853, c. 80, 10 Stat. 161, that the fees to clerks shall be "taxed and allowed," applies, *prima facie*, to taxable fees and costs in ordinary suits between party and party, prosecuted in a court; and there is no specification of naturalization matters in the fees of clerks. (2) The statute being of doubtful construction as to what fees were to be returned, the interpretation of it by judges, heads of departments, and accounting officers, contemporaneous and continuous, was one on which the obligors in the bond had a right to rely, and, it not being clearly erroneous, it will not now be overruled. U. S. v. Hill, 120 U. S. 169, *affirming* Hill v. U. S., 40 Fed. Rep. 441.

1. Suits by Clerk for Fees. — South, etc., Alabama R. Co. v. Bradley, 84 Ala. 468; Johnson v. MacCoy, 32 W. Va. 552; Bedilion v. Cowley County, 27 Kan. 592.

2. Against Successful Party. — The clerk of a court may maintain an action against the successful party in a civil suit, for subpoenas issued at his instance or for other services rendered, although these items were included in the judgment for costs rendered against the unsuccessful party. South, etc., Alabama R. Co. v. Bradley, 84 Ala. 468.

Liability of County where Criminal Suit Dismissed. — In Kansas, where a *nolle prosequi* was entered in a criminal case, and no judgment for costs was rendered against the defendant or the prosecuting witness, it was held that the county was liable for the fees of the clerk

which had accrued, and that he might maintain an action for their recovery. Bedilion v. Cowley County, 27 Kan. 592.

3. Must Be Officer De Jure. — Baxter v. Brooks, 29 Ark. 173; McCue v. Wapello County, 56 Iowa 698, 41 Am. Rep. 134; Matthews v. Copiah County, 53 Miss. 715, 24 Am. Rep. 715; State v. Storey County, 16 Nev. 92; Meehan v. Hudson County, 46 N. J. L. 276, 50 Am. Rep. 421. See also the titles PUBLIC OFFICERS; DE FACTO OFFICERS.

4. Burke v. Edgar, 67 Cal. 182.

5. Liable in Damages — Alabama. — Williams v. Hart, 17 Ala. 102.

Georgia. — Spain v. Clements, 63 Ga. 786; Collins v. McDaniel, 66 Ga. 203.

Illinois. — Billings v. Lafferty, 31 Ill. 318; State v. Dodd, 81 Ill. 163.

Iowa. — Haverly v. McClelland, 57 Iowa 182; Hubbard v. Switzer, 47 Iowa 681; Parks v. Davis, 16 Iowa 20.

Louisiana. — Anderson v. Johett, 14 La. Ann. 624.

Maine. — Maxwell v. Pike, 2 Me. 8.

Minnesota. — Rosenthal v. Davenport, 38 Minn. 543.

Mississippi. — McNutt v. Livingston, 7 Smed. & M. (Miss.) 641; Brown v. Lester, 13 Smed. & M. (Miss.) 392; Lewis v. State, 65 Miss. 468.

Nebraska. — Brock v. Hopkins, 5 Neb. 231; Ryan v. State Bank, 10 Neb. 524.

North Carolina. — Topping v. Windley, 99 N. Car. 4; Redmond v. Staton, 116 N. Car. 140; Wright v. Wheeler, 8 Ired. L. (N. Car.) 184.

Pennsylvania. — Work v. Hoofnagle, 1 Yeates (Pa.) 506.

South Carolina. — Chester County v. Hemp-hill, 29 S. Car. 584; Strain v. Babb, 30 S. Car. 342, 14 Am. St. Rep. 905.

Tennessee. — Pass v. Dibrell, 8 Yerg. (Tenn.) 470; Wright v. Shelby County, 9 Baxt. (Tenn.) 145; Ellis v. Rogers, 2 Swan. (Tenn.) 64.

Virginia. — Auditor v. Nicholas, 2 Munf. (Va.) 31; Monroe v. Webb, 4 Munf. (Va.) 73; Russell v. Clayton, 3 Call. (Va.) 41.

Damages sustained by a person by reason of the nonfeasance or misfeasance of a clerk are

2. Issuing Writ that Does Not Conform with Judgment. — When a clerk issues a writ which does not properly conform with the judgment, and in consequence of such negligence the claim, or any part thereof, is lost, he is liable in damages to the party injured thereby.¹

3. Failure to Transmit Bill of Exceptions. — One of the chief duties of a clerk of court being to send up the record of a case on appeal, his refusal or failure to do so may render him liable to whatever damage the appellant suffers by reason of such failure.²

4. Refusal to Permit Access to Records. — It is the duty of a clerk to permit access to and inspection of the records of his office by any one having a right to such inspection.³ On his refusal to permit such inspection he may be compelled by mandamus⁴ or by suit on his official bond to permit it.⁵

IX. MANDAMUS TO COMPEL PERFORMANCE OF DUTY — **1. In General.** — The duties of a clerk of a court are sometimes judicial, but generally ministerial. In the latter case resort is frequently had to the writ of mandamus to compel the clerk to perform a function which he has refused to perform.⁶

2. Issuance of Execution. — The duty of a clerk to issue an execution on a judgment may, on his refusal, be enforced by mandamus if the judgment creditor has not an adequate remedy against the clerk on his bond, or cannot attain the result sought by appeal to the judge of the court in which the judgment was rendered.⁷

Where Writ Will Not Issue for the Purpose. — If, however, the judgment creditor has a "plain, speedy, and adequate remedy" by motion in the court, or otherwise, the writ will not be allowed;⁸ nor will it be allowed when the judgment

recoverable on his official bond. The question is treated at length, *infra*, this title, *Official Bond of Clerk — Liability of Sureties*.

1. Issuance of Writs. — The prothonotary was directed to issue a *testatum fieri facias*, but did so without inspecting the record of the plaintiff's judgment. The judgment contained a waiver of exemption, and he neglected to note such waiver in the writ issued; and, in consequence, a part of the claim was lost. It was held that the clerk was liable to respond in damages to the extent of the plaintiff's loss. *Wilson v. Arnold*, 172 Pa. St. 264.

2. Failure to Transmit Bill of Exceptions. — Where persons who had a case pending in court filed a bill of exceptions, and the clerk of such court did not and would not make out and transmit the papers in due time, and by reason of this default the case was dismissed, and it was shown that if such dismissal had not occurred the plaintiffs would have recovered the amount of their claim, it was held that the plaintiffs were entitled to recover of the clerk all damages suffered by them. *Collins v. McDaniel*, 66 Ga. 203.

3. Inspection of Records. — *Daly v. Dimock*, 55 Conn. 579; *O'Hara v. King*, 52 Ill. 303; *Boylan v. Warren*, 39 Kan. 301, 7 Am. St. Rep. 551; *Hawes v. White*, 66 Me. 305; *State v. Rachac*, 37 Minn. 372; *Lum v. McCarty*, 39 N. J. L. 287; *People v. Richards*, 99 N. Y. 620; *Lyman v. Windsor*, 24 Vt. 575; *Lyman v. Edgerton*, 29 Vt. 305, 70 Am. Dec. 415.

⁴ See *infra*, this title, *Mandamus to Compel Performance of Duty*.

⁵ **Bond.** — See *infra*, this title, *Official Bond of Clerk — Liability of Sureties*.

⁶ **For a Full Discussion** of the nature of particular duties generally, which may be compelled by this writ, see the title *MANDAMUS*.

Cumulative Remedies. — Though a motion ad-

dressed to the court of which the clerk is an officer is generally the most prompt and economical remedy to secure the issuance of any writ or process which he refuses to a party who is entitled to demand it, a writ of mandamus will be granted for the purpose of compelling him to perform the duty. *Moore v. Muse*, 47 Tex. 210.

7. Issuance of Execution. — *People v. Loucks*, 28 Cal. 68; *People v. Gale*, 22 Barb. (N. Y.) 503; *Moore v. Muse*, 47 Tex. 210; *Atty.-Gen. v. Lum*, 2 Wis. 507.

8. When Writ Will Not Lie. — *Fulton v. Hanna*, 40 Cal. 278; *Goodwin v. Glazer*, 10 Cal. 333. See the more recent case of *Babcock v. Goodrich*, 47 Cal. 488, in which the court holds that an action on the bond of the officer is not an adequate remedy for failure to perform his duty.

Where a statute provided that a writ of mandamus should not be granted in any case where there is a "plain, speedy, and adequate remedy" in the ordinary course of law, and another statute provided that a judge in vacation might issue orders directing officers in the discharge of their duties, it was held that a writ would not issue to a clerk of a court directing the issue of an execution on a judgment, as the relator could have availed himself by application to the judge of the remedy provided by statute. *Pickell v. Owen*, 66 Iowa 485.

A mandamus will not lie to compel a clerk to issue an execution for arrears of alimony, where it does not appear that an application and proper showing have first been made to the judge who granted the decree. The question as to whether there was an accumulation of the arrears unpaid was a question for the decision of the court, and not of the clerk. *Compton v. Airial*, 9 La. Ann. 496.

on which it is sought is ambiguous and open to more than one construction.¹

3. Issuance of Commission. — Where a clerk refuses to file interrogatories and issue a commission to take depositions of witnesses he may be compelled by mandamus to perform these duties.²

4. Issuance of Certificate of Election. — A writ of mandamus will be granted to compel the issuance of a certificate of election by the clerk of a court who wrongfully withholds it.³

5. Transmission of Transcript. — When the clerk of a court refuses to transmit a transcript on appeal, mandamus will lie to compel him to do so.⁴

When Transcript Withheld by Erroneous Order of Court. — Where, however, the clerk refuses to issue the transcript under erroneous instructions from the court not to do so until an appeal bond is filed, a writ of mandamus will not be granted to compel him to do so.⁵

6. Permission of Access to Records. — Where the clerk of a court refuses to a person access to records or papers, which as a matter of right he is entitled to inspect, mandamus will lie to compel the clerk to permit such access.⁶

7. Approval of Bond. — The approval by a clerk is, in its nature, a *quasi-judicial* act, and mandamus will not ordinarily lie to compel his judgment as to the approval of a bond presented.⁷ Where, however, the clerk's failure to approve a bond which he admits to be good, so far as the sureties are concerned, is based on other and untenable grounds, the law makes it his duty to act on such bond, and mandamus will lie to control his action.⁸

8. To Take Action on Bond. — Where the law imposes on the clerk of a court the duty to act in either approving or rejecting the sureties on a bond when presented for that purpose by one authorized to demand such action,

1. Attempting to Enforce Ambiguous Judgment by Mandamus. — Where a judgment is ambiguous, and, giving it one construction to which it is open, a judgment creditor is not entitled to execution thereon, the clerk's refusal to issue one will not be compelled by mandamus. *Hall v. Stewart*, 23 Kan. 396.

2. Roney v. Simmons, 97 Ala. 88.

3. Brower v. O'Brien, 2 Ind. 423.

4. Transmission of Transcript. — *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 21 U. S. App. 50; *Rodgers v. Alexander*, 35 Tex. 116; *State v. Armstrong*, 5 Wash. 123. In this last case the ground of the clerk's refusal to transmit the transcript was that the appeal bond was defective under the *Washington* code. It was held that the supreme court alone had the power to pass upon the sufficiency of the bond, and that, therefore, the duty required of the clerk was a purely ministerial one, and that the writ should issue.

Will Not Lie that Appellate Court May Determine in Advance the Record. — On an appeal to the circuit court of appeals a writ of mandamus will not be granted to the appellant to compel the clerk of the lower court to transmit a transcript of the records in order that it may be determined in advance by the appellate court whether a certain deposition is part of the record, as the ordinary procedure is adequate for that purpose. *Starcke v. Klein*, 62 Fed. Rep. 502.

5. Erroneous Order of Court. — The court granted an appeal with the proviso that no transcript should issue until the filing of a bond. It was held that such proviso was unwarranted, but the clerk properly refused to issue the transcript in default of bond, and

mandamus would not lie against him to compel its issuance. The proper remedy in such a case would be a writ of error. *State v. Engleman*, 45 Mo. 27.

6. Compelling Clerk to Permit Access to Records. — *Boylan v. Warren*, 39 Kan. 301, 7 Am. St. Rep. 551.

Where the law provided that a coroner should reduce to writing all testimony taken at an inquest and file the same with the clerk of the court, and where, under the application of one indicted for homicide, as to which the inquest was held, the clerk refused to permit an examination of the testimony, it was held that mandamus would lie to compel the clerk to permit such inspection. *Daly v. Dimock*, 55 Conn. 579.

7. Approval of Bonds. — *Ex p. Thompson*, 52 Ala. 98; *Ex p. Harris*, 52 Ala. 87, 23 Am. Rep. 559; *State v. Barnes*, 25 Fla. 298, 23 Am. St. Rep. 516; *Swan v. Gray*, 44 Miss. 393; *Shotwell v. Covington*, 69 Miss. 735.

Where the clerk refused to approve the bond for two reasons, viz., first, because it was not such a bond as he was authorized by law to approve, and, secondly, because he did not deem the sureties sufficient, it was held that in such case his exercise of power to approve could not be controlled by mandamus, his second reason for not approving the bond involving the exercise of discretionary power. *McDuffie v. Cook*, 65 Ala. 430.

8. Daniels v. Miller, 8 Colo. 542.

And again, when the clerk has no discretion as to the approval of the bond, and where the law makes it his duty to accept and file it, and he refuses to do so, he may be compelled to by mandamus. *People v. Fletcher*, 3 Ill. 482.

and he refuses to act, mandamus will lie to compel his action on the bond presented.¹

X. OFFICIAL BOND OF CLERK — LIABILITY OF SURETIES — 1. In General. — In accordance with the general legislative policy to require bonds of public officers who have the performance of ministerial duties, and who become, by virtue of their office, custodians of funds, the several states have enacted laws exacting from clerks of courts, on their assumption of office, bonds with sufficient sureties to protect citizens and litigants from financial loss, from the failure of the clerk to perform his duties, or from the misappropriation of funds coming into his hands as such clerk.

2. Failure to Pay Over Money Collected — a. GENERALLY. — The bonds are universally conditioned so that the bondsmen are liable in damages for the failure of the clerk to pay over any funds which come into his hands, *virtute officii*, to the person entitled thereto.²

Turning Over Funds to Successor. — And the bondsmen are likewise liable if the clerk should fail to turn over to his successor in office all moneys paid to him as such officer.³

Order of Court. — It is immaterial that there has not been a special order of the court requiring such transfer, as it is the duty of the outgoing clerk to account without an order.⁴

b. FEES OF HIS OFFICE. — Where, as is frequently the case, a clerk's maximum compensation is limited, he is required to account for all costs received by him in excess of that amount, and to that end he is required to file an account showing his receipts and expenditures. The bonds in such cases are so conditioned, and he and his sureties are liable for the excess

1. To Compel Clerk to Act on a Bond. — In approving an attachment bond the clerk of a court acts in a *quasi*-judicial capacity, and when he refuses to approve it his refusal will not be controlled by mandamus; but when he refuses to act on the bond tendered, or bases his refusal to accept it on a specific reason, insufficient in law, mandamus will lie, not to compel his approval, but to compel him to pass on the sufficiency of the bond without regard to the supposed defect. *Mobile Mut. Ins. Co. v. Cleveland*, 76 Ala. 321. In this case Stone, C. J., distinguishing those cases where mandamus cannot be granted to compel the approval of the bond from those where it should be granted to compel action on the bond, said: "It is contended for appellee that, in refusing to approve the bond tendered, he acted in a *quasi*-judicial capacity — did only what was confided to his judgment and discretion — and that his judgment and decision can neither be controlled nor reviewed in the manner here proposed. If this record presented only the question of a bond tendered to the clerk for his approval, and his refusal to approve it because he deemed the sureties insufficient, or for no assigned reason, the argument would be unanswerable. If, however, the clerk refuses to consider the sufficiency of a bond tendered for his approval, either for no reason or for an assigned insufficient reason, mandamus will lie, not to compel him to approve the bond; that is a matter for his own enlightened judgment; it will lie to compel him to consider and pronounce on the sufficiency of the bond. This involves an inquiry into its form, whether it is in proper penalty and condition, and whether the sureties ten-

dered are sufficient. This is a duty cast on him, which he alone can perform, and suitors who may be required to give such bonds have the clear legal right to demand its exercise."

The same rules as to compelling action by mandamus apply to a clerk of a court on his refusal to act on a bond presented as to other public officers on whom such duty is imposed. See the title *MANDAMUS*.

2. Failure to Turn Over Money Collected — Illinois. — *Connole v. People*, 46 Ill. App. 72; *Weisenborn v. People*, 58 Ill. App. 114.

Indiana. — *Swift v. State*, 63 Ind. 81.

Iowa. — *Morgan v. Long*, 29 Iowa 434; *Walters-Cates v. Wilkinson*, 92 Iowa 129.

North Carolina. — *Havens v. Lathene*, 75 N. Car. 505; *Cox v. Blair*, 76 N. Car. 78; *Wilmington v. Nutt*, 78 N. Car. 177; *Peebles v. Boone*, 116 N. Car. 57.

Tennessee. — *Allen v. Wood*, 2 Baxt. (Tenn.) 401.

3. Turning Over Funds to Successor. — *Peebles v. Boone*, 116 N. Car. 57.

4. Special Order of Court Unnecessary. — *Peebles v. Boone*, 116 N. Car. 57.

But see *State v. Lake*, 30 S. Car. 43, which was an action brought on the bond of a clerk thirteen years after he went out of office, assigning as breaches, (1) the failure of the clerk to report to the court the moneys in his hands; (2) his failure to deposit them in bank; (3) his failure to pay over to his successor; (4) his failure to pay to the parties entitled. The court held that, in order to constitute a breach of the bond, there must appear that there had been orders of court for the clerk to pay out the money to the persons entitled thereto, and demands made under that order.

collected by him.¹

c. FEES OF OTHER COURT OFFICERS. — Although, in the absence of statutory enactment, it probably is not the duty of a clerk of court to receive costs other than his own, yet, under statutes authorizing costs tendered to be brought into court, the clerk receives such costs by virtue of his office, and the sureties on his official bond are liable for his failure to pay them over to the person entitled thereto.²

d. MONEY PAID INTO COURT IN SATISFACTION OF JUDGMENT. — In some jurisdictions there are statutes authorizing the payment by a judgment debtor, and by the sheriff, of money collected by him, into court. Money so received by the clerk is received by virtue of his office, and upon his failure to pay over the money to the judgment creditor a recovery therefor may be had on his official bond.³

e. MONEY PAID INTO COURT BY ORDER OF COURT. — When money is paid into court by order of the court, the clerk is its proper custodian and receives it by virtue of his office, and upon his failure to account therefor a recovery may be had on his official bond.⁴

3. When Default Occurs What Official Bond Holds. — It has been held that where money of an infant was ordered by decree of a court to be paid over by a guardian to the clerk of a court to be by him invested, the sureties are liable on the official bond in force at the time of the making of the decree, independently of the time when the money was actually received, the decree giving him the right to receive it at any and at all times.⁵

Where Default Continues. — When a clerk of a court fails to deposit his official funds in bank, or fails to pay them out in proper cases, the sureties on a bond executed after the receipt of the money, but while unaccounted for, are bound for its payment.⁶

4. Where Money Not Received Virtute Officii — Non-liability of Bondsmen —
a. IN GENERAL. — The rule is that the sureties on the bond of an officer are not liable for his refusal or failure to act, or for his performing an act which is not imposed by law;⁷ hence, generally, the sureties of an officer are not liable for money paid to him which the law did not contemplate that he should receive.⁸ This general rule of law finds its application with respect to the non-liability of the sureties on the official bond of a clerk of court. Thus,

1. Fees of His Office. — Under sections 823 and 839 of the U. S. Rev. Stat., no clerk of the circuit or district court is entitled for his personal compensation, over and above office expenses, to more than three thousand five hundred dollars a year, or exceeding that rate for any time less than a year, and any surplus of fees and emoluments received by him may be recovered by the United States from him and his bondsmen. *U. S. v. Averill*, 130 U. S. 335.

2. *Connole v. People*, 46 Ill. App. 72.

3. Receipt of Money upon a Judgment. — *Morgan v. Long*, 29 Iowa 434; *McDonald v. Atkins*, 13 Neb. 568.

4. Money Paid into Court by Order of Court. — *Walters-Cates v. Wilkinson*, 92 Iowa 129; *State v. Watson*, 38 Ark. 96; *Craig v. Governor*, 3 Coldw. (Tenn.) 244.

The Fact That Money Was Not Legal Tender No Defense. — In an action upon the official bond of a clerk to recover the amount of a tender deposited in a case, the fact that the money was not United States Treasury notes, but currency which was not a legal tender, constitutes no defense. *Billings v. Teeling*, 40 Iowa 607.

5. *Latham v. Fagan*, 6 Jones L. (N. Car.) 62. In this case the court does not decide

whether other parties on a subsequent bond of a clerk were not liable for the whole or part of the funds as to which he defaulted.

6. The clerk of a court neglecting to deposit his official moneys in bank as required by law, or to pay out in proper cases under orders of the court, is guilty of a continuing default, for which (without demand of the parties in interest) he and the sureties on his second and additional official bond are liable, although the moneys were received before the execution of such bond. *State v. Moses*, 18 S. Car. 366.

7. Acts Outside of Duties Imposed by Law. — *Cotton v. Atkinson*, 53 Ark. 98; *Schmitt v. Drouet*, 42 La. Ann. 1064, 21 Am. St. Rep. 408; *State v. Norwood*, 12 Md. 177; *State v. Rollins*, 29 Mo. 267; *State v. Conover*, 28 N. J. L. 224, 78 Am. Dec. 54; *Gerber v. Ackley*, 37 Wis. 43, 19 Am. Rep. 751. See generally the title PUBLIC OFFICERS.

8. *Smith v. Stapler*, 53 Ga. 300; *Sample v. Davis*, 4 Greene (Iowa) 117; *Saltenberry v. Loucks*, 8 La. Ann. 95; *Nolley v. Callaway County Ct.* 11 Mo. 447; *People v. Pennock*, 60 N. Y. 421; *Ward v. Stahl*, 81 N. Y. 407; *State v. White*, 10 Rich. L. (S. Car.) 442; *Branch v. Com.*, 2 Call (Va.) 510.

where a payment is made to the clerk of money which he is not authorized to receive, his bondsmen are not liable for his failure to account for such payment.¹

b. WHERE CLERK APPOINTED RECEIVER. — When the clerk of a court or master in chancery is appointed receiver in a cause pending in the court, his sureties cannot be held liable for his default as such receiver.²

c. WHERE CLERK APPOINTED PROBATE JUDGE. — Although the sureties on an official bond are, by the terms of the bond, bound for the default of their principal in the discharge of duties imposed subsequent to its execution, yet that liability is limited to official duties, and does not extend to acts not within the line of that duty, and not done under color of that office. Thus the sureties on a bond of a clerk and register in chancery cannot be held liable for acts done by him when appointed to act as probate judge after the execution of the bond, even though a law was subsequently passed imposing the custody of money on judges of probate.³

5. Making False Certificate of Acknowledgment. — Where the clerk makes a false certificate of acknowledgment, his official bond is holden for any damage suffered by a person by reason of his reliance on the verity of such certificate.⁴

6. Making False Certificate of Record of Judgment. — And if he should certify, through mistake, that there is no judgment recorded against a person in his office, when as a matter of fact there is a judgment, he is liable on his official bond for all damages incurred by one relying on the truth of such certificate.⁵

1. Moneys that Clerk Not Authorized to Receive. — *Jenkins v. Lemonds*, 29 Ind. 204; *Bowers v. Fleming*, 67 Ind. 541; *State v. Enslow*, 41 W. Va. 744. In this last case a statute required the payment in a certain case to be made to the court. Instead of being made to the court, it was paid during vacation to the clerk of the court, who had in law no warrant to receive it. In an action against his bondsmen to recover the amount paid, it was held that, under the statute, payment to the clerk was not payment to the court, and there had been no breach of the clerk's official bond.

Where there was no law authorizing an administrator to pay the clerk money belonging to an estate, and as the liability of the bondsmen of the clerk extended only to the rightful discharge of his official duties, it was held that such sureties could not be made liable for money thus paid to the clerk without authority of law. *Jenkins v. Lemonds*, 29 Ind. 204.

As to the failure of one to discharge a debt by its payment to the clerk in vacation before its reduction to judgment, see *Currie v. Thomas*, 8 Port. (Ala.) 293; *Mazyck v. M'Ewen*, 2 Bailey L. (S. Car.) 28.

2. Where Clerk Appointed Receiver. — *Waters v. Carroll*, 9 Yerg. (Tenn.) 102; *Kerr v. Brandon*, 84 N. Car. 128; *Rogers v. Odom*, 86 N. Car. 432; *Syme v. Bunting*, 91 N. Car. 48.

3. Acting as Probate Judge. — The sureties on the official bond of a register in chancery conditioned as prescribed by law are not liable for the default of their principal as to moneys paid him while acting in the capacity of probate judge when there was no law in force at the time the payment was made authorizing such payment to be made to the probate judge. The subsequent passing of a law authorizing such payment could not retroact upon an unauthorized payment already made, nor render sureties liable for his default in reference to it. *McKee v. Griffin*, 66 Ala. 211. In this case

Stone, J., delivering the opinion of the court, said, in part: "At the time the money was paid to McFarlane (August 3, 1861), there was no statute authorizing the commissioners appointed to sell property for partition to pay the proceeds to the judge of probate. Nor was there such statute during the term covered by the official bond sued on in this action. True, on the 11th of November, 1861, an act was approved, explanatory of the act of February 5, 1856, which authorized the commissioners to 'discharge themselves from all liability, for moneys received by them for property sold under said act, by paying over the same into the hands of the judge of probate.' * * * This, however, could not retroact and make that an official act which at the time of its doing was a private deposit, unauthorized by any law. * * * Without noticing specially the several points raised, we think the court rightly ruled that, under the testimony, the plaintiff was not entitled to recover."

4. False Certificate of Acknowledgment. — Where a clerk falsely certifies an acknowledgment to a forged mortgage at the instance of the person named as mortgagee in the mortgage, he and his official bondsmen are liable in a suit brought for the use of the assignee of the mortgage for all loss sustained by him in relying on the truth of such certificate. *Bartels v. People*, 152 Ill. 557.

5. False Certificate as to Record of Judgments. — *Ziegler v. Com.*, 12 Pa. St. 227.

Seal to Certificate Not Necessary. — It is immaterial that there is no seal attached to such certificate, and that there is no proof of the payment of fee. As to these matters the court said: "The defense is that the prothonotary neglected his duty in not putting the seal of the court to his certificate, and that there is no evidence that he was paid for the search and certificate, Melvin having left the country. If the officer neglected to charge for the

7. For Failure to Enter Cause on Docket. — If a clerk should fail to enter a cause on the docket, and by reason of such default damage is suffered, the clerk and his bondsmen are liable to the judgment creditor for whatever loss he has sustained by reason of such failure.¹

8. Refusal to Issue Citation. — If a clerk refuses or neglects to issue a citation to which the person asking therefor is entitled, such refusal or neglect is a breach of his official bond, and any damage sustained by the one applying therefor may be recovered from him and his sureties.²

9. Failure to Transmit Transcript. — If the clerk of a court should fail to transmit a transcript of the record to an appellate court on appeal of the cause, he and his official bondsmen are liable for whatever damage may have been sustained thereby by the appellant.³

10. Negligent Entering Up of Judgment. — If, in entering up a judgment, he is guilty of negligence which deprives the judgment creditor of an opportunity to have an execution levied, he is liable on his official bond to the judgment creditor for the damage sustained by him on account of such negligence.⁴

11. Erroneously Marking Judgment Satisfied. — Where a clerk by mistake enters satisfaction of an unpaid judgment, a recovery may be had on his official bond of whatever damage has been sustained by an innocent plaintiff in relying upon the truth of such entry.⁵

12. Failure to Enrol Judgment. — Where it is one of the duties of the clerk to enrol a judgment that it may become a lien on the judgment debtor's land, his failure to do so will render him liable on his official bond to the judgment creditor for whatever damage the latter may have suffered.⁶

13. Failure to Issue Execution. — A clerk's failure to issue an execution on the application of a party entitled thereto is a breach of his official duty for which his bondsmen are liable for whatever damage may have been sustained. In some jurisdictions it is the duty of the clerk to issue an execution on a judgment as a matter of course unless notified by the judgment creditor not to do so. In such cases his failure to issue it even without demand is an express breach of his official duty.⁷

14. Discriminating Between Judgment Creditors. — Where two creditors obtain judgment against their common debtor at the same time, and the clerk wrongfully issues execution to one of them, whereby he obtains a priority over the other, the latter may recover in an action on the official bond of the clerk whatever damage he may have sustained by reason of such discrimination.⁸

search and certificate, which is not very probable, it was his own affair. Omitting a portion of his duty in not putting the seal of his office to the certificate will not avail him. Our law will not permit him to take the advantage of his own negligence and enable him by that negligence to mislead others." *Ziegler v. Com.*, 12 Pa. St. 227.

1. *Brown v. Lester*, 13 Smed. & M. (Miss.) 392.

2. *Anderson v. Johett*, 14 La. Ann. 624.

3. *Collins v. McDaniel*, 66 Ga. 203.

4. **Negligently Entering Up Judgment.** — Where a party recovered judgment, and the clerk in entering it up failed to name any sum for which the recovery was had, so that a levy of execution was defeated, it was held that the clerk and his sureties were liable to the party injured on his official bond for his neglect to make a proper entry of the judgment. *State v. Dodd*, 81 Ill. 162.

5. **The Erroneous Entry of Satisfaction of a Judgment** by a mere mistake is such a breach of his official duty as will render the clerk and

his sureties liable in an action on his official bond for such damage as an innocent plaintiff may have sustained by reason of his relying on the truthfulness of said entry. *Van Etten v. Com.*, 102 Pa. St. 596.

6. *Strain v. Babb*, 30 S. Car. 342, 14 Am. St. Rep. 905.

7. **Failure to Issue Execution.** — *Badham v. Jones*, 64 N. Car. 655.

Statutory Construction — Repeal of Section Requiring Clerk to Issue Without Demand. — Where, by statute, it was the duty of clerks to issue execution unless otherwise directed, and a subsequent statute provided that no execution must issue without the order of court or demand of the judgment creditor, it was held that the judge's entry on the docket of the words "Issue execution" was not an order to do so, and at most was only a memorandum of an order intended to be given by the court, or one of an order already given. *Badham v. Jones*, 64 N. Car. 655.

8. *Newbern Bank v. Jones*, 2 Dev. Eq. (N. Car.) 284.

15. Approval of Insufficient Bonds — Appeal Bonds. — It is generally one of the official duties of a clerk of court to pass on the sufficiency of the sureties offered on an appeal bond. Notwithstanding the approval of the bond is a *quasi-judicial* act, when a supersedeas is granted conditioned on the approval of a bond by the clerk, if the clerk negligently and without making due inquiry as to the sufficiency of the sureties approves such bond, it is a breach of the duty imposed on him by law and covered by the conditions of his bond.¹

Administrator's Bond. — Where it is the duty of a clerk to approve an administrator's bond, his negligent acceptance of an insufficient one renders him and the sureties on his official bond liable in damages for any loss which such negligence may occasion.²

Where Approval Not Duty of Clerk. — In those cases where the law makes it the duty of the court to approve bonds, the approval or acceptance of an insufficient one by the clerk does not render his sureties liable.³

Diligence Before Approval Question of Fact. — The clerk and his official bondsmen do not become guarantors of the solvency and sufficiency of the sureties accepted. Whether he made proper investigation, and was justified upon that investigation in approving the bond, is necessarily a question of fact.⁴

XI. DISQUALIFICATION OF CLERK — 1. Effect of Disqualification of Judge. — The entry of a judgment by default is a ministerial act, which can be performed by the clerk, and the disqualification of the judge to try the cause does not render entry of judgment by the clerk invalid.⁵

2. Effect of Self-interest — When Act is Judicial. — Many acts performed by a clerk of court are in their nature judicial, and when so, the self-interest of the clerk would invalidate them when done by him.⁶

When Clerk Agent of Party in Interest. — If the clerk is the agent of one of the parties to the cause, he is disqualified for the performance of any judicial act.⁷

1. Approval of Insufficient Appeal Bond. — *McNutt v. Livingston*, 7 Smed. & M. (Miss.) 641; *Brock v. Hopkins*, 5 Neb. 231; *Hubbard v. Switzer*, 47 Iowa 681; *Billings v. Lafferty*, 31 Ill. 318.

Where the condition of the clerk's bond required that he "should faithfully perform the duties of his office," and the law provided that the clerk should not grant a supersedeas without having first taken the bond with two sufficient sureties, it was held that an allegation that the clerk had accepted insufficient sureties was a sufficient charge of a breach of the bond. *McNutt v. Livingston*, 7 Smed. & M. (Miss.) 641.

2. *Field v. Wallace*, 89 Iowa 597.

3. *M'Alister v. Scrice*, 7 Yerg. (Tenn.) 277, 27 Am. Dec. 504; *Dewey v. Kavanaugh*, 45 Neb. 233.

4. *Brock v. Hopkins*, 5 Neb. 231; *Haverly v. McClelland*, 57 Iowa 182; *Field v. Wallace*, 89 Iowa 597.

Where the surety justified before having been accepted by the clerk, and where evidence as to his solvency at that time and of the negligence of the clerk in accepting him was conflicting, the court refused to disturb the verdict of the jury finding the clerk guilty of negligence. *Haverly v. McClelland*, 57 Iowa 182.

The clerk of a court is a ministerial officer, and is liable for damages occasioned by his negligently and carelessly taking insufficient security; but if he exercises a reasonable degree of care in the performance of his duty he is not liable even if the security should prove insufficient. *Brock v. Hopkins*, 5 Neb. 231.

But see *McNutt v. Livingston*, 7 Smed. & M. (Miss.) 641, where it is held that no allegation of negligence on the part of the clerk was necessary.

What Is Proper Evidence of Diligence. — In an action against the clerk of a court for negligently approving an insufficient administrator's bond, evidence of inquiries made by the clerk of business men in the community, and of information received, before approving the bond, as to the extent and value of the estate of the deceased, and of the financial standing of the firm of which he was a member when he died, is admissible for the purpose of showing the degree of care and diligence exercised. *Field v. Wallace*, 89 Iowa 597.

5. *People v. De Carrillo*, 35 Cal. 37.

6. Self-interest. — See the succeeding notes of this subdivision; and the title PUBLIC OFFICERS.

It was held in *Laning v. Iron City Nat. Bank*, (Tex. Civ. App. 1896) 36 S. W. Rep. 481, that a deputy clerk (although it was conceded that his act was that of the clerk) was not disqualified to approve a bond for attachment because the clerk was a director and the vice-president of the bank that sued out the attachment.

7. Where Clerk Agent of Party. — Where the clerk of a chancery court was agent for an express company, who was complainant in a cause, and where, as such clerk, he swore to the bill as agent for the complainant, and sitting at rules in vacation he rendered a decree in its favor, ordering a sale of land, it was held that the clerk was disqualified, and that

When Act Ministerial — Clerk Not Disqualified. — The clerk of court is not disqualified for the performance of an act which is ministerial, because of self-interest.¹ He may issue an attachment in a cause in which he is plaintiff,² or take a confession of judgment in his own favor.³ His disqualification *vel non* depends altogether on the nature of the function exercised.

CLIENT. (See the titles *ADVICE OF COUNSEL*, vol. 1, p. 894; *ATTORNEY AND CLIENT*, vol. 3, pp. 278, 282; *PRIVILEGED COMMUNICATIONS*.) — A client is one who applies to an advocate for counsel and defense; one who retains the attorney; is responsible to him for his fees, and to whom the attorney is responsible for the management of the suit.⁴

CLOSE. (See *ENCYC. OF PL. AND PR.*, title *TRESPASS*.) — To “close” means to shut, to end, to terminate, to seal.⁵ The term “close” as a noun is

the subsequent confirmation of the decree by the chancellor did not validate the act of the clerk in granting it in the first instance. *Kirkland v. Texas Express Co.*, 57 Miss. 316.

1. **When the Act Is Ministerial.** — *Evans v. Etheridge*, 96 N. Car. 42; *Trimmier v. Winsmith*, 23 S. Car. 449.

2. **Issuing Attachment Ministerial Act.** — A party is only prohibited from acting in his own case when he exercises a judicial, and not a ministerial, function. The clerk of the court, upon making affidavit before a person authorized to administer oaths, may issue a warrant of attachment in an action in which he is plaintiff. *Evans v. Etheridge*, 96 N. Car. 42.

3. **Taking a Confession of Judgment.** — *Trimmier v. Winsmith*, 23 S. Car. 449.

4. By Mr. Tallmadge in *McFarland v. Crary*, 6 Wend. (N. Y.) 312.

In *Peek v. Boone*, 90 Ga. 774, it was held that the term *client*, within a statute making communications with attorney and *client* privileged, includes one who seeks counsel, but who in fact pays no fee, and employs others in the prosecution of the business, the counsel consulted being afterwards employed against him. See also *Cross v. Riggins*, 50 Mo. 335.

5. **Closed.** — A statute required that the commissioners, after taking an examination, should return it *closed* up under their seals. It was held that a commission inclosed in an envelope which came to hand with an opening not large enough to allow the escape of the papers contained therein was sufficiently *closed* under the statute. The court said: “‘*Close* under the hand and seal,’ etc., we suppose should receive the meaning which the words ordinarily bear when applied to parcels generally which are transmitted through the post office. A letter is usually quite *close*, so that no part of the contents can be seen; but many documents are *closed* up and passed through the post office which are not wholly *closed* or inclosed; and we are not prepared to say that a document quite inclosed in an envelope, excepting that one end of the covering is burst, is not a document which may be called *close* or *closed*; or that a parcel folded and secured by tape or cord merely, so that it cannot be read or opened without force, is not also a document which may properly be called *close* or *closed*, especially when the opening was scarcely large enough to allow of the papers coming out.” *Frank v. Carson*, 15 U. C. C. P. 151.

Closing an Account. (See also the titles *ACCOUNTS*, vol. 1, p. 433; *LIMITATION OF ACTIONS*.) — In *Bass v. Bass*, 8 Pick. (Mass.) 187, it was held that an account that is *closed* is not in consequence necessarily a settled account. Parker, C. J., said: “It is insisted that the death of the testator more than six years before the commencement of the suit *closed* the account between the parties, so that from that time the balance then existing became liable to the operation of the statute of limitations, like an account stated; which, according to all the authorities, ceases to be a merchants’ account so far as respects the exception in the statute. There are no authorities for this position except a loose dictum in 5 Dane’s Abr. 395, founded upon a supposed decision of this court, stated in Story’s Pleading 91. The position itself is inconsistent with a subsequent position of the same learned authority, in 6 Dane’s Abr. 152, where it is laid down that an account *closed* is not a stated account. Death *closes* accounts in one sense, that is, there can be no further additions to them on either side; but they remain open for adjustment and set-off, which is not the case in an account stated; for that supposes a rendering of the account by the party who is the creditor, with a balance struck, and an assent to that balance, expressed or implied; and thus the demand is essentially the same as if a promissory note had been given for the balance.”

Closing an Account. — In *Patton v. Craig*, 7 S. & R. (Pa.) 128, the court says: “The letter concludes with saying, ‘I will write you again, some time hence, and inform you when I will again return to the city, and put a *close* to this affair in the best manner I can.’ Now we see that in this letter Patton expressly acknowledged an unsettled account with Craig’s estate, and an intention to *close* it. By *closing* it I understand paying it, if the balance should be against him. It would have been most extraordinary, indeed, if the court had directed the jury that this letter could have no effect on the statute of limitations.”

Closing Assessment Book. — The provision in *New York Laws* 1859, c. 302, § 8, as to the keeping of the annual record of the assessed valuation of real and personal estate, etc., open for examination between certain specified dates, means merely that during the time designated those interested can apply to have mistakes in the assessments of property for taxes corrected; and when the said books are

sometimes used to signify an interest in the soil,¹ and at other times as the equivalent to "enclosure."²

CLOSE-HAULED. (See also the title NAVIGATION.) — See note 3.

CLOTH. — "Cloth" is a woven fabric of fibrous material, used for garments and for other purposes.⁴

closed, that such applicants will not be received. The **closing** of the books contemplated by this section is not a physical act, but is a simple limitation of the time during which those interested can apply to have mistakes in the assessment of property for taxes corrected. *Clarke v. New York*, (Super. Ct.) 13 N. Y. St. Rep. 290, affirmed in 111 N. Y. 621.

Closed — **Intoxicating Liquors.** (See also the titles INTOXICATING LIQUORS; SUNDAY.) — A *Michigan* statute provided that saloons should be **closed** on Sunday. The meaning of **closed** in this connection has received construction in *People v. Waldvogel*, 49 Mich. 337; *Kurtz v. People*, 33 Mich. 279; *People v. Higgins*, 56 Mich. 159; *People v. Cummerford*, 58 Mich. 328; *People v. Cox*, 70 Mich. 247; *People v. James*, 100 Mich. 522; *People v. Crowley*, 90 Mich. 366.

Closing Out. — As to the meaning of this term, and usage of stockbrokers, see the titles STOCK EXCHANGE; STOCK BROKERS; and see *Kingsbury v. Kirwin*, 43 N. Y. Super. Ct. 451, affirmed in 77 N. Y. 612.

Real Estate Broker. (See also the title REAL ESTATE BROKERS.) — A broker employed "to **close** the bargain" for the sale of real property is not authorized to sign the name of his principal to a contract of sale. *Coleman v. Garrigues*, 18 Barb. (N. Y.) 60; and see *Roach v. Coe*, 1 E. D. Smith (N. Y.) 175.

1. Close Denoting Interest of Party. — In *Heath v. Milward*, 2 Bing. N. Cas. 98, 29 E. C. L. 269, Park, J., says that the word **close** may sometimes be employed to denote the interest as well as the possession of the party.

In *Meade v. Watson*, 67 Cal. 593, it is said: "The word **close** is purely technical, and relates to the interest in the soil and to its invisible boundaries, and not to those artificial barriers often erected around land."

The term **close**, in its common acceptance, means an inclosed field; but in law it rather denotes the interest of the party in the land, whether inclosed or not. It signifies any interest which will enable the party to maintain trespass for an injury to the real property or to the mere possession. *Wright v. Bennett*, 4 Ill. 258.

The term **close** signifies interest in the soil. *Dorsey v. Eagle*, 7 Gill & J. (Md.) 333; *Richardson v. Brewer*, 81 Ind. 108.

Enclosure Distinguished from Close. — The word "enclosure," as used in the Act of 1797 (Slade's Vt. Stat., p. 450, § 3; Revised Stat., p. 412, § 4), relating to impounding, imports land inclosed by something more than the imaginary boundary line; that there should be some visible, tangible obstruction, such as a fence, hedge, ditch, or something equivalent, for the protection of the premises against encroachment by cattle. The word **close** is more comprehensive; it embraces land owned by the party or of which he is in the rightful possession, although embraced only by an imaginary boundary line which defines its territorial lim-

its. A plea, therefore, under this statute, in which the word **close** is used for "enclosure," as descriptive of the *locus in quo*, would be insufficient. Such plea would also be insufficient under the present statute (Gen. Stat., p. 617, § 4), because, as indicated by Gen. Stat., p. 625, § 1, only occupied land is deemed an enclosure. *Porter v. Aldrich*, 39 Vt. 326.

Fishery. — In an action against one infringing on the plaintiff's exclusive right to catch fish by means of fixtures attached to the soil, where the declaration was technically that of trespass *qu. cl.*, charging that the defendant "with force and arms broke and entered the plaintiff's **close**," followed by a description of the premises, it was held that using the word **close** in its more comprehensive sense, as indicated here by the words "fishery and fishing privilege" following, is not entirely inappropriate in an action on the case, and as the person and case could be rightly understood an amendment if necessary would be allowed. *Matthews v. Treat*, 75 Me. 594.

2. Enclosure. — In a will the word **close** was construed as denoting an enclosure, and parol evidence was held inadmissible to show that the testator had used it in another sense. *Richardson v. Watson*, 4 B. & Ad. 787, 24 E. C. L. 164.

Close — **Verdict.** — The verdict sentenced the defendant to **close** confinement in the penitentiary. It was contended that the verdict was bad, as the statute provided for imprisonment at hard labor for life. The court refused to sustain this contention, saying: "One of the definitions of **close** given by Mr. Webster is 'pent up,' which, we take, is tantamount to imprisonment. If this were not so, we think that the word **close** might be stricken out from the verdict as surplusage, and the verdict still be good." *Gladden v. State*, 2 Tex. App. 508.

Close Proximity. (See also NEAR; PROXIMITY.) — In *Ward v. Wilmington, etc., R. Co.*, 109 N. Car. 363, Avery, J., said: "'Near' in common parlance is understood, and by lexicographers is defined, to mean either **close** or 'at no great distance;' while 'in **close** proximity,' or 'in the immediate vicinity,' are equivalent terms."

3. "Close-hauled," in the Regulations for Preventing Collisions at Sea (1879), is not confined to a vessel sailing as "close" as possible to the wind; it may be applied to a vessel on the wind, although she may be able to luff a point or more without losing steerageway. *1 Maule & P. on Shep.* 599, 600, citing *Chadwick v. Dublin Steam Packet Co.*, 6 El. & Bl. 771, 88 E. C. L. 771.

4. Revenue Laws. — This definition was given in *Robertson v. Hedden*, 40 Fed. Rep. 323, where it was held that the word **cloth**, as used in the Tariff Act of 1883, in the provision for cotton **cloth**, was used in its popular and not its commercial meaning. To the same effect see *Ullman v. Hedden*, 38 Fed. Rep. 95. In this latter case the court cited *Maillard v. Law-*

CLOTHES.—See note 1.

rence, 16 How. (U. S.) 251, and *Greenleaf v. Goodrich*, 101 U. S. 278, to the effect that in tariff acts popular terms should receive their common meaning. See also the title **REVENUE LAWS**.

1. In **Will**. (See also the title **WILLS**.—A bequest of all “my linen and *clothes*” was held to pass body linen only. *Hunt v. Hort*, 3 Bro. Ch. 311.

In *Dean v. Gibson*, L. R. 3 Eq. 713, it was said: “Now, as regards personal estate, it is to be observed that, at all times, a disposition by will, in general words, of ‘my personal estate,’ has been held to pass the property of which a testator was possessed at his death; and of course, since the Wills Act, the same rule applies to real estate. Before the Act, however, every devise was regarded as a conveyance, and the presumed intention of the testator was to pass no more of the real estate than he was seized of at the date of the will. The tendency has always been to narrow the construction of a devise of realty. But, as to personal estate, it has always been presumed to have been the intention of the testator to pass whatever he might be possessed of at the date of his death. In the present instance, suppose the testatrix, at her death, had been possessed of nothing but money and clothes. I apprehend that, before the Wills Act, the gift in the will would not have been a specific gift of the identical money and clothes at the date of the will, and nothing more; since the passing of the statute (7 Will. IV. and 1 Vict., c. 26), enacting that every will shall be construed to speak from the death of the testator, such a contention, indeed, cannot arise. There is a case, if I remember right, before Vice-Chancellor Sir L. Shadwell, resembling the present. *Ellis v. Selby*, 7 Sim. 352. The question also is touched upon in Mr. Roper’s book on legacies, under the chapter entitled ‘Rights of Specific Legatees.’ A case of *Bridges v. Bridges*, 8 Vin. Abr. 295, is there cited, where a testator bequeathed ‘the remainder of his estate, viz. his bank stock,

India stock, and South Sea annuities;’ and Lord King held that not those particular funds only, but the whole residuary estate, passed; the specification not being added in a restrictive sense, but as an enumeration of the chief particulars of which the estate consisted. Then the reader is referred to *Chalmers v. Storil*, 2 V. & B. 222, in which Sir W. Grant followed Lord King’s decision. In this case there is reason, stronger perhaps than in any that has been cited, to say that the whole estate passed. The clause in question is the whole will; there is no other bequest. I am not infringing the rule which says that you are to look at the words in order to find out the intention of a testator, when I say you are to look also at all the circumstances of the case. When a person is found making her will (although it is true she does not appoint executors), and the only bequest she makes is a gift of her ‘personal property, consisting of money and clothes,’ the strong presumption is, that she did not intend only to do that which she might have effectually done by giving her ‘money and clothes’ simply. It appears to me there is no *falsa demonstratio* here, there is simply an imperfect enumeration. The testatrix was a markswoman, and not very cognizant of the force of particular expressions. She attempted to enumerate the items of which her personal estate consisted, and failed to mention them all; just as in the case of *Bridges v. Bridges*, 8 Vin. Abr. 295, where three kinds of stock only were enumerated, the court nevertheless held that the whole of the property passed.” And in this case it was held that the whole of the property passed.

Ready-made Clothing.—On a note made payable in ready-made *clothing*, the *clothing* may be called for in parcels, but the payee has no right to call for a garment made for a customer at a stipulated price. There must be a demand and refusal before action can be brought. *Vance v. Bloomer*, 20 Wend. (N. Y.) 196.

Larceny.—See the title **LARCENY**.

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CROSS-REFERENCES.

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For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ADVERSE POSSESSION*, vol. 1, p. 787; *BOUNDARIES*, vol. 4, p. 756; *COMMUNITY PROPERTY*, *post*; *DEEDS*; *EQUITY*; *ESCROW*; *EXECUTIONS*; *FRAUDULENT SALES AND CONVEYANCES*; *HOMESTEAD*; *INJUNCTIONS*; *JUDGMENTS AND DECREES*; *JUDICIAL SALES*; *LEASES*; *LIENS*; *LIS PENDENS*; *MECHANICS' LIENS*; *MORTGAGES*; *REAL PROPERTY*; *RECORDING ACTS*; *REFORMATION AND CANCELLATION OF INSTRUMENTS*; *SHERIFF'S SALES*; *SLANDER OF TITLE*; *SPECIAL ASSESSMENTS*; *TAXATION*; *TAX SALES*; *TAX TITLES*; *TITLE (REAL PROPERTY)*; *USURY*.

I. DEFINITION. — The term "cloud on title" has been defined to be an outstanding claim or incumbrance which, if valid, would affect or impair the title of the owner of a particular estate, and which apparently and on its face has

that effect, but which can be shown by extrinsic proof to be invalid or inapplicable to the estate in question.¹

II. THE TEST. — The true test by which may be determined the question, whether a deed would cast a cloud upon the title of the plaintiff, has been thus stated: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed. If the action would fall of its own weight, without proof in rebuttal, no occasion could arise for the equitable interposition of the court; as in the case of a deed void upon its face, or which was the result of proceedings void upon their face, requiring no extrinsic evidence to disclose their illegality. All actions resting upon instruments of that character must necessarily fail.²

III. PROPERTY SUBJECT TO CLOUD — Real Property. — It has been generally held that a cloud can arise with reference to real property only,³ including rights appurtenant to the use thereof.⁴

1. The Term Defined. — Black's Law Dict.; *Welden v. Stickney*, 1 App. Cas. (D. C.) 343.

In 1 Abbott's L. Dict. 235, it is said, in reference to the term: "This expression, chiefly used in equity jurisprudence, designates some instrument or proceeding, some deed, mortgage, judgment, decree, assessment, tax, or the like, which apparently, and upon its face, assuming it to be valid, impairs the title of a party to real property, but which, upon extrinsic facts, is void, and ought equitably to be annulled or removed."

"A cloud upon one's title is something which shows *prima facie* some right of a third person to it." *Waterbury Sav. Bank v. Lawyer*, 46 Conn. 243.

"A cloud is said to be the semblance of a title, either legal or equitable, or a claim of an interest in lands, appearing in some legal form, but which is, in fact, unfounded, or which it would be inequitable to enforce." *Rigdon v. Shirk*, 127 Ill. 411.

"A cloud upon one's title is something which constitutes an apparent incumbrance upon it, or an apparent defect in it; something that shows *prima facie* some right of a third party, either to the whole or some interest in it." *Cooley on Taxation*, 542, approved in *Detroit v. Martin*, 34 Mich. 170, 22 Am. Rep. 512; *Frost v. Leatherman*, 55 Mich. 33.

Morse, J., in *Whitney v. Port Huron*, 88 Mich. 268, 26 Am. St. Rep. 291, says: "A cloud upon a title is but an apparent defect in it. If the title, sole and absolute in fee, is really in the person moving against the cloud, the density of the cloud can make no difference in the right to have it removed. Anything of this kind that has a tendency, even in a slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is, in my judgment, a cloud upon his title which the law should recognize and remove."

"A cloud upon title is a title or incumbrance apparently valid, but in fact invalid." *Teal v. Collins*, 9 Oregon 89; *Bissell v. Kellogg*, 60 Barb. (N. Y.) 629.

2. *Pixley v. Huggins*, 15 Cal. 129.

It is not many years since Mr. Justice Sel-

den, in dealing with the question as presented in *Ward v. Dewey*, 16 N. Y. 519, commented upon the fact that "none of the cases define what is meant by a cloud upon title, nor attempt to lay down any general rules by which what will constitute such a cloud may be ascertained." But Field, C. J., in *Pixley v. Huggins*, 15 Cal. 129, defines accurately and precisely the test in such cases. And this test has been adopted in other cases. *Rea v. Longstreet*, 54 Ala. 291. See *Lick v. Ray*, 43 Cal. 83; *Lytle v. Sandefur*, 93 Ala. 396; *Davidson v. Seegar*, 15 Fla. 671; *Barnes v. Mayo*, 19 Fla. 542; *Shalley v. Spillman*, 19 Fla. 500; *Benner v. Kendall*, 21 Fla. 584; *Thompson v. Etowah Iron Co.*, 91 Ga. 538.

3. General Rule Confined to Real Property. — *Welden v. Stickney*, 1 App. Cas. (D. C.) 343; *Key City Gas Light Co. v. Munsell*, 19 Iowa 305; *Bushnell v. Avery*, 121 Mass. 148; *Gott v. Hoschna*, 57 Mich. 413; *Leslie v. St. Louis*, 47 Mo. 476; *Ward v. Dewey*, 16 N. Y. 519; *Smith v. New York*, 68 N. Y. 552; *Nichols v. Voorhis*, 18 Hun (N. Y.) 33.

"A distinction is sometimes made between controversies involving the title to real estate and those involving only the title to chattels, or a claim of personal responsibility. A claim of the latter class, it is supposed, will inflict but little injury, while in the former case the value of real estate may be seriously impaired by such a cloud upon the title. Whether courts of equity will interpose to set aside a bill of exchange, promissory note, or bond, etc., to which there is a perfect defense at law, has been much doubted. See *Ward v. Dewey*, 16 N. Y. 525, Selden's opinion." *Fonda v. Sage*, 48 N. Y. 173.

4. Right of Way. — *Sanxay v. Hunger*, 42 Ind. 44.

Water Power. — Under section 658 of the Civil Code of California, which provides that real or immovable property consists of land, that which is affixed to land, that which is incidental or appurtenant to land, and that which is immovable by law; and section 662, which provides that "a thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse, or of a passage

Personal Property. — The term has sometimes been used, however, with reference to rights in relation to personal property.¹

IV. THE EQUITABLE JURISDICTION — 1. Principle of Its Exercise. — The jurisdiction exercised in cases of this kind is founded upon the administration of a protective or preventive justice. Relief is afforded upon the principle of *quia timet*; that is, that the instruments sought to be canceled may be vexatiously or injuriously used against the rightful owner, when the evidence to impeach them may be lost; or that they may at the time throw a cloud or suspicion over the complainant's title or interest, and this where his title is good at law. *A fortiori*, the party will have a right to come into equity to have such instruments delivered up and canceled when he has a defense against them

for light, air, or heat from or across the land of another;" it was held that a right to use an iron pipe through which water necessary to the use of a mill was conducted, including the right to the water itself, was real property, and that an adverse claim to said water pipe and water would constitute a cloud upon the title thereof. *Standart v. Round Valley Water Co.*, 77 Cal. 399.

Use of Spring. — In *Lyon v. Ross*, 1 Bibb (Ky.) 466, a decree establishing the complainant's right to the quiet enjoyment of the use in common with the defendant of a spring through which the dividing line of the land belonging to the parties passed, the defendant having claimed the exclusive right thereto, was affirmed.

1. Personalty. — See *Springport v. Teutonia Sav. Bank*, 75 N. Y. 397; *Lewen v. Stone*, 3 Ala. 485.

Chattel Mortgage. — A bill in equity was filed by the assignees of a corporation, praying for a decree that a recorded mortgage of personal property, held forth by the respondent as having been made to him by the corporation, might be declared void, and alleging that a sale of the property by the assignees while the title to it should remain so in dispute would be detrimental to the creditors. The court said: "There is a cloud upon their title which seriously affects its value. The mortgage is upon record, and it is evident that they cannot sell the property with any prospect of obtaining its fair value, because the purchaser would know that he exposes himself to an action, if the defendant's claim is well founded." And, quoting 2 Story's Eq., § 694, which sets forth the doctrine that "whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and canceled, or by making any other decree which justice and the rights of the parties may require," the court further said: "This statement of the principle is precisely applicable to the case at bar." *Sherman v. Fitch*, 98 Mass. 59.

Spurious Certificates of Stock. — In *New York, etc., R. Co. v. Schuyler*, 17 N. Y. 592, spurious certificates of stock in a corporation, issued by the officer having apparent authority to do so, undistinguishable upon their face from the

certificates of genuine stock, and outstanding in the hands of numerous holders as evidence of interests in the property of the corporation, were held to be clouds upon the title of the genuine stockholders which a court of equity would remove. The court said: "In order to evolve the principle of this controversy, we may suppose that a natural person is clothed with the legal title to, and is in possession of, an extensive line of railroad, receiving the gross earnings for the purpose of dividing the net profits amongst a large class of individuals, whose right, in certain fixed proportions, is evidenced by a certificate or declaration of trust, which each one holds, signed by the legal owner or his authorized agent. If, then, a new class of individuals should come forward claiming the same rights, and presenting, as the evidence thereof, instruments of the same kind in all respects, bearing on their face all the appearances of genuineness and authority, but in fact unauthorized and spurious, what would be the rights and the duty of the legal owner in that exigency? Upon the settled principles of equity, it would be his right and his duty to call the false claimants into court, in order to remove the cloud upon the equitable interests of those whom he represented. * * * There is no head of equity jurisdiction more firmly established than that which embraces the cancellation of instruments which are capable of a vexatious use after the means of defense at law may become impaired or lost, or when they are calculated to throw a cloud upon the title or interest of the party seeking relief. * * * These shares of stock are a description of property as much entitled to invoke the protective remedies peculiar to courts of equity as any other. In applying these remedies to any other kind of property thus clouded and depressed by a written instrument professing to be, and on its face actually being, an incumbrance upon it, no doubt, it seems to me, would arise. * * * It is difficult to separate, even in abstract contemplation, the rights and interests of a corporation from those of the shareholders. * * * If, therefore, I have been successful in showing that the fraudulent certificates of stock are instruments of such annoyance and vexation, in depressing values and disturbing the fair enjoyment of rights, that they ought not to be allowed to stand, then this suit by the corporation rests firmly upon that branch of equity jurisdiction which includes the cancellation of such instruments."

which is good in equity but not available at law.¹

2. Circumstances of Its Exercise — *a*. **ALLEGED CLOUD MUST BE SUBSTANTIAL.** — The alleged cloud must be *prima facie* substantial,² and cast such a suspicion on the title or interest to which it is hostile³ as will injuriously affect the market value thereof;⁴ or seriously embarrass the owner by preventing, affecting, or impeding the free sale or other disposition of his title or interest in the property;⁵ or cause a reasonable fear that the alleged title,

1. Grounds of Equitable Cognizance. — 2 Story's Eq. Juris. (13th ed.), § 694; Marston *v.* Rowe, 39 Ala. 722; Martin *v.* Hewitt, 44 Ala. 418; Lehman *v.* Shook, 69 Ala. 486; Sale *v.* McLean, 29 Ark. 612; Brooks *v.* Howland, 58 N. H. 98; Field *v.* Holbrook, 14 How. Pr. (N. Y. Super. Ct.) 105; Byerly *v.* Humphrey, 95 N. Car. 151; Eckman *v.* Eckman, 55 Pa. St. 269; Drill's Appeal, 113 Pa. St. 510; Anderson *v.* Talbot, 1 Heisk. (Tenn.) 407. See also the cases cited throughout this title. And see the title EQUITV.

"The jurisdiction takes its rise in the doctrines of *quia timet*, in order to give repose and peace to the party in possession, by virtue of a rightful claim or title against him who might vex and harass with suits after the right had been fairly tested in a court of law, or against a deed or other evidence of title which had been fraudulently obtained, and which might be set up after the evidence which could manifest its true character had become obscure or had passed away." Huntington *v.* Allen, 44 Miss. 654.

2. Small Charge on Land. — In Patch *v.* Morisett, (Va. 1895) 22 S. E. Rep. 173, the existence of a lien for a small paving tax was held to be not such a cloud on the title as to warrant the enjoining of a sale under a deed of trust given for the price thereof, because the trustee could be compelled to pay the tax out of the purchase money, and it was further held that a sale of land under a trust deed for the price of the land conveyed thereby would not be enjoined because upon a part of the same tract, other than that conveyed by the trust deed, a family burying ground was reserved by a previous grantee, there being sufficient land remaining in the seller, the beneficiary of the trust deed, to afford ingress to the burying ground and egress therefrom without touching the land conveyed by the trust deed. The court said: "There is no reason to suppose that if it was an existing incumbrance upon the property for which the appellees were liable, the trustees would not have made a proper application of the purchase money. They could, without doubt, have been compelled to do so, and it is scarcely possible that so small a charge could seriously have affected the sale of the property; nor do we think that the reservation of the burial lot constitutes any substantial objection to the title."

3. Lease. — "To illustrate, suppose the defendant's claim was a lease from the plaintiff; such lease would be a rightful claim, which might greatly lessen the market value of the property, yet no one would contend that an action *quia timet* would lie in such case. But in order to maintain the action, it should appear that the claim of title or right was hostile to the title of the plaintiff." Campbell *v.* Disney, 93 Ky. 41.

Conveyances Not in Conflict. — The owner of land conveyed an undivided third thereof, the consideration therefor being an agreement by the grantee to prosecute the claim of the grantor to the land before the board of land commissioners and the courts of the United States, the title, however, resting absolutely in the grantee, his agreement not constituting the condition upon a breach of which the title would revert in the grantor. Such grantee failed to perform his agreement. A subsequent deed by the grantor contained two descriptions, the first of which described the interest in the land thereby conveyed as the undivided one-third theretofore conveyed as aforesaid, the second description being of "all the undivided one-third part" of the land, without designating what third. It was held that, the second description controlling, the conveyances were not in conflict and could exist as valid titles independently of each other, and that the first conveyance therefore could not in any event be a cloud on the interest of the grantee under the second. Hartman *v.* Reed, 50 Cal. 485.

A deed of the grantor's "now remaining" interest in certain lands does not defeat a prior unrecorded conveyance because it is not a second conveyance of anything previously conveyed; the deeds may stand together. Eaton *v.* Trowbridge, 38 Mich. 454.

Mortgage by Co-tenant. — A mortgage executed by a tenant in common in exclusive possession, but claiming no greater interest than an undivided half, is not a cloud on the title of his co-tenant. Ward *v.* Dewey, 16 N. Y. 519.

4. Market Value Affected — *United States.* — Lyon *v.* Alley, 130 U. S. 177.

Alabama. — Anderson *v.* Hooks, 9 Ala. 704; Marston *v.* Rowe, 39 Ala. 722; Martin *v.* Hewitt, 44 Ala. 418.

Georgia. — Dart *v.* Orme, 41 Ga. 376.

Illinois. — Reed *v.* Tyler, 56 Ill. 288; Hodgen *v.* Guttery, 58 Ill. 431; Ames *v.* Sankey, 128 Ill. 523.

Kansas. — Douglass *v.* Nuzum, 16 Kan. 516.

Maryland. — Holland *v.* Baltimore, 11 Md. 186, 69 Am. Dec. 195.

Michigan. — King *v.* Carpenter, 37 Mich. 363.

Minnesota. — Conkey *v.* Dike, 17 Minn. 457.

Mississippi. — Fowler *v.* McCartney, 27 Miss. 509; Glazier *v.* Bailey, 47 Miss. 395; Phelps *v.* Harris, 51 Miss. 789.

Nebraska. — Corey *v.* Schuster, 44 Neb. 269.

Tennessee. — Anderson *v.* Talbot, 1 Heisk. (Tenn.) 407.

See also Carroll *v.* Brown, 28 Gratt. (Va.) 791.

5. Impeding Free Alienation. — Lehman *v.* Shook, 69 Ala. 486; Hodgen *v.* Guttery, 58 Ill. 431; Key City Gas Light Co. *v.* Munsell, 19 Iowa 305; Tucker *v.* Kenniston, 47 N. H. 267, 93 Am. Dec. 425. See also Van Wyck *v.*

interest, or claim constituting the alleged cloud may be at some time vexatiously or injuriously asserted against him.¹

Unfounded Apprehension. — Where the bill "discloses no more than an inquiet and unfounded apprehension" as to the validity of the complainant's title to lands of which he is in possession, "and a false, clamorous assertion of a hostile title" by the defendants, founded on supposed defects in a deed executed by their trustee to the complainant's vendor, "a court of equity will not interfere to quiet the one or to silence the other."²

b. PRETENDED CLAIM MUST BE APPARENTLY VALID. — The rule applicable to this class of cases is that equity will interpose only where the pretended title which it is alleged constitutes a cloud, or the proceeding which it is apprehended will create one, is apparently valid on its face, and the party in possession will be compelled to resort to extrinsic evidence to show the invalidity of the pretended title and to defend his own. If the instrument or proceeding is on its face plainly illegal and void³ there is no

Knevals, 106 U. S. 360; *Damouth v. Klock*, 29 Mich. 289.

"Equity interferes to remove clouds upon title because they embarrass the owner of the property clouded, and tend to impede his free sale and disposition of it." *Bissell v. Kellogg*, 60 Barb. (N. Y.) 629, *affirmed* 65 N. Y. 432. See also *Douglass v. Nuzum*, 16 Kan. 516; *Byerly v. Humphrey*, 95 N. Car. 151; *Kay v. Scates*, 37 Pa. St. 31, 78 Am. Dec. 399.

1. Where Alleged Title May Be Used Vexatiously — *United States*. — *Phelps v. Harris*, 101 U. S. 370; *Lyon v. Alley*, 130 U. S. 177.

Alabama. — *Martin v. Hewitt*, 44 Ala. 418.

Connecticut. — *Hartford v. Chipman*, 21 Conn. 488.

Maine. — *Gerry v. Stimson*, 60 Me. 186.

Maryland. — *Polk v. Rose*, 25 Md. 153, 89 Am. Dec. 773.

Massachusetts. — *Martin v. Graves*, 5 Allen (Mass.) 601.

New Hampshire. — *Brooks v. Howland*, 58 N. H. 98.

New York. — *Townsend v. New York*, 77 N. Y. 542.

North Carolina. — *Murray v. Hazell*, 99 N. Car. 168.

Pennsylvania. — *Haines's Appeal*, 73 Pa. St. 169; *Stewart's Appeal*, 78 Pa. St. 88.

Tennessee. — *Anderson v. Talbot*, 1 Heisk. (Tenn.) 407.

To constitute a cloud which the court will interfere to remove, it must appear that it is prejudicial, and that it involves the existence of some reason to apprehend injury, or that it is set on foot and relied upon to the prejudice of the title. *Crooke v. Andrews*, 40 N. Y. 547.

Suits. — "Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title and to quiet the possession of real estate is to protect the owner of the legal title from being disturbed in his possession or harassed by suits in regard to that title." *Frost v. Spitley*, 121 U. S. 552.

2. March v. England, 65 Ala. 275. See also *Washburn's Appeal*, 105 Pa. St. 480; *Borst v. Simpson*, 90 Ala. 373; *Watson v. Wigginton*, 28 W. Va. 533.

3. Invalidity Apparent on Face of Instrument or Proceeding — *United States*. — *Ewing v. St. Louis*, 5 Wall. (U. S.) 418; *Bunce v. Gallagher*,

5 Blatchf. (U. S.) 481; *Phelps v. Harris*, 101 U. S. 370; *Van Wyck v. Knevals*, 106 U. S. 360; *Chapman v. Brewer*, 114 U. S. 158; *Lyon v. Alley*, 130 U. S. 177; *Coulson v. Portland, Deady* (U. S.) 481; *West v. Duncan*, 42 Fed. Rep. 430.

Alabama. — *Lyon v. Hunt*, 11 Ala. 295, 46 Am. Dec. 216; *Rea v. Longstreet*, 54 Ala. 291; *Daniel v. Stewart*, 55 Ala. 278; *Mitchell v. Spence*, 62 Ala. 450; *Cowan v. Sapp*, 74 Ala. 44; *Borst v. Simpson*, 90 Ala. 373; *Barclay v. Henderson*, 44 Ala. 269.

Arkansas. — *Chaplin v. Holmes*, 27 Ark. 414; *Crane v. Randolph*, 30 Ark. 579; *Davis v. Hare*, 32 Ark. 386; *Lawrence v. Zimpleman*, 37 Ark. 643.

California. — *Head v. Fordyce*, 17 Cal. 149; *Ramsdell v. Fuller*, 28 Cal. 37, 87 Am. Dec. 103; *Lick v. Ray*, 43 Cal. 83; *Cohen v. Sharp*, 44 Cal. 29; *Hearst v. Egglestone*, 55 Cal. 365; *Pearson v. Creed*, 78 Cal. 144; *Tibbetts v. Fore*, 70 Cal. 242.

Connecticut. — *Hartford v. Chipman*, 21 Conn. 488; *Munson v. Munson*, 28 Conn. 582, 73 Am. Dec. 693; *Alden v. Trubee*, 44 Conn. 455.

District of Columbia. — *Mayse v. Gaddis*, 2 App. Cas. (D. C.) 20.

Florida. — *Sloan v. Sloan*, 25 Fla. 53; *Benner v. Kendall*, 21 Fla. 584.

Georgia. — *Dart v. Orme*, 41 Ga. 376.

Illinois. — *Reed v. Tyler*, 56 Ill. 288; *Fredrick v. Ewig*, 82 Ill. 363; *Brooks v. Kearns*, 86 Ill. 547; *Gage v. Williams*, 119 Ill. 563; *Stout v. Cook*, 37 Ill. 283.

Indiana. — *Darkies v. Bellows*, 94 Ind. 64; *Killian v. Andrews*, 130 Ind. 579; *Watkins v. Brunt*, 53 Ind. 208.

Maine. — *Briggs v. Johnson*, 71 Me. 235.

Michigan. — *Stoddard v. Prescott*, 58 Mich. 542.

Minnesota. — *Scribner v. Allen*, 12 Minn. 148; *Bennett v. Hotchkiss*, 17 Minn. 89; *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468; *Gilman v. Van Brunt*, 29 Minn. 271; *Conkey v. Dike*, 17 Minn. 457.

Missouri. — *Gamble v. St. Louis*, 12 Mo. 617; *Bayha v. Taylor*, 36 Mo. App. 427.

Nebraska. — *Corey v. Schuster*, 44 Neb. 269.

New Hampshire. — *Brooks v. Howland*, 58 N. H. 98.

New Jersey. — *Foley v. Kirk*, 33 N. J. Eq. 170.

cloud, and no occasion for equitable interference. As has been said, "it

New York. — *Lewis v. Buffalo*, Sheld. (N. Y.) 80; *Longley v. Hudson*, 4 Thomp. & C. (N. Y.) 353; *Crooke v. Andrews*, 40 N. Y. 547; *Hebrew Free School Assoc. v. New York*, 4 Hun (N. Y.) 446; *Field v. Holbrook*, 6 Duer (N. Y.) 597; *Cook v. Newman*, 8 How. Pr. (N. Y. Supreme Ct.) 523; *Van Doren v. New York*, 9 Paige (N. Y.) 388; *Crevier v. New York*, 12 Abb. Pr. N. S. (N. Y. C. Pl.) 340; *Clark v. Dunkirk*, 12 Hun (N. Y.) 181, *affirmed* in 75 N. Y. 612; *Mutual L. Ins. Co. v. Holladay*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 16; *Rogers v. Sandy Hill*, 14 N. Y. Wkly. Dig. 45; *Hotchkiss v. Elting*, 36 Barb. (N. Y.) 38; *Butler v. Viele*, 44 Barb. (N. Y.) 166; *Coit v. Grey*, 25 Hun (N. Y.) 444; *Heywood v. Buffalo*, 14 N. Y. 534; *Tisdale v. Jones*, 38 Barb. (N. Y.) 523; *Travis v. Phelps*, 86 Hun (N. Y.) 594; *Mellen v. Banning*, 60 Hun (N. Y.) 151; *Cox v. Clift*, 2 N. Y. 118; *Scott v. Onderdonk*, 14 N. Y. 9, 67 Am. Dec. 106; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *New York, etc., R. Co. v. Schuyler*, 17 N. Y. 599; *Farnham v. Campbell*, 34 N. Y. 480; *Astor v. New York*, 37 N. Y. Super. Ct. 539, *reversed* on other grounds in 39 N. Y. Super. Ct. 120, 62 N. Y. 580; *Hatch v. Buffalo*, 38 N. Y. 276; *Fonda v. Sage*, 48 N. Y. 173; *Newell v. Wheeler*, 48 N. Y. 486; *Shaara Tephila v. New York*, 53 How. Pr. (N. Y. Supreme Ct.) 213; *Smith v. Fellows*, 41 N. Y. Super. Ct. 37; *Overing v. Foote*, 65 N. Y. 263; *Hassan v. Rochester*, 67 N. Y. 528; *Peyser v. New York*, 70 N. Y. 497, 26 Am. Rep. 624; *Boyle v. Brooklyn*, 71 N. Y. 1; *Wiggin v. New York*, 9 Paige (N. Y.) 16; *Bockes v. Lansing*, 74 N. Y. 437; *Townsend v. New York*, 77 N. Y. 542; *Lehman v. Roberts*, 86 N. Y. 232; *Levy v. Hart*, 54 Barb. (N. Y.) 248; *Strusburgh v. New York*, 87 N. Y. 452; *Rumsey v. Buffalo*, 97 N. Y. 114; *King v. Townshend*, 141 N. Y. 358.

North Carolina. — *Busbee v. Macy*, 85 N. Car. 329; *Basket v. Moss*, 115 N. Car. 448, 44 Am. St. Rep. 463.

Ohio. — *Haff v. Fuller*, 45 Ohio St. 495; *Lowmiller v. Fouser*, 52 Ohio St. 123.

Pennsylvania. — *Clark v. Gibson*, 10 W. N. C. (Pa.) 522; *Lewis v. Parrott*, 37 W. N. C. (Pa.) 330.

Vermont. — *Eldridge v. Smith*, 34 Vt. 484.

West Virginia. — *Cunningham v. Brown*, 39 W. Va. 588.

Wisconsin. — *Head v. James*, 13 Wis. 641; *Moore v. Cord*, 14 Wis. 213; *Gamble v. Loop*, 14 Wis. 465; *Hamilton v. Fond du Lac*, 25 Wis. 490; *Maxon v. Ayers*, 28 Wis. 612; *Shepardson v. Milwaukee County*, 28 Wis. 593; *Pier v. Fond du Lac*, 38 Wis. 470; *Horn v. Garry*, 49 Wis. 464; *Pier v. Fond du Lac County*, 53 Wis. 421; *Smith v. Smith*, 23 Wis. 176, 99 Am. Dec. 153; *Cornish v. Frees*, 74 Wis. 490; *S. L. Sheldon Co. v. Mayers*, 81 Wis. 627.

Canada. — *Dynes v. Bales*, 25 Grant's Ch. (U. C.) 593, *distinguishing* *Hurd v. Billington*, 6 Grant's Ch. (U. C.) 145; *Ontario Industrial Loan, etc., Co. v. Lindsey*, 3 Ont. Rep. 66; *Ross v. Harvey*, 3 Grant's Ch. (U. C.) 649; *Harkin v. Rabidon*, 7 Grant's Ch. (U. C.) 243; *Truesdell v. Cook*, 18 Grant's Ch. (U. C.) 534; *Keefer v. McKay*, 10 Ont. Pr. 345.

See also *Simpson v. Howden*, 3 Myl. & C. 97. And note to *Colman v. Sarrel*, 1 Ves. Jr. 50, and *Whistler v. Newman*, 4 Ves. Jr. 129; *Buchanan v. Campbell*, 14 Grant's Ch. (U. C.) 163; *Greenwood v. Adams*, 80 Cal. 74.

There is a cloud so long as by the record it is at least questionable if the title of the defendant is not *prima facie* better than the complainant's. *Eaton v. Trowbridge*, 38 Mich. 454.

In *Hanson v. Johnson*, 20 Minn. 194, it was held that an execution issued more than ten years after the entry of judgment is void (Minnesota Gen. Stat., c. 66, §§ 262, 264), and no sale thereunder will create a cloud upon title to real estate so as to justify an injunction to restrain it.

Rule Stated. — In *Lehman v. Roberts*, 86 N. Y. 232, the following language was used: "An action to remove a cloud upon title, or to restrain a sale or conveyance upon the ground that it would create such a cloud, can only be maintained where the pretended title, which is alleged to constitute the cloud, or the proceeding which it is apprehended will create one, is apparently valid on its face, and the party in possession will be compelled to resort to extrinsic evidence to show the invalidity of the pretended title, and to defend his own. But when the pretended claim is invalid on its face, or where it requires that extrinsic facts be proved for the purpose of establishing its validity, a court of equity will not interfere on the ground that the facts which are essential to sustain the pretended claim do not exist, but will leave the party in possession to his defense. These are the general and well-settled rules, subject, perhaps, to some exceptions in special cases, which have no application to the present one. *Heywood v. Buffalo*, 14 N. Y. 534; *Scott v. Onderdonk*, 14 N. Y. 9, 67 Am. Dec. 106; *Farnham v. Campbell*, 34 N. Y. 480; *Fonda v. Sage*, 48 N. Y. 173; *Venice v. Woodruff*, 62 N. Y. 467, 20 Am. Rep. 495; *Springport v. Teutonia Sav. Bank*, 75 N. Y. 397."

"The court does not entertain such an action to remove a doubt which might be created in the minds of persons dealing with the title, provided the means of forming a correct legal judgment are patent on the face of the instrument or proceeding by which the existence or nonexistence of the right in question must be determined." *Mellen v. Mellen*, 139 N. Y. 210.

Slander of Title. — In *Scott v. Onderdonk*, 14 N. Y. 9, 67 Am. Dec. 106, *Denio, C. J.*, said: "The party whose estate is questioned may naturally wish to have the matter speedily determined, as he may in the meantime suffer inconveniences and even actual damage on account of the discredit attaching to his title by reason of the unfounded claim. But unless the circumstances are such as to sustain an action for slander of title, the law regards the injury too speculative to warrant its interference. I am not able, therefore, to concur in the views of the city court of Brooklyn, contained in the opinion which has been laid before us, to the effect that in every case where an instrument in the hands of another person is calculated to induce the belief that the title

would be idle to set in motion the machinery of the law to nullify that which

of the plaintiff is invalid, an action will lie to set it aside." See also *Ryerson v. Willis*, 81 N. Y. 277.

Reason of Rule. — In *Field v. Holbrook*, 14 How. Pr. (N. Y. Super. Ct.) 106, the court said: "Although there is some contrariety in the earlier cases, the law is now settled that the court will not order an instrument to be delivered up and canceled which, upon its face, is plainly illegal and void. * * * Nor a deed of lands, when it is certain that, from its nature and contents, it can throw no cloud upon the title of the plaintiff. * * * And in all these cases the denial of the relief rests upon one and the same ground, namely, that the plaintiff is exposed to no hazard from any future litigation, since it is certain that in no action founded on the instrument can a recovery be had against him. * * * If the possibility that a void instrument may be vexatiously and maliciously used were a sufficient reason for ordering it to be delivered up and canceled, it is plain that the relief sought ought to have been granted in every case in which it has been denied, and indeed ought to be granted in every case in which, upon sufficient grounds, the instrument is alleged to be void; for in all such cases that have arisen, or that can arise, the same possibility will be found to exist."

Color of Title in Defendant. — To constitute a cloud some color of title must be shown in the defendant. Accordingly a petition praying for the removal of a cloud from the title to certain lands which states merely that the defendant had conveyed away the lands, but does not aver that he had any title in them to convey, is bad on demurrer. *Dunklin County v. Clark*, 51 Mo. 60.

Prima Facie Record Title. — It is not necessary, in order to maintain an action to remove the cloud and quiet the title, that the claimant should have a *prima facie* record title which the real owner must call in extrinsic evidence to overthrow. *Fonda v. Sage*, 48 N. Y. 173.

Presumption of Removal of Cloud. — A bill to restrain further proceedings to enforce a tax upon lands cannot be sustained as a bill to remove a cloud from the title to the lands, where a levy has been made upon personal property to satisfy the tax, since presumptively the cloud is already removed. *Henry v. Gregory*, 29 Mich. 68.

Sheriff's Sale. — Where a judgment is void on its face equity will not enjoin an execution sale of land thereunder on the ground that it will create a cloud on title. *Kirk v. Duren*, 45 S. Car. 597.

Grantor Out of Possession. — A deed or other instrument purporting to convey land that shows upon its face that the grantors therein were out of possession of the land granted at the time of its execution, and that such land at the time was adversely held by another, is void upon its face as to such adverse occupant, and as to him does not create such a cloud upon his title as will authorize the interposition of a court of equity on his behalf for its removal. *Reves v. Middleton*, 36 Fla. 99.

Deed Subject to Homestead Rights. — A deed by an assignee in bankruptcy, made subject

on its face to a bankrupt's homestead, does not cast a cloud upon the homestead title and does not furnish ground for an action to set it aside as such. *Murray v. Hazell*, 99 N. Car. 168.

Redemption Receipts. — In *Brown v. Cohn*, 88 Wis. 627, it was held that redemption receipts not countersigned by the county treasurer, as required by section 1167 *Wisconsin Rev. Stat.*, are not legal evidence of the redemption of the lands described in them, and, being void on their face, do not constitute a claim of redemption or cloud upon the title which a court of equity will interfere to cancel or set aside, for their invalidity would necessarily appear whenever they might be produced, even though they might be used to corroborate evidence of actual payment of the proper sums for redemption.

Husband and Wife. — In *Mulligan v. Baring*, 3 Daly (N. Y.) 75, it was held that an attachment against the property of a husband and a levy thereunder upon the wife's realty and the filing of a notice of *lis pendens* constitute *prima facie* no real or apparent incumbrance upon the wife's title, and a court of equity will not interfere, at the wife's instance, to discharge the attachment and levy and vacate the notice of *lis pendens* as a cloud upon her title. See the title HUSBAND AND WIFE.

Mining Property. — It has been said that, "although, as a general rule, it is true that an action cannot be maintained by a plaintiff to remove, as a cloud upon his title, conveyances or liens or incumbrances which appear to be void upon the face thereof, yet the authorities show that a different rule prevails when the subject of the controversy is mines or mining property or claims." *Allegany Oil Co. v. Bradford Oil Co.*, 21 Hun (N. Y.) 26, *affirmed* without opinion in 86 N. Y. 638. See the title MINES AND MINING CLAIMS.

In Tennessee it is held that a bill will lie to remove a cloud upon a title and declare a deed which constitutes that cloud void and have the same canceled, whether its character as such appears from the face of the instrument or not. *Jones v. Perry*, 10 Yerg. (Tenn.) 83, 30 Am. Dec. 430; *Anderson v. Talbot*, 1 Heisk. (Tenn.) 407; *Almony v. Hicks*, 3 Head (Tenn.) 39.

Missouri. — In *Merchants' Bank v. Evans*, 51 Mo. 335, the court said: "I know that the authorities are somewhat conflicting in regard to what sort of titles constitute a cloud, so as to warrant a court of equity to interfere and remove it. Some of the courts hold that if the defect is apparent on the deed the law will not entertain jurisdiction; but I think that the weight of authority and reason sustain the position that if the defect is such as to require legal acumen to discover it, whether it appears on the deed or proceedings, or is to be proven *aliunde*, courts of equity entertain jurisdiction to remove the cloud. * * * The remarks of Judge Napton in *Gamble v. St. Louis*, 12 Mo. 617, are rather too broad and in conflict with the weight of authority, if he intended to be understood as holding in all cases where the defect appears on the face of the proceedings a court of equity will not interfere, but leave the parties to their remedy at law."

appears on its own face to be null." ¹

Prima Facie Evidence — Tax Deeds. — Where the instrument, as in the case of tax deeds and certificates, is by statute made presumptive evidence of a good title in the holder, so that he may rely upon it until the illegality thereof is established, equity will grant relief on the ground that a cloud exists or is imminent. ²

Character of Record Intended. — When it is said that equity will not interfere where the asserted claim is void upon the face of the records, the records thus spoken of and intended are some public records of the county or state in which the lands are situate, and of which the purchasers and others having occasion to examine the title are bound to take notice. The records of neither the general nor the local land office of the United States are of this character. ³

c. DEFENDANT'S TITLE MUST BE IN FACT INVALID, COMPLAINANT'S VALID. — In order for a person successfully to invoke the interposition of equity to remove a cloud, he must not only establish the validity of his own title, but also the invalidity of his opponent's. ⁴

But in *Verdin v. St. Louis*, 131 Mo. 29, *Sherwood, J. (Brace, C. J., and Robinson, J., concurring)*, disapproved of the "legal acumen" doctrine declared in *Merchants' Bank v. Evans*, 51 Mo. 345, that whenever one has to consult a lawyer as to whether he has a good title to land, this circumstance authorizes a proceeding to remove a cloud on title, and approved *Clark v. Covenant Mut. L. Ins. Co.*, 52 Mo. 272, and subsequent cases announcing a different rule.

Extrinsic Facts. — In several cases it has been stated that to induce a court of chancery to order a writing to be canceled or surrendered as constituting a cloud upon title, it must, at least, be an instrument which upon its face is, or with the aid of extrinsic facts may be, some evidence of a right adverse to that of the party claiming relief. *Nickerson v. Loud*, 115 Mass. 94; *Leeds v. Wheeler*, 157 Mass. 67; *Thompson v. Etowah Iron Co.*, 91 Ga. 538.

In the first two of these cases it was held that a paper signed by A. and recorded in the registry of deeds, giving notice that certain realty held by B. is subject to an equitable interest in favor of A., and that he forbids all persons purchasing the same, does not constitute a cloud upon title.

1. *Paine, J.*, in *Meloy v. Dougherty*, 16 Wis. 269.

2. **For a Full Discussion** of tax proceedings, deeds, etc., in this connection, see the titles **TAXATION; TAX SALES; TAX TITLES; SPECIAL ASSESSMENTS.**

Patent for Lands. — "A patent from the state for lands in lieu of a sixteenth or thirty-sixth section granted to it by the Act of Congress of March 3, 1853, shows at least a *prima facie* title in the holder, on which he could recover in ejectment in the absence of evidence overcoming it. The patent is attended with the presumption that every step necessary to its issuance has been complied with, including the listing of the land to the state. Unless this is so, it is difficult to perceive the use of such an instrument. The existence of such a patent creates a cloud upon the true title." *Southern Pac. R. Co. v. Stanley*, 49 Fed. Rep. 263. See also *Steel v. St. Louis Smelting, etc., Co.*, 106 U. S. 447; *Rose v. Richmond Min. Co.*, 17 Nev. 25;

Danforth v. Morrical, 84 Ill. 456; *McGhee v. Wright*, 16 Ill. 555.

Acts of Public Officers. — Where a lease, which was executed by the department of docks in pursuance of a statutory authority conferred upon it, was regular on its face, but was claimed to be invalid on account of the omission of certain statutory formalities, it was held that, although no presumption as to the validity of the lease arose by virtue of the statute from its execution and delivery, yet as such presumption was created in favor thereof by the general presumption of law as to the regularity of all acts of public officers, an action to have the same declared void as a cloud on the title was properly brought and could be maintained. The court said: "The lease is not void upon its face, therefore, but valid, because it is the act of public officers vested with power to perform it, and because of the presumption of law in favor of the legality of such acts. When the defendants, for example, are assailed in their possession, they exhibit the lease, and the possession is maintained. It is not until proof is made of the omission to observe the formalities mentioned that the lease fades away as an authority to keep the possession." *New York v. North Shore Staten Island Ferry Co.*, 9 Hun (N. Y.) 620.

3. *Gile v. Hallock*, 33 Wis. 523.

4. **Actual Invalidity of Pretended Claim.** — *Phelps v. Harris*, 101 U. S. 370; *Benner v. Kendall*, 21 Fla. 584; *Huntington v. Allen*, 44 Miss. 654; *Banks v. Evans*, 10 Smed. & M. (Miss.) 62, 48 Am. Dec. 734; *Boyd v. Thornton*, 13 Smed. & M. (Miss.) 344; *Brown v. Goodwin*, 75 N. Y. 409; *Ryerson v. Willis*, 81 N. Y. 277; *Bork v. Buffalo*, (Supreme Ct.) 18 N. Y. St. Rep. 458, *affirmed* in 127 N. Y. 64. See also *Holland v. Baltimore*, 11 Md. 186, 69 Am. Dec. 195.

Complainant's Title. — In *Glazier v. Bailey*, 47 Miss. 402, it is said that the party who invokes this jurisdiction must have a good title to the land, either at law or in equity. See also *Lawrence v. Zimpleman*, 37 Ark. 644. And see the cases cited throughout this title.

Where the cancellation of an instrument is sought on the principle *quia timet*, the complainant, to be successful, must show the title

When Defendant's Claim Valid. — If the claim sought to be removed is valid, and may be enforced, either at law or in equity, it cannot be said to be a cloud.¹

Deeds Operative as to Undivided Half of Premises. — Thus it has been held that if the deeds sought to be canceled as a cloud upon the plaintiff's title are valid and operative muniments of title in favor of the defendant to the extent of one undivided half of the premises to which they relate, although the plaintiff may be the rightful owner, legal and equitable, of the other half, the prayer for cancellation must be denied.²

Both Titles Equitable. — It has been held that where neither of the parties to a controversy about the title to a tract of land has obtained the legal title, but their titles are both purely equitable and emanate from the same source, and each party is equally innocent and has been equally diligent, he who has the elder equity must receive the legal title.³

Warrantor in Chain of Title. — It has been held that a complainant who has no legal title to the land, and is simply a warrantor in the chain of title, may invoke the interference of equity to remove a cloud.⁴

Right of Purchaser After Expiration of Period of Redemption. — The purchaser of lands on sale under execution after the expiration of the period of redemption, without redemption, acquires an equitable title which entitles him to maintain an action for the cancellation of instruments which, within the definition of courts of equity, are clouds on title.⁵

d. WHEN EVIDENCE TO REBUT CLAIM MAY BE LOST. — Where there is a defense valid in law and which rests upon evidence which may be lost by lapse of time or the imperfections of memory, the court will entertain the litigation without waiting for the assertion of the claim;⁶ but there is no cloud where neither lapse of time nor change of circumstances can weaken the means of defense,⁷ especially where such defense can be conclusively established by matters of record.⁸

to the relief free from all reasonable doubt, and it must also appear that it is clearly against conscience that the instrument should be permitted to remain uncanceled. *Shotwell v. Shotwell*, 24 N. J. Eq. 378. See also *Jones v. Georgia R. Co.*, 62 Ga. 718.

1. **When Claim Enforceable Either at Law or in Equity.** — *Rigdon v. Shirk*, 127 Ill. 411; *Shults v. Shults*, 159 Ill. 663, 50 Am. St. Rep. 188; *Hodgdon v. Clark*, 84 Me. 314. See also *Shanahan v. Crampton*, 92 Cal. 9; *Biddick v. Kobler*, 110 Cal. 191.

A bill to remove a cloud upon the complainant's title will not be sustained when by the case made by the bill the alleged cloud appears to be supported by an equitable right in the defendant. *Torrent v. Muskegon Booming Co.*, 22 Mich. 21.

Obligee in Title Bond. — A bond to make title to land upon payment of the purchase money vests an inchoate equitable interest in the land in the obligee and vendee which will become perfect upon payment of the purchase money; and until such inchoate equitable interest be shown to be lost by the default of the obligee, equity will not entertain a bill on behalf of the vendor or his heirs to cancel any conveyances made by the obligee and which, it is alleged, are clouds on the complainant's title. *Jayne v. Boisgerard*, 39 Miss. 796.

2. *Latham v. Inman*, 88 Ga. 505.

3. *Camden v. Harris*, 15 W. Va. 554. See also the title *EQUITY*.

4. *Remer v. Mackay*, 35 Fed. Rep. 86.

5. *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474, 650.

6. **Loss of Evidence.** — *Martin v. Hewitt*, 44 Ala. 418; *Huntington v. Allen*, 44 Miss. 654; *Harrington v. Utterback*, 57 Mo. 519; *Beedle v. Mead*, 81 Mo. 297; *Brooks v. Howland*, 58 N. H. 98; *Cook v. Newman*, 8 How. Pr. (N. Y. Supreme Ct.) 523; *Carpenter v. Carpenter*, 40 Hun (N. Y.) 263; *Masterson v. Hoyt*, 55 Barb. (N. Y.) 520; *Marsh v. Brooklyn*, 59 N. Y. 283; *Radcliff v. Rowley*, 2 Barb. Ch. (N. Y.) 23; *Wood v. Seely*, 32 N. Y. 105; *Dull's Appeal*, 113 Pa. St. 510; *Lewis v. Parrott*, 37 W. N. C. (Pa.) 330.

Instrument Functus Officio. — "Cases also may occur where a deed or other instrument, originally valid, has by subsequent events, such as by a satisfaction or payment, or other extinguishment of it, legal or equitable, become *functus officio*; and yet its existence may be either a cloud upon the title of the other party, or subject him to the danger of some future litigation when the facts are no longer capable of complete proof, or have become involved in the obscurities of time." *Story's Eq. Jur.*, § 705, quoted in *Borst v. Simpson*, 90 Ala. 373.

7. **Where Defense Not Weakened by Lapse of Time.** — *Phelps v. Harris*, 101 U. S. 370; *Tyson v. Brown*, 64 Ala. 244; *Munson v. Munson*, 28 Conn. 582, 73 Am. Dec. 693; *Sloan v. Sloan*, 25 Fla. 53; *New York, etc., R. Co. v. Schuyler*, 17 N. Y. 592; *Wood v. Seely*, 32 N. Y. 105; *Fonda v. Sage*, 48 N. Y. 173; *Guest v. Brooklyn*, 9 Hun (N. Y.) 198, reversed on other points in 73 N. Y. 611; *Basket v. Moss*, 115 N. Car. 448, 44 Am. St. Rep. 463.

8. **Where Defense Can Be Established by Matters of Record.** — *Douglass v. Nuzun*, 16 Kan. 516;

c. WHERE EVIDENCE OFFERED WILL SHOW INVALIDITY.—In a number of cases it has been held that although the deed or instrument is not invalid on its face, yet if the party claiming under it must, in order to recover upon it, offer evidence that will inevitably show its invalidity and destroy its effect, then there is no cloud.¹

Hart *v.* Marshall, 4 Minn. 294; Mogan *v.* Carter, 48 Minn. 501; Derry Nat. Bank *v.* Griffin, (N. H. 1895) 34 Atl. Rep. 740; Nichols *v.* Voorhies, 6 Hun (N. Y.) 307; Bailey *v.* Briggs, 56 N. Y. 407; Moore *v.* Cord, 14 Wis. 213; Hamilton *v.* Fond du Lac, 25 Wis. 490; Pier *v.* Fond du Lac, 38 Wis. 470; Pier *v.* Fond du Lac County, 53 Wis. 421.

Permanence of Record Evidence.—Where the illegality of collecting certain taxes out of the identical property assessed did not appear on the face of the record of the proceedings relative to the laying and collecting thereof, and a *prima facie* right in a third person who should receive a deed of the land from the tax collector was thereby created, which brought the case apparently within the ordinary definition of a threatened cloud upon the plaintiff's title by creating a *prima facie* right which must be overcome by evidence *aliunde*, the court said: "Yet there is one element wanting, which in this class of cases always calls most imperatively for equitable interference. I refer to the fact that the evidence to rebut the *prima facie* title is not, in this case, liable to be lost by the unavoidable death of witnesses, or any other cause likely to happen; for the rebutting facts relied upon, to wit, the mortgage, the foreclosure, and the date when the plaintiff's title became absolute, are all matters of record and easily obtained. So that ultimately the petitioner will be sure to vindicate his title in a court of law and successfully defend his possession. The injury to be apprehended, therefore, is by no means irreparable, and the court might well act upon its discretion and deny the injunction." Waterbury Sav. Bank *v.* Lawler, 46 Conn. 243.

1. Where Evidence to Be Offered Will Show Invalidity.—3 Pomeroy's Eq. Jurisprudence (2d ed.), § 1399.

United States.—Hannewinkle *v.* Georgetown, 15 Wall. (U. S.) 547.

Alabama.—Lytle *v.* Sandefur, 93 Ala. 396; Morgan *v.* Lehman, 92 Ala. 440.

District of Columbia.—Bradford *v.* District of Columbia, 18 D. C. 353.

Florida.—Sloan *v.* Sloan, 25 Fla. 53.

Minnesota.—Gilman *v.* Van Brunt, 29 Minn. 271.

Missouri.—Gamble *v.* St. Louis, 12 Mo. 617; Clark *v.* Covenant Mut. E. Ins. Co., 52 Mo. 272.

New Hampshire.—Eastman *v.* Thayer, 60 N. H. 408.

New York.—Van Doren *v.* New York, 9 Paige (N. Y.) 388; Crevier *v.* New York, 12 Abb. Pr. N. S. (N. Y. C. Pl.) 340; Cook *v.* Newman, 8 How. Pr. (N. Y. Supreme Ct.) 523; Bouton *v.* Brooklyn, 15 Barb. (N. Y.) 375; Guest *v.* Brooklyn, 9 Hun (N. Y.) 198, reversed on other points in 73 N. Y. 611; Nichols *v.* Voorhis, 18 Hun (N. Y.) 33; Stewart *v.* Cryslar, 21 Hun (N. Y.) 285; Sherman *v.* Adirondack R. Co., 92 Hun (N. Y.) 39; Scott *v.* Onderdonk,

14 N. Y. 9, 67 Am. Dec. 106; Ward *v.* Dewey, 16 N. Y. 519; Farnham *v.* Campbell, 34 N. Y. 480; Hatch *v.* Buffalo, 38 N. Y. 276; Crooke *v.* Andrews, 40 N. Y. 547; Overing *v.* Foote, 43 N. Y. 290; Fonda *v.* Sage, 48 N. Y. 173; Marsh *v.* Brooklyn, 59 N. Y. 283; Washburn *v.* Burnham, 63 N. Y. 132; Sanders *v.* Yonkers, 63 N. Y. 489; Guest *v.* Brooklyn, 69 N. Y. 506; Springport *v.* Teutonia Sav. Bank, 75 N. Y. 397; Dederer *v.* Voorhies, 81 N. Y. 153; Horn *v.* New Lots, 83 N. Y. 101, 38 Am. Rep. 402; Lehman *v.* Roberts, 86 N. Y. 232; Clark *v.* Davenport, 95 N. Y. 477; Moores *v.* Townshend, 102 N. Y. 387; Whiteside *v.* Noyac Cottage Assoc., 142 N. Y. 585.

See also Dart *v.* Orme, 41 Ga. 376; Guest *v.* Brooklyn, 79 N. Y. 624; Meloy *v.* Dougherty, 16 Wis. 269; Hurd *v.* Billington, 6 Grant's Ch. (U. C.) 145; Dynes *v.* Bales, 25 Grant's Ch. (U. C.) 593.

Reason of Rule.—"The reason assigned for the adoption of this rule is that the courts of law are adequate to afford relief, and therefore the interference of a court of equity is unnecessary." Cox *v.* Clift, 3 Barb. (N. Y.) 481, affirmed in 2 N. Y. 118.

Foreclosure.—In Morris *v.* McKnight, 1 N. Dak. 266, which was an action in equity to set aside foreclosure proceedings as constituting a cloud on the plaintiff's title, the court said: "Title under the foreclosure can only be asserted by tracing back through the assignments of the mortgage. Under the ruling such assignments are held to be insufficient in law to sustain the foreclosure, * * * hence every effort to assert the title exhibits its invalidity. We see no escape from this position, and while the rule itself has been severely criticised (see Pom. Eq. Jur., p. 437), yet, as it has legislative sanction in this state, we cannot regard the criticism. * * * For the reasons above stated the attempted foreclosure in this case was a nullity, and the trial court was correct in so holding. But as the invalidity of the proceedings is apparent on the face of the record, no action can be maintained to set them aside, and for that reason the case is reversed and remanded, with instructions to the District Court to dismiss the complaint."

Execution Sale.—The sale by a sheriff of real property, by virtue of an execution unauthorized by law and void upon its face, would not cast a cloud upon the title, and a court of equity will not interfere to restrain such sale, the law affording complete and ample redress, because the purchaser at any such sale, in order to recover the possession in an action, must show a paramount title and right of entry under it, and to effect this, the execution upon which the sale was made must be produced in evidence. Davidson *v.* Seegar, 15 Fla. 671.

Executory Contract for Sale of Land—Agency.—In Washburn *v.* Burnham, 63 N. Y. 132, it was held that an action cannot be maintained to

f. NECESSITY OF POSSESSION.—While the cases are not entirely accordant respecting the matter, yet the general rule is that if the complainant's title is legal in its nature, he must be in possession of the premises before he can successfully invoke the aid of equity, in the absence of a statute to the contrary; since if he is out of possession he may, by bringing ejectment, test the validity of the instrument constituting the alleged cloud. Where, however, his title is an equitable one, possession is not essential.¹

g. ADEQUATE REMEDY AT LAW.—Equity will not relieve where there is a plain, adequate, and sufficient remedy at law.²

h. PREVENTION OF CLOUD.—The equitable jurisdiction extends to the prevention of a threatened cloud on title, where there appears to be a determination to create one, and the danger is not merely speculative or potential.³

cancel as a cloud upon title an executory contract for the sale of land, made by one claiming to act as agent for the owner but having in truth no such authority, because the defect would necessarily appear in any proceeding by one claiming under the contract to enforce it, as he would be required to prove the authority of the agent.

South Dakota Statute.—Sections 4644, 4645, Comp. Laws of S. Dak., establish the rule in that state that an instrument constitutes no cloud upon title if its invalidity appears on its face, or if it necessarily appears from the evidence which the party claiming under it must use in order to enforce it. Grant County v. Colonial, etc., Mortg. Co., 3 S. Dak. 390.

1. Possession.—Lawrence v. Zimbleman, 37 Ark. 643; Sloan v. Sloan, 25 Fla. 53; Hall v. Kellogg, 16 Mich. 135; Busbee v. Lewis, 85 N. Car. 332; Weaver v. Arnold, 15 R. I. 53. See also the cases throughout this title. And see ENCYC. OF PLEADING AND PRACTICE, tit. QUIETING TITLE—REMOVAL OF CLOUD.

2. Where There Is Adequate Remedy at Law—United States.—Coulson v. Portland, Deady (U. S.) 481; Speigle v. Meredith, 4 Biss. (U. S.) 120; Ewing v. St. Louis, 5 Wall. (U. S.) 418; Greenwalt v. Duncan, 16 Fed. Rep. 35; Dows v. Chicago, 11 Wall. (U. S.) 108; Hanne-winkle v. Georgetown, 15 Wall. (U. S.) 548; State Railroad Tax Cases, 92 U. S. 575; Phelps v. Harris, 101 U. S. 370; Chapman v. Brewer, 114 U. S. 158; Union Pac. R. Co. v. Cheyenne, 113 U. S. 516; Lyon v. Alley, 130 U. S. 177.

Alabama.—Montgomery v. Sayre, 65 Ala. 564; Tyler v. Jewett, 82 Ala. 93. See also Elyton Land Co. v. Ayres, 62 Ala. 413; Alabama Gold L. Ins. Co. v. Lott, 54 Ala. 499.

Connecticut.—Munson v. Munson, 28 Conn. 582, 73 Am. Dec. 693.

Iowa.—Powers v. Bowman, 53 Iowa 359.

Maryland.—Cowman v. Colquhoun, 60 Md. 127.

Massachusetts.—Pratt v. Pond, 5 Allen (Mass.) 59; Martin v. Graves, 5 Allen (Mass.) 601; Hunnewell v. Charlestown, 106 Mass. 350; Norton v. Boston, 119 Mass. 195; Russell v. Barstow, 144 Mass. 130.

Michigan.—Albany, etc., Min. Co. v. Auditor-Gen., 37 Mich. 391.

Mississippi.—Phelps v. Harris, 51 Miss. 789.

Missouri.—Leslie v. St. Louis, 47 Mo. 474; Odle v. Odle, 73 Mo. 289.

Nebraska.—Boeck v. Merriam, 10 Neb. 199.

New Hampshire.—Brooks v. Howland, 58 N. H. 98.

New Jersey.—Newark v. Schuh, 34 N. J. Eq. 262; Bellows v. Wilson, 32 N. J. Eq. 481.

New York.—Handley v. New York, 7 Abb. Pr. (N. Y. Supreme Ct.) 11; Cox v. Clift, 3 Barb. (N. Y.) 481, affirmed in 2 N. Y. 118; Hall v. Fisher, 9 Barb. (N. Y.) 17; Nichols v. Voorhis, 18 Hun (N. Y.) 33; Mace v. Newburgh, 15 How. Pr. (N. Y. Supreme Ct.) 161; Western R. Co. v. Nolan, 48 N. Y. 513. See also Magee v. Cutler, 43 Barb. (N. Y.) 239.

North Carolina.—Busbee v. Lewis, 85 N. Car. 332; Pearson v. Boyden, 86 N. Car. 585; Byerly v. Humphrey, 95 N. Car. 151.

Ohio.—Mawhorter v. Armstrong, 16 Ohio 188; Haff v. Fuller, 45 Ohio St. 495.

Pennsylvania.—Stewart's Appeal, 78 Pa. St. 88; Barclay's Appeal, 93 Pa. St. 50; Meck's Appeal, 97 Pa. St. 513.

See also Tute on Taxation.

3. Prevention of Cloud—United States.—Huntington v. Central Pac. R. Co., 2 Sawy. (U. S.) 503; Chapman v. Brewer, 114 U. S. 158; Lyon v. Alley, 130 U. S. 177.

Alabama.—Burt v. Cassety, 12 Ala. 734; Rea v. Longstreet, 54 Ala. 291.

California.—Shattuck v. Carson, 2 Cal. 588; Gray v. Hermance, 5 Cal. 73, 63 Am. Dec. 85.

Florida.—Sloan v. Sloan, 25 Fla. 53.

Illinois.—Groves v. Webber, 72 Ill. 606.

Indiana.—Knightstown First Nat. Bank v. Deitch, 83 Ind. 131.

Iowa.—Key City Gas Light Co. v. Munsell, 19 Iowa 305.

Maine.—Gerry v. Stimson, 60 Me. 186.

Maryland.—Holland v. Baltimore, 11 Md. 186, 69 Am. Dec. 195.

Massachusetts.—O'Hare v. Downing, 130 Mass. 16.

Michigan.—Marquette, etc., R. Co. v. Marquette, 35 Mich. 504.

Minnesota.—Conkey v. Dike, 17 Minn. 457.

Mississippi.—Irwin v. Lewis, 50 Miss. 363.

Missouri.—Vogler v. Montgomery, 54 Mo. 577; Mechanics' Bank v. Kansas City, 73 Mo. 555; North St. Louis Gymnastic Soc. v. Hudson, 85 Mo. 32.

Nebraska.—Corey v. Schuster, 44 Neb. 269.

New Hampshire.—Brooks v. Howland, 58 N. H. 98.

New York.—Pettit v. Shepherd, 5 Paige (N. Y.) 493, 28 Am. Dec. 437; Oakley v. Williamsburgh, 6 Paige (N. Y.) 262; Scott v. Onderdonk, 14 N. Y. 9, 67 Am. Dec. 106; Crooke v. Andrews, 40 N. Y. 547; Clark v. Davenport, 95 N. Y. 477; DeWitt v. Van

V. PARTICULAR INSTANCES — 1. General Statement. — It is impossible to lay down rules which will cover all the cases in which a court of equity will interpose its jurisdiction to remove a cloud upon the title to lands. This jurisdiction does not rest upon any arbitrary rules, but depends upon the facts of each case; and whether it will be exercised or not is generally in the discretion of the court.¹ In the sections following will be found instances of what have been held to constitute clouds, and what not.

2. Instruments Tainted with Fraud. — A deed void for fraud and constituting a cloud on the title of the true owner will be canceled in equity.²

Conveyance to Minor Children — Destruction of Deed by Administrator. — Where a parent conveyed land to his minor children, but retained the custody of the deed during his lifetime, and after his death his administrator fraudulently destroyed the deed, and the land was sold under fraudulent proceedings for partition by the other heirs, the minors were permitted to have such sale set aside, as against a purchaser with notice of their rights.³

Fraud of Holder of Senior Judgment. — Where the holder of senior judgments which have been paid and satisfied fraudulently keeps them on foot, to the prejudice of a junior judgment creditor, and proceeds to collect them by execution, and threatens to sell the debtor's lands, the junior creditor is entitled to have the cloud removed and the proceedings upon the execution stayed.⁴

3. Forged Instruments. — Forgery is, of itself, a sufficient ground for invoking the interposition of equity to compel the surrender and cancellation of the forged instrument.⁵

Schoyk, 110 N. Y. 7, 6 Am. St. Rep. 342; Butler v. Johnson, 111 N. Y. 204; King v. Townshend, 141 N. Y. 358.

Wisconsin. — Moore v. Cord, 14 Wis. 213; Siegel v. Outagamie County, 26 Wis. 70; Goodell v. Blumer, 41 Wis. 436; Roe v. Lincoln County, 56 Wis. 66.

And see the cases throughout this title.

1. Fonda v. Sage, 48 N. Y. 179.

2. **Fraud — England.** — Hayward v. Dimsdale, 17 Ves. Jr. 111.

Canada. — Harkin v. Rabidon, 7 Grant's Ch. (U. C.) 243.

Alabama. — Lehman v. Shook, 69 Ala. 486.

California. — Tompkins v. Sprout, 55 Cal. 31; Hager v. Shindler, 29 Cal. 47.

Illinois. — Kennedy v. Northrup, 15 Ill. 149; Moore v. Munn, 69 Ill. 591.

Massachusetts. — Martin v. Graves, 5 Allen (Mass.) 601.

Minnesota. — New England Mut. L. Ins. Co. v. Capehart, 63 Minn. 120.

New York. — Van Doren v. New York, 9 Paige (N. Y.) 388; Smith v. Reid, 134 N. Y. 568.

See also Swarthout v. Ranier, 143 N. Y. 499; Schoener v. Lissauer, 107 N. Y. 111; Pierce v. Lamson, 5 Allen (Mass.) 60, 81 Am. Dec. 732; Pulford v. Whicher, 76 Wis. 555. And see the title **FRAUD**.

Voluntary Conveyance — New York Statute. — The fact that a conveyance shows upon its face that it was voluntary does not alone prevent a party from maintaining an action to set it aside as a cloud on his title. The conveyance cannot be judged fraudulent solely upon the ground that it was voluntary (2 N. Y. Rev. Stat. 137, § 4), and extrinsic evidence is necessary to show an existing indebtedness of the grantor at the time of its execution. Smith v. Reid, 134 N. Y. 569.

Trust. — Equity has jurisdiction to entertain

a bill by a party out of possession of land against one in possession to set aside a deed fraudulently obtained, which is a cloud upon title, in case of a trust. Redmond v. Packenham, 66 Ill. 434.

Fraud on Creditors. — In a suit to have a deed absolute on its face declared a satisfied mortgage, and set aside and canceled as a cloud on title, it is no defense that the deed was given for the purpose of hindering the other creditors of the complainant. Halloran v. Halloran, 137 Ill. 100.

Fraud — Intervening Marriage. — In Whillock v. Grisham, 3 Sneed (Tenn.) 237, a vendor of land, being in jail on a charge of felony, conveyed the land, by deed duly registered, to his sister, a *feme sole*, taking her notes therefor, for the sole purpose of qualifying her to become his bail; after being rejected as such by the court, she returned to him the deed, destroyed her notes, and pronounced the proceeding a fraud; after which the vendor sold and conveyed the same land, for a valuable consideration, to another who had notice of the facts, but before the latter deed was registered the first vendee married. Such intervening marriage, in the absence of proof that the same was superinduced by the existence of said first named deed, or by any deceit practiced upon the husband in reference thereto, will not validate said first conveyance, but will operate merely as a cloud upon the title which a court of chancery will remove, and will vest the title in the subsequent purchaser for value.

3. Grand Tower Min., etc., Co. v. Cady, 96 Ill. 430.

4. Shaw v. Dwight, 16 Barb. (N. Y.) 536, affirmed 27 N. Y. 244, 84 Am. Dec. 275. See the title **JUDGMENTS AND DECREES**.

5. **Forgery.** — Bunce v. Gallagher, 5 Blatchf. (U. S.) 481; Bushnell v. Harford, 4 Johns. Ch.

False Certificate of Acknowledgment. — An action is maintainable for the cancellation, as a cloud on title, of a forged deed which, upon the strength of a false certificate of acknowledgment, made by an officer duly authorized, has been put upon record.¹

4. Proceedings under Unconstitutional Laws — Taxation. — As no valid tax can be imposed by virtue of an unconstitutional law, such a tax cannot be a cloud on title.²

Order of Board Laying Out Road. — So where an order of a board of supervisors laying out a road is unconstitutional and null and void upon its face, it does not cloud the title to the land over which the road passes.³

5. Mortgages — When Satisfied. — If a mortgage has been both in fact and in law discharged, but there is no evidence of record of the exoneration of the title, the mortgagee or those claiming under him may be required to release of record.⁴

Unsatisfied Mortgage. — If a cloud rests upon one's title to lands by reason of

(N. Y.) 301. See also *Easthampton v. Bowman*, 136 N. Y. 521; *Chrimes v. Squier*, 4 N. Y. App. Div. 611, 38 N. Y. Supp. 996. See the title *FORGERY*.

Where the defendant had a registered mortgage on the land of the plaintiff, purporting to be signed by the plaintiff, but it was admitted that the mortgage was a forgery, it was held that equity would entertain a suit to remove the cloud upon the title, although the complainant was still in possession of the land. *Byerly v. Humphrey*, 95 N. Car. 151.

A Person in Possession of Part of a House, claiming title thereto, may maintain a bill in equity to quiet his title against one who, having entered by the plaintiff's permission into possession of the other part of the house, remains there, claiming title to the whole house under a deed alleged by the plaintiff to be a forgery. *Sullivan v. Finnegan*, 101 Mass. 447.

1. Remington Paper Co. v. O'Dougherty, 81 N. Y. 474, 650.

Where a deed is alleged to be a forgery, and has been improperly certified as duly proved and recorded, equity will take jurisdiction to remove the cloud. *Apthorp v. Comstock*, 2 Paige (N. Y.) 482.

2. Unconstitutional Laws. — *Springer v. Rosette*, 47 Ill. 223; *Ewing v. St. Louis*, 5 Wall. (U. S.) 418; *Detroit v. Martin*, 34 Mich. 170, 22 Am. Rep. 512; *Curtis v. East Saginaw*, 35 Mich. 508; *Wells v. Buffalo*, 80 N. Y. 253; *Townsend v. New York*, 77 N. Y. 542; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289. See also *Backlott v. Davenport*, 17 Iowa 379; *Nugent v. Macks*, 51 Iowa 77, 33 Am. Rep. 117; *Powers v. Bowman*, 53 Iowa 359. Compare *Wells v. Weston*, 22 Mo. 384; *Lockwood v. St. Louis*, 24 Mo. 20. And see generally the titles *TAXATION*; *TAX SALES*; *TAX TITLES*; *SPECIAL ASSESSMENTS*.

3. Leach v. Day, 27 Cal. 643.

4. Satisfied Mortgage. — *Brown v. Stewart*, 56 Md. 421. See generally the title *MORTGAGES*.

Mortgage Equitably Satisfied. — If a mortgagee, after his mortgage has been equitably satisfied, attempts to set it up as a subsisting lien on the premises, satisfaction of the mortgage may be decreed so that it may be canceled on the record of mortgages. *Kellogg v. Wood*, 4 Paige (N. Y.) 578.

A Foreclosure being had by the assignees of

a satisfied mortgage, under which a decree and deed are procured, a grantee of the mortgagor not being made a party and having no notice of the proceeding until after a sale under the decree, such grantee may maintain a suit in equity to enjoin the parties from conveying or asserting claim to the property, and to annul such decree and deed, the same being a cloud upon his title. *Matheson v. Thompson*, 20 Fla. 790.

Sale under a Power — Debt Fully Paid — Reconveyance. — Where a sale has been made under a power contained in a mortgage after full payment of the debt, and the purchaser is in possession, equity will set aside the sale and deed and compel a reconveyance of the legal title, and thus remove an apparent cloud. *Redmond v. Packenham*, 66 Ill. 434. See the title *TRUST DEEDS AND POWER OF SALE MORTGAGES*.

Mortgagee's Right Against Strangers to Equity of Redemption. — In *Craft v. Merrill*, 14 N. Y. 456, it was held that a mortgagee or his assignee, in possession under color of a foreclosure, even though the foreclosure proceedings were a nullity, may maintain an action to remove a cloud from his title against persons who have a paper title apparently good but in reality bad, and who are strangers to the equity of redemption; that the plaintiff in such a suit is not bound, as in the case of a party claiming title and seeking to recover possession, to show a perfect title as against all the world, and it is immaterial to the defendants, who are strangers to the mortgagor, whether the equity of redemption be in existence or not.

Mortgagee with Constructive Notice of Prior Sale. — Where a vendor of land, after giving the purchaser a bond for a deed and taking notes for the purchase money, executed a mortgage to a third person who had constructive notice of the prior sale, and afterwards, before the maturity of the mortgage, made a conveyance to the purchaser according to his bond, taking notes for the remaining payments which he transferred to an innocent party, and which were subsequently paid by the purchaser, it was held that the purchaser was entitled to have his vendor's mortgage canceled, as a cloud upon his title. *Doolittle v. Cook*, 75 Ill. 354.

an unsatisfied mortgage, he may come into equity to have the cloud removed.¹

Mortgage Subordinate to Lien for Purchase Money. — A mortgage appearing by record as a first mortgage, but in fact subordinate to the lien for unpaid purchase money, constitutes a cloud on the title.²

A Mortgage the Amount of Which Includes Sums Not Advanced constitutes a cloud to the extent of such sums.³

6. Judgments and Decrees — Want of Jurisdiction. — Where a judgment is void for want of jurisdiction in the court, and this defect is not manifest upon the record, and it is necessary to resort to extrinsic evidence to show it, the judgment constitutes a cloud.⁴ But there is no cloud if the defect is apparent upon the face of the record.⁵

Lis Pendens. — The rule of law that he who purchases during the pendency of a suit is bound by the decree against the person from whom he derives his title, does not apply to one who purchases from a person not a party to the suit. He may maintain a bill to remove the cloud caused by the decree.⁶

Judgment Paid but Not Discharged of Record. — It has been held that one who buys real estate subject to all taxes, assessments, and other incumbrances, is entitled to have a judgment, apparently a lien, which has been paid but not discharged of record, canceled as a cloud on title, when his deed contains no covenant or obligation to pay it as a part of the consideration.⁷

Notes Paid Before Suit — Part of Lands Released from Lien of Mortgage. — Where a party

1. Unsatisfied Mortgage. — *Carter v. Taylor*, 3 Head (Tenn.) 30. See also *Smith v. Orton*, 21 How. (U. S.) 241.

2. Kennedy v. Babcock, 19 Misc. Rep. (N. Y. Supreme Ct.) 87.

3. Calvert v. Burnham, 6 Ont. App. 620. See also *Williams v. Fitzhugh*, 37 N. Y. 444.

4. Want of Jurisdiction Not Manifest on the Record. — *Hatch v. Buffalo*, 38 N. Y. 276; *Hunt v. Acre*, 28 Ala. 580. See the title JUDGMENTS AND DECREES.

Where the facts disclosed authorized the court to assume that the defendant was dead when the plaintiff commenced his action against him, and, consequently, that the judgment obtained in the action was void, it was nevertheless an apparent lien or cloud on the real estate of the defendant which might be set aside. *Blodget v. Blodget*, 42 How. Pr. (N. Y. Supreme Ct.) 19.

A decree rendered without jurisdiction upon which a sale of property is made or title conveyed to the complainant creates such a cloud on the title of the owner as authorizes equitable interposition, notwithstanding it could not be insisted on to defeat a recovery by the owner in an action at law. *Campbell v. McCahan*, 41 Ill. 45.

Heirs Not Made Parties. — If a mortgagee obtains a decree of foreclosure against the personal representatives and devisees of the mortgagor, without making the heirs at law parties to the suit, and becomes the purchaser of the premises at the master's sale, this constitutes such a cloud on the title of the heirs after they have set aside the probate of the will by bill in chancery as authorizes them to ask the interposition of equity for its removal. *Hunt v. Acre*, 28 Ala. 580.

A Decree for the Sale of Real Estate, void for the want of jurisdiction of the person, creates a cloud upon the owner's title. *Johnson v. Johnson*, 30 Ill. 215; *Culver v. Phelps*, 130 Ill. 217.

A Sale on Foreclosure of a Mechanic's Lien which purports to convey the whole estate is a cloud on the title of the owner, who was not a party to the suit. *Franklin Sav. Bank v. Taylor*, 131 Ill. 376. See the title MECHANICS' LIENS.

Married Woman's Property. — A sheriff may be enjoined from selling real property belonging to the wife under an execution against the husband. Such a sale would be a cloud upon the wife's title to the property, as the deed of the sheriff would convey to the purchaser a *prima facie* title which she would have to overcome by proof. *Alverson v. Jones*, 10 Cal. 9, 70 Am. Dec. 689.

Where the sale of the interest of the husband in lands held by his wife was decreed by a court that had no jurisdiction over her person, and a sale was made thereunder which purported to convey the whole estate in the property, the sale was held to constitute a cloud on the wife's title. *Remer v. McKay*, 54 Fed. Rep. 432. Compare *Arndt v. Griggs*, 134 U. S. 316.

5. Want of Jurisdiction Apparent on Record. — *Tyson v. Brown*, 64 Ala. 244; *Curry v. Peebles*, 83 Ala. 225; *Roman Catholic Archbishop v. Shipman*, 69 Cal. 590; *Hodgen v. Guttery*, 58 Ill. 431; *Griswold v. Fuller*, 33 Mich. 268; *Gilman v. Van Brunt*, 29 Minn. 271; *Fontaine v. Hudson*, 93 Mo. 62, 3 Am. St. Rep. 515. See also *Sloan v. Sloan*, 25 Fla. 53; *Florence v. Paschal*, 50 Ala. 28.

6. Lis Pendens. — *Fitzgerald v. Cummings*, 1 Lea (Tenn.) 232. See the title LIS PENDENS.

A *lis pendens* asserting a right in lands hostile to that claimed by the plaintiff, and a judgment determining that the defendant has the right asserted in the *lis pendens*, are a cloud upon the plaintiff's title, and an action is maintainable to remove the same. *Brown v. Goodwin*, 75 N. Y. 409.

7. Harris v. Graham, 90 Hun (N. Y.) 198. See also *Smith v. Hickman*, 68 Ill. 314.

obtains judgment by scire facias on the foreclosure of a mortgage given to secure notes which have been paid by taking new notes and mortgage, and purchases the mortgaged premises, a portion of which he had previously released from the lien of his mortgage, equity will enjoin the execution of a deed to him, and set aside the judgment as a cloud upon the title of a subsequent purchaser of the premises.¹

Older Lien. — A decree founded upon proceedings taken prior to the plaintiff's title, and seeking to condemn the property by virtue of an asserted lien older than such title, may be a cloud upon that title.²

7. Sales of Lands — Execution Against One Not the Owner. — It has been adjudged in many cases that the sale of lands on execution against one who never had any title thereto or interest therein will not cast a cloud upon the title of the true owner.³ But it is otherwise when the judgment debtor had at some time an interest in the lands.⁴

Sale Before Judgment Becomes a Lien. — Where a party sells real estate under execution as the property of his debtor, with either actual or constructive notice of a *bona fide* sale and conveyance to another before the judgment became a lien, the owner may have the sheriff's sale set aside as a cloud upon his title.⁵

And the Redemption of Land from execution sale by a judgment creditor who has no lien or levy thereon is ineffectual as against one who purchased the lands of the judgment debtor after the original levy and prior to the sale thereunder, and the purchaser may maintain a bill to remove the cloud occasioned by the claim of such creditor.⁶

Sale Vacated by Court of Law — Cancellation. — A sheriff's deed at an execution sale of lands clouds the title, notwithstanding the court of law subsequently vacates the sale, for that court cannot compel the cancellation of the deed, and the order of vacation being no part of the record of the judgment under which the sale was made, the purchaser is not bound to offer it in support of his deed, which, sustained by a valid execution, is apparently good and would authorize recovery in ejectment, unless the subsequent order be shown in rebuttal.⁷

Obstructions to Sale of Property under Execution. — Equity will remove obstructions

1. Tucker v. Conwell, 67 Ill. 552.

2. Head v. Fordyce, 17 Cal. 149. See the title LIENS.

3. Sale of Land of One Person on Execution Against Another — Alabama. — Rea v. Longstreet, 54 Ala. 291.

Florida. — Shalley v. Spillman, 19 Fla. 500; Davidson v. Seegar, 15 Fla. 671; Barnes v. Mayo, 19 Fla. 542.

Minnesota. — Hart v. Marshall, 4 Minn. 294.

Missouri. — Witthaus v. Washington Sav. Bank, 18 Mo. App. 181; Drake v. Jones, 27 Mo. 428; Haeussler v. Thomas, 4 Mo. App. 463; Kuhn v. McNeil, 47 Mo. 389.

New York. — Wilson v. Kelly, 31 Hun (N. Y.) 75; Mulligan v. Baring, 3 Daly (N. Y.) 76; Farnham v. Campbell, 34 N. Y. 480; Lehman v. Roberts, 86 N. Y. 232.

Texas. — Heath v. Cleburne First Nat. Bank, (Tex. Civ. App. 1895) 32 S. W. Rep. 778; Carlin v. Hudson, 12 Tex. 202, 62 Am. Dec. 521; Whitman v. Willis, 51 Tex. 427.

Compare Budd v. Long, 13 Fla. 288; Burt v. Cassety, 12 Ala. 734. See the SHERIFFS' SALES.

4. Barnes v. Mayo, 19 Fla. 542. See also Mustian v. Jones, 30 Ga. 951; Englund v. Lewis, 25 Cal. 338; Key City Gas Light Co. v.

Munsell, 19 Iowa 305; O'Hare v. Downing, 130 Mass. 16; U. S. Bank v. Schultz, 2 Ohio 495; Norton v. Beaver, 5 Ohio 178.

5. Sale Before Judgment Becomes a Lien. — Phillips v. Pitts, 78 Ill. 72.

Where a judgment was rendered in 1858 and an execution issued upon it and levied upon real estate in June of the same year, and no further steps were taken until February, 1867, when the property was advertised for sale under the execution and sold, it was held that the sale could not be sustained, and the title acquired under it should be set aside as a cloud upon the title of one who had become the owner of the title by conveyances from the defendant in execution, after the levy and before the sale. Conwell v. Watkins, 71 Ill. 488.

Where, Before a Judgment Is Docketed in a certain county, land of the judgment debtor there situated has been purchased by a third person in good faith but no conveyance has been executed, the judgment does not become a lien thereon, and a sale under execution upon the judgment will be enjoined. Goodell v. Blumer, 41 Wis. 436.

6. Kenner v. Loyd, 89 Tenn. 290.

7. Lockett v. Hurt, 57 Ala. 198.

to a fair sale of property under an execution, although the property is legally liable to be so sold.¹

8. Trusts — Resulting Trust — Fraud on Creditors. — Although equity may not entertain a bill to enforce a resulting trust when land is bought with the complainant's money and the title is taken in the name of the defendant to defraud the creditors of the former, yet when the trust has been executed by a conveyance, equity will remove a cloud upon the title under a mortgage given by the defendant while he held the title.²

The Existence of a Power in Trust valid in itself and once capable of execution, but now incapable of execution by reason of the death of the person having the power of appointment without an exercise of the power, does not present a proper case for the exercise of the equitable power of the court to remove a cloud upon the title by reason of the necessity of resorting to extrinsic evidence to establish the extinguishment of the power.³

9. Instruments Delivered in Escrow. — A deed made in the course of negotiations for the sale of land, delivered only as an escrow, and by some means finding its way on the record, is such a cloud upon the grantor's title as, the negotiations failing, will entitle him to demand the cancellation of the instrument.⁴

Original Contract Held in Escrow — Unauthenticated Copy Recorded. — The placing of a mere private and unauthenticated copy of a contract for the sale of land on record while the original is held in escrow, and thus making a record which, so far as any one examining it could discern, is a transcript of the original, is a tortious clouding of the title, and an act against which equity will relieve.⁵

10. Instruments of Record — Priority — Fraud. — The owner of land may have a registered deed set aside as a cloud on his title, though no privity exists between him and the parties to such deed, and no fraud on their part is alleged.⁶

1. *Vasser v. Henderson*, 40 Miss. 519, 90 Am. Dec. 351; *Fowler v. McCartney*, 27 Miss. 509.

2. *Redmond v. Packenham*, 66 Ill. 434.

Parol Agreement — Strangers. — In *Hazlett v. Harwood*, 80 Tex. 508, land was conveyed by a deed absolute in form and for an expressed consideration, but there existed between the parties a parol agreement that the land should be sold by the grantee, and that one-half of the proceeds should be appropriated to specified purposes designated by and for the benefit of the grantor. It was held that the grantee was entitled to recover the whole of the land, and to a decree removing a cloud from the title, as against one who had no interest in the trusts created by the parol agreement.

Trust — Defendant Buying with Notice. — Where it was alleged that the land in question was bought with the complainant's money, for his use and benefit, although the title was taken in the name of another, and that the defendant's title was acquired under execution sale on a judgment against the holder of the legal title, but that at the date of the levy and sale the defendant knew that the land was the plaintiff's property, it was held to be a sufficient averment of notice to the defendant that the land was the plaintiff's when the defendant acquired title. *Osborne v. Prather*, 83 Tex. 208. See also *Pettit v. Shepherd*, 5 Paige (N. Y.) 493, 28 Am. Dec. 437.

3. *Hotchkiss v. Elting*, 36 Barb. (N. Y.) 38.

4. **Escrow.** — *Kimberley v. Fox*, 27 Conn. 307; *Brewton v. Smith*, 28 Ga. 442; *Smith v. Dennett*, 15 Minn. 81; *Donovan v. Wheeler*, 67 Hun (N. Y.) 68; *Jennings v. Dixey*, 36 N.

J. Eq. 490; *Eckman v. Eckman*, 55 Pa. St. 269; *Willis v. Sweet*, 49 Wis. 505. See the title ESCROW.

A deed executed by the grantor and placed in the hands of a stranger, to be held by him until the grantor does a particular thing, and then to be delivered to him, and which, by accident or mistake, is placed upon record without ever having been delivered to the grantee, is, as to such grantee, absolutely void, and is a cloud on the grantor's title which a court of equity will cancel. *Stanley v. Valentine*, 79 Ill. 544.

Where the grantee in a deed drew a draft for the amount of the purchase money for land which he had previously contracted to buy, and left it with a banker for collection, and the owner of the land placed his deed to the purchaser in the hands of the same banker, to be delivered to the purchaser on condition that the draft was duly paid, and the purchaser agreed that if the draft was not duly paid he would relinquish all his right to the land under the contract, and the draft was returned protested for nonpayment, it was held that no title passed by the deed, and that all claim of the grantee to the land under his contract was extinguished, and all rights of those claiming under him ceased, and that a lease from him which stood upon the record was a cloud upon the title of the owner and should be removed by a court of equity by decree. *Skinner v. Baker*, 79 Ill. 496.

5. *Lane v. Lesser*, 135 Ill. 567.

6. *Shaw v. Ledyard*, 12 Grant's Ch. (U. C.) 382. See the title RECORDING ACTS.

Deed Delivered in Escrow — False Representations of Grantee. — A complaint which shows that a deed of land deposited in escrow was procured to be recorded through false representations of the person named therein as grantee, without performance of the conditions upon which it was to be delivered to him, states a good cause of action in equity for a removal of the cloud.¹

Recording Paper Claiming Equitable Interest. — In *Massachusetts* it is held that a paper recorded in the registry of deeds, not purporting to convey any interest in the land, but simply a claim by the party of an equitable interest, does not acquire any greater importance from being thus filed, nor does it for this reason constitute a cloud upon title.²

Recording Notice Denying Right of Way. — Where there is no record evidence of a right of way, and the owner of the land over which the way is claimed denies its existence and is threatening to interrupt its use and enjoyment, and has placed upon record notice that he disputes such right of way, the claimant may have his right ascertained and the way established while those who are acquainted with the facts are alive.³

Notice Made in Ex Parte Proceeding. — It has been held that a notice, lacking the elements of a judicial determination, made in an *ex parte* proceeding and filed in the town clerk's office, did not create a cloud upon title.⁴

Exchange of Lands — Conditions Precedent. — Where parties make contracts for the exchange of lands, each to exhibit to the other by a day named an abstract of title showing a good title to their respective lands, this is a condition precedent to be performed before either party is entitled to call upon the other to perform the agreement; and if the abstract of either is not satisfactory and fails to show the title agreed to be made, the other may elect to consider the contract at an end, and, if it is recorded in the proper county, to have it set aside as a cloud upon his title.⁵

Contract by Agent. — The record of a contract for the sale of lands made by an agent not in pursuance of his authority, or in excess thereof, if such as to interfere with the sale by the principal, will be regarded in equity as a cloud upon the title of the latter.⁶

Option of Purchase. — Where the owner of land gave to another, by an instru-

1. *Willis v. Sweet*, 49 Wis. 505.

2. *Leeds v. Wheeler*, 157 Mass. 67; *Nickerson v. Loud*, 115 Mass. 94.

In *First African M. E. Soc. v. Brown*, 147 Mass. 296, a paper signed by a grantor and filed by him in the registry of deeds, alleging that a conveyance was obtained from him by fraud and that he would dispute its validity, was held, in the absence of confirmatory facts or proceedings for more than six years to enforce his right, not to constitute a cloud upon title such as would bar specific performance.

3. *Sanxay v. Hunger*, 42 Ind. 44.

4. **Notice Not Judicial — Ex Parte Proceeding.** — *Flood v. Van Wormer*, 147 N. Y. 284. In this case, in an action brought to restrain the defendant as commissioner of highways from removing the plaintiff's house as encroaching upon the highway, under the Highway Law (Laws of 1890, c. 568, § 105), it appeared that the defendant had served a notice upon the plaintiff, which was also filed in the town clerk's office, to the effect that his house encroached upon the highway to an extent described, and he was required to remove the building; annexed to the notice was a copy of an order which recited that the commissioner of highways had ascertained that the highway was so encroached upon, and which ordered the house to be removed; it also appeared that the

defendant stated to the plaintiff that he would move his house after collecting the fine. The plaintiff recovered a judgment adjudging that his house did not encroach upon the highway and restraining the defendant as prayed for. This was held proper; that while the action could not be maintained upon the ground that the notice created a cloud upon plaintiff's title, it was maintainable (Peckham, J., *dissenting*) by reason of a threatened abuse of authority by a public officer under color of office; that as the statute gave the power to the defendant to proceed summarily against the plaintiff's property, and he had threatened to exercise it, the plaintiff, having established that he did not come within the provisions of the statute, was entitled to an injunction restraining the threatened injury.

5. *Howe v. Hutchison*, 105 Ill. 501.

6. *Monson v. Kill*, 144 Ill. 248; *Monson v. Jacques*, 144 Ill. 651.

In *Sargent v. McGuire*, 43 Ill. App. 582, a contract for the sale of lands was executed by an agent acting under verbal authority. The vendor afterwards refused to complete the transaction, whereupon the contract was recorded. The court held that, under the circumstances of the case, a bill to remove the cloud from the vendor's title was properly sustained.

ment 'in writing, the exclusive sale and option of purchase thereof for a designated time, upon certain conditions, and he, after the expiration of such time, without having notified the owner of his intention to accept the purchase, and without having complied with any of the conditions upon which the sale was by the terms of the writing authorized, placed such instrument in writing upon record, it was held proper for a court of equity to set aside such instrument as a cloud upon the title of the owner.¹

Bond for a Deed. — An owner of lands who has executed a bond conditioned to convey the same to the obligee upon being paid a certain price secured by notes, such bond being acknowledged and recorded, may, upon default of the obligee to pay the price upon offering to deliver up the notes, maintain an action to have the bond canceled, the existence of the same being a cloud upon his title, and need not tender a deed.²

Under the Recording Laws of Michigan any record title is presumptively better than a title defective of record, and clouds it.³

Contract Not Recorded. — A contract for the sale or exchange of lands not recorded in the county where the lands of one of the parties are situated is no cloud upon his title.⁴

11. Deed from Stranger to the Title. — While every instrument purporting by its terms to convey land from the original source of title, however invalid, creates a cloud upon the title if it requires extrinsic evidence to show its invalidity,⁵ yet a conveyance not falling in the chain of title, as from one who never had any connection with the property, will not constitute a cloud upon the title.⁶

12. Rescinded Contracts — Title Bonds. — An instrument rescinded or canceled as between the parties may be a cloud. Thus, after the rescission of a conveyance of land by a redelivery of the deed to the grantor and an unequivocal act of abandonment on the part of the grantee, such deed will be declared a cloud on the title, and canceled.⁷

Title Bonds. — And where the owner of certain real estate, under an agreement to sell the same, had executed a bond for a deed and received from the purchaser notes for the deferred payments, and after a time the parties by mutual agreement rescinded the contract, and the notes were returned, but the bond was never surrendered, it was held that the owner was entitled to a decree quieting his title.⁸

13. Lands in Another State. — A court of equity having jurisdiction of the parties may compel a defendant to release and discharge an apparent cloud upon the title to lands situated in another state, since the decree operates only *in personam*.⁹

1. *Sea v. Morehouse*, 79 Ill. 216.

Where a Written Proposition for the Sale of Real Estate, without consideration and not under seal, was delivered by the owner thereof to another, but which offer was not accepted by the latter so as to be binding upon the former, and the vendee subsequently wrote upon the same an acceptance of the offer and caused the proposal and acceptance to be recorded in the recorder's office of the county in which the land was located, in violation of a pledge to the contrary, and in fraud of the rights of the vendor, the instrument as it stood upon the record was regarded as a cloud upon the title of the vendor which the court held he was entitled to have removed. *Larmon v. Jordan*, 56 Ill. 204.

2. *Dahl v. Pross*, 6 Minn. 89; *Yoss v. De Freudenrich*, 6 Minn. 95.

3. *King v. Carpenter*, 37 Mich. 363.

4. *Howe v. Hutchison*, 105 Ill. 501.

5. **Original Source of Title.** — *Pixley v. Hug-*

gins, 15 Cal. 128; *Thompson v. Lynch*, 29 Cal. 189; *Stoddard v. Prescott*, 58 Mich. 542; *Van Wyck v. Knevals*, 106 U. S. 370.

6. **Conveyance from Stranger to the Title.** — *Lytle v. Sandefur*, 93 Ala. 396; *Read v. Longstreet*, 54 Ala. 291; *Welden v. Stickney*, 1 App. Cas. (D. C.) 343; *Thompson v. Etowah Iron Co.*, 91 Ga. 538; *Houghtaling v. Walling*, 48 Hun (N. Y.) 104; *Ward v. Dewey*, 16 N. Y. 529. See also *Armstrong v. Sanford*, 7 Minn. 53; *Montgomery v. McEwen*, 9 Minn. 107; *Clark v. Covenant Mut. L. Ins. Co.*, 52 Mo. 272.

A Mortgage of land given by one who has no title, or a foreclosure sale thereunder, is not even an apparent cloud upon the true title. *Cornish v. Frees*, 74 Wis. 490.

7. *Huffman v. Huffman*, 1 Lea (Tenn.) 491.

8. *Smith v. Van Campen*, 40 Iowa 411.

9. **Lands in Another State.** — *Remer v. Mackay*, 35 Fed. Rep. 86, 54 Fed. Rep. 432.

In one instance a mortgage void for usury

14. Other Instruments and Proceedings. — A Semblance of Title Shown by a Bill in Equity claiming title to real property may constitute a cloud upon title which equity may remove, even though such bill was dismissed without a hearing on the merits.¹

An Award will not be set aside on the ground that it is void, if its invalidity will appear on the face of the papers when any right is claimed under it.²

Executor Selling Lands to Pay Outlawed Debts. — Where an executor, having a power of sale of the testator's real estate to pay debts, is proceeding to execute the power for the purpose of paying debts that are outlawed, those who have succeeded to the testator's title may restrain such sale, as it would cast a cloud upon their title.³

Sale by Administrator — Intestate's Prior Grantee. — The sale by an administrator of land, once the property of the intestate, but which he is alleged to have sold during his lifetime, will cast such a cloud on the title of the intestate's prior grantee as will enable him to maintain an action to restrain the sale.⁴

Title Acquired by Adverse Possession. — An apparently good record title to land constitutes a cloud upon the title thereto which has been subsequently acquired by adverse possession under the statute of limitations which the holder by adverse possession is entitled to have removed.⁵

An Attachment issued against a vendor after he has conveyed away the land, the deed therefor having been recorded within fifteen days after its delivery, is held in *New Jersey* to create no cloud upon the title.⁶

A Conveyance of Land by a Minor is voidable and not void; and where he disaffirms such act after coming of age, by conveying to a third person, the grantee in such subsequent conveyance, though taking the same with notice of the prior deed, is entitled to a decree quieting the title in himself without restoring the consideration paid for the voidable conveyance.⁷

Agreement to Devise Land — Subsequent Will. — It has been held that an agreement to devise land, if founded on a good consideration and clearly proved, may be enforced in equity by holding a will made pursuant to it irrevocable, and a subsequent will inconsistent therewith may be adjudged void as a cloud on title at the suit of those claiming under the original promisee and devisee.⁸

Forfeited Leasehold. — Where a lessor regains possession of the land by re-entry, after condition broken, as provided in the lease, equity has jurisdiction of the suit to remove the cloud created by the forfeited lease.⁹

Failure to Perform Conditions Subsequent. — Where lands were conveyed upon certain conditions subsequent which the grantor failed to perform, the grantor was held entitled to maintain suit for removal of the cloud thus created.¹⁰

Boundaries — Erroneous Calls. — A deed the calls in which are incorrectly stated, so that land is embraced which was not in fact conveyed, and which the grantees contend is correct, creates a cloud on the title of the owner which equity will remove.¹¹

Mere Verbal Claim. — A bill will not lie to remove a mere verbal claim or oral

was, by a court of equity, ordered to be surrendered up and canceled although the property the title to which was clouded by the usurious obligation was situated beyond the jurisdiction of the court, the court having jurisdiction of the parties. *Williams v. Ayrault*, 31 Barb. (N. Y.) 364. See also *Williams v. Fitzhugh*, 44 Barb. (N. Y.) 321, affirmed with a modification in *Williams v. Fitzhugh*, 37 N. Y. 444; *Cope v. Wheeler*, 41 N. Y. 303.

1. *Shults v. Shults*, 159 Ill. 654, 50 Am. St. Rep. 188.

2. *Meloy v. Dougherty*, 16 Wis. 269.

3. *Butler v. Johnson*, 111 N. Y. 204

4. *Thompson v. Lynch*, 29 Cal. 189.

5. *Arrington v. Liscom*, 34 Cal. 365, 94 Am. Dec. 722. See also *Echols v. Hubbard*, 90 Ala. 309; *Torrent F. Engine Co. No. 5 v. Mobile*, 101 Ala. 559; *Marston v. Rowe*, 39 Ala. 722.

6. *Maisch v. Hoffman*, 42 N. J. Eq. 116.

7. *Nettleton v. Morrison*, 5 Dill. (U. S.) 503

8. *Mutual L. Ins. Co. v. Holloday*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 16.

9. *Pendill v. Union Min. Co.*, 64 Mich. 172.

10. *Liebrand v. Otto*, 56 Cal. 242. See also *Smith v. Smith*, 23 Wis. 176, 99 Am. Dec. 153.

11. *Riggs v. Pope*, 3 Tex. Civ. App. 179. See also the title BOUNDARIES, vol. 4, p. 756.

assertion of ownership in property as a cloud upon the title.¹

Instruments Affected with Usury. — Mortgages, deeds of trust, and the like, void for usury, and creating a cloud on title, have been set aside by courts of equity.²

Inquisition of Lunacy. — When, after a conveyance of land, a commission of lunacy is taken out and executed against the grantor, by the finding in which it appears that the grantor had been a lunatic without a lucid interval from a time anterior to the date of the conveyance, and such finding has been duly confirmed by the court, these circumstances cast a sufficient cloud upon the title of the purchaser to entitle him to come into equity for relief.³

Married Woman's Deed — Homestead Rights. — Where a deed of real estate made by a married woman directly to her husband was absolutely void, but it did not appear on the face or elsewhere in the deed that the grantor was the wife of the grantee when she executed it, but extrinsic evidence was necessary to establish that fact, there was held to be a cloud on the title which equity would remove.⁴

Homestead. — Where the wife does not join in a conveyance of the homestead, such conveyance is absolutely void so far as it abridges her homestead rights, and she may, by next friend, file a bill *quia timet* to have the cloud removed and her homestead rights declared, though she has never parted with the possession or occupancy.⁵

Unlawful Acts. — Unlawful acts may constitute a cloud on one's title. Thus the unlawful closing of a highway adjoining, and the construction without right of a new road upon, the land of another, was held to entitle the latter to the interposition of a court of equity to restrain such action, which, if completed, would cast a cloud on the title.⁶

A Mortgage by a Corporation of Its Franchise, not authorized by law, is not a cloud as against a second valid mortgage by the corporation.⁷

Tax Proceedings. — A very large number of the cases involving the questions under consideration have arisen in connection with tax proceedings, and this branch of the subject will be treated elsewhere in this work.⁸

VI. STATUTORY ENACTMENTS. — Statutes providing for the determination of adverse titles, interests, and claims in lands have been passed in some jurisdictions. The purpose and effect of these enactments are to enlarge the power of the court to grant relief in cases of claims to real estate which by the settled rules of a court of equity do not constitute a cloud upon the title.⁹

1. *Parker v. Shannon*, 121 Ill. 452.

2. See the title *USURY*.

3. *Yauger v. Skinner*, 14 N. J. Eq. 389.

4. *Wife's Deed to Husband*. — *Brooks v. Kearns*, 86 Ill. 547.

Deed Executed in Woman's Maiden Name — Dated Prior to Marriage. — In *Galliano v. Lane*, 2 Sandf. Ch. (N. Y.) 147, a married woman seized of land in her own right executed a deed in her maiden name, dated prior to the marriage, which was proved by a subscribing witness and then recorded. The deed was set aside as invalid, both because it was not acknowledged by her in due form and because her husband did not join in it or execute a concurrent conveyance. The guardian *ad litem* of an infant defendant in whom the invalid title in part vested was directed to join in a reconveyance, executing it for and in the name of the infant.

Marital Possession — Abandonment. — A man who married in Alabama before 1842, and declined to take marital possession of the wife's estate during his coverture, but left the same under her control, and declared that the same belonged to her and not to him, up to the day

of his death in 1862, waived and abandoned his marital rights over her estate. In such a case, on the death of the husband the right of the wife revives, and equity will interfere to remove a cloud from the title of her land, unintentionally occasioned by the husband and wife in adjusting the deed of conveyance on an exchange of one tract of land for another tract for her benefit. *Barclay v. Henderson*, 44 Ala. 269.

5. *Williams v. Williams*, 7 Baxt. (Tenn.) 116.

6. *DeWitt v. Van Schoyk*, 110 N. Y. 7, 6 Am. St. Rep. 342.

7. *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

8. **For a Full Discussion**, see the titles *SPECIAL ASSESSMENTS; TAXATION; TAX SALES; TAX TITLES*.

9. **Statutes—California.** — *Von Drachenfels v. Doolittle*, 77 Cal. 295.

Georgia. — *Graham v. Hall*, 68 Ga. 354.

Kentucky. — *Campbell v. Disney*, 93 Ky. 41;

Kincaid v. McGowan, 88 Ky. 91.

Michigan. — *Scofield v. Lansing*, 17 Mich.

437; *Haddon v. Hemingway*, 39 Mich. 615;

Chaffee v. Detroit, 53 Mich. 573.

CLUB. — “Club” is defined as a heavy staff or stick fit to be used in the hand as a weapon; a bludgeon.¹

CLUBS. — See the title SOCIETIES AND CLUBS.

CO. (See also the titles ABBREVIATIONS, vol. I, p. 97; JUDICIAL NOTICE.) — “Co.” is a well-understood abbreviation of the word “company.”² It is also

Mississippi. — Handy v. Noonan, 51 Miss. 166.

New Jersey. — Raymond v. Post, 25 N. J. Eq. 447; Holmes v. Chester, 26 N. J. Eq. 79; Bogert v. Elizabeth, 27 N. J. Eq. 568; Ludington v. Elizabeth, 34 N. J. Eq. 357.

New York. — Temple Grove Seminary v. Cramer, 98 N. Y. 121.

South Dakota. — Wood v. Conrad, 2 S. Dak. 405.

Wisconsin. — Ellis v. Northern Pac. R. Co., 77 Wis. 114.

Michigan Statute. — Under Michigan Comp. L., § 3490 (How. Anno. Stat. Mich., § 6626), which provides that “any person having the actual possession and legal or equitable title to lands may institute a suit in chancery against any other person setting up a claim thereto in opposition to the title claimed by the complainant,” etc., the complainant need not show by his bill that the claim set up by the defendant is one which would be *prima facie* good at law. Holbrook v. Winsor, 23 Mich. 394.

Tax Certificate. — Under section 5449 Comp. Laws of *South Dakota*, the holder of a certificate of purchase of land at a tax sale, by which he is entitled to a deed to the land at the maturity of the certificate, claims “an estate or interest” in such land. Clark v. Darlington, 7 S. Dak. 148. See also the titles TAX SALES; TAX TITLES.

Technical Cloud on Title — Oregon Statute. — In a suit brought under section 500 of the Oregon Code, it is not essential that the adverse claim should constitute a technical “cloud on title,” as the term is understood in general equity jurisprudence; it is enough if calculated to create doubt and uncertainty in respect to the title of the true owner, or if operating injuriously in any way to his enjoyment of, or beneficial dominion over, such property. Any attempt persisted in to have such property sold on an execution against a third party amounts to an adverse claim within the meaning of the statute. Murphy v. Sears, 11 Oregon 127. See also *supra*, this title, Sales of Lands.

Tax Assessments Void on Their Face. — Under the *California Code of Civil Procedure*, § 738, authorizing an action by any person against another claiming an adverse interest in lands, an action to quiet the title may be maintained though the complaint shows that the adverse claim of the defendant rests on a sale of the land by a municipality for the nonpayment of street assessments void on their face. Kittle v. Bellegarde, 86 Cal. 556. In this case the court said: “It is contended that the complaint does not warrant any relief, because it shows that the adverse claim of the defendants rests upon proceedings which are void upon their face; but this objection is not available in an action to determine an adverse claim, under section 738 of the Code of Civil Procedure. Such an action may be maintained against a person who claims under a void tax deed.

Harper v. Rowe, 53 Cal. 234; Hearst v. Eglestone, 55 Cal. 365; Pearson v. Creed, 78 Cal. 144; Greenwood v. Adams, 80 Cal. 74.” See also the title SPECIAL ASSESSMENTS.

Contract of Sale Invalid on Its Face. — Under *Wisconsin Rev. Stat.*, § 3186, Laws of 1893, c. 88, an action is maintainable against a person claiming an interest in land under a contract of sale though it appears from the face of the contract that the claim is invalid. Fox v. Williams, 92 Wis. 320.

Defendant Must “Set Up Claim” to the Land — Wisconsin Statute. — A complaint to quiet the title to land under Wis. Rev. Stat., § 29, c. 141, must show that the defendant “sets up a claim” to the land. It is not sufficient to aver that he is doing all he can to dispossess the plaintiff of his interest in and possession of the land. Gamble v. Loop, 14 Wis. 465. See Maxon v. Ayers, 28 Wis. 612; Moore v. Cord, 14 Wis. 213.

For Further Discussion of the subject, see ENCYC. OF PLEADING AND PRACTICE, title QUIETING TITLE — REMOVAL OF CLOUD.

1. State v. Phillips, 104 N. Car. 786, in which case it was held that a *club* was a deadly weapon. See also DEADLY WEAPONS; and see the title ASSAULT AND BATTERY, vol. 2, p. 972.

Clubbing. — In Rex v. Coltishall, 5 T. R. 193, it is said: “The term *clubbing* signifies a person’s contracting to serve for the purpose of being taught some art or trade, and to have the less wages on account of learning the trade.” See also the title APPRENTICES, vol. 2, p. 488.

2. Keith v. Sturges, 51 Ill. 142.

In Estis v. Trabue, 128 U. S. 225, it is said that a writ of error in which both the plaintiffs in error and the defendants in error are designated merely by the name of a firm, containing the expression “& Co.,” is not sufficient to give the Supreme Court jurisdiction, but, as the record discloses the names of the persons composing the firms, the writ is, under section 1005 of the Revised Statutes, amendable by the Supreme Court, and will not be dismissed.”

Partnership. — The abbreviation “& Co.” added to a name does not necessarily give rise to the presumption of the existence of a partnership. Schroeder v. Turner, 68 Md. 509. To the same effect see Robinson v. Magarity, 28 Ill. 423; Brennan v. Pardridge, 67 Mich. 449. See also the title PARTNERSHIP.

Conflict of Laws. — Where a contract was entered into at the city of Philadelphia, under a firm name of “I. M. Stoddard & Co.,” by one who had in fact no partner, it was held, in an action brought in New York by the said Stoddard, that the contract was not void under the *New York* statute which forbids the use of the words “& Co.,” when such use represents no actual partner, being governed by the *lex loci contractus*. Stoddard v. Key, 62 How. Pr. (N. Y. Supreme Ct.) 137.

used as an abbreviation of "county."¹

COACH. — "Coach" is a generic term. It is a kind of carriage.²

COAL. (See also the title MINES AND MINING.) — A mineral; any substance composed of the ingredients of which coal is composed, and used for fuel, in commercial usage or by common understanding may be known as coal.³

1. **County.** — In *Gilman v. Sheets*, 78 Iowa 501, the court says, *per* Robinson, J.: "It is a matter of common knowledge that *Co.* is used as an abbreviation of 'county.'" *Citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 15, title ABBREVIATIONS.

2. **Stage Coach.** — See also *STAGE*; and see the title *TURNPIKES*.

A clause imposing tolls upon *coaches*, chariots, and other four-wheeled pleasure carriages includes stage *coaches*. The court said: "*Coach* is a generic term. It is a kind of carriage, and is distinguished from other vehicles chiefly as being a covered box, hung on leathers, with four wheels." 3 Encyc. Amer. 271, tit. *Coach*. "A very large kind of *coaches* called 'omnibus,' has lately come into use, which serve to carry passengers, newspapers, and furniture' (ib. 272). Here an omnibus is called a *coach*, though not used for pleasure, but for the common transportation of persons and baggage. Johnson defines a mail *coach*, 'a *coach* that carries the mail;' and a stage *coach*, 'a *coach* that regularly carries passengers from town to town.' Each is called a *coach*. It is contended that the word 'other,' in the clause of the act describing these vehicles, refers to *coach* as well as chariot, and that the substantive 'chariot,' used in the sentence adjectively, qualifies *coach* and carries with it the signification of pleasure *coach*. We do not so understand it. *Coach* forms a distinct member of the sentence; 'chariot' then intervenes; and this Johnson defines, 'a half *coach* with four wheels, used for convenience and pleasure.' Then follow the words, 'other four-wheeled pleasure carriage;' and 'chariot' and 'carriage' are coupled directly by the disjunctive 'or,' intended to comprehend all pleasure carriages other than chariots, but having no relation to *coaches*. We would not oppose the mere grammatical construction of a sentence to the obvious meaning of the legislature; but both concur here. A mail *coach* and a stage *coach* are nevertheless *coaches*. A *coach* is the description in the Act. The defendants' *coaches* are run on the road with the mail and with passengers, and must pay the toll assessed upon *coaches*." *Cincinnati, etc., Turnpike Co. v. Neil*, 9 Ohio 11.

In *New York v. Third Ave. R. Co.*, 117 N. Y. 410, 40 Am. & Eng. R. Cas. 278, it is said: "In definition a 'car' or *coach*, or 'stage,' or a 'stage *coach*,' is the same. They are vehicles that turn, or that run by turning on wheels."

Where an exemption from toll was made by statute of certain vehicles, but excepted therefrom were "any stage *coach*, diligence, van, caravan, or stage wagon, or other stage carriage conveying passengers or goods for pay," it was held that a wagon employed in carrying goods from a canal wharf to persons in the neighborhood, and from such persons to the canal company, was not a stage wagon, and

therefore not excluded from the exempting clause. The word "stage" conveys the idea of traveling to and from certain places. *Reg. v. Ruscoe*, 8 Ad. & El. 386, 35 E. C. L. 409.

3. **Patent Fuel.** — It is proper to allow a witness who is acquainted with the composition of "patent fuel" to testify whether it is embraced under the word *coal* in a policy of insurance, although he did not deal in *coal* or patent fuel either as a merchant or an underwriter. A commercial usage that it was no *coal* must have been a general usage known to the parties at the time the contract was made, and it must be shown that the character of the fuel had been so changed, either by other ingredients than *coal*, or by the process to which it had been subjected, that the general term *coal*, according to the common understanding of that name, would not apply to it. *Howare v. Great Western Ins. Co.*, 109 Mass. 384. See the titles *PAROL EVIDENCE*; *USAGES AND CUSTOMS*.

But patent fuel, composed of *coal*-dust mixed with three per cent. pitch and lime, was held not liable to duties imposed on *coals* imported into the port of London, notwithstanding there is no purpose to which ordinary pit *coal* can be applied to which *coal*-dust, without the admixture of pitch and lime, could not also be applied. *London v. Parkinson*, 10 C. B. 228, 70 E. C. L. 228.

Coal Is a Mineral. — In *Henry v. Lowe*, 73 Mo. 96, it was held that within a statute giving treble damages against any person who should dig up a quarry, or carry away any stone, ore, or mineral, *coal* was a mineral.

Coal Privileges. — A common practice prevails among the owners of *coal* lands to grant what are called "*coal* privileges," that is, to grant the right of mining and taking out all the *coal* lying under a certain piece of ground, or a given number of acres, either at a specified rate per bushel, or so much by the acre. *Peterson v. Kier*, 2 Pittsb. (Pa.) 199.

Refined Coal or Earth Oils in Policy. — The insured made application for insurance, and the agent who inspected the premises was informed and knew that kerosene oil was used for lighting. The policy which the agent gave to the insured contained the condition that if refined *coal* or earth oil was used or stored without written consent the policy was void. It was held that kerosene, in a commercial sense, was a refined *coal* or earth oil, and that it could not be supposed, without imputing bad faith to the defendant, that the use of kerosene for lighting was intended to be prohibited, as it would have rendered the policy void from the beginning, and also that the defendant waived the condition requiring consent in writing, and was estopped from setting up a forfeiture for breach thereof. *Bennett v. North British, etc., Ins. Co.*, 81 N. Y. 273, 37 Am. Rep. 501. See also the title *FIRE INSURANCE*.

Coal Gas — Life Insurance. — See the titles *AC-*

COAST. (See also the titles INTERNATIONAL LAW; NAVIGATION; NAVIGABLE WATERS; SHIPS AND SHIPPING.)—"Coast" is defined to be the seaboard of a country.¹

CIDENT INSURANCE, vol. 1, pp. 314, 315; LIFE INSURANCE; and see GAS.

Refuse Coal.—See REFUSE.

Coal Mines.—The express mention in a statute of *coal* mines is a virtual exclusion of all other mines, and consequently all other mines, even though operated in the same manner as *coal* mines, were held not ratable to the relief of the poor under the statute 43 Eliz., c. 2. *Rex v. Sedgley*, 2 B. & Ad. 65, 22 E. C. L. 24.

Coals Worked Out.—Where a lease was made of a colliery, by which the owners were to have a certain quantity of *coals* at the mouth of the pit, and the lessees, on suit being brought for non-fulfilment of covenant, filed their plea that the coals were worked out, and it appeared that there was some *coal* left in the pit, but it would cost more than it was worth to work it, the court held the covenant absolute, and the plea to be no answer. 7 B. & S. 243.

Coke.—Coke is not *coal* within the meaning of section 15 of the Metropolitan Streets Act, 1867 (30 and 31 Vict., c. 134), which prohibits the loading or unloading of *coal* on or across the footway between certain hours, and imposes a penalty for so doing. *Fletcher v. Fields*, (1891) 1 Q. B. 790. But the expression, "*coals* or produce of mines," includes coke. *Warren v. Peabody*, 8 C. B. 800, 65 E. C. L. 800. See also *Bowes v. Ravensworth*, 15 C. B. 512, 80 E. C. L. 512.

Coal-tar Naphtha.—In *Ayling v. Hull*, 2 Cliff. (U. S.) 497, the court says: "The expert testimony offered by the complainant shows that *coal-tar naphtha* has been long known as the light oil produced in the decomposition of *coal*, when sudden and high heat is applied to it. The statement is that it consists, when highly rectified, in a large part, of a substance called by chemists benzole, or benzine, and that it has specific characters, although it is a mixture. The principal expert witness called for complainant states that it has a low boiling point, but congeals wholly or in part at about the temperature of freezing water. It forms compounds of decomposition with nitric acid, one of which crystallizes and has the composition of compounds in the benzole series, derived from benzoic acid. One of its peculiar physical characters is, that although very volatile, it does not diffuse in air at forty degrees, and cannot, therefore, be used in the manufacture of air-gas." This was a patent case.

1. *Ravesies v. U. S.*, 35 Fed. Rep. 919.

Coasting Trade.—In *North River Steamboat Co. v. Livingston*, 3 Cow. (N. Y.) 747, the court said that *coasting* trade means "commercial intercourse carried on between different districts in different states, between different districts in the same state, and between different places in the same district, on the sea-coast or on a navigable river."

The term "*coasting* trade" embraces trade upon navigable rivers. *Bennett v. Morta*, Holt 359, 3 E. C. L. 146. See also *San Francisco v. California Steam Nav. Co.*, 10 Cal. 507; *North River Steamboat Co. v. Livingston*, 3

Cow. (N. Y.) 747; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Blackwell v. Walker*, 1 Wend. (N. Y.) 557.

So, in *The Victory*, 63 Fed. Rep. 631, it was held that waters navigable from the ocean are *coast* waters, within the Act of March 3, 1885, adopting the international rules governing navigation.

But the term "*coasting* trade" cannot be applied to ferrying across a river, and Congress has no authority to require a license to carry on a ferry over a river at a place entirely within the limits of the state. *U. S. v. The Steamboat James Morrison*, 1 Newb. Adm. 241.

Coastwise Trade Synonymous with Coasting Trade—Navigable Rivers.—In *Ravesies v. U. S.*, 37 Fed. Rep. 447, *Pardee, J.*, says: "The district judge held, and gave judgment accordingly, that *coastwise* trade means trade or intercourse carried on by sea between two ports or places belonging to the same country, and does not include trade carried on on the navigable rivers. I am inclined to the opinion that this interpretation is too narrow. In the statutes of the United States relating to commerce, navigation, and revenue, the words '*coasting* trade' and '*coastwise* trade' are used synonymously. See Act April 14, 1874 (Rev. Stat., §§ 2513, 4358); 16 Opp. Atty.-Gen. 247. In the case of *Gibbons v. Ogden*, 9 Wheat. (U. S.) 214, it is said by Chief Justice Marshall, in giving the opinion of the court: 'The *coasting* trade is a term well understood. The law has defined it, and all know its meaning perfectly. The Act describes with great minuteness the various operations of a vessel engaged in it, and it cannot, we think, be doubted that a voyage from New Jersey to New York is one of those operations.'" See also the case of *North River Steamboat Co. v. Livingston*, 3 Cow. (N. Y.) 713.

Coastwise Trade.—The term "*coastwise* trade" does not include trade between the Atlantic and Pacific *coasts* of the United States. *U. S. v. Patten*, Holmes (U. S.) 421.

Same—Plying Coastwise.—The terms "*plying coastwise*" and "*coasting* trade" indicate vessels engaged in the domestic trade, or plying between port and port in the United States, as contradistinguished from those vessels engaged in the foreign trade, or plying between a port of the United States and a port of a foreign country. *Walker v. Blackwell*, 1 Wend. (N. Y.) 557; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1. Accordingly, vessels plying between San Francisco and Sacramento, and San Francisco and Stockton, are liable to the payment of harbor dues to the city and county of San Francisco. *San Francisco v. California Steam Nav. Co.*, 10 Cal. 505.

Coaster—Coasting Vessel.—In *Belden v. Chase* 150 U. S. 696, it is said: "Ordinarily the terms *coaster* and '*coasting* vessel' are applied to vessels plying exclusively between domestic ports, and usually to those engaged in domestic trade as distinguished from vessels engaged in the foreign trade or plying between a port of the United States and a port of

COASTING. — See note 1.

C. O. D. (For a full treatment of a carrier's obligation in case of goods sent C. O. D., see the titles **CARRIERS OF GOODS**, vol. 5, p. 223 *et seq.*; **EXPRESS COMPANIES**.) — The term "C. O. D." means "collect on delivery."²

a foreign country. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1."

Vessels trading between England and Guernsey and Jersey have been decided not to be *coasting* vessels. *Shepherd v. Hills*, 11 Exch. 55.

In *Shepherd v. Hills*, 25 L. J. Exch. 6, Alderson, B., said: "A *coasting* vessel would seem to mean a vessel that goes along the *coast*." But in *Davison v. Mekibben*, 6 Moo. 387, it was held that an Irish vessel trading between Belfast and London was not a *coasting* vessel within a Pilot Act.

Goods brought from an Irish port to Bristol are not brought *coastwise*. *Battersby v. Kirk*, 5 L. J. C. P. 166, 2 Bing. N. Cas. 584, 29 E. C. L. 432.

Shore. (See also **SHORE**.) — The jurisdiction of district courts of the United States, ascertained by Act of Congress of 1794, extends a marine league from the *coasts* or shores, extending to low-water mark. Shoals covered with water are not part of the *coast* or shore. *Soult v. L'Africaine*, Bee Adm. 204.

Atlantic Coast in Insurance Policy. — In the printed part of the policy the assured warranted that it would not use (among other places) ports and places in Texas, except Galveston, nor foreign ports and places in the Gulf of Mexico. By a written memorandum on the margin the vessel was to be employed in the *coasting* trade on the United States Atlantic *coast*, and was permitted to use gulf ports not west of New Orleans. The vessel was lost in the gulf, west of New Orleans, not far from Morgan City, Louisiana, which is west of New Orleans, while on her voyage to that place from Maine. The assured could not recover, the meaning of the policy excluding the Gulf of Mexico, and the permission to use the gulf ports not west of New Orleans not extending the *coasting* trade through the gulf. *New Haven Steam Saw Mill Co. v. Security Ins. Co.*, 7 Fed. Rep. 847. See also the title **MARINE INSURANCE**.

1. Coasting in Highways. — Towns are not liable for injuries to travelers by *coasting* on sleds in highways. This is not an insufficiency of a highway, within the meaning of a statute which renders towns liable for injuries by reason of insufficiencies, though the selectmen neglected to forbid *coasting*. *Hutchinson v. Concord*, 41 Vt. 271. See also the titles **HIGHWAYS**; **MUNICIPAL CORPORATIONS**; **STREETS AND SIDEWALKS**; **TOWNS AND TOWNSHIPS**.

2. American Express Co. v. Wettstein, 28 Ill. App. 100.

In *Com. v. Fleming*, 130 Pa. St. 157, it is said the well-known meaning of such an order (**C. O. D.**) is that the price of the goods is to be collected at the time of their delivery.

Contract. (See also **CARRIERS OF GOODS**, vol. 5, p. 223.) — In *American Express Co. v. Lesem*, 39 Ill. 333, the court said: "It is proper here to discuss the nature and import of the letters **C. O. D.**, as placed on the receipt

and on the box by the express company. Do they amount to a contract? And, if so, what is the extent of it? What are the liabilities assumed by the company, and how can they discharge them? These are interesting questions to the whole business community, and deserve careful and full investigation, the more especially after the effort made by this company to deprive them of any force or meaning. The counsel treats them as an enigma not legally explainable. * * * The letters are the initials, and so understood, of the words 'collect on delivery,' and this undertaking, by those letters the appellants assumed, and they must be held to a strict performance thereof."

Judicial Notice. (See also the title **JUDICIAL NOTICE**. — In *State v. Intoxicating Liquors*, 73 Me. 278, the court said: "Undoubtedly, the initials **C. O. D.** meant, 'collect on delivery;' or, more fully stated, 'deliver upon payment of the charges due the seller for the price, and the carrier for the carriage, of the goods.' These initials have acquired a fixed and determinate meaning which courts and juries may recognize from their general information. What can be established by indisputable proof may be acknowledged without proof. What is notorious needs no proof. 1 Whar. Ev., § 330; Best Ev. 351." See the titles **CARRIERS OF GOODS**, vol. 5, p. 224; **EXPRESS COMPANIES**.

Same — Parol Evidence. — In *Collender v. Dinsmore*, 55 N. Y. 205, it was held competent to give parol evidence to explain the meaning of the letters **C. O. D.**, and thus remove all ambiguity. The court said: "The letters **C. O. D.**, followed by an amount in dollars, have come to be very well understood in the community and by the public, but perhaps could not, without the aid of extrinsic evidence, be read and interpreted by the courts; that is, their meaning may not be considered as judicially settled, or so well understood that judicial notice can be taken of the purpose for which those letters are used, in the connection in which they are here found, or the contract to be implied from them. It was certainly competent to explain them, and thus remove all ambiguity by parol evidence." See also the title **PAROL EVIDENCE**.

Evidence may be given to show what the meaning of **C. O. D.** is; but they being letters familiar and ordinary, no other than the usual meaning can be given them, neither by proof of custom, previous dealing, nor otherwise. *American Express Co. v. Lesem*, 39 Ill. 312.

Previous Dealings. — Where goods are sent **C. O. D.** it is not competent for the company to prove by parol that goods which had on prior occasions been sent by the same consignor to the same consignee, and the receipt given therefor using the same letters, were delivered to the consignee without payment being first required, upon an understanding to that effect between him and the consignor, as such an arrangement in regard to prior transactions did not preclude the company from contract-

CODE — CODIFICATION. — A general collection or compilation of laws by public authority. The word is used frequently in the United States to signify a concise, comprehensive, systematic re-enactment of the law, deduced from both its principal sources, the pre-existing statutes, and the adjudications of courts, as distinguished from compilations of statute law only.¹ Codes, such as here described, have been adopted and are now in use in many of the states. They are for the most part modeled upon that of New York.

ing not to deliver the goods until the money was paid, and such proof would change the legal import and effect of the written contract, which cannot be done by parol. *American Express Co. v. Lesem*, 39 Ill. 312.

Pleading. — In *U. S. Express Co. v. Keefer*, 59 Ind. 263, it was considered that the letters "have acquired such a fixed and determinate meaning that courts and juries, from their general information, will readily understand what is meant thereby, when they are used as the appellees have used them [a use in no sense peculiar] in their complaint. If the complaint were defective, for the want of an averment of the meaning of those letters, the defect would be one which could only be reached by a motion to make more specific, and which would certainly be cured by the verdict. A motion in arrest of judgment would not reach such a defect in the complaint, if it were conceded to be defective in this particular."

C. O. D. — Intoxicating Liquors. — As to the liability of the vendor or express company for illegal sale of liquors sent *C. O. D.*, see the titles *INTOXICATING LIQUORS*; *SALES*.

Jus Disponendi. (See also the title *SALES*.) — In *Wagner v. Hallack*, 3 Colo. 177, it was held that the initials *C. O. D.* have a well-known commercial meaning, and manifest the intention of the vendor to control the *jus disponendi*. The court said: "The goods were shipped to the agent of plaintiffs, and marked *C. O. D.* These initials have a well-known commercial meaning, and show clearly that the plaintiffs did not intend to give credit to any one. Their purpose is manifest to retain control of the goods and thereby secure themselves against the default of either Heenan or the defendants. Delivery to the carrier, therefore, was not delivery to the buyer, and the *jus disponendi* remained in the vendors. *Benjamin on Sales*, § 382 *et seq.*" Compare *State v. Intoxicating Liquors*, 73 Me. 278.

Transportation Charges. — *C. O. D.* does not

concern these. *American Merchants' Union Express Co. v. Schier*, 55 Ill. 140; *American Express Co. v. Lesem*, 39 Ill. 312.

Receipt. — Where the carrier's agent gives a receipt in which the letters *C. O. D.* are used, the company is bound by the contract. *American Express Co. v. Lesem*, 39 Ill. 312.

Refusal of Goods by Consignee. — On refusal of the consignee to receive the goods, and the storing of the same by the carrier pending instructions from the consignor, the liability of the carrier is that of warehouseman only. *Gibson v. American Merchants' Union Express Co.*, 1 Hun (N. Y.) 387; *Weed v. Barney*, 45 N. Y. 344.

Connecting Lines. — Where goods are shipped *C. O. D.*, and there are intermediate carriers, this direction, *C. O. D.*, means to collect of the ultimate consignee, and intermediate carriers are not called upon to advance the amount on their receipt of the goods. But where packages were marked "*C. O. D.* \$375, from Turner's Express, Boston, Mass.," and the receipt by the defendant, the first or intermediate carrier, read: "Rec'd of Phelan & Collender [describing goods], marked: 'A. King, Clifton House, Windsor, N. S.' *C. O. D.* \$375, from Turner's Express, Boston, Mass.," it was held that the contract must be read: "Collect on delivery \$375 from Turner's Express, Boston;" and that evidence could not be given to show a custom under which a different meaning should be given, since the letters *C. O. D.* had come to have a well understood meaning in the community. *Collender v. Dinsmore*, 55 N. Y. 206.

1. "Code" means a system of law, a systematic and complete body of law. *Johnson v. Harrison*, 47 Minn. 575, in which case it was held that an act to establish a private code was not obnoxious to the constitutional provision that no law should embrace more than one subject.

Code Pleading. — See the title *CODE PLEADING*, 4 ENCYC. OF PL. AND PR., p. 556.

CODICILS.

BY SIDNEY R. PERRY.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the titles *HEIRS AND DEVISEES; LEGACIES AND DEVISES; WILLS*, in the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ADEPTION OF LEGACIES*, vol. 1, p. 610; *DEBTS OF DECEDENTS; EXECUTORS AND ADMINISTRATORS; LEGACIES AND DEVISES; TESTAMENTARY CAPACITY; UNDUE INFLUENCE; WILLS*.

I. DEFINITION, OBJECT, AND ORIGIN. — A codicil is a supplement or an addition to a will, made by the testator, to be taken as part of the testament, and having for its object the explanation, modification, addition to, subtraction from, or alteration of, some or all of the provisions contained in the will.¹ A codicil may confirm, re-execute, revive, republish, or revoke any will with which it may be incorporated.²

Origin of Term. — The name, and, in some sense, the modern use of a codicil, are taken from the *codillus* of the Roman law, this being a diminutive of *codex*, and literally importing a little code or writing.³

1. Burrill L. Dict., tit. Codicil; 1 Bouv. L. Dict., tit. Codicil; 1 Redf. on Wills (4th ed.) 287; *Hitchcock v. U. S. Bank*, 7 Ala. 386; *Mason v. Smith*, 49 Ala. 71; *Leavens v. Butler*, 8 Port. (Ala.) 380; *Boyd v. Latham*, Busb. L. (N. Car.) 365; *Neff's Appeal*, 48 Pa. St. 501.

Explanation of Doubtful or Ambiguous Clauses. — A codicil is sometimes used to explain provisions in the will which are somewhat doubtful or ambiguous. *M'Cutchen v. Marshall*, 8 Pet. (U. S.) 220.

Testamentary Letter Considered a Codicil. — A testator shortly before his death wrote a letter to his lawyer, which, after reciting his marriage, ran thus: "What I want is for you to change my will so that she [his wife] will be entitled to all that belongs to her as my wife. I am in very poor health, and would like this attended to as soon as convenient. I don't know what the laws are in Montana. I don't know what ought to be done, but you do." It was held that this letter was executed according to the statute (Prob. Prac. Act Mont., § 19, 439) of *Montana* concerning holographic wills, was testamentary in its nature, and should properly be considered a codicil to his will. *Barney v. Hayes*, 11 Mont. 571.

Additional Clause Considered a Codicil. — "The addition which the testator made to his will, in November, 1851, and which he calls an 'additional clause,' is undoubtedly a codicil. It was written more than three years after the will, and was intended to alter it in certain particulars. It comes, therefore, directly within the most approved definition of a codicil, which is, 'a supplement to a will or an addition made by the testator and annexed to

and to be taken as a part of a testament — being for its explanation or alteration, or to make some addition to or subtraction from the former disposition of the testator.'" *Per Battle, J.*, in *Joiner v. Joiner*, 2 Jones Eq. (N. Car.) 68.

Check Considered Codicil — Canada. — In Canada it has been held that where the testator, after making his will, drew a check for one thousand dollars and handed it, through his private secretary, to a party not mentioned in the will, such check was a valid testamentary instrument, in the nature of a codicil, and in so far revoked the will. *Colville v. Flanagan*, 8 L. C. J. 225, 14 L. C. Rep. 328.

Difference Between Codicil and Subsequent Will. — But a codicil is made to be added to the will, to enlarge, restrict, or modify some of its provisions, and not, like a later will, to stand in the place of or supersede it. *Collier v. Collier*, 3 Ohio St. 369.

2. See *infra*, this title, *Republication; Revocation*.

3. 1 Burr. L. Dict., tit. Codicil; 1 Bouv. L. Dict., tit. Codicil.

Origin of Use of Codicils. — Codicils owe their origin to the following circumstances: Lucius Lentulus dying in Africa left codicils, confirmed by anticipation in a will of former date, and in these codicils requested the Emperor Augustus, by way of *fidei commissum* or trust, to do something therein expressed. The emperor carried this will into effect, and the daughter of Lentulus paid legacies which she would not otherwise have been legally bound to pay. Other persons made similar *fidei commissa*, and then the emperor, by the

II. EXECUTION — 1. As to Testamentary Capacity. — It is requisite that the testator be of sound mind and testamentary capacity at the time of executing a codicil.¹

Codicil Executed with Testamentary Capacity Curing Defective Will. — But though the testator be of insane mind or under undue influence at the time of making his will, yet if he were sane and free from this influence at the date of the execution of a codicil thereto, the will is established.²

2. As to Formalities in Execution — a. GENERAL MANNER OF EXECUTION. — The formalities to be observed in the execution of a codicil are governed for the most part by statutory provisions, and in general it may be said that the codicil should be executed with the same formalities necessary in a will for the same purpose.³

advice of learned men, sanctioned the making of codicils, and thus they became clothed with legal authority. Inst. 225; Bouv. L. Dict., tit. Codicil.

Difference Between Codicil and Codillus. — The codicil and codillus are now two very different instruments, the peculiarities of the latter as contradistinguished from the former being, that it required no solemnity in its execution; that an inheritance could neither be given nor taken away by it except through a trust; and that it might be made before as well as after a testament. Burrill's L. Dict., tit. Codicil.

1. *In re Kohler*, 79 Cal. 313; *Matter of Soule*, 22 Abb. N. Cas. (Cayuga Surrogate Ct.) 236, 1 Connolly (N. Y.) 18; *Ross v. Gleason*, 115 N. Y. 664, 26 N. Y. St. Rep. 501. See generally the titles TESTAMENTARY CAPACITY; WILLS.

Presumption as to Testamentary Capacity. — Testamentary capacity or incapacity at the time of the execution of a will is presumed to have continued to the time of the execution of a codicil thereto, in the absence of a contrary showing. *Thomas's Estate*, 20 W. N. C. (Pa.) 336.

2. *Brown v. Riggins*, 94 Ill. 560; *O'Neill v. Farr*, 1 Rich. L. (S. Car.) 80; *Gass v. Gass*, 3 Humph. (Tenn.) 278. See *infra*, this title, *Defective Will Cured by Duly Executed Codicil*.

3. See generally the title WILLS.

Method of Signature and Attestation in Codicil. — See *In Goods of Killick*, 3 Sw. & Tr. 578, 34 L. J. P. 2, 10 Jur. N. S. 1083; *In Goods of Garner*, 1 Ir. L. R. 307; *Riggs v. Riggs*, 135 Mass. 238, 46 Am. Rep. 464.

Place of Signature and Attestation in Codicil. — See *Woodhouse v. Balfour*, 13 Prob. Div. 2, 57 L. J. P. 22, 58 L. T. 59, 36 W. R. 368, 52 J. P. 7; *In Goods of Hughes*, 12 Prob. Div. 107, 56 L. J. P. 71, 57 L. T. 495, 35 W. R. 568; *In Goods of Hammond*, 3 Sw. & Tr. 90, 32 L. J. Prob. 200, 9 Jur. N. S. 581, 11 W. R. 639; *In Goods of Horsford*, L. R. 3 P. D. 211, 44 L. J. P. 9, 31 L. T. 553; *In Goods of Jones*, 4 S. & T. 1, 34 L. J. Prob. 41, 11 Jur. N. S. 118, 13 L. T. 210.

Improperly Executed Codicil Not Validated by Subsequent Proceedings in Court. — If a paper purporting to be a codicil to a will is not executed with the formalities required by law, the fact that the same has been presented to the surrogate, with the will, evidence received in regard to it, and the paper recorded by the surrogate in connection with the will, will not add in any way to its force and validity as a codicil. *Burhans v. Haswell*, 43 Barb. (N. Y.) 424.

Codicil Containing Attestation Clause but No Attestation. — Where a codicil contained an attestation clause in the testator's own handwriting, but was not subscribed by any attesting witnesses, the presumption of law is that the intention of the testator was to acknowledge or publish it in the presence of witnesses, which not being done renders it incomplete and invalid as a testamentary paper. *Power v. Davis*, 3 MacArthur (D. C.) 153.

Codicil Dealing with Realty. — A codicil unattested and unsigned, especially where the circumstances show the design of the testator to let the codicil remain in this uncompleted condition, is insufficient to pass real estate under the laws of *Maryland*. *Plater v. Groome*, 3 Md. 134, *distinguishing* *Brown v. Tilden*, 5 Har. & J. (Md.) 371.

Codicil Dealing with Personalty. — A codicil in the handwriting of the testator, found with his will, reciting the changes and alterations he intended to make in it as to his personal estate, is a good and valid testamentary disposition of such estate, though not signed by the testator or attested by witnesses. *Brown v. Tilden*, 5 Har. & J. (Md.) 371, *distinguishing* in *Plater v. Groome*, 3 Md. 134. See also *Cogbill v. Cogbill*, 2 Hen. & M. (Va.) 467.

And a will which is effectual to emancipate slaves is not invalidated by a codicil attached, by which the terms of emancipation are more clearly defined and the price to be paid for their liberty is lowered, though the codicil be proved by only one witness, it dealing only with personalty and not realty. *Orchard v. David*, 6 B. Mon. (Ky.) 376.

Will So Attested as to Embrace Attestation of Codicil. — A will and codicil, the last providing for executors only, were both signed at the same time by the testator, both being written on the same piece of paper; the witnesses to the will signed the same as such but once, it being the intention to attest the execution of the whole will, including the codicil. It was held that, the proceedings being regular in other respects, the codicil was properly executed, and it did not matter on what portion of the will the subscribing witnesses signed their names, if the signatures were affixed after making the codicil, with the purpose to attest the execution of the entire will, including the codicil. *Fowler v. Stagner*, 55 Tex. 393.

Codicil Written in Pencil. — In *Bell County v. Alexander*, 22 Tex. 350, an objection that the codicil was written with a pencil was not noticed by the court.

b. FOR PURPOSES OF REVOCATION. — A codicil not executed according to the requirements of law cannot operate as a revocation of a perfect will.¹

c. FOR PURPOSES OF REPUBLICATION AND CONFIRMATION. — In order to republish or confirm a will, the codicil must be properly and legally executed. An improperly executed codicil will not have this effect.²

Beneficiary under Will, Attesting Witness to Codicil. — A beneficiary does not lose his rights under the will in consequence of his being an attesting witness to a codicil ratifying and confirming the will.³

1. *Grantly v. Garthwaite*, 2 Russ. 90; *Fischer v. Popham*, L. R. 3 P. D. 246, 33 L. T. 231; *Heise v. Heise*, 31 Pa. St. 246.

Revoking Codicil Executed as Will. — Under the *Wills Act of England*, 7 Will. IV. & 1 Vict., c. 26, the instrument of revocation must be executed in the same manner as a will. *Baker v. Story*, 31 L. T. N. S. 631, 23 W. R. 147.

Under the *New York Statute*, to work a revocation the codicil must be "executed with the same formalities with which the will itself was required to be executed." *Nelson v. Public Administrator*, 2 Bradf. (N. Y.) 210.

Under the *Texas Statute*, the revoking instrument must be executed with like formalities necessary in the execution of a will. *Kennedy v. Upshaw*, 64 Tex. 411.

Under the *Canadian Statute*, § 5 of the *Wills Act* of 1868, which provides that no will shall be revoked otherwise than by "another will or codicil executed according to law, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is by law required to be executed," means a will, codicil, or other writing executed with the same formalities as are required in the case of the will or codicil which it purports to revoke. See *Ont. Rev. Stat.*, c. 106, § 22; *In re Parker*, 20 Grant's Ch. (U. C.) 389.

Revocation by Nuncupative Codicil. — Under *Rev. Stat. Wis.*, c. 97, § 10, a nuncupative codicil cannot operate as a *pro tanto* revocation of the will. *Brook v. Chappell*, 34 Wis. 405.

Revocation by Holographic Codicil. — In *Hooper v. McQuary*, 5 Coldw. (Tenn.) 129, it was held that a will might be revoked by a codicil in the testator's handwriting and subscribed by him, although there were not attesting witnesses. In *In re Soher*, 78 Cal. 477, however, it was decided that the fiction that the will and codicil were one instrument would not be carried to the extent of allowing a holographic codicil to revoke an attested will written by some person other than the testator.

As to revocation by unattested codicil of legacies charged on realty, see *infra*, this section, *As to Legacies Charged on Realty*.

2. Revival of Unattested Will by Unattested Codicil. — An unattested codicil, although wholly in the handwriting of the testator, cannot bring into operation as a will a paper which is neither in the handwriting of the testator nor attested as required by the statute, since both the codicil and will must be considered as one instrument. *Sharp v. Wallace*, 83 Ky. 584.

Republishing of Revoked Holographic Will. — A holographic will once revoked can be republished only by a written instrument, setting forth the testator's intentions, and duly at-

tested by the statutory number of witnesses, or by a paper written by the testator himself, and deposited by him as required for the original will, and such subsequent writing would be construed to be a codicil. *Love v. Johnston*, 12 Ired. L. (N. Car.) 355; *Sawyer v. Sawyer*, 7 Jones L. (N. Car.) 134.

Republishing of Will Revoked by Marriage. — A codicil, not executed as a will as required by *N. Y. Rev. Stat.* 63, § 40, so as to stand alone as a will, does not validate and republish a will made by a testatrix before her marriage. By marriage the will was utterly revoked, and could only be revived by a codicil executed as a will, and not merely as a codicil. *Harris v. Meyer*, 3 Redf. (N. Y.) 450. In *Brown v. Clark*, 77 N. Y. 369, a codicil was held under this statute to operate as a republishing of a will revoked by marriage, since in this case the codicil was executed as a will, and not merely as a codicil.

Republishing of Will Dealing with Real Estate. — In *South Carolina*, where the statute requires that to pass real estate, the will and the codicil thereto must be attested by three subscribing witnesses, a testator made a will, which was attested by only two subscribing witnesses, and a codicil which was attested also by two witnesses, one of whom, however, was not a subscriber to the will. It was argued that since the will and codicil were parts of the same instrument, and the will was signed by two, and the codicil by a third, the provisions of the statute were complied with. The court held, however, that such was not the case, and that the codicil being improperly executed could not republish or affirm the will as far as real estate was concerned. *Dunlap v. Dunlap*, 4 Desaus. (S. Car.) 305.

3. *Denne v. Wood*, 4 L. J. Ch. 57; *Tempest v. Tempest*, 2 Kay & J. 635.

A bequest of a legacy is not void because the legatee attests a codicil which gives him nothing, nor does a residuary legatee of a share of the residue lose his title by attesting a codicil, which, by revoking legacies, indirectly benefits him by increasing the residue. *Gurney v. Gurney*, 3 Drew. 208, 24 L. J. Ch. 656, 1 Jur. N. S. 298.

And where by a will bequests were given to two of the testator's employees, one of whom had attested both the will and the codicil confirming it, while the other had attested only the codicil, it was held that the former could not take the bequest, but the latter was not incapacitated from taking under the will. *Marcus v. Marcus*, 57 L. T. 399.

But a witness to a codicil being interested under the parol trust created by the will for objects specified in the will and codicils, it was held that his interest under the codicil failed.

d. AS TO LEGACIES CHARGED ON REALTY — Legacies Charged on Realty Generally in Aid of Personalty. — Where real estate is charged with legacies generally, by will duly executed, legacies may be revoked or charged by an unattested instrument.¹ And if a testator, by will properly attested, charge real estate with legacies he shall afterwards give by codicils, a legacy by a codicil not attested is good.²

Legacies Charged Primarily on Land. — But a distinction is to be noted between legacies charged upon the land as an auxiliary fund and a portion of the land itself or the produce of the land when directed to be sold. In the latter case an unattested codicil is held to be unavailing.³

In re Fleetwood, 15 Ch. Div. 594, 49 L. J. Ch. Div. 514, 29 W. R. 45.

1. *Buckeridge v. Ingram*, 2 Ves. Jr. 665; *Hannis v. Packer*, Ambl. 556.

Power to Create Future Charges Cannot Be Reserved. — A testator cannot, by a will duly executed, reserve to himself the power to charge his real estate for the payment of legacies by an unattested codicil. *Whytall v. Kay*, 2 Myl. & K. 765. In this case, Sir John Leach, M. R., said: "It is now settled, though not upon a very satisfactory principle, that a testator may, by will duly executed, charge his real estate with the payment of all legacies, which will include future legacies given by an unattested codicil. * * * But he cannot, by a will duly executed, reserve to himself a power to charge his real estate, or the produce of his real estate, with legacies given by an unattested codicil. This plain distinction is expressed in the case of *Rose v. Cunynghame*, 12 Ves. Jr. 37."

In the case referred to, Sir William Grant, M. R., said: "It is impossible previously to ascertain what debts a man may owe at the time of his death; and it is difficult to ascertain, when he is making his formal and regular will, what legacies he may think fit, or his fortune will enable him, to give. The court has therefore said that when he has by a will, duly executed, charged debts and legacies, it is only necessary to shew that there is a debt, or that there is a legacy, in order to constitute a charge; for the moment that character is shewn to belong to the demand you shew that it is already charged upon the estate. Then an unattested instrument is itself perfectly competent to give a legacy; and, when given, you predicate of it that it is a legacy; and then the charge immediately attaches by virtue of the executed will. But here the testator says he does not now determine that all annuities and all legacies he shall hereafter give shall be charges; but only that if at some future period he shall think proper to declare legacies and annuities to be charges upon this real estate, then the trustees shall pay them out of the real estate. Therefore, not only the legacy is to be found, but also the will of the testator to make it a charge upon this estate; without which it is not a charge. That is only an attempt to reserve, by a will duly executed, a power to charge by a will not duly executed."

Reduction of Charged Legacies by Unattested Codicil. — A testator made a will and codicil; the former was attested so as to pass real estate, but the latter was not. By his will he bequeathed a legacy of £3,000 and charged it on his real in "aid of his personal estate." And he devised his real and personal estate to

trustees, charged with legacies throughout, by mortgage, sale, or other disposition, to pay the legacy of £3,000. By the codicil he reduced the legacy to £2,000. It was held that the codicil, though not properly attested, effected the reduction. *Coverdale v. Lewis*, 30 Beav. 409, 8 Jur. N. S. 351, 10 W. R. 307.

2. *Inchiquin v. French*, Ambl. 41; *Ridgw.* 230; 1 Cox 1.

A legacy given by an unattested codicil is within a general charge in the will of debts and legacies to be given by codicil on the real estate, though the will gives no legacies. An annuity is a legacy for this purpose. *Swift v. Nash*, 1 Jur. 557.

3. **Direct Bequest of Produce of Land.** — *Sheddon v. Goodrich*, 8 Ves. Jr. 481; *Hooper v. Goodwin*, 18 Ves. Jr. 156.

In this latter case conversion was directed by will of real estate into personal, not for all intents, but for the purpose only of answering legacies and annuities, subject to that, as to the real estate, a resulting trust for the heir. This was held not affected by an unattested codicil bequeathing a lapsed share of the residue.

So, where real estate was devised to be sold and the produce applied in the same manner as the residue of the personal estate, a codicil not executed so as to pass real estate, revoking the bequest of the residue, was held not to affect the will as to the real. *Gallini v. Noble*, 3 Meriv. 691.

Where Land Is Charged Primarily, and not in aid of the personal estate only, with the payment of a legacy, the legacy cannot be revoked or modified by a codicil, unless executed with the same solemnities as the original will. *Brudenell v. Boughton*, 2 Atk. 272; *Habergam v. Vincent*, 2 Ves. Jr. 237; *Beckett v. Harden*, 4 M. & S. 1. See also *Locke v. James*, 11 M. & W. 901; *Mortimer v. West*, 2 Sim. 274; *Smith v. Newbould*, 1 W. R. 230.

So, where land is not generally, but only particularly, charged, as with legacies "hereby" or "hereinafter given" or "above mentioned." *Masters v. Masters*, 1 P. Wms. 422; *Bonner v. Bonner*, 13 Ves. Jr. 379.

But though, where the charge by the will is not general, the testator may not, by an unattested codicil, give fresh legacies, he may substitute one legatee for another. *Atty.-Gen. v. Ward*, 3 Ves. Jr. 331; note to *Hannis v. Packer*, Ambl. 556.

The Revocation by an Unattested Codicil of a Legacy Given out of a Mixed Fund constituted of both real and personal estate, though good as to such proportion as would have been payable out of the personal estate, fails as to such proportion as was payable out of the produce

3. Defective Will Cured by Duly Executed Codicil. — Though a will, or a codicil thereto, be informally or improperly executed, yet if it be confirmed or republished by a codicil duly and legally executed, the effect will be to cure all defects in the will or codicil so confirmed.¹

III. GENERAL PRINCIPLES OF CONSTRUCTION AND INTERPRETATION — 1. Intention of Testator Governs. — The general principles governing the interpretation of wills of course prevail with equal force with regard to the interpretation of codicils, and here, as in the case of wills, the object of the court is to ascertain and give effect to the intent of the testator.²

2. Will and Codicil Construed as One Instrument — *a. IN GENERAL.* — It is a leading rule, that for the purposes of construction, the will and its codicil or codicils are to be considered parts of one and the same instrument, and must all be construed together.³

of the real estate. *Stocker v. Harbin*, 3 Beav. 484.

1. Duly Executed Codicil Validating Imperfect Will. — *De Bathe v. Fingal*, 16 Ves. Jr. 167; *Doe v. Evans*, 1 Cramp. & M. 42; *Burge v. Hamilton*, 72 Ga. 568; *Beall v. Cunningham*, 3 B. Mon. (Ky.) 390, 39 Am. Dec. 469; *Harvy v. Chouteau*, 14 Mo. 587, 55 Am. Dec. 120; *Stover v. Kendall*, 1 Coldw. (Tenn.) 557. See *supra*, II. 1.

All Defects and Omissions in a will are cured and supplied by a legally executed codicil expressly confirming it. *McCurdy v. Neall*, 42 N. J. Eq. 333.

Thus, a will or codicil containing a devise of real estate, but not duly witnessed was held good if confirmed by a subsequent codicil, having the proper attestation, though the latter document was in no way annexed to the will or prior codicil, and though the attesting witnesses to the latter codicil did not see the former one on the will. *Utterton v. Robins*, 1 Ad. & El. 423, 28 E. C. L. 111.

Attestation by Incompetent Witness Cured. — If a will be attested by witnesses, one or more of whom are incompetent, the defect is cured by a confirmation codicil duly executed with the proper number of competent witnesses. *Mooers v. White*, 6 Johns. Ch. (N. Y.) 360; *In re Murfield*, 74 Iowa 479; *Anderson v. Anderson*, L. R. 13 Eq. 381, 20 W. R. 313, 41 L. J. Ch. 247.

Incorporation of Unattested Interlineation. — By his will, in the body thereof, a testator gave a legacy of £10,000 to one of his executors, and by an unattested interlineation gave £1,000 to each of his executors. In a codicil the testator recited that to A., one of his executors, he had given a legacy of £11,000. This reference was held to show that the interlineation was made prior to the execution of the codicil and that it was therefore incorporated by it. In *Goods of Heath*, (1892) Prob. 253, 61 L. J. P. 131, 67 L. T. 356.

Defective Codicil Cured by Codicil Duly Executed. — A person having executed his will, afterwards wrote an addition to it, marked it "sheet B," and attached it to the will, intending it to operate as a codicil, but did not acknowledge it or cause it to be attested. He afterwards executed and acknowledged a codicil, and fastened it, "sheet B," and the will together. It was held that the last codicil operated as a publication and due execution of the sheet B and the will, all speaking from

the date of the codicil. *Camp v. Shaw*, 52 Ill. App. 241.

A testator made his will, dated 1828, and duly attested, so as to pass freehold estate; and in May, 1831, made a codicil, attested by two witnesses only, declaring it to be a codicil to his will, and directing that it should be annexed thereto. This codicil varied the disposition of part of his real estate. In September, 1831, he made a second codicil duly attested, so as to pass freehold estate, which he declared to be a second codicil to his will, and directed the same to be annexed thereto and taken as part thereof. The second codicil concluded by confirming his will. It was held that the second codicil gave the same effect to the first codicil as if it had been duly attested by three witnesses. *Aaron v. Aaron*, 3 De G. & S. 475, 14 Jur. 125. See also *Gordon v. Reay*, 5 Sim. 274.

2. See generally the title WILLS.

3. England. — *Sherer v. Bishop*, 4 Bro. C. C. 55; *Crosbie v. MacDougal*, 4 Ves. Jr. 610; *Hall v. Severne*, 9 Sim. 517; *Atty.-Gen. v. Wilshire*, 11 Jur. 792; *Palmer v. Answorth*, 2 R. 619, 69 L. T. 477; *St. Alban v. Beauclerk*, 2 Atk. 639; *Hill v. Chapman*, 1 Ves. Jr. 407, 2 Bro. C. C. 612; *Campbell v. Radnor*, 1 Bro. C. C. 271; *Hartley v. Tribber*, 16 Beav. 510; *Phipps v. Anglesey*, 7 Bro. P. C. 443; *Jauncey v. Atty.-Gen.*, 10 W. R. 129, 5 L. T. N. S. 374, 8 Jur. N. S. 6; *Clark v. Phillips*, 17 Jur. 886; *Ellis v. Bartrum*, 25 Beav. 107; *In re Gibson*, 31 L. J. Ch. N. S. 231, 2 J. & H. 656; *In re Buckee*, 7 R. 72, (1894) 1 Ch. 286, 63 L. J. Ch. 330, 70 L. T. 115, 42 W. R. 229; *Matthews v. Bowman*, 3 Anstr. 727.

Canada. — *Doe v. Gross*, 9 U. C. Q. B. 580; *Wright v. Wright*, 16 U. C. Q. B. 184; *Christie v. Saunders*, 5 Grant's Ch. (U. C.) 464.

United States. — *Bosley v. Wyatt*, 14 How. (U. S.) 391; *Homer v. Brown*, 16 How. (U. S.) 354.

Alabama. — *Grimball v. Patton*, 70 Ala. 626; *Leavens v. Butler*, 8 Port. (Ala.) 380; *Gelbke v. Gelbke*, 88 Ala. 427.

California. — *In re Ladd*, 94 Cal. 670; *In re Zeile*, 74 Cal. 137.

Georgia. — *Atwood v. Geiger*, 69 Ga. 498; *Jones v. Johnson*, 67 Ga. 269.

Connecticut. — *Wheeler v. Fellowes*, 52 Conn. 238.

Indiana. — *Cunningham v. Dungan*, 83 Ind. 572; *Sturgis v. Work*, 122 Ind. 134.

Kentucky. — *Sharp v. Wallace*, 83 Ky. 584; *Delph v. Delph*, 2 Bush (Ky.) 171.

Annexing Incidents of Trust to Devise. — Since the will and codicil are to be considered as one instrument, although the will contains no words creating a trust, if from the codicil, or the two instruments together, it can be implied that it was the testator's intention to establish a trust in the executors, for objects declared and set forth in the will, it is sufficient.¹ If, however, it appears that the intention of the testator is not to create a trust by the codicil, or to continue one made in the will, no trust estate will result, but

Maryland. — *Lee v. Pindle*, 12 Gill & J. (Md.) 288; *Boyle v. Parker*, 3 Md. Ch. 42; *Johns Hopkins University v. Pinckney*, 55 Md. 365.

Massachusetts. — *Holden v. Blaney*, 119 Mass. 421; *Bedloe v. Homer*, 16 Gray (Mass.) 432.

New York. — *Newcomb v. Webster*, 113 N. Y. 191; *Westcott v. Cady*, 5 Johns. Ch. (N. Y.) 334, 9 Am. Dec. 306; *Hone v. Van Schaick*, 3 Barb. Ch. (N. Y.) 488; *Hard v. Ashley*, 117 N. Y. 606, reversing *Hard v. Davison*, 53 Hun (N. Y.) 112; *Lynch v. Pendergast*, 67 Barb. (N. Y.) 501; *Matter of Feeks*, (Supreme Ct.) 6 N. Y. St. Rep. 60; *Altrock v. Vandenburgh*, (Supreme Ct.) 54 N. Y. St. Rep. 329.

North Carolina. — *Purnell v. Dudley*, 4 Jones Eq. (N. Car.) 203.

Ohio. — *Collier v. Collier*, 3 Ohio St. 369.

Pennsylvania. — *Hamilton's Estate*, 74 Pa. St. 69; *Bradish v. McClellan*, 100 Pa. St. 607; *Bartholomew's Appeal*, 75 Pa. St. 169.

South Carolina. — *Richardson v. Richardson*, *Dudley Eq.* (S. Car.) 184; *Otis v. Brown*, 20 S. Car. 586.

Tennessee. — *Stover v. Kendall*, 1 Coldw. (Tenn.) 557; *Brown v. Cannon*, 3 Head (Tenn.) 355.

Vermont. — *Barnes v. Hanks*, 55 Vt. 317; *Putnam v. American Bible Soc.*, 37 Vt. 271.

West Virginia. — *Carpenter v. Miller*, 3 W. Va. 174, 100 Am. Dec. 744.

The Will and Codicil Are One Instrument for purposes of construction, and must be read as if they were executed at one and the same time, except that clauses in the will that are expressly revoked in the codicil, and clauses that are irreconcilably repugnant to provisions in the codicil, must be treated as if stricken out. This is the purpose, this the office, of the codicil. *Hemphill v. Moody*, 62 Ala. 510.

Codicil Executed with Original Will. — If a codicil is signed and attested at the same time and place with the body of the will, it may well be considered as constituting a part of the original will. *Negley v. Gard*, 20 Ohio 310.

Codicil Drawn to Attach to Either of Two Wills on Stated Conditions. — A testator, by an instrument termed a codicil to his will, made distinct bequests and devises, and further, referring to two former wills, the latter of which contained certain charitable bequests, provided that if he died within three calendar months of the execution of said latter will, the former should go into effect; otherwise the latter should be his will. The testator died within three months of the execution of the latter will. It was held that the former will took effect, and that the codicil was to be considered as part thereof. *Bradish v. McClellan*, 100 Pa. St. 607.

Revoked Codicil Part of Will. — A codicil revoked, which was duly executed, is as much

part of the will as if on the same paper with the will; is necessary in its construction; and upon a bill in equity, filed for that purpose, the court will enforce its production. *Langdon v. Pickering*, 19 Me. 214.

Reference to Will Embraces Reference to Codicil. — Where a testator devised property to the children of B. in like manner as they were entitled under the will of B., it was held that the testator referred to the will and codicils of B., as the whole together must be taken to be his will. *Pigott v. Wilder*, 26 Beav. 90.

Identification of Point of Insertion of Codicil in Original Will. — The second clause of a will commenced: "Second. After paying all my just debts," etc. A codicil afterwards made commenced thus: "Additional to page 1, from second clause. Second." It was held that the codicil thus clearly identified the point in the original paper where the codicil was to be inserted in the reading of both as one instrument. *Kelly v. Richardson*, 100 Ala. 584.

Legacies by Codicil Settled According to Directions in Will. — A testatrix, by her will, appointed £3,000 thus: £1,000 upon trusts for her daughter F. for life, for her separate use, and then for her husband and children; two other sums of £1,000 each upon like trusts for her daughters N. and P. and their respective husbands and children by reference to the former trusts, except that the life interests of N. and P. were not for their separate use. By codicil, reciting the appointments by the will and the payment to N. of £1,000, the testatrix directed this: "£1,000 so left to my said daughter N. by said will must be considered canceled and discharged. And as the mortgages, securities, moneys, or debts, my property, which I left by said will or intended to pay my daughters F. and P., may not remain situated, vested, or of the same value, I will and direct that the sum of £1,000 be paid to my said daughter F., and £1,000 be paid to my daughter P." It was held that the £1,000 directed by the codicil to be paid to F. must be settled according to the directions in the will. *Fenton v. Farington*, 2 Jur. N. S. 1120.

Omission to Provide for Children — California. — Where a will makes no provision for the testator's children, but a codicil afterwards executed refers to and mentions them, reading the two together as one instrument it is apparent that the omission to provide for the children was not unintentional, within § 17, Act of Cal. 1850, concerning wills, which declares that if the testator omit to provide in his will for his children, they shall inherit the same share in his estate as if he had died intestate, "unless it shall appear that such omission was intentional." *Payne v. Payne*, 18 Cal. 291.

1. *Ward v. Ward*, 105 N. Y. 68.

the property will pass absolutely.¹

Rule Not Unwarrantably Extended. — But the fiction that will and codicil constitute one instrument ought not to be extended to absurd or unjust consequences.²

Rule Not Applicable Where Intent Is Adverse. — And, like every other general and artificial rule applied in the construction of wills, it gives way before an ascertained adverse intent.³

Codicil Not Affecting Independent Construction of Will. — Nor does the addition of a codicil affect the construction of the will as an independent instrument.⁴

b. EFFECT ON LEGACIES GIVEN BY WILL AND CODICIL — Incidents of Original Follow Additional Legacies. — By virtue of this rule, an additional or substitutional legacy given by a codicil is held *prima facie* to be attended by the same incidents and conditions as was the original legacy given by the will.⁵

1. Intention Not to Continue Trust. — A testatrix having given the residue of her estate to her four grandchildren, afterwards made the following codicil: "I revoke that portion of the will which gives F. an equal portion with the other granddaughters in my estate, and give to my granddaughter M. in trust for the benefit of F. all that was bequeathed by my will to F., but providing that in case F. should die before M., the sum in trust shall be given to the latter." M. died before F. It was held that F. took the property in fee and free from trust. *Neely v. Phelps*, 63 Conn. 251.

A testator possessed of lands in England and Upper Canada, by his will, made in England, gave the whole to a stranger and his nephew, in trust to pay certain legacies, and to pay the residue between his six brothers and sisters, and appointed them executors and trustees of his will. By a codicil, made in Canada, the testator gave his property in Canada to two persons resident there, upon trust to sell, and, after payment of his debts in Canada, to remit any surplus to his nephew, to whom he gave the rest of his estate in the said province or in Great Britain or elsewhere, not otherwise given by that codicil or his will; and he revoked every clause in his will variant from that codicil. The nephew was held to be entitled to the surplus produce of the Canadian property absolutely, and not as trustee for the purpose expressed in the will. *Schofield v. Cahuac*, 4 De G. & S. 533, 15 Jur. 1069, 2 Eq. Rep. 885.

Trust Void by Statute. — A testatrix by a codicil made W. her residuary legatee and devisee, and requested him to carry into effect certain charitable bequests made in the will, which were of doubtful validity, but stated such request not to be an absolute direction, but simply her desire. Within two months after making the will the testatrix died, and thereby invalidated said charitable bequests under the statute of New York. It was held that W. took the residuary estate free from any trust. *Matter of Keleman's Will*, 126 N. Y. 73.

2. In re Soher, 78 Cal. 477, where it was contended that an attested will could not be revoked by a holographic codicil, since the latter could not be understood without reference to the former, formed in law "a part" of it, and therefore did not come within the definition of a holographic will — "entirely" written by the testator's own hand. The court held, however, that the fiction of the identity of will and codicil would not be extended so far, and the

codicil was considered as complete in itself — not as a "part" of the will referred to — and as effective to revoke the will.

Inconsistent Division in Will and in Codicil. — "As a general rule, all the several instruments, the will and codicils, must be construed together as one instrument speaking from the date of the last. But because this rule is not universal in its application, it is, that a different rule of construction is applied to inconsistent devises, in the same will, from that which is applied to inconsistent devises in different instruments, as in a will and codicil." *Per Brayton, J.*, in *Derby v. Derby*, 4 R. I. 414.

3. In re Lockwood, (Supreme Ct.) 17 N. Y. Supp. 771; *Sloane v. Stevens*, 107 N. Y. 122.

As where a testator republishes his will and the codicils, and in the attestation styles them codicils; they do not thereby become parts of the will, but remain codicils. *Alsop's Appeal*, 9 Pa. St. 374.

4. Griffiths v. Grieve, 1 Jac. & W. 31.

A testator devised property "equally" to his two sons, J. S. and T. G., with a provision that "in the event of the death of my said son T. G. unmarried or without leaving issue," his interest should go to J. S. By codicil a third son was given an equal interest with his brothers in the property, on a condition which was not complied with, and the devise to him became of no effect. It was held that the codicil did not affect the construction to be put on the devise in the will; that J. S. and T. G. took as tenants in common in equal moieties, the estate of J. S. being absolute and that of T. G. subject to an executory devise over in case of death at any time, and not merely during the lifetime of the testator. *Fraser v. Fraser*, 26 Can. Sup. Ct. 316, reversing 28 Nova Scotia 172.

5. May v. May, 19 W. R. 432; *Day v. Croft*, 4 Beav. 561; *Cator v. Cator*, 14 Beav. 463; *Duncan v. Duncan*, 27 Beav. 392; *Knowles v. Sadler*, W. N. (1879) 20; *Benyon v. Grieve*, W. N. (1884) 157; *Tilden v. Tilden*, 13 Gray (Mass.) 103; *Pike v. Walley*, 15 Gray (Mass.) 345; *Matter of Jackson*, 5 Redf. (N. Y.) 129; *Earnes v. Hanks*, 55 Vt. 317. See also *Smith v. Seaton*, 17 Grant's Ch. (U. C.) 397; and *infra*, this title, *Revocation — Will Not Unnecessarily Disturb*.

"It is a general rule that a further bequest to a legatee or legatees, by way of codicil, if expressed to be an additional bequest, is subject to the conditions, limitations, and pro-

Conditions Added by Codicil. — And if provisions in a will are made by a codicil to depend on certain conditions, these conditions must be complied with.¹

Property Out of Which Legacies Payable. — Following out the rule laid down where legacies given by will are payable out of a particular fund,² or are charged, either on the real or personal estate, by the terms of the will or by operation of law, additional or substitutional legacies given by a codicil will be charged

visions of the bequest to the same legatees in the will, unless making application of the conditions, limitations, and provisions of the bequest in the will to the additional bequest in the codicil will create a repugnancy in some of the provisions of the whole will, as found in the will and codicil, or will in some way contravene the manifest intention of the testator, ascertained by considering the entire provisions of the will." *Thompson v. Churchill*, 60 Vt. 371.

For English and Canadian doctrine as to whether an additional or substitutional legacy given by codicil is subject to the same executory provisions as the original legacy in the will, see *Crowder v. Clowes*, 2 Ves. Jr. 449; *Alexander v. Alexander*, 5 Beav. 518; *Haley v. Bannister*, 23 Beav. 336; *Mann v. Fuller*, 1 Kay 624; *Scott v. Gohn*, 4 Ont. Rep. 457.

By his will a testator bequeathed £10,000 upon trust for A. for life, and after her decease for eight persons named in certain proportions, one of whom, B., was to receive £1,000. By a codicil the testator gave to B. "£2,000, instead of £1,000 as bequeathed by my said will." It was held that, following the general rule, the legacy by the codicil, being given instead of that by the will, was subject to the same incidents, and the payment must be deferred until after the death of A. *Millikin v. Snelling*, 55 L. T. 344.

The testator, by his will, gave annuities to his granddaughters, A. and E., and directed that after their death the amount should go to their children in such manner as they should appoint, and in default of appointment the children were to share equally during their respective lives. By a codicil he revoked these annuities, and instead gave to A. and E. annuities of half the amount of the original ones. It was held that the children of the granddaughters had the same interest in these substituted smaller annuities that they had under the will. *Freme v. Hall*, 64 L. J. Ch. 862, (1895) 2 Ch. 778, 73 L. T. 366, 44 W. R. 164.

Codicil Subject to Clause of Survivorship. — An additional bequest in a codicil is subject to the conditions of a clause of survivorship in the will, to the same legatee, where no repugnancy is created by such a construction. *Thompson v. Churchill*, 60 Vt. 371.

Conditions as to Widowhood. — A testator, by his will, gave the income of shares in a bank to E., a married woman, for life, provided she were a widow at the time of his death, or should become such afterwards, but during her widowhood only; and gave the income during the coverture of E. to P. He also gave P. £800, in case E. should become a widow, in lieu of the income of the shares. By a codicil the testator revoked the gift of this income, and gave a portion of the income to E. for life, whether she were a widow at the time of his

death or not, or should become such afterwards or not. At the time of the testator's death E. was under coverture. It was held that P. was not entitled to the £800 at the death of the testator, and would become entitled only in the event of E. becoming a widow. *Morrison v. Morrison*, 2 Y. & Coll. Ch. 652, 13 L. J. N. S. Ch. 68, 8 Jur. 304.

Condition on Compliance with Will, Necessitates Compliance with Codicil. — A devise conditioned upon the devisee's compliance "with what is enjoined upon him" in the will subjects him to compliance with what may be enjoined upon him by any future codicil. *Tilden v. Tilden*, 13 Gray (Mass.) 103.

Conditions in Will as to Bequests, Devises, etc., Held Not Applicable to Trust Estate Given by Codicil. — But where the testator provided in his will that if his two sons, J. and H., or either of them, became surety for any person or persons, "they shall, in such case, forfeit all bequests, legacies, and devises given them in this my will," and afterwards by a codicil the testator devised an estate to his son H. in trust for his son J. during the natural life of the said J., it was held that the trust estate so devised would not be forfeited if J. and H. became sureties for others. *Patten v. Tallman*, 27 Me. 17.

1. *Lewis v. Henry*, 28 Gratt. (Va.) 192. See *Tilden v. Tilden*, 13 Gray (Mass.) 103.

Estate on Contingency Which Happens. — The testator gave £4,000 to his granddaughter, and directed his executors to pay it to her on her attaining twenty-one, and to apply the interest of it for her maintenance during her minority. By a codicil he directed that his granddaughter should have only the interest of £2,000 for her maintenance, until she attained twenty-three, and that the interest of the other £2,000 should be accumulated, and that on her attaining twenty-three his executors should have the whole settled upon her for life, and, after her death, to her child or children, in equal proportions, so that no husband of hers might spend it. The granddaughter attained twenty-three, and died without having had a child, and without the executors having made any settlement of the legacy. It was held that the gift in the will was an absolute gift, and that, in the events that had happened, it was not affected by the codicil. *Bell v. Jackson*, 1 Sim. N. S. 547.

2. Fund Out of Which Legacy Payable. — Additional or substitutional legacies given by codicil are payable out of the same fund as were the original ones given in the will. *Crowder v. Clowes*, 2 Ves. Jr. 449; *Bristow v. Bristow*, 5 Beav. 289.

And this will be the case, though there are no words to that effect in the codicil, and the legacy is given *simpliciter*. *Johnstone v. Harrowby*, 1 De G. F. & J. 183.

for payment in a corresponding manner.¹

Legacies Payable Free from Legacy Duty. — If legacies by will are given free from legacy duty, additional or substitutional legacies by codicil will likewise be free from such duty.²

3. Will and Codicil Construed Harmoniously. — Another general rule in interpreting a will and codicil is that the whole will takes effect so far as it is not inconsistent with the codicil, and the provisions of the latter are to be so construed, if it can fairly be done, as to make it harmonize with the body of the will.³ Or, as the rule has been otherwise expressed, the construction should, if possible, satisfy all the words of the codicil and be consistent with the whole scheme of the will.⁴

IV. REVOCATION — 1. Of Will by Valid Codicil — a. EXECUTION NECESSARY FOR. — As before observed, a codicil in order to work a revocation of a will must be legally and properly executed.⁵

1. Realty Charged with Payment of Legacies. — Where legacies given by will are charged on the realty, and other legacies are by codicil substituted therefor, the substituted legacies are likewise payable out of the realty. *Leacroft v. Maynard*, 1 Ves. Jr. 279.

So where a testator by will has given legacies, and charged them on his realty should his personality be insufficient, and by a subsequent codicil has given additional legacies, the latter are payable out of the realty if the personality is not sufficient therefor. *Lease v. Knight*, 11 L. T. N. S. 134; *Williams v. Hughes*, 24 Beav. 474, 4 Jur. N. S. 42, 27 L. J. Ch. 218.

And the principle that where a will contains a gift of legacies and residue, the legacies are, in the event of the personal estate proving insufficient for their payment, to be deemed to be charged upon the real estate, applies in favor of an additional legacy given by a codicil to a legatee named in the will. *Hall v. Hall*, 51 L. T. 86.

But where the charge of legacies upon real estate is limited to those "hereby" or "hereinafter" given, additional legacies by codicil are not payable out of the realty. *Bonner v. Bonner*, 13 Ves. Jr. 379; *Strong v. Ingram*, 6 Sim. 197. See *Hannis v. Packer*, Amb. 556.

Legacies by Will, Charged on Realty; by Codicil, on Personality. — It is held that where one gives legacies by his will and other legacies by his codicil, and the lands are charged with the legacies in the will only, and the personal estate is not sufficient to pay all the legacies, the legacies in the will shall be charged on the land and the legacies by codicil on the personal estate. *Masters v. Masters*, 1 P. Wms. 422.

Legacies by Will Charged on Realty and Personality — Codicil Directs Sale of Personality. — If a testator devises his real estate and chattel property subject to payment of specified legacies, and by codicil directs the chattel property to be sold and the proceeds divided amongst his children, the specified legacies will be a charge on the realty. *Stewart v. Dick*, 10 Pr. Rep. (Can.) 411.

Codicil Exonerating Realty from Legacy Charges. — A testatrix having by her will blended the proceeds of her real and personal estate into one fund, and having made a charge not exceeding £5,000 on such mixed fund in favor of A, subsequently by codicil devised her real estate to A in fee simple, freed and dis-

charged from all her debts, liabilities, and engagements, and also from any charges created by her said will, if any. It was held that the exoneration of the real estate devised to A by the codicil threw the burden of the whole charge of £5,000 upon the residuary personal estate. *Tatlock v. Jenkins*, 2 Kay 654, 23 L. J. Ch. 767, 18 Jur. 891.

2. Johnstone v. Harrowby, 1 De G. F. & J. 183; *Shaftsbury v. Marlborough*, 7 Sim. 237; *Cooper v. Day*, 3 Meriv. 154; *Fisher v. Brierley*, 30 Beav. 267.

3. England. — *Robertson v. Powell*, 2 H. & C. 762; *Lease v. Knight*, 11 L. T. N. S. 134.

Alabama. — *Mason v. Smith*, 49 Ala. 71.

Kentucky. — *Proctor v. Duncan*, 1 Duv. (Ky.) 318.

Maryland. — *Boyle v. Parker*, 3 Md. Ch. 42; *Johns Hopkins University v. Pinckney*, 55 Md. 365; *Thomas v. Safe Deposit, etc., Co.*, 73 Md. 451.

Massachusetts. — *Holden v. Blaney*, 119 Mass. 421.

Mississippi. — *Vaughan v. Bunch*, 53 Miss. 513.

New York. — *Lynch v. Pendergast*, 67 Barb. (N. Y.) 501; *Heartt v. Livingston*, 53 How. Pr. (N. Y. Supreme Ct.) 487; *DeLafield v. Parish*, 25 N. Y. 9; *Appleton v. Fuller* (Supreme Ct.) 16 N. Y. Supp. 353.

Tennessee. — *Smith v. Puryear*, 3 Heisk. (Tenn.) 706.

Vermont. — *Barnes v. Hanks*, 55 Vt. 317.

4. Fahrney v. Holsinger, 65 Pa. St. 388.

5. See supra, this title, *Execution — For Purposes of Revocation*.

Prevention of Execution of Codicil. — The fact that the proper execution of a codicil was prevented by improper means, cannot, in general, render the codicil valid as a revocation of a will; for though the intent be to revoke, yet this is ineffective, unless the instrument be actually executed. *Leaycraft v. Simmons*, 3 Bradf. (N. Y.) 35.

But where A had been given the entire estate, and the testatrix desired to execute a codicil changing part of the gift to B, and A consented, but prevented the execution of the codicil by assuring and promising testatrix that he would effectuate her intention by conveying the desired portion to B at her death, it was held that A, having prevented the execution of the codicil by fraud, took the property under trust for B, the conveyance of

b. HOW AND WHEN EFFECTED — (1) *Generally*. — A will or a provision therein is not revoked by a codicil unless by express words or necessary implication.¹

Present or Future Intention to Revoke. — And neither an express nor an implied revocation is effected if the testator by his codicil merely indicates a future intention to revoke or to differently dispose of his estate. The revocatory intention must be actual and present.²

(2) *Express Revocation* — (a) **General Effect to Be Given**. — A codicil often in express terms revokes provisions in a will, and in such case every effect contemplated by the revocation must be given, so as to carry into operation the purposes of the testator.³

which a court of equity would enforce. *Dowd v. Tucker*, 41 Conn. 197.

1. *England*. — *Butler v. Greenwood*, 22 Beav. 303; *Griffiths v. Grieve*, 1 Jac. & W. 31. *Kentucky*. — *Bedford v. Bedford*, (Ky. 1896) 35 S. W. Rep. 926.

Massachusetts. — *Bliss v. American Bible Soc.*, 2 Allen (Mass.) 334.

Pennsylvania. — *Jones's Estate*, 43 Leg. Int. (Pa.) 140; *Sutton's Estate*, 26 Pittsb. Leg. J. N. S. 255.

Codicil Republishes rather than Revokes Will. — A codicil does not necessarily revoke any of the provisions of the will of which it becomes a part. It republishes and reaffirms rather than revokes the will. *In re Sternberg's Estate*, (Iowa) 62 N. W. 735, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 296.

2. *Burton v. Gowell*, Cro. Eliz. 306; *Cleoburey v. Beckett*, 14 Beav. 588; *Thomas v. Evans*, 2 East 488. See also *Griffin v. Griffin*, 4 Ves. Jr. 197, note a.

Indication of Present Intention. — A testator, in *Massachusetts*, before the enactment of the Revised Statutes, wrote on his will: "It is my intention at some future time to alter the tenor of the above will, or rather to make another will; therefore, be it known, if I should die before another will is made, I desire that the foregoing be considered as revoked and of no effect." This was held indicative of a present intention to revoke. *Brown v. Thorndike*, 15 Pick. (Mass.) 388.

3. **Revocation of Provisions in Favor of Party**. — A codicil revoking all devises and bequests "in favor of" a certain person will revoke a power of appointment given by the will over a life interest therein bequeathed, as well as the life interest itself. *In re Brough*, 38 Ch. Div. 456, 57 L. J. Ch. 436, 58 L. T. 788, 36 W. R. 409.

Bequest in Codicil Barring Participation in Residue. — Where a testator in his codicil makes provision for certain of his grandchildren, and expressly revokes all prior bequests to them, it must be considered that he intends the above provision to be all that shall be made for them out of his estate, and they are not entitled to share in the undisposed residue. *Hayes v. Davenport*, 25 Vt. 109.

Revocation of Charge of Debts, Etc. — A testator devised an estate X, and other estates, to A, charged with annuities; and an estate Y, and his residuary real and personal estate, to B, subject to the payment of his debts, funeral expenses, and legacies. He afterwards revoked so much of the second devise as in-

cluded Y, and devised it, subject to the same annuities, and in the same manner, as the estate X. It was held that the charge of debts, etc., on Y was revoked. *Ravens v. Taylor*, 4 Beav. 425.

Revocation of Joint Tenancy as to One. — Where a residuary devise to two executors, in the nature of a joint tenancy, is revoked as to one, by codicil, the other will take the whole. *Humphrey v. Tayleur*, Ambl. 138.

Revocation of Absolute Bequest — Codicil Creating Life Estate with Provisions Over. — By a will a testator bequeathed stock to his granddaughters absolutely. By a codicil he revoked the bequest, and directed his trustees to hold the stock for his granddaughters for life, with remainder to their issue. It was held that this was a total revocation of the first gift, and, the issue having failed, that the stock fell into the residue. *Nevill v. Boddam*, 28 Beav. 554.

Revocation of Specific Devise Inuring to Benefit of Other Legatees and Devisees. — A testator by a will made since the stat. 1 Vict., c. 26, bequeathed the residue of his personal estate and certain freehold and leasehold estates in equal shares to L, M, N, O, and P; in a subsequent part of his will he bequeathed to H. "one-half of the legacy named to each of the other legatees, that is to say, one-half of what his brother M. may receive. By a codicil the testator declared as follows: "I revoke all that part written in my former will * * * which leaves a legacy to H., * * * written in my will on the thirty-second and thirty-third lines." It was held that by force of this revocation the will was to be read as if the gift to H. were not in it; consequently, that such revocation inured to the benefit of the other legatees and devisees. *Harris v. Davis*, 1 Coll. Ch. 416, 9 Jur. 269.

Revocation When Absolute — Reference to Prior Non-testamentary Paper as Will. — A testator, having executed a will and codicil, signed a second codicil, in which he expressed a desire to cancel his will, and that a document which he described as a will of earlier date, and the first and second codicils, should together stand as his last will and testament. The only document executed at the earlier date was a settlement on his marriage, which was not of a testamentary character. It was held that the revocation of the will was absolute, and not dependent on the incorporation of the settlement in the papers admitted to probate. *Goods of Gentry*, L. R. 3 P. D. 80, 42 L. J. P. 49, 28 L. T. 480, 21 W. R. 888.

(b) **Of Estate with Limitations.** — Thus where an estate is given by will to a person or persons, with limitations over or dependent thereon, a revocation of the gift of the particular estate will often extend to and effect the revocation of the limitations.¹

(c) **Of Bequest to Pay Legacies.** — A codicil which revokes a gift of moneys out of which a legacy was to be paid operates to revoke the legacy itself.²

(d) **Of Purposes for Which Bequest Made.** — Where a will bequeathes money upon trusts for certain purposes, and a codicil revokes such parts of the will as relate to those purposes, the bequest of the money will be revoked.³

(3) **Implied Revocation** — (a) **By Inconsistency** — *aa.* **INSTRUMENTS MUST BE ABSOLUTELY INCONSISTENT.** — In order for a codicil to revoke impliedly a will, there must be an absolute inconsistency between the provisions of the two instruments, and if they can both stand together no revocation will be accomplished.⁴

1. *Sanford v. Sanford*, 1 De G. & S. 67, 11 Jur. 322; *Boulcott v. Boulcott*, 2 Drew. 25, 18 Jur. 231, 23 L. J. Ch. 57; *Madden v. Kirwan*, 7 Ir. Eq. R. 570; *Edwards v. Findlay*, 25 Ont. Rep. 489.

Revocation and Substitution of Devise Held to Cut Off Limitations. — A testator, by his will, devised his messuages, tenements, etc., called P., to J. L. for life, with remainders to the first and other sons in tail; and he devised his messuages, tenements, and lands, known by the name of C., to J. P. for life, with remainder to his first and other sons in tail; and in subsequent parts of his will he mentioned the estate as his P. and C. estate. By a codicil, after reciting that he gave the P. estate to J. L., he revoked the said P. estate, and gave it to J. P.; and, after further reciting that he had given the said C. estate in his will to J. P., he revoked the said bequest, and gave the said C. estate to J. L. It was held that the limitations in the will of the two estates were revoked, and that J. P. took P. in fee; and J. L., C. in fee. *Philipps v. Allen*, 7 Sim. 446.

A testatrix having, by her will, devised two different properties among her nephews successively for life, remainder to their issue in strict settlement, making A. the head of one set of the limitations, and B. of the other, by a codicil reciting that she had made devises to A. and B. respectively, and that she wished to make them change places as to the properties so devised, revoked "the said bequests by my will made to the said A. and B. respectively," and left and bequeathed "the property and provision by my said will devised to the said A. to B., his heirs, executors, administrators, and assigns," and in like manner "as to A. and his heirs, etc.," with respect to the property devised by the will to B. It was held that the codicil revoked all the limitations in the will subsequently to A.'s and B.'s estates respectively, and vested the respective properties in A. and B. absolutely. *Murray v. Johnston*, 2 Con. & L. 104, 3 Dr. & War. 143.

Revocation of All Gifts to I. Includes Gifts to I. as Member of a Class. — By a will several legacies were given to R. I. by name, and a legacy by trustees to E. I. and S. C., for their lives and to the survivor of them, and after the decease of the survivor, equally among all the children of E. I. and S. C., living at that time, to be vested at twenty-one, or on

death before that age leaving issue. A codicil revoked all the legacies, bequests, and benefits in and by the will given to R. I. therein named, and in lieu thereof gave to R. I. £1,000 five per cents. R. I. was the only issue of E. I. and S. C. It was held that the codicil revoked not only the specific legacies given to R. I., but also the legacy to which he would have become entitled as only issue of E. I. and S. C. *Cotterell v. Sanderson*, 1 Jur. 471.

Revocation of Gifts to S. Includes Limitation Over to S.'s Children. — A testator bequeathed his residuary estate upon trusts for the benefit of his children, and as to the sons' shares he directed that one moiety be held absolutely, and that the other moiety be settled. By a codicil the testator revoked every devise and bequest to or in favor of his son S. This was held a revocation of the gift to the children of S. in the settled moiety. *Tabor v. Prentice*, 52 L. T. 85, 32 W. R. 872.

2. *Grice v. Funnell*, 1 Sm. & G. 130.

3. *Baldwin v. Baldwin*, 2 Jur. N. S. 773, 22 Beav. 413.

4. *O'Shea v. Howley*, 1 J. & L. 391, 7 Ir. Eq. R. 56; *Norman v. Kynaston*, 9 W. R. 50, 30 L. J. Ch. 189, 29 Beav. 96, *affirming* 7 Jur. N. S. 129, 3 L. T. N. S. 826, 3 De G. F. & J. 29; *Lee v. Delane*, 4 De G. & S. 1, 14 Jur. 861. See *Pendergast v. Tibbetts*, 164 Mass. 270.

Instances of Clauses in Codicil Not Inconsistent with Will. — A devise to the children of A. is not revoked by an expression in a codicil that they were not intended to take any beneficial interest under the will or codicil. *Cleobury v. Beckett*, 14 Beav. 583.

A will devising estates for life without impeachment of waste is not revoked by a codicil directing the trustees to let until the tenant for life married, such leases to be under restrictions, one of which was that the lessees should not be unimpeachable of waste. *Lushington v. Boldero*, Cooper 216.

A bequest to the wife of a testator of one-third of his real and personal property, directed to be sold and converted into money by his executors, is not impliedly revoked by a codicil which reserves from sale a part of such real property until her death, and secures to her the use of it during her life. *Collier v. Collier*, 3 Ohio St. 369.

bb. WHERE INCONSISTENT CODICIL PREVAILS. — Where, however, there are clauses in a codicil irreconcilable and inconsistent with clauses in the will, the provisions of the codicil, as the last indication of the testator's mind, must prevail, and to the extent of the inconsistency revoke the clauses of the will.¹

Words of Revocation Unnecessary. — And where this inconsistency exists there need be no express clause or words of revocation.²

Precise Description Unnecessary. — A codicil showing clearly the intention to revoke certain provisions of the will should be given this effect, although it does not describe with absolute precision the gifts to which the revocation evidently applies.³

cc. INSTANCES OF INCONSISTENCIES — Different Disposition by Codicil of Estate in Will. — If an estate given by the will is disposed of in a different manner by codicil, the former will be revoked by the inconsistency.⁴

Gift by Codicil of Residue Previously Given in Will. — Thus a gift of the residuary estate in the codicil revokes a gift of the residue in the will.⁵ This effect, however, will not follow where the will disposes of a particular and the codicil of the general residue, or *vice versa*.⁶

Limitations in Codicil Inconsistent with Will. — Where a codicil contains an unbroken set of limitations not reconcilable with those in the will and

1. *England.* — Butler *v.* Greenwood, 22 Beav. 303; Stocks *v.* Hammond, 2 N. R. 307; Wells *v.* Wells, 17 Beav. 490, 17 Jur. 1020, 2 W. R. 6.

United States. — Bosley *v.* Wyatt, 14 How. (U. S.) 390; Brownell *v.* De Wolf, 3 Mason (U. S.) 486.

Arkansas. — McKenzie *v.* Roleson, 28 Ark. 102.

Alabama. — Grimbail *v.* Patton, 70 Ala. 626.

Indiana. — Sturgis *v.* Work, 122 Ind. 134.

Maine. — Pickering *v.* Langdon, 22 Me. 413.

Maryland. — Lee *v.* Pindle, 12 Gill & J. (Md.) 288; Boyle *v.* Parker, 3 Md. Ch. 42; Johns Hopkins University *v.* Pinckney, 55 Md. 365.

Massachusetts. — Bedloe *v.* Homer, 16 Gray (Mass.) 432.

New York. — Newcomb *v.* Webster, 113 N. Y. 191; Folk *v.* Stocking, (Supreme Ct.) 12 N. Y. St. Rep. 373, affirmed 122 N. Y. 664; Barlow *v.* Coffin, 24 How. Pr. (N. Y. Supreme Ct.) 54.

Rhode Island. — Derby *v.* Derby, 4 R. I. 414.

South Carolina. — Flood *v.* Howser, 1 Nott & M. (S. Car.) 321.

Vermont. — Larrabee *v.* Larrabee, 28 Vt. 274.

Virginia. — Dawson *v.* Dawson, 10 Leigh (Va.) 631.

2. Read *v.* Manning, 30 Miss. 308; Den *v.* Snowhill, 23 N. J. L. 447; *In re* Van Beuren's Estate, (Surrogate Ct.) 13 N. Y. Supp. 261.

3. Flagg *v.* Harbeck, 6 Den. (N. Y.) 289. See Baldwin *v.* Baldwin, 22 Beav. 413.

4. Kermode *v.* Macdonald, L. R. 3 Ch. 584, 37 L. J. Ch. 879, affirming L. R. 1 Eq. 457, 35 L. J. Ch. 358; Poore *v.* Wright, 3 L. T. N. S. 773; Younge *v.* Combe, 4 Ves. Jr. 101; Duffield *v.* Elwes, 2 Sim. & S. 544, 4 L. J. Ch. 189.

Gift of Entire Estate for Life Revoked by Subsequent Gift of Legacies. — Where a will gives the testator's entire estate to one for life, and a codicil provides legacies to others in absolute and unambiguous terms, the codicil changes the will to that extent, and the legacies are payable at the usual time, unaffected by the

life estate Beardsley *v.* Bridgeport, 53 Conn. 489, 55 Am. Rep. 152.

Right of Residence on Estate Revoked by Subsequent Disposition of Estate. — If land is devised by a will to minor children, with provision to their mother to occupy during their minority, a different disposition of the fee by a codicil revokes the right to occupy by the mother. Den *v.* Snowhill, 23 N. J. L. 447.

Codicil Acknowledging B as Next of Kin and Heir. — A testator by will gave his real estate to A, but afterwards made the following codicil: "I acknowledge B to be my next of kin and heir-at-law of all my real and personal property." It was held that the word "acknowledge" indicated an intention that B should fill that character, which according to law would entitle him to the whole of the real estate, and that the will was revoked by the inconsistency in the codicil. Parker *v.* Nickson, 9 Jur. N. S. 451, 11 W. R. 533, 7 L. T. N. S. 813.

Power to Sell Revoked by Inconsistent Disposal in Codicil. — A power given by will to sell certain premises at a fixed price is revoked by a subsequent codicil devising the premises to trustees to be sold for the payment of debts, and subject thereto upon the limitations of the will. Bridger *v.* Rice, 1 Jac. & W. 74.

Second Gift from Same Fund Held Not Revocation in Toto. — A testator devises to A. all his dividends on his South Sea annuities, and afterwards by codicil gives to C. an annuity for life, payable out of his South Sea annuities. This was held not to be a revocation *in toto*, but that both devises might consistently stand together. Stone *v.* Evans, 2 Atk. 86.

5. *England.* — Hardwicke *v.* Douglas, 7 Cl. & F. 795; Kermode *v.* Macdonald, L. R. 1 Eq. 457; Sanford *v.* Sanford, 1 De G. & S. 67, 11 Jur. 322; In Goods of Hastings, 26 L. T. N. S. 715, 20 W. R. 616; Evans *v.* Evans, 17 Sim. 107, 14 Jur. 383; Crawshaw *v.* Maule, 1 Swanst. 495; Bosley *v.* Wyatt, 14 How. (U. S.) 390; Atwater *v.* Russell, 49 Minn. 22; Richard's Estate, 36 W. N. C. (Pa.) 264.

6. Inglefield *v.* Coghlan, 2 Coll. 247.

exhausting the fee, it is to be inferred that the testator intended to dispose of the whole fee by the codicil, which he had otherwise disposed of by his will.¹

(b) **By Effect of Republication.** — Sometimes a codicil republishing a will or codicil has the effect of revoking another will or codicil. This will be treated subsequently.²

(4) **In Case of Mistake in Fact.** — If the intention of the testator in revoking a will by a codicil is founded on a mistake or misconception of fact, there will be no revocation.³

(5) **In Case of Misrecital of Will.** — The merely erroneous recital by a codicil of the terms or provisions of the will, will not operate to revoke or cut down gifts in the will, in the absence of a contrary intention.⁴

(6) **Where Legacies Are Given in Both Instruments.** — If legacies are given to the same person by will and also by codicil, and there is nothing to show a contrary intention, the legacies by codicil will be considered additional to and not revocatory of those in the will.⁵

1. *Daly v. Daly*, 2 J. & L. 752, 8 Ir. Eq. R. 508.

2. See *infra*, this title, *Republication*; *Mendinhall's Appeal*, 124 Pa. St. 387.

3. **Misconception of Effect of Will.** — A bequest of specific chattels by will is revoked by a gift *simpliciter* of the chattels by a codicil to another; but where the latter bequest is not made, but is prefaced by a recital showing that it was founded on a misconception of the true effect of the will, the same result will not necessarily follow. *Barclay v. Maskelyne*, 1 Johns. 124, 4 Jur. N. S. 1293, 28 L. J. Ch. 115.

Mistake as to Provisions of Will. — A codicil which gives as a reason for bequeathing a legacy to the testator's grandson, that he had disinherited the grandson, the fact being that he had not disinherited him at all, but had given him a large legacy by the will, does not revoke the legacy in the will, but is itself rendered void by the mistake. *Mordecai v. Boylan*, 6 Jones Eq. (N. Car.) 365.

Mistake as to Death of Legatees by Will. — A testator, by his will, gave legacies to A and B, describing them as grandchildren of C, and their residence in A. By a codicil he revoked those legacies, giving as a reason therefor that the legatees were dead. The fact not being true, it was held they were entitled upon proof of identity. *Campbell v. French*, 3 Ves. Jr. 321.

Doubt as to Certain Facts. — A testatrix by codicil gave to A the legacy given by her will to the children of B, "as I know not whether any of them are alive, and if they are well provided for." The court held that though these children are living, B is entitled; the construction being that if they are living they are well provided for. *Atty.-Gen. v. Ward*, 3 Ves. Jr. 327.

4. *Scarlett v. Thurlow*, 21 W. R. 728, 28 L. T. N. S. 583; *Haggard v. Haggard*, 46 L. T. 807, 30 W. R. 930, *affirmed* 48 L. T. 172, 31 W. R. 257.

Gift by Will Only Partially Affected. — Where a legacy of £500 was given by will to A, and by a codicil the testator declared that she revoked the legacy of £100 to him, it was held to be the intention of the testator to revoke the legacy of £500 to the extent of £100 only, and that A was entitled to the remaining £400. *Thurnall v. Rayner*, 4 W. R. 404.

Gifts of Will Cut Down by First Codicil, Enlarged to Original Amount by Subsequent Codicil. —

A testator, by his will, gave £500 to A and £1,000 to B, to be paid within twelve calendar months after his wife's death. By a codicil of the same date he reduced these legacies to £300 and £500 respectively. Afterwards he formally republished his will. By a second codicil, after reciting the bequest in his will of £500 to A, he revoked that bequest, and, in lieu of it, gave A £300, to be paid at the same time as the revoked bequest was directed by his will. By a third codicil, after reciting that by his will he had given R. £3,000, he reduced that legacy to £2,000, and then directed that the £300 given to A, as well as the £1,000 given to B, should not be paid till twelve months after the death of his wife. It was held, taking all the instruments together, that B was entitled to a legacy of £1,000. *Grand v. Reeve*, 11 Sim. 66.

Effect of Codicil Reciting Gifts Not Made in Will. — In *Pitcher v. Hole*, 7 Sim. 208, 4 L. J. N. S. Ch. 50, the testator had directed his trustees to invest such a sum as would produce £40 a year, and to pay the same to his daughter, and after her death to transfer the fund to his residuary legatees; and he gave £100 to his daughter absolutely. By a codicil he revoked the sum of £1,200 given to his daughter for her life, and gave her £500 in lieu thereof. It was held, that as the £40 a year was the only sum given to the daughter for life, it was revoked by the codicil.

5. *Wainwright v. Tuckerman*, 120 Mass. 232; *Ball v. Church of Ascension*, 5 Ont. Rep. 386.

If legacies by will and codicil are given *simpliciter*, in the absence of intrinsic evidence, as the testator has given twice, he must *prima facie* be intended to mean two gifts, and the gift in the codicil will not act as a revocation or substitution of that in the will. *Manifold's Appeal*, 126 Pa. St. 508.

Additional Gift Founded on Mistake of Fact. — A testator, having by his will given £4,000 to certain charitable institutions, made a codicil as follows: "Presuming and believing that the rental of my estate will produce £16,000 a year, I give those institutions £4,000 more." The income of the estate however, was at his death much less than £16,000 a year. It was

Where Intention that Gift Is Additional Is Apparent.—*A fortiori* will the bequest be considered additional if from the language and circumstances it is apparent that such is the intention of the testator.¹

Where Intention to Make Second Gift Revoke First Is Apparent.—But of course the intention of the testator must govern, and if he meant the legacies given by codicil to be revocatory or substitutionary, instead of additional, this intention will be given its proper effect.²

(7) *Of Appointment to Office under Will when Effected.*—An appointment by will to offices, as executor, trustee, guardian, etc., will not be revoked by a codicil, unless the two are absolutely inconsistent,³ or the intention to revoke is apparent.⁴

held that the testator's reason for the gift of the second £4,000 being the supposed increase of his property, and the fact of such increase being incorrect, the gift of this £4,000 failed. *Thomas v. Howell*, 43 L. J. Ch. 511.

Legacy by Codicil Not Excluding Share in Residuary Estate.—By a codicil to his will the testator declared: "As I have sold the tract of land which I willed to the heirs of my son John, I now will that the heirs of him have \$700 each." It was held that this legacy to the children of John did not exclude them from a share of the residuary estate, which was directed by his original will to be "divided among my heirs as the law directs." *Stultz v. Kiser*, 2 Ired. Eq. (N. Car.) 538.

Legacy Changed to Annuity.—Where the codicil provided that an annuity of £30 given in the will should be increased to an annuity of £50, the will having in fact given only a legacy of £30, it was held that the legatee should take the annuity. The court said: "The plain meaning of the words of the codicil is to say that the plaintiff was to have an annuity of £50. For some reason or other the testatrix wished to increase her bounty to her to that amount. The words as they stand would give A B an annuity of £50; and if so, it is for those who assert that there has been a mistake to point out what the mistake is, and how it is to be cured. The mistake lies in the words 'immediate annuity of;' but because the testatrix has misdescribed a legacy as an annuity, I cannot hold that by 'an annuity of £50' she meant 'a legacy of £50.' If she had said 'And I increase the £30 left by will to A B to an annuity of £50,' there would have been no difficulty. I must, therefore, strike out the erroneous words, and read the codicil as it would stand without them. The result is that the plaintiff will take an annuity of £50." *Ives v. Dodgson*, L. R. 9 Eq. 401.

Appointment by Codicil in Full Discharge of All Claims, Assets, etc.—A testator having bequeathed legacies to his daughters, and annuities by way of maintenance to them and to one of his sons, to whom he also devised real estate, made a codicil by which he purported to appoint amongst them, in full discharge of all claims or assets which they could have upon his estate or assets, a sum of money which, under his marriage settlement, he had power to appoint among his younger children. It was held that irrespectively of the validity or effect of the codicil as an appointment, it did not operate to revoke the prior gifts in the will. *M'Dermot v. O'Connor*, 10 Ir. Eq. R. 352.

Moneys Brought into Hotchpot with Previous Bequests.—A will bequeathed certain portions to younger children, and a codicil directed certain moneys to be brought into hotchpot with them. This direction was held to be no ademption of any part of these portions. *Chamier v. Tyrell*, (1894) 1 Ir. R. 267.

1. *Noel v. Noel*, 86 Va. 109. See also *Parker v. Wasley*, 9 Gratt. (Va.) 477.

A testator in his lifetime by bond secured to H. C. C. an annuity of £300 for life, payable on the usual quarter days, etc., and by his will confirmed it, and bequeathed a further annuity of £200 payable in the same manner, it being his intention that she should receive an annuity of £500 instead of £300. By a codicil the testator directed his trustees to raise £500 a year, and pay the same to H. C. C. during her life by quarterly payments. It was held that the second annuity was not cumulative. *Radburn v. Jervis*, 3 Beav. 450.

2. *Wainwright v. Tuckerman*, 120 Mass. 232; *Scott v. Gohn*, 4 Ont. Rep. 457.

All But One Gift Repetitive as to Amount.—Where a testator made a will and two codicils, the second of which contained gifts merely repetitive as to amount of gifts made in the first codicil, and only one of increased amount, the court held that the intention of the testator was to revoke the first codicil and substitute therefor the second. *Chichester v. Quatre-fagas*, 64 L. J. P. 79, 72 L. T. 475, 43 W. R. 667.

3. Codicil Naming Executors, but Not Expressly Revoking Officer in Will.—A testator executed a codicil to his last will, and by such codicil absolutely revoked and made void all bequests and dispositions in the will, and nominated executors, but did not in direct terms revoke the appointment of executors and guardians in the will. It was held that the will was not revoked, the court saying: "The testator calls this paper a codicil to his will, and the legal operation of a codicil is to confirm such parts of the will to which it refers as it does not revoke." In *Goods of Howard*, L. R. 1 P. D. 636, 20 L. T. 230.

Appointment of Guardian Not Revoked by Codicil Providing for Care and Education of Children.—The testator appointed his widow and two other persons guardians of his children. By a codicil he "left the care, charge, and education" to his widow. It was held that the appointment by the will of guardians was not revoked by the codicil. *Hare v. Hare*, 5 Beav. 629, 12 L. J. N. S. Ch. 344, 7 Jur. 337.

4. Effect on Revocation in First Codicil of Second Codicil Containing Additional Revocations.

Will Naming Executor, Codicil Naming Sole Executor. — And even where the will names one person executor, and the codicil names another sole executor, it has been held that the provisions were not inconsistent and that both persons named executor were entitled to probate of both papers.¹

Revocation of One of Two or More Offices. — Where by will the testator has appointed a certain person to two or more offices, as executor, trustee, guardian, etc., and afterwards by codicil revokes the appointment as to one or more of the offices, the revocation will be strictly limited to the office mentioned, and will not affect the appointee's right to act in the other capacities to which he was appointed.²

Revocation of Offices Not Altering Provisions of Will. — Where trustees or executors are appointed by the will to carry into effect its provisions, a change of appointment by codicil will, in general, have no effect to alter or disturb the provisions.³

Revocation of Offices as Affecting Bequests to Appointees. — If gifts are made to executors or trustees by will, not *virtute officii*, but as a mark of respect and esteem, and their appointment is afterwards revoked by a codicil, the revocation of the office will not operate to revoke the bequests to them.⁴ Where, however, the bequest is connected with and inseparable from the office, the revocation of the appointment will operate to revoke the bequest.⁵

— The testator appointed A, B, and C to be trustees and executors. He revoked the appointment of C as executor and trustee, by his first codicil. By a second codicil he revoked the appointment of B and C as executors, but ratified his will as altered thereby. It was held that the first codicil was not revoked, and that C was not a trustee. *Cartwright v. Shephard*, 17 Beav. 301.

1. *Greaves v. Price*, 32 L. J. Prob. 113. See *Ogden v. Smith*, 2 Paige (N. Y.) 195.

Additional Executors Named in Codicil. — Where by will the testator intended that three executors should qualify, and made provision for filling vacancies if any should occur, and by codicil named two additional executors, without any new directions as to supplying vacancies, it was held that the original intention of the testator would be carried into effect by permitting any number of the executors, not less than three, to qualify and execute the trust. *Ogden v. Smith*, 2 Paige (N. Y.) 195.

2. *Cartwright v. Shephard*, 17 Beav. 301; *Worley v. Worley*, 18 Beav. 58, 2 W. R. 216; *In re Park*, 14 Sim. 89, 13 L. J. N. S. Ch. 369, 8 Jur. 372.

Revocation as to Executrix Not Extended to Office of Trustee. — A testator appointed his wife sole executrix, and made her and A trustees. By a codicil he revoked the appointment of his wife as an executrix, on the ground that the duties were "too arduous for a lady," and he appointed A, B, and C "executors in trust" of his will. By another codicil he referred to his having revoked the executorship, and to having appointed A, B, and C executors. It was held that the revocation was confined to the office of executrix only. *Graham v. Graham*, 16 Beav. 550, 17 Jur. 569, 22 L. J. Ch. 937.

3. **Change of Trustees.** — A testator, by his will, directed that his trade should be carried on by his daughter and others as trustees, for ten years, when the concern should be closed, the property sold, the produce invested in the

funds, and the funds held in trust as to one moiety for the benefit of the daughter and her children, and as to the other moiety for the benefit of the children of his brother. By a codicil the testator revoked that part of his will which empowered his trustees to sell his effects, and instead thereof he authorized his daughter to take possession of all furniture, stock in trade, and every description of property found on his, the testator's premises, to be disposed of at her discretion. It was held that the effect of the codicil was not to alter the enjoyment of the property, but only to constitute the daughter sole trustee under the will. *Newman v. Lade*, 1 Y. & Coll. Ch. 680. See also *Chifferiel v. Watson*, 73 L. T. 53.

New Trustees Standing Seized upon Same Trusts. — By will, lands were devised to trustees, who were afterwards changed by a codicil. It was held that the new trustees should stand seized upon the trusts of the will, although the word "heirs" was made use of in the codicil. *Acherley v. Vernon*, 3 B. P. C. Toml. 85, 9 Mod. 68, 1 P. Wms. 783.

4. *Burgess v. Burgess*, 1 Coll. Ch. 367, 8 Jur. 660.

5. **Bequest on Condition of Accepting Trusts — Appointment Revoked.** — A testator appointed A B and C D trustees and executors of his will. By a codicil he bequeathed to each of the trustees named in his will the sum of £5,000, on condition that he accepted the trusts thereof. By a subsequent codicil he revoked all that part of his will which related to C D, and requested E F "to undertake and fulfil the same purposes and intentions, and on the same conditions, for the effecting of which I had appointed the said C D." By a subsequent codicil he revoked the appointment of A B and C D as trustees and executors, and all legacies to them, and he nominated E F executor and trustee thereof. It was held that E F was entitled to the legacy of £5,000. *Radburn v. Jervis*, 3 Beav. 450.

Revocation of Trustee in Consequence of His Interest. — A testator devised real estates to

c. EXTENT AND EFFECT — Intention of Testator Is the Governing Consideration. — The intention of the testator is the test in determining how far the revocation of a will is effected by a codicil, as it is in all other cases of testamentary construction, and such intention should be given its proper effect, neither enlarged nor restricted.¹ So that although a strictly grammatical construction of the language used in the codicil would favor the conclusion that a considerable revocation was contemplated, yet if, in view of all the provisions of the will and codicil, it can be inferred more properly that so sweeping a revocation was not intended, the codicil should be construed in accordance with the apparent intention.²

Revocatory Intent Must Be Clear. — Where by the terms of a will a devise or bequest is clearly given, a codicil will not operate to revoke such bequest or devise, unless the intention that it shall so operate appears with equal clearness.³

Negation of Revocatory Intent. — A determination expressed in a codicil to make an alteration in the will in one particular negatives by implication any intention to alter it in any other respect.⁴

Will Not Unnecessarily Disturb. — It is an invariable rule that a codicil will not disturb or alter the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil.⁵

two trustees. By a codicil he appointed another person to be a trustee and executor of his will, in the place of one of the two trustees he did not wish to act as executor in consequence of his being an interested party in the disposal of the estate. It was held that the codicil was a revocation of the devise to the displaced trustee, as well as of the office. *In re Hough's Estate*, 4 De G. & Sm. 371, 15 Jur. 943, 20 L. J. Ch. 422.

1. *Bradhurst v. Field*, (Supreme Ct.) 13 N. Y. Supp. 60, 59 Hun (N. Y.) 621; *Coster v. Coster*, 3 Sandf. Ch. (N. Y.) 111; *Appleton v. Fuller*, (Supreme Ct.) 16 N. Y. Supp. 353; *Bradlee v. Andrews*, 137 Mass. 50; *Crafts v. Hunnewell*, 129 Mass. 220; *Towne v. Weston*, 132 Mass. 513.

2. *Reichard's Appeal*, 116 Pa. St. 232.

3. **Intent to Revoke Must Be Clear — England.** — *Doe v. Hicks*, 8 Bing. 479, 21 E. C. L. 349, 1 Cl. & F. 20, 1 M. & Scott, 759; *Robertson v. Powell*, 2 H. & C. 762, 33 L. J. Exch. 34, 10 Jur. N. S. 442, 12 W. R. 623; *Pilsworth v. Mosse*, 14 Ir. Ch. R. 163; *Cleoburey v. Beckett*, 14 Beav. 587; *Williams v. Evans*, 1 El. & Bl. 739, 72 E. C. L. 739; *Patch v. Graves*, 3 Drew. 347; *Butler v. Greenwood*, 22 Beav. 303; *Molyneux v. Rowe*, 8 De G. M. & G. 368; *Kellett v. Kellett*, L. R. 3 H. L. 167; *Evans v. Evans*, 17 Sim. 86; *In re Arrowsmith's Trusts*, 2 De G. F. & J. 474; *Lemage v. Goodban*, L. R. 1 P. D. 57; *Alt v. Gregory*, 8 De G. M. & G. 221; *Clarke v. Butler*, 1 Meriv. 304; *Hill v. Walker*, 4 Kay & J. 166; *Kermode v. Macdonald*, L. R. 3 Ch. 584; *Barclay v. Maske-lyne*, 1 John. 124, 4 Jur. N. S. 1293, 28 L. J. Ch. 115; *Follett v. Pettman*, 23 Ch. Div. 337, 52 L. J. Ch. 521, 48 L. T. 865; *Goblet v. Beachy*, 2 R. & M. 624.

Massachusetts. — *Chapin v. Parker*, 157 Mass. 63; *Quincy v. Rogers*, 9 Cush. (Mass.) 291.

New York. — *Kane v. Astor*, 5 Sandf. (N. Y.) 467; *Hard v. Ashley*, 117 N. Y. 606, *reversing* 53 Hun (N. Y.) 112; *Weld v. Strong*, 54 How. Pr. (N. Y. Supreme Ct.) 133.

North Carolina. — *Joiner v. Joiner*, 2 Jones Eq. (N. Car.) 68.

Pennsylvania. — *Wetter's Appeal*, (Pa. 1888) 12 Atl. Rep. 262.

Rhode Island. — *Derby v. Derby*, 4 R. I. 414.

4. **Expressed Intent to Revoke Given Disposition Negatives General Revocation.** — *Mason v. Smith*, 49 Ala. 71; *In re Ladd*, 94 Cal. 670; *Quincy v. Rogers*, 9 Cush. (Mass.) 291; *Vaughan v. Bunch*, 53 Miss. 513; *Wetmore v. Parker*, 52 N. Y. 450; *Redfield v. Redfield*, 126 N. Y. 466; *Viele v. Keeler*, 129 N. Y. 190; *Kinkele v. Wilson*, 9 Misc. Rep. (N. Y. C. Pl.) 139; *Lutheran Congregation's Appeal*, 113 Pa. St. 32.

5. *England.* — *Lovat v. Leeds*, 2 Dr. & Sm. 62; *Hinchcliffe v. Hinchcliffe*, 2 Dr. & Sm. 96; *Molyneux v. Rowe*, 8 De G. M. & G. 368; *Davis v. Bennet*, 30 Beav. 226; *Kirke v. Kirke*, 4 Russ. 435, 6 L. J. Ch. 143; *Leicester v. Wood*, 15 W. R. 308; *Young v. Hassard*, 1 Dr. & War. 638; *Stephenson v. Stephenson*, 56 L. T. 75; *Follett v. Pettman*, 23 Ch. Div. 337, 52 L. J. Ch. 521, 48 L. T. 865; *Carrington v. Payne*, 5 Ves. Jr. 404; *Stocks v. Hammond*, 2 N. R. 307; *Pilsworth v. Mosse*, 14 Ir. Ch. R. 163; *Butler v. Greenwood*, 22 Beav. 303; *Megison v. Moore*, 2 Ves. Jr. 630; *Arnold v. Congreve*, 1 R. & M. 209; *Doe v. Ward*, 18 Q. B. 197, 83 E. C. L. 197, 21 L. J. Q. B. 145, 16 Jur. 709; *Darley v. Martin*, 13 C. B. 683, 76 E. C. L. 683, 22 L. J. C. P. 249; *Norman v. Kynaston*, 7 Jur. N. S. 129, *affirming* 30 L. J. Ch. 189; *Fitzmaurice v. Sadlier*, 12 Ir. Eq. R. 544.

United States. — *Boyd v. Boyd*, 2 Fed. Rep. 138.

California. — *In re Ladd*, 94 Cal. 670.

New Jersey. — *Den v. Snowhill*, 23 N. J. L. 447; *Conover v. Conover*, (N. J. 1887) 8 Atl. Rep. 500.

New York. — *Conover v. Hoffman*, 1 Bosw. (N. Y.) 214; *Pierpont v. Patrick*, 53 N. Y. 591; *Newcomb v. Webster*, 113 N. Y. 191; *Kane v. Astor*, 5 Sandf. (N. Y.) 467; *Matter of Willets*,

Codicil Not Operative Beyond Import of Language.—And a codicil will not operate as a revocation of a will beyond the clear import of its language.¹

112 N. Y. 289; *Hard v. Ashley*, 117 N. Y. 606, reversing 53 Hun (N. Y.) 112.

North Carolina.—*Joiner v. Joiner*, 2 Jones Eq. (N. Car.) 68.

Ohio.—*Collier v. Collier*, 3 Ohio St. 369.

Pennsylvania.—*Reichard's Appeal*, 116 Pa. St. 232; *Lewis's Appeal*, 108 Pa. St. 133; *Spang v. Hill*, 2 Woodw. (Pa.) 45; *Whelen's Estate*, 175 Pa. St. 23.

Rhode Island.—*Ives v. Harris*, 7 R. I. 413.

South Carolina.—*Coffin v. Elliott*, 9 Rich. Eq. (S. Car.) 244.

Tennessee.—*Brown v. Cannon*, 3 Head (Tenn.) 355; *Rodgers v. Rodgers*, 6 Heisk. (Tenn.) 489.

Where, by a will, various pecuniary legacies were given to certain persons named therein, who were relatives of the testator, and the residue was divided amongst them in proportion to the amounts of the legacies, and a codicil revoked the legacies and substituted in their place legacies of different amounts, and ratified and confirmed the will in all other respects than those named in the codicil, it was held that the rights of the legatees named in the will to their shares under the residuary clause were not affected by the codicil. *Pendegast v. Tibbetts*, 164 Mass. 270. In this case the court said: "The general rule is, that 'the codicil shall change the will so far only as the intent is manifest, especially where, in all other respects, the will is in terms ratified and confirmed,' which is the case here. *Quincy v. Rogers*, 9 Cush. (Mass.) 205; *Chapin v. Parker*, 157 Mass. 63. * * * The rule is again stated in *Tilden v. Tilden*, 13 Gray (Mass.) 103, in these words: 'A codicil duly executed is an addition or supplement to a will, and is no revocation thereof, except in the precise degree in which it is inconsistent therewith, unless there be words of revocation,' and then, it might be added, only to the precise extent of the revocation. * * * Though the will and codicil are to be taken together in ascertaining what disposition is made by the testator of his estate, the will remains, save as altered by the codicil. The latter does not, in terms or otherwise, purport to deal with the rest and residue, and we think that it would be going too far to infer that the testator intended to change the distribution of the rest and residue, because certain legacies named in the will are reduced by the codicil, and, as thus reduced, are given in place of those named in the will. * * * We think that this construction is in accordance with the cases, except perhaps *Courtauld v. Causton*, W. N. (1882) 185, which stands on its own facts, and does not appear to have been followed. *Quincy v. Rogers*, 9 Cush. (Mass.) 201; *Chapin v. Parker*, 157 Mass. 63; *Wetmore v. Parker*, 52 N. Y. 450; *Colt v. Colt*, 32 Conn. 422; *In re Gibson's Trusts*, 2 J. & H. 656; *Lushington v. Boldero*, Cooper, 216; *Hillersdon v. Grove*, 21 Beav. 518."

Codicil Directing Sale of Estate Given by Will—Devisee Holds Until Sale.—A testator gave, in the body of his will, a fee simple in a tract of land to A, and by a codicil ordered the land to be sold by his executor, and the proceeds

divided among other persons than A. It was held that until the exercise of the power of sale by the executor, the legal estate remained in A, the devisee mentioned in the body of the will. *Jenkins v. Maxwell*, 7 Jones L. (N. Car.) 612.

Change of Legacy as to Amount Not Altering Manner or Time of Payment.—Where a pecuniary legacy was given in the body of the will to A, one-half payable at the settlement of the testator's estate, and the other half twelve months thereafter, and charged personally on specific devisees, to whom a valuable property was given; and a codicil was afterwards added in these words: "I hereby revoke the donation in the body of my will to A, and give her a proportionate share with the rest of my nieces," who were residuary legatees, under the will; it was held that the codicil only changed the amount of the legacy to A, and not the fund out of which it was payable, nor the time and manner of its payment; and that the legacy still continued a personal charge on the devisees, and was not payable out of the residuum. *Mason v. Smith*, 49 Ala. 71.

Change in Proportions Not Affecting Trusts and Limitations.—A testatrix gave her residuary personal estate to trustees in trust as to one-fourth for her granddaughter A., and as to the remaining three-fourths in trust for the children of her daughter B., with certain after limitations. Afterwards, by an informal codicil, she desired her will to be altered so that instead of her granddaughter A. receiving one-fourth part of the trust estate, such estate should be equally divided between A. and the children "now born or hereafter to be born" of her daughter B. The will directed the trustees to hold the residuary personal estate in the proportions above mentioned on certain trusts in favor of A. and the children of B., with certain limitations over. It was held that the codicil merely altered the proportions and did not affect the trusts and limitations. *Armitage v. Ashton*, 20 L. T. N. S. 102.

1. *England.*—*Agnew v. Pope*, 1 De G. & J. 49, 3 Jur. N. S. 625; *Ives v. Ives*, 4 Y. & Coll. 34, 4 Jur. 265; *Bunny v. Bunny*, 3 Beav. 109, 4 Jur. 716; *Pratt v. Pratt*, 14 Sim. 129, 8 Jur. 507; *Barclay v. Maskelyne*, 5 Jur. N. S. 12; *Boote v. Dutton*, 59 L. T. 21; *Patch v. Graves*, 3 Drew. 348; *Bridges v. Strachan*, 8 Ch. Div. 558.

Connecticut.—*Colt v. Colt*, 32 Conn. 422.

Georgia.—*Colquitt v. Tarver*, 45 Ga. 631.

Massachusetts.—*Potter v. Merrill*, 143 Mass. 189.

New York.—*Wetmore v. Parker*, 52 N. Y. 450; *Westcott v. Cady*, 5 Johns. Ch. (N. Y.) 334, 9 Am. Dec. 306; *Viele v. Keeler*, 129 N. Y. 190, reversing 13 N. Y. Supp. 196, 59 Hun (N. Y.) 617; *Redfield v. Redfield*, 126 N. Y. 466; *Kinkele v. Wilson*, 9 Misc. Rep. (N. Y. C. Pl.) 139.

Virginia.—*Jenkins v. Lawrence*, 86 Va. 35.

Revocation of Residuary Personal Estate Not Revocation of Produce of Freeholds.—A testator, in the case of an event which happened after his death, directed a freehold estate to be sold,

2. Of Will by Invalid or Inoperative Codicil.—In order to effectuate the intention of the testator, the question often arises whether a codicil which is void and inoperative will revoke a will to which it is attached or refers. The cases are not entirely consistent, but these doctrines have been laid down and followed:

Codicil Inoperative from Incapacity of Devisees.—If a codicil revokes a will and makes a new disposition of property, which disposition fails, not from the infirmity of the instrument but from the incapacity of the devisees to take, the revocation is effective.¹

Implied Revocation.—But the rule is stated that if a will is not expressly revoked, but the codicil contains provisions inconsistent with and intended to take the place of those in the will, no revocation is effected if the dispositions made by the codicil are invalid and inoperative.²

and the produce applied upon the trusts, intents, and purposes afterwards expressed in his will, as to his residuary personal estate; by a codicil he revoked the gift in his will of his residuary personal estate, and made a new disposition of it. The produce of the freehold estate is not thereby affected, but passes upon the trusts, intents, and purposes which were expressed in the will as to the residuary personal estate. *Francis v. Collier*, 4 Russ. 331.

Revocation of General Residue Not Revocation of Enumerated Articles.—A testator bequeathed as follows: "As to all that my leasehold house in L., and all my household goods and furniture there and at S., and as to all my plate, linen, chinaware, pictures, live and dead stock, and all the rest and residue of my goods, chattels, and personal estate, etc., I give and bequeath the same to A." By a codicil he revokes the bequest of the residue to A., and gives "the residue of my said personal estate" to B; the gift of the general residue only, and not of the articles enumerated, is revoked by this codicil. *Clarke v. Butler*, 1 Meriv. 304. See also *Barclay v. Maskelyne*, 5 Jur. N. S. 12.

Codicil Operative Only to Extent of Inconsistency.—The will is affected only so far as there is a repugnance between it and the codicil, and the latter is not a revocation of the former except in the exact degree in which the two are inconsistent. *Robertson v. Powell*, 2 H. & C. 762, 33 L. J. Exch. 34, 10 Jur. N. S. 442, 12 W. R. 623; *Doe v. Marchant*, 6 M. & G. 813, 46 E. C. L. 813; *Inglefield v. Coghlan*, 2 Coll. 247; *Cookson v. Hancock*, 2 Myl. & C. 606, affirming 1 Keen 817; *Hill v. Walker*, 4 Kay & J. 166; *Molyneux v. Rowe*, 8 De G. M. & G. 368; *Bosley v. Wyatt*, 14 How. (U. S.) 390; *Grimball v. Patton*, 70 Ala. 626; *Tilden v. Tilden*, 13 Gray (Mass.) 103; *Pierpont v. Patrick*, 53 N. Y. 591; *Brant v. Willson*, 8 Cow. (N. Y.) 56; *Rhyme v. Torrence*, 109 N. Car. 652; *Wetter's Appeal*, (Pa. 1888) 12 Atl. Rep. 262; *Webb v. Carpenter*, 16 R. I. 68; *Dawson v. Dawson*, 10 Leigh (Va.) 631. See also *In re Arrowsmith*, 6 Jur. N. S. 1231; on appeal, 7 Jur. N. S. 9, 2 De G. F. & J. 474; *Froggatt v. Wardell*, 3 De G. & Sm. 685, 14 Jur. 1101.

1. 1 Jar. on Wills (5th ed.) 169; French's Case, 8 Vin. Abr. 133, 1 Roll. Abr. 614; *Radcliffe v. Roper*, 10 Mod. 89; *Roper v. Radcliffe*, 1 Bro. P. C. 450; *Canfield v. Crandall*, 4 Dem. (N. Y.) 111. See also *Walton v. Walton*, 7

Johns. Ch. (N. Y.) 269, 11 Am. Dec. 456; *Price v. Maxwell*, 28 Pa. St. 39.

Compare, as disapproving the distinction upon which these cases proceed, and adjudging a codicil effective as a revocation on broader grounds, *Quinn v. Butler*, L. R. 6 Eq. 225, set out more fully *infra*, this section.

A testator, by his will, bequeathed his slaves absolutely to his widow, but, by a codicil to the will, he provided that "if my wife should marry and have issue, then she can hold all my property; otherwise I will all my negroes to be free." It was held that although the provision in the codicil providing for the freedom of the slaves was void by the statute of Mississippi, yet that the codicil was effective as a revocation of the will, and that the widow took only the interest declared by the codicil. *Read v. Manning*, 30 Miss. 308. *following Hairston v. Hairston*, 30 Miss. 276.

2. *Altrock v. Vandenburg*, (Supreme Ct.) 25 N. Y. Supp. 851, 54 N. Y. St. Rep. 327, *following Austin v. Oakes*, 117 N. Y. 577.

In the first case above cited, the testator by his will bequeathed his lands to his son for life, remainder to his son's children. After the death of the son a codicil was added by the testator, reciting the bequest and "instead thereof" devising the land to his son's children for life, remainder over, but the previous devise was not in terms revoked. It was held that the codicil was void because it violated the statute against perpetuities, but that it did not revoke the devise in the will.

In another case a special power of appointment was given a married woman, the objects of which were her husband and children, and in default of appointment the fund was to go, not to that class, but to different persons. By will, the testatrix exercised this power by appointing the whole fund to her husband and children, but subsequently, one of the children having died, she made a codicil, reciting the fact of his death, and appointing the share that would have been his to his children. This appointment was invalid because to persons not objects of the power. It was held that the appointment in the will not being expressly revoked by the codicil, the invalidity of the latter would not operate as a *pro tanto* revocation of the former, since the intention of the testator, as evidenced by the testator, was merely to carry out her power, which failing by reason of its invalidity left the appointment as originally made in the will, *i. e.*, to

Express Revocation. — And it is held that even where an express revocation is made of a previous testamentary disposition, and in the revoking instrument another disposition is made, and the court can discover that the object of the revocation is to make way for this second disposition, if this cannot take effect there shall not be a revocation.¹

Intention to Revoke Unqualifiedly. — Where, however, it can be seen that the intention of the testator is to revoke the dispositions of the will without regard to whether or not the dispositions of the codicil are operative, the revocation is effective, notwithstanding the fact that the substituted provisions in the codicil are ineffectual.²

3. Of Will by Revocation of Codicil. — Whether a revocation of a codicil will operate as a revocation of the will also, depends, it seems, upon the intention of the testator and the manner in which the revocation is accomplished.³

her husband and surviving children. *Duguid v. Fraser*, 31 Ch. Div. 449.

So where a testator devised the whole income of his estate to his widow, but added a codicil directing that a part of such income be accumulated for the payment of the testator's debts, it was held that the direction for accumulations was void, under Act Pa., Apr. 18, 1853, prohibiting accumulation except in certain specified cases, and the same being a revocation of the devise to the widow, dependent on its validity for effect, on its failure to operate as such the widow became entitled to the whole of the income under the original devise. *Lutz's Estate*, 9 Pa. Co. Ct. Rep. 294.

1. *Edlestone v. Speake*, 1 Show. 89; *Onions v. Tyrer*, 1 P. Wms. 343; *Jones v. Jones*, 2 Dev. Eq. (N. Car.) 387.

2. *Tupper v. Tupper*, 1 Kay & J. 665, 1 Jur. N. S. 917.

A testator having a power by will to charge hereditaments with £7,000, to be divided among his children in such shares as he should by will appoint, and in default among them equally, by his will charged the hereditaments with the £7,000 and directed that £4,000, part thereof, should be paid to his younger son, and the remaining £3,000 to his three daughters equally. By a codicil he revoked the appointment or charge of £7,000 made by his will, and charged the same hereditaments with the payment of £7,000 to his younger son alone. It was held that though the appointment made by the codicil was invalid as not being within the terms of the power, the revocation nevertheless took effect. *Quinn v. Butler*, L. R. 6 Eq. 225. In this case Lord Romilly, M. R., said: "I think it is impossible to draw a distinction so technical as to say that the codicil shall prevail or not according as the person named in it can take or not."

A codicil to a will "unqualifiedly" revoking a bequest given in the body of the will, and in addition containing a bequest, will operate as a revocation, although it is not good as to the bequest it contains. The court in this case said: "The revocation contained in the second codicil to the testatrix's will is self supporting. It is wholly independent of the devise following. The entire separation of the two testamentary acts is expressed in the clearest language. In saying, as she does, 'I hereby unqualifiedly revoke' the bequest previously made, she thereby wholly disconnects the revocation

from all and every other bequest which she has made or may make." *Lutheran Congregation's Appeal*, 113 Pa. St. 32.

3. Cancellation of Codicil — Intention to Revoke Will. — Where a codicil, written on the same piece of paper as the will, four years thereafter, and merely making a readjustment of certain shares which had depreciated in value, had the signature of the testator crossed out and was marked, three years before the testator's death, "Void. H. D. B." (testator's initials), and it appeared that there had been some family quarrels, it was held that the intention was to revoke both will and codicil. *In re Brookman*, 11 N. Y. Misc. Rep. (Kings County Surrogate Ct.) 675.

Destruction of Codicil — Presumption as to Destruction. — A codicil having been destroyed, the law presumes, in the absence of proof to the contrary, that it was done by the testator himself, and where there is nothing beyond mere suspicion pointing to anybody else, it is not sufficient to sustain a verdict against the will. *Stewart's Estate*, 149 Pa. St. 111.

No Intention to Revoke Will. — A testator made a will in 1871. He married in 1872, and on the day of the marriage, but after the ceremony, he executed a codicil by which he made provision for his wife, and revived his will. The codicil was destroyed, but the court, being satisfied that he had no intention of thereby revoking his will, decreed probate of both papers. *James v. Shrimpton*, 1 Prob. Div. 431, 45 L. J. P. 85, 35 L. T. 428, 24 W. R. 740.

In tearing the name from the codicil a part of the will written on the opposite side of the sheet was also torn; and the jury was instructed that if by mistake, intending only to cancel the codicil, the testator tore off a part of the will, forgetting that there was writing on the other side, the will would not thereby be canceled. It was held that the jury might have been instructed as a matter of law that there was no cancellation of the will. *Cook's Will*, 5 Clark (Pa.) 1.

Virginia Statute. — In a case in Virginia it appeared that the codicil was destroyed by direction of the testator. The evidence tended to show that the will and codicil were written on separate sheets of paper, were left each with a different person, and continued in such separate custody up to the time of the destruction of the codicil. The court instructed the jury that if they believed from the evidence that the decedent intended, at the time of

4. Of Codicil by Revocation of Will — England — Prior to the Wills Act. — The law of England prior to the Wills Act (7 Will. IV. and 1 Vict., c. 26) appears to have been that a codicil was considered *prima facie* dependent on the will, and that a revocation of the will was an implied revocation of the codicil.¹ This legal presumption, however, was liable to be repelled by proof that the testator intended the codicil to operate notwithstanding the revocation of the will.²

Under the Wills Act. — Section 20 of the Wills Act (7 Will. IV. and 1 Vict., c. 26) provides that “no will or codicil or any part thereof shall be revoked otherwise than aforesaid [*i. e.* by marriage], or by another will or codicil executed in the manner hereinbefore required, or by some writing declaring an intention to revoke the same, * * * or by the burning, tearing, or otherwise destroying the same by the testator * * * with the intention of revoking the same.” The effect of this legislation is held to do away with the implied revocation of codicils by the revocation or destruction of the will, and to give the codicil full force and effect unless it has been revoked by one of the methods above indicated.³

destroying the codicil, thereby to destroy or revoke the will, the destruction of the codicil was a revocation of both the will and the codicil. It was held by the court above that under the Virginia statute requiring both the intention to revoke and some overt act, such as burning, tearing, canceling, etc., this instruction was erroneous. *Malone v. Hobbs*, 1 Rob. (Va.) 366, 39 Am. Dec. 263.

Revocation of Codicil under English Wills Act. — A codicil had been obliterated by black marks and at the foot of it the testator had written: “We are witnesses of the erasure of the above.” This was signed by the testator and attested by two witnesses. These words were held to effect the revocation of the codicil, being “a writing declaring an intention to revoke” it within section 20 of the Wills Act. In *Goods of Gosling*, 11 Prob. Div. 79, 55 L. J. P. 27, 34 W. R. 492, 50 J. P. 263.

1. *Medlycott v. Assheton*, 2 Add. 229; *Copple v. Dillon*, 4 Hagg. 369. And see *Grimwood v. Cozens*, 2 Sw. & Tr. 364.

If the dispositions of the codicil were complicated with, and dependent upon, those of the will, the destruction of the will was held necessarily to revoke the codicil. *Ustick v. Bawden*, 2 Add. 116.

2. *Barrow v. Barrow*, 2 Lee Ecc. 335.

See *Tagart v. Squire*, 1 Curt. 289, where the testator made provision for an illegitimate child and its mother by a codicil which he declared should be taken as part of his will, such child being born after the making of the will. The will not being found at the decease of the testator, it was held that the codicil should be treated as unrevoked, there being nothing to show an intention to revoke it, and its provisions being in favor of those to whom the testator owed a moral duty, but one not recognized by the municipal law, and the provisions of the codicil having no dependence upon those of the will.

In *Black v. Jobling*, L. R. 1 P. D. 685, the cases decided prior to the Wills Act are reviewed, and the court says: “The consideration of these cases leaves upon the mind no very definite idea of what is meant by ‘dependent on the will.’ In one sense any codicil that makes any disposition of property at

all must be considered to be dependent on the will which disposes of the rest, for the codicil conveys only a part of the testator’s intention regarding his property, and the motives inducing that particular part of his intention cannot with any certainty be dis severed from the motives which induced the disposition of the rest. * * * It may be that the independence of the will spoken of is something of a more limited character; and the meaning of the cases may be that a codicil is independent of a will, unless it is of such a character that the giving validity and effect to it, without the will to which it was intended to be attached, would produce some manifest absurdity. I am not sure that even this rule is capable of being easily applied to all the cases that might arise, and I have serious doubts whether such a rule is to be gathered from the cases with sufficient distinctness to justify the court in adopting it.”

3. *Black v. Jobling*, L. R. 1 P. D. 685.

Doctrine of Earlier Cases. — Previous to this decision, though subsequent to the passage of the above statute, the effect of the cases seems to be that the codicil would be considered *prima facie* dependent on the will, and would be involved in its revocation or destruction, unless an intention was shown to have the codicil operate independently of the will, in which case the codicil would not be revoked, but would be admitted to probate. In *Goods of Halliwell*, 4 Notes of Cases 400; *Clogston v. Wallcott*, 5 Notes of Cases 623; *In re Ellice*, 33 L. J. Prob. 27; In *Goods of Coulthard*, 11 Jur. N. S. 184; *Grimwood v. Cozens*, 2 Sw. & Tr. 364; In *Goods of Greig*, L. R. 1 P. D. 72.

Doctrine of Later Cases. — The later cases, however, settle the law that the words of the Wills Act are imperative, and that though a will has been revoked, destroyed, or is not forthcoming, yet a codicil thereto must remain in full force and effect unless it has been revoked by one of the methods and in the manner indicated in the statute. *Black v. Jobling*, L. R. 1 P. D. 685, 38 L. J. P. 74, 21 L. T. 298, 17 W. R. 1108; In *Goods of Savage*, L. R. 2 P. D. 78, 39 L. J. P. 25, 22 L. T. 375, 18 W. R. 766; In *Goods of Turner*, L. R. 2 P. D. 403, 27 L. T. 322, 21 W. R. 38; *Gardiner v. Courthope*,

In the United States it has been held that a will revoked by the testator operates as a revocation of the codicil thereto, unless the codicil is independent of the will and can stand alone.¹ If the codicil is capable of subsisting independently, and effectually makes a complete disposition of the testator's whole estate, its validity is not affected by the destruction of the will.²

V. REPUBLICATION — 1. Execution Necessary. — It has been seen that a codicil, to act as a republication of a will, must be legally and properly executed.³

2. Methods of Republication. — A codicil may republish a will, either by expressly referring to or confirming it, or by being annexed or attached thereto.⁴ But an actual, physical attachment is not necessary if it can be otherwise determined to what will the codicil belongs.⁵

3. How and When Effected — *a.* **GENERALLY.** — It is well settled that the execution of a codicil is, in legal contemplation, a republication of the will, in the absence of a contrary intention, and that no precise form of words, nor even an apparent intention to republish, is necessary; though there are often

12 Prob. Div. 14, 56 L. J. P. 55, 57 L. T. 280, 35 W. R. 352, 50 J. P. 791.

A codicil referring to a will which never existed is not thereby avoided. In *Goods of Dent*, 23 W. R. 417.

And it may be admitted to probate as the will of the party. In *re Smith*, 2 John & H. 594.

A codicil revoking a will does not necessarily revoke a prior codicil. *Farrer v. St. Catharine's College*, L. R. 16 Eq. 19, 42 L. J. Ch. 809, 28 L. T. N. S. 800.

If under the Wills Act the revocation of the will is so effected as to accomplish the revocation of the codicil, both instruments will be revoked. Thus a testator having executed a codicil at the foot of his will cut off his signature to the will; upon proof that he intended to revoke the codicil the court held that the codicil was also revoked. In *Goods of Bleckley*, 8 Prob. Div. 169, 52 L. J. P. 102, 31 W. R. 171, 47 J. P. 663.

1. *Youse v. Forman*, 5 Bush (Ky.) 337. A testator executed a will in June, 1861, and another will March 16, 1863; also a codicil, March 28, 1863, which declared itself a codicil to the will of 1861. The will of 1861 was found with the signature and seal cut off. It was held that the codicil of 1863 had revived the will of 1861 and revoked the will of 1863, but the will of 1861 being canceled, the effect was to abrogate and revoke both wills, and that the codicil, not being able to stand alone as a testamentary disposition, was involved in the revocation. *Pinkney's Will*, 1 Tuck (N. Y.) 436.

2. *Smith's Estate*, 2 Pa. Co. Ct. Rep. 626. It would appear, however, that the course of decision upon this question might be affected by the provisions of statutes similar to the English Wills Act, quoted above.

3. See *supra*, this title, *Execution* — *For Purposes of Republication or Confirmation*.

4. *Richardson v. Richardson*, Dudley Eq. (S. Car.) 181.

Paper Enclosed in Will without Reference Thereto. — A testamentary paper bearing the same date as the will in which it was found enclosed is a valid codicil, though it does not make express reference to the will. *Perkins v. Jones*, 84 Va. 358.

Under the Statute of Frauds it has been held that the annexation of a codicil to a will is not admissible evidence of republication, because parol. *Barnes v. Crowe*, 1 Ves. Jr. 495, 4 Bro. C. C. 2, *overruling Atty.-Gen. v. Downing*, Ambler 573. See *Hutton v. Simpson*, 2 Vern. 722.

5. *England.* — *Potter v. Potter*, 1 Ves. 437; *Acherly v. Vernon*, 1 Comyns Rep. 381; *Jackson v. Hurlock*, Ambler 487; *Doe v. Davy*, Cowp. 158; *Barnes v. Crowe*, 1 Ves. Jr. 486.

Georgia. — *Pope v. Pope*, 95 Ga. 87, *citing* 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 292.

New York. — *Kip v. Van Cortland*, 7 Hill (N. Y.) 346.

Reference to Will without Annexation Thereto. — A codicil will amount to a republication of the will to which it refers, whether it be annexed to the will or not, for every codicil is, in construction of law, a part of a man's will, and as such furnishes conclusive evidence of the testator's considering his will as then existing. *Gass v. Gass*, 3 Humph. (Tenn.) 278.

The testator, in a codicil to a holographic will, referred to it thus: "I have made an olographic will, which is made in duplicate, one of which has been placed in the hands of A, of St. Louis, in the state of Missouri, and the other deposited in the hands of B, of the parish of Jefferson." This was held a sufficient attachment, the court saying: "If the codicil had been attached by a wafer to the original olographic copy sent to A, I presume that there would have been no room for doubt. A list of decisions for more than one hundred and thirty years sustains this point. What is the difference between this wafer annexation of a codicil, which may not mention the previous will otherwise than by reciting that 'this is my codicil to my last will,' and the case before us, where the fact of making his olographic will in duplicate, and the statement of the fact to whom he had sent the duplicates, appear on the face of the codicil? In this case the codicil, by the manner in which it refers to the original olographic will, affords a specimen of internal annexation morally as strong as, if not stronger than, the physical annexation of wafer, wrapper, and tape." *Harvy v. Chouteau*, 14 Mo. 587, 55 Am. Dec. 120.

confirmatory clauses.¹

b. REVIVAL OF REVOKED WILLS. — The addition of a codicil to a revoked will has often the effect of reviving it,² but the intention to revive should not be left to doubt or implication, and there are statutory enactments to this effect.³ Under the *Pennsylvania* statute, however, it has been held that a codicil to a will is a republication of it, unless the contrary intent is avowed by the testator.⁴

1. *England.* — *Acherly v. Vernon*, 3 Bro. P. C. 91, 1 Comyns Rep. 381, 9 Mod. 68; *Barnes v. Crowe*, 1 Ves. Jr. 486, 4 Bro. C. C. 2; *Gibson v. Rogers*, Ambl. 97, 1 Ves. 485; *Thellusson v. Woodford*, 4 Ves. Jr. 288, note *a*; *Potter v. Potter*, 1 Ves. 442; *Pigott v. Waller*, 7 Ves. Jr. 98; *Goodtitle v. Meredith*, 2 M. & S. 5; *Re Earl*, 4 Kay & J. 673; *In re Da Silva*, 2 Sw. & Tr. 315, 30 L. J. Prob. 171, 5 L. T. N. S. 140; *Jackson v. Hurlock*, Ambl. 487; *Doe v. Davy*, Comp. 158.

Canada. — *Baker v. Clark*, 7 U. C. Q. B. 44. *Delaware.* — *Smith v. Dolby*, 4 Harr. (Del.) 350.

Illinois. — *Duncan v. Duncan*, 23 Ill. 364, 76 Am. Dec. 699; *Fry v. Morrison*, 159 Ill. 244; *Camp v. Shaw*, 52 Ill. App. 241.

Nebraska. — *Hawke v. Euyart*, 30 Neb. 149. *New York.* — *Van Cortlandt v. Kip*, 1 Hill (N. Y.) 590, 7 Hill (N. Y.) 346.

Texas. — *Campbell v. Barrera*, (Tex. Civ. App. 1895) 32 S. W. Rep. 724.

Will Republished in Absence of Negative Intention. — "If repeated decision can settle any disputable point, it is now incontrovertibly established that a codicil duly executed, whether expressly confirmatory of the will or not, whether it relate to lands or goods before devised or not, and whether there be one or not, an actual intention to republish, unless a negative intention be disclosed by the codicil itself, operates a republication of the original will, so as to make it speak from the period of the execution of the codicil." *Per Bell*, P. J., in *Coale v. Smith*, 4 Pa. St. 376.

Codicil Revoking all Former Wills Republishes Will of Which It Forms Part. — A codicil dated three days after the date of the will to which it was annexed was as follows: "As codicil to the foregoing last will and testament, and to be taken as a part thereof, I, Frederick Louis Gelbke, hereby declare that I hereby revoke and annul all wills by me heretofore made, and especially that executed," etc., describing it. It was held that since the will and codicil were to be construed together as one instrument, speaking from the date of the codicil, the latter republished rather than revoked the will of which it formed a part. The clear intention was to revoke all former wills, but to give the one to which it was attached fresh affirmation and vitality. *Gelbke v. Gelbke*, 88 Ala. 427.

2. *Carte v. Carte*, Ridgw. 210, Ambl. 28, 3 Atk. 174; *Burge v. Hamilton*, 72 Ga. 568.

A Will Revoked by Marriage may be revived by a codicil properly executed. *Brown v. Clark*, 77 N. Y. 369; *Kurtz v. Saylor*, 20 Pa. St. 205.

Though the Will Be Not Present at the Time, yet the codicil will act as a revival of it. *Wikoff's Appeal*, 15 Pa. St. 281, 53 Am. Dec. 597.

3. **Under the Statute of Wills of England**, 7 Will. IV. and 1 Vict., c. 26, no revoked will can be revived by a codicil unless it shows an intention to revive the same. In order to satisfy these words it is held that the intention must appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some expression conveying to the mind of the court with reasonable certainty the existence of the intention. In *Goods of Steele*, L. R. 1 P. D. 575; In *Goods of May*, 37 L. J. P. 68, 19 L. T. N. S. 91, 17 W. R. 15.

References in Codicils by Date to revoke wills are insufficient to revive them, there being no evidences on the faces of such codicils of an intention to revive the wills so referred to. In *Goods of Steele*, L. R. 1 P. D. 575; In *Goods of Ince*, 2 Prob. Div. 111, 46 L. J. P. 30, 36 L. T. 519, 25 W. R. 396; In *Goods of May*, 37 L. J. P. 68, 19 L. T. N. S. 91, 17 W. R. 15.

The Physical Annexation (by a piece of paper) of a duly executed codicil of later date to testamentary papers duly executed is no ground for inferring the intention to revive required by the statute. *Marsh v. Marsh*, 1 Sw. & Tr. 528, 30 L. J. Prob. 77, 6 Jur. N. S. 380.

The Revised Statutes of Nova Scotia (fifth series) c. 89, provide that "no will or codicil shall be revived otherwise than by a codicil executed in the manner hereinbefore required, and showing an intention to revive the same." Under this it was held that the mere reference by its date to the document intended to be dealt with, whether will or codicil, is not sufficient. It is necessary to look to the context, and to anything else in the document which may explain whether the intention of the testator was to confine the action of the testamentary disposition to the document of that date or to extend it to something more. *McLeod v. McNab*, (1891) App. 471, 60 L. J. P. C. 70, 65 L. T. 266.

In Ontario, by Ont. Wills Act, R. S. O. 1887, c. 109, a revoked will cannot be revived by a codicil unless the intention to revive be apparent. See *Macdonell v. Furcell*, 23 Canada Sup. Ct. 101; *Holmes v. Murray*, 13 Ont. Rep. 756; *Purcell v. Bergin*, 20 Ont. App. 535.

4. *Neff's Appeal*, 48 Pa. St. 501, where the authorities are thoroughly reviewed and the conclusion is arrived at that the clause of the *Pennsylvania* Statute of Wills making provision for the manner in which wills may be revoked or altered makes no change in the law as it previously existed, the effect of which is thus stated in a quotation from the judgment of Lord Ellenborough in *Goodtitle v. Meredith*, 2 M. & S. 13: "The effect of all these decisions is to give an operation to the codicil *per se*, and

c. REPUBLICATION OF ONE OF SEVERAL WILLS. — A codicil, by expressly referring to one of two or more wills as "the last will," operates as a republication of that will.¹ And if the codicil is attached to one of them, that is regarded as effective to show that the codicil was intended as a republication of the particular one to which it is attached.²

4. **Extent and Effect** — a. HOW MUCH OF WILL ITSELF REPUBLISHED. — By the republishing effect of a codicil, everything in the will is set up that is not altered by the codicil.³ But it appears that such a republication speaks only to what is included in the will, and no more.⁴

Misrecital of Will. — A merely erroneous recital, however, in a codicil, that gifts had by will been made in a particular form or amount, does not extend such bequest beyond its legitimate operation according to the terms of the will.⁵

independently of any intention, so as to bring down the will to the date of the codicil, making the will speak as of that date, unless indeed a contrary intention be shown, in which case it will repel that effect."

1. **Republication Dependent on Time of Death.** — A testator, having executed two wills, by a codicil declared that one or the other of the two was to be his last will according as his death took place before or after a certain date. He died before the date designated, and it was held that the clause in the codicil took effect and made the earlier of the two wills his will. *Hamilton's Estate*, 74 Pa. St. 69.

Reference by Wrong Date to one of two existing wills does not defeat republication, when it can be seen to what will reference is had. *Jansen v. Jansen*, cited in *Roger v. Pittis*, 1 Add. 38.

Wills and Codicils Prepared by Different Solicitors. — The testator made a will and codicil thereto in 1886, both prepared by the same solicitor. In 1887 he made a second will, prepared by a different solicitor, which made additional dispositions of his property and which did not refer to his first will. In 1888 he made a second codicil to his first will, prepared by the first solicitor and having no reference to the second will. In 1890 he made two codicils to his second will, prepared by the second solicitor, making further alterations in the disposition of his property. It was held that the second will was thereby revived and should, with its codicils, be admitted to probate. In *Goods of Courtenay*, 27 L. R. Ir. 507.

The testatrix executed a will and codicil and afterwards, in 1885, made another will and codicil. She either forgot that she had made this second will and codicil or was apprehensive of the effect it would have on the first one, and in 1891 she executed a "second codicil" to the earlier will and codicil, to "ratify and confirm" them. The solicitors who drew the first will and codicil and the last codicil were ignorant of the existence or execution of the intermediate will and codicil until after the testator's death. It was held that the first will and codicil were not revived by the last codicil. In *Goods of Turner*, 64 L. T. 805.

2. *Barnes v. Crowe*, 1 Ves. Jr. 486; *Rogers v. Pittis*, 1 Add. 41.

3. *Carte v. Carte*, *Ridgw.* 210, *Ambl.* 28, 3 *Atk.* 174.

The **Entire Will** is republished, and not only that part which the codicil modifies. In *re Ladd*, 94 Cal. 670.

4. *Lane v. Wilkins*, 10 East 241; *Barry v. Sturdivant*, 53 Miss. 490; *Du Hourmelin v. Sheldon*, 19 Beav. 389, 2 W. R. 639. In this case a married woman devised "all other the manors and hereditaments * * * which she had any power to appoint and devise." After her husband's death she confirmed the will by a codicil. It was held that the property not included in the power did not pass.

Supplying Omitted Trust. — A codicil reciting a specific and limited purpose revoked the whole devise, declared the trusts again with the proposed alterations, and confirmed the will in every particular not thereby altered or revoked. It was held that the omission of one trust, though probably against the intention, could not be supplied. *Holder v. Howell*, 8 Ves. Jr. 97.

Supplying Words of Intention. — A testator devised his freehold estates to certain uses, and provided that any person becoming entitled thereto should take and use his name and arms. He then devised his copyhold estates (upon which stood his principal mansion house) and his leasehold estates to trustees, to be held by them upon trusts, as far as the nature of the several estates would allow, to correspond with the uses before declared as to his freehold estates. Subsequently, by a codicil which he stated was to be taken as part of and added to his will, he altered the uses declared in his will as to his freehold estates, and declared that the proviso respecting the use of his name and arms should follow the new limitations. No mention was made in the codicil of the copyhold and leasehold estates. It was held that though it was probable, from the circumstances, that he intended his copyhold and leasehold estates to follow the limitations of his freeholds as declared in the codicil, still, as there were no words therein which affected it, the court would not supply them, and that the copyhold and leasehold estates passed according to the trusts originally declared in the will. *Langdale v. Briggs*, 28 L. T. N. S. 467, 21 W. R. 620; *Martineau v. Briggs*, 45 L. J. Ch. Div. 674.

Incorporation of Paper Not Referred to. — A codicil to a will not referring to a paper as existing at the date of the will cannot have the effect of incorporating the paper with the will and codicil. *Durham v. Northen*, 69 L. T. 691, following *In Goods of Reid*, 38 L. J. P. 1.

5. *In re Smith*, 2 John. & H. 594; *Scarlett v. Thurlow*, 21 W. R. 728, 28 L. T. N. S. 583; *Morgan v. Middlemiss*, 35 Beav. 278. See also

b. AS TO WILL AND CODICILS. — The will, together with all previous codicils, is taken to be confirmed.¹ And a prior codicil, operative in itself, is not revoked by a subsequent codicil which refers to the will by its date and confirms it without mentioning the prior codicil.²

Subsequent Will Confirming Prior Revoking Codicil. — Where one of a number of codicils revokes certain or all of them, and by a subsequent codicil the will and former codicils are confirmed, the effect of the revival is to make good the revocation, since otherwise the revoking codicil would not have its legitimate operation.³

c. DATE FROM WHICH WILL SPEAKS — (1) *Generally.* — The effect of the republication of a will by a codicil is to make the two instruments one, and the codicil will operate *per se*, and independently of any intention, to bring the will down to and make it speak from the date of the codicil, for most purposes, unless a contrary intention be shown. It draws the will down to its own date in the very terms of the will, and makes it operate as if it had been executed in those terms.⁴

Armit v. Hipkins, 28 L. T. N. S. 222, 21 W. R. 575.

1. *Crosbie v. MacDoual*, 4 Ves. Jr. 610; *Gordon v. Reay*, 5 Sim. 274; *Wade v. Nazer*, 12 Jur. 188; In Goods of *De La Saussaye*, L. R. 3 P. D. 42; *Green v. Tribe*, 9 Ch. Div. 231, 47 L. J. Ch. 783. See, however, In Goods of *Reynolds*, L. R. 3 P. D. 35, 42 L. J. P. 20; In Goods of *Spotten*, 5 L. R. Ir. 403; In Goods of *Dennis*, (1891) Prob. 326; *Crocker v. Hertford*, 4 Moo. P. C. 339.

Though a Reference Simply to the Date of the Will in a subsequent codicil is not sufficient in itself to restrict the confirmation to that particular document, yet other words and circumstances may convey such an intention, and accordingly it has been held that under such circumstances the will alone was confirmed and was no longer affected by a partial revocation by an intermediate codicil. *McLeod v. McNab*, (1891) App. 471.

2. *Green v. Tribe*, 9 Ch. Div. 231, 47 L. J. Ch. 783. But see *Burton v. Newbery*, 1 Ch. Div. 234, 45 L. J. Ch. 202.

Rebuttal of Implied Revocation of Codicil by Circumstances. — It has been held in *Pennsylvania* that an omission to mention a particular codicil in a clause of republication may be an implied revocation of such codicil; but this implication may be rebutted by other circumstances. *Wikoff's Appeal*, 15 Pa. St. 281, 53 Am. Dec. 597.

Re-execution of Will No Revocation of Codicil. — Where a testator made and duly executed a codicil to his last will, and afterwards re-executed the original will without in any way referring to the codicil, it was held that although the original will contained a clause revoking "all other wills," etc., yet in the absence of an intention to revoke the will, the inference from the wording of the attestation clause being that the will was re-executed for the purpose of giving effect to certain alterations that had been made in it, the codicil was not revoked by such re-execution. In Goods of *Rawlings*, 41 L. T. 559, 44 J. P. 60.

3. In Goods of *Thomson*, L. R. 1 P. D. 8; *In Bonis Carritt*, 66 L. T. 379.

Of One of Several Wills. — Republishing one of two or more wills revokes the other one.

Crosbie v. MacDoual, 4 Ves. Jr. 616; *Neff's Appeal*, 48 Pa. St. 501.

A testator executed one will in June, 1861, and another in March, 1863. He afterwards made a codicil which declared itself to be a codicil to the will of 1861, and revoked in part that will. It was held that this codicil, by annexing itself to the former will, made that the last will and revoked the one of 1863, the effect being to revoke and abrogate both wills. *Pinckney's Will*, 1 Tuck. (N. Y.) 436.

4. *England.* — *Goodtitle v. Meredith*, 2 M. & S. 13; *Acherly v. Vernon*, 1 Comyns Rep. 381; *Potter v. Potter*, 1 Ves. 437; *Barnes v. Crowe*, 1 Ves. Jr. 486; *Pigott v. Waller*, 7 Ves. Jr. 98; *DeBathe v. Fingal*, 16 Ves. Jr. 167; *Doe v. Evans*, 1 Crompt. & M. 42; *Wilkinson v. Adam*, 1 Ves. & B. 445; *Winter v. Winter*, 5 Hare 306.

Canada. — *Baker v. Clark*, 7 U. C. Q. B. 44; *Purcell v. Bergin*, 20 Ont. App. 535.

California. — *In re Ladd*, 94 Cal. 670; *In re Zeile*, 74 Cal. 137; *Payne v. Payne*, 18 Cal. 292.

Georgia. — *Jones v. Shewmake*, 35 Ga. 151.

Illinois. — *Camp v. Shaw*, 52 Ill. App. 241; *Hobart v. Hobart* (Ill.) 39 N. E. 581, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 301.

Kentucky. — *Armstrong v. Armstrong*, 14 B. Mon. (Ky.) 269; *Davis v. Taul*, 6 Dana (Ky.) 51; *Alexander v. Waller*, 6 Bush (Ky.) 330; *Sharp v. Wallace*, 83 Ky. 584.

Maryland. — *Jones v. Earle*, 1 Gill (Md.) 395.

Massachusetts. — *Gray v. Sherman*, 5 Allen (Mass.) 198; *Brimmer v. Sohier*, 1 Cush. (Mass.) 118; *Bedloe v. Homer*, 16 Gray (Mass.) 432; *Hosea v. Jacobs*, 98 Mass. 65.

Missouri. — *Harvy v. Chouteau*, 14 Mo. 587, 55 Am. Dec. 120.

Nebraska. — *Hawke v. Euyart*, 30 Neb. 149.

New York. — *Kip v. Van Cortland*, 7 Hill (N. Y.) 346, referring to and explaining *Van Kleeck v. Reformed Protestant Dutch Church*, 20 Wend. (N. Y.) 457.

North Carolina. — *Murray v. Oliver*, 6 Ired. Eq. (N. Car.) 55.

Pennsylvania. — *Linnard's Appeal*, 93 Pa. St. 313, 39 Am. Rep. 753; *Hamilton's Estate*, 74 Pa. St. 69; *Coale v. Smith*, 4 Pa. St. 376; *Neff's Appeal*, 48 Pa. St. 501.

Texas. — *Cliett v. Cliett*, 1 Tex. Unrep. Cas.

This Rule Is Subject to the Limitations that the intention of the testator be not defeated by regarding the two instruments as of the same date,¹ that they are not to be so regarded for all and every purpose,² and that the rule does not of necessity alter the construction of the will, its original date still being a factor for purposes of construction and interpretation.³

(2) *Effect of Statute Passed Between Date of Will and Codicil.* — If a will be made before, and a codicil after, the passage of a statute, the effect of republication will be to render the construction of the will subject to the provisions of that statute.⁴

(3) *Revival of Revoked, Adeemed, or Satisfied Legacies.* — The rule that a codicil republishing or confirming a will makes it speak from the date of the codicil is not applicable for all purposes, and will not operate to revive legacies which have been revoked, adeemed, or satisfied in the interval between the will and the codicil.⁵

(4) *Effect as to After-acquired Estate — Intention Not Contrary to Passage.* — A direct result of the rule that a codicil republishing a will makes it speak from the date of the former is that estates acquired after the execution of the will, and prior to the execution of the codicil, are governed by the provisions of the will as republished by the codicil, and pass under the republished instrument.⁶

407; *Campbell v. Barrera*, (Tex. Civ. App. 1895) 32 S. W. Rep. 724.

Codicil Confirming Will Discharging Debts. — A will discharging all debts is a release of a new debt incurred between the date of the will and the last codicil, though there be no reference therein to such debts, and no express words of republication. *Coale v. Smith*, 4 Pa. St. 376.

1. *Doe v. Hole*, 15 Q. B. 848, 69 E. C. L. 848, 20 L. J. Q. B. 57, 15 Jur. 13. See *infra*, this section, *Effect as to After-acquired Estate*.

2. *Stilwell v. Mellersh*, 20 L. J. N. S. Ch. 356. See *infra*, this section, *Revival of Revoked, Adeemed, or Satisfied Legacies*.

3. *Mountcashell v. Smyth*, 1 Ir. R. 346; *Baker v. Clark*, 7 U. C. Q. B. 44.

Thus in *Colt v. Colt*, 32 Conn. 422, it was held that while the rule is that a will is to be read as if of the date of the codicil, yet, where legacies have been revoked by the codicil, it does not follow that the will is to be read as if they had never been in it. The revoked clauses may be read for the purpose of understanding better the meaning of clauses which remain.

4. *Ayres v. Methodist Episcopal Church*, 3 Sandf. (N. Y.) 351; *Brimmer v. Sohler*, 1 Cush. (Mass.) 118.

Thus a will dated prior to 9 Geo. II., c. 36, bequeathed personality to be invested in real estate for charitable purposes. By a codicil dated subsequently to the above statute the will was confirmed. The codicil was held to operate as a new will, thus rendering the bequest void. *Atty.-Gen. v. Heartwell*, Amb. 451.

And a codicil made in Ireland after 6 Geo. IV., c. 79, had changed the currency of the realm was held such a republication of the will as to make the legacies payable in British currency, though the codicil said nothing about it. *Hamilton v. Carroll*, 1 Ir. Eq. 175.

A will having been made before, and a codicil after, the passing of Mass. Rev. Stat., 1836, c. 62, § 3, regarding the passage of real estate, it was held that the will might operate upon after-purchased real estate in the same manner as if it had originally been made at the date

of the codicil. *Brimmer v. Sohler*, 1 Cush. (Mass.) 118.

5. *Powys v. Mansfield*, 3 Myl. & C. 359, 7 L. J. N. S. Ch. 9, 1 Jur. 861; *Montague v. Montague*, 15 Beav. 565; *Cowper v. Mantell*, 22 Beav. 223, 2 Jur. N. S. 745, 4 W. R. 500; *Hopwood v. Hopwood*, 7 H. L. Cas. 728, 5 Jur. N. S. 897; *Monck v. Monck*, 1 B. & B. 298; *Boulcott v. Boulcott*, 2 Drew. 25, 18 Jur. 231, 23 L. J. Ch. 57, 2 W. R. 52, 2 Eq. Rep. 457; *Drinkwater v. Falconer*, 2 Ves. 623; *Paine v. Parsons*, 14 Pick. (Mass.) 318.

Re-execution of Instruments as Affecting Revival of Legacies. — The will of John Jacob Astor, together with the several codicils thereto, all originally executed on different dates, were, on a subsequent date, before three attesting witnesses, acknowledged and published by the testator as his last will and codicils thereto. It was held that the will and codicils were not to be regarded as one entire instrument, executed for the first time on the date of re-execution, but that the acknowledgment and renewed attestation which then took place had only the effect of a republication, giving no different operation to the several instruments from that which they would have had if they had stood upon their original execution, and therefore the will or codicils did not speak from the date of the republication for the purpose of reviving legacies which had been adeemed or satisfied. *Langdon v. Astor*, 16 N. Y. 9.

6. *England.* — *Broome v. Monck*, 10 Ves. Jr. 605; *Yarnold v. Wallis*, 4 Y. & Coll. 160, 10 L. J. N. S. Exch. Eq. 5; *Meggison v. Moore*, 2 Ves. Jr. 630; *Powys v. Mansfield*, 3 Myl. & C. 359, 7 L. J. N. S. Ch. 9, 1 Jur. 861; *Hulme v. Heygate*, 1 Meriv. 285; *Williams v. Goodtitle*, 10 B. & C. 895, 21 E. C. L. 192; *Re Earl*, 4 Kay & J. 673; *Acherly v. Vernon*, 1 Comyns Rep. 381, 10 Mod. 518; *Gibson v. Rogers*, Amb. 93; *Atty.-Gen. v. Downing*, Amb. 571; *Potter v. Potter*, 1 Ves. 438.

United States. — *Brownell v. De Wolf*, 3 Mason (U. S.) 486. See also *Musser v. Curry*, 3 Wash. (U. S.) 481.

Intention Contrary to Passage.—If, however, the intention of the testator is clear that he does not desire a codicil to republish his will so as to pass property acquired after the date of the will, the codicil, of course, will not have that effect.¹

Estate Acquired After Date of Will and Codicil.—Where property is acquired after the date of both the will and the codicil, the latter republishing the former will not have the effect of passing this property in the absence of a contrary intent.²

Georgia.—*Jones v. Shewmake*, 35 Ga. 151.
Kentucky.—*Beall v. Cunningham*, 3 B. Mon. (Ky.) 390, 39 Am. Dec. 469; *Alexander v. Waller*, 6 Bush (Ky.) 330.
Maine.—*Langdon v. Pickering*, 19 Me. 214.
Massachusetts.—*Haven v. Foster*, 14 Pick. (Mass.) 534. See also *Miles v. Boyden*, 3 Pick. (Mass.) 213.
New York.—*Kip v. Van Cortland*, 7 Hill (N. Y.) 346.
South Carolina.—*Rose v. Drayton*, 4 Rich. Eq. (S. Car.) 260.
Tennessee.—*Smith v. Puryear*, 3 Heisk. (Tenn.) 706.

Effect of Codicil Concerning Only Personal Estate on After-acquired Lands.—It has been held that a codicil relating only to personal estate could not so republish a will as to pass lands acquired after the making thereof. *Strode v. Russell*, 2 Vern. 625.

But a codicil concerning only personalty, and not expressly confirming the will, if attested by three witnesses is held to republish the will so as to carry lands purchased after a general devise in the will. *Barnes v. Crowe*, 1 Ves. Jr. 486, 4 Bro. C. C. 2; *Pigott v. Waller*, 7 Ves. Jr. 98.

Effect of Codicil on Renewed Lease.—A renewal of a prebendal lease is an ademption of a bequest of it in the will; but a codicil to the will, though executed to pass after-purchased property, is a republication of the will, under which the lease will pass. *Coppin v. Ferny-rough*, 2 Bro. C. C. 291.

A held a church lease of which nine months remained unexpired. He made his will in sickness, devising all his interest in such lands to B, and upon recovering renewed his lease and republished his will. It was held that the renewed lease passed by the republication. *Anonymous*, 2 Freem. 116.

Subjecting After-purchased Estate to Payment of Debts.—A testator by will charged all his estates with payment of debts, and made his son his residuary devisee. He afterwards purchased copyhold estates, which were duly surrendered to the use of his will, and by a codicil devised them to his son in fee. This codicil was held to be a republication of the will so as to subject the copyholds to the payment of debts. *Rowley v. Eyton*, 2 Meriv. 128.

Estate Acquired After First but Before Second Codicil.—A testator devised all his freehold and leasehold property whatsoever, of which he was or might be seized or possessed at his decease, upon certain trusts, and subsequently executed three codicils in which he appointed other trustees, and devised all his said property described as by the will. After the date of his will and first codicil, but prior to the execution of the second codicil, he acquired an

estate. It was held that this estate passed under the words of the will and codicil. *Bridge v. Yates*, 14 L. J. N. S. Ch. 426.

1. Intention Negating Effect on After-acquired Property.—*Hughes v. Hosking*, 11 Moo. P. C. 1, 4 W. R. 755; *Smith v. Dearmer*, 3 Y. & J. 280.

Kendall v. Kendall, 5 Munf. (Va.) 272, in which case, there being no words in the codicil indicating an intention to pass after-acquired lands, it was held, from all the circumstances, that the intention was not to have them so pass. See *Smith v. Puryear*, 3 Heisk. (Tenn.) 706, where, though a codicil made no allusion to estates purchased after the date of the will, it was held that the intention was nevertheless to have them pass.

Express Intention.—Where a codicil in its dispositive part is applicable solely and expressly to the property previously devised by the will, as where it says, "I am now dealing with the property given by will and with none other," it will not have the effect of republishing the will so as to carry after-purchased property, notwithstanding a more general intent indicated in its recital. *Money Penny v. Bristow*, 2 R. & M. 117.

Limited Will of Married Woman—Effect of Codicil When Discoverd.—A married woman, having the power of appointment over certain securities, and being entitled to personal property for her separate use, made a will during her coverture disposing of the same. Subsequently her husband died, leaving her possessed of real and personal estate. By a codicil the testatrix devised certain real estate, referring to it as having come from her husband, but did not otherwise refer to or confirm her will. It was held that the codicil merely confirmed the will as it originally stood, and in no way enlarged its scope so as to make it include the personal property acquired upon her husband's death, and that, as to such personalty, there was an intestacy. *In re Taylor*, 57 L. J. Ch. 430, 58 L. T. 842. See also *Du Hourmelin v. Sheldon*, 19 Beav. 389, 2 W. R. 639.

Implied Intention.—Where a will gave certain specified property to trustees, and a codicil revoked the estates given to and the duties devolved on these trustees, giving to other trustees the same estates and duties, it was held that the intention of the testator was to deal only with the property embraced within the provisions of the will, and that the codicil was not effective to pass after-acquired estates. *Bowes v. Bowes*, 2 B. & P. 500; *Ashley v. Waugh*, 9 L. J. N. S. Ch. 31, 4 Jur. 572; *Hughes v. Turner*, 3 Myl. & K. 666, 4 L. J. Ch. N. S. 141.

2. Brownell v. De Wolf, 3 Mason (U. S.) 486.

CO-EMPLOYEES. — See the titles FELLOW-SERVANTS; MASTER AND SERVANT.

COERCION. — See generally the titles DURESS; THREATS AND THREATENING LETTERS; UNDUE INFLUENCE. As to a wife's responsibility for crime, see the titles CRIMINAL LAW; HUSBAND AND WIFE.

COFFEE-HOUSE. (See also the title INNS AND INNKEEPERS.) — A coffee-house is defined to be a house of entertainment where coffee is sold. The term is sometimes used to denote a hotel or tavern.¹

COFFEE ROASTER. — See note 2.

COFFER. — A chest or trunk; especially one used for keeping money or other valuables.³

COGNATE. (See also the titles RELATIONSHIP; SUCCESSION.) — Cognates or *cognati* are relatives by the mother's side or by females.⁴ *Cognatio*, relationship through females.⁵

COGNIZANCE. (See also AVOWRY, vol. 3, p. 523; and see ENCYC. OF

1. Com. v. Woods, 27 Alb. L. J. 64. In that case the court further said: "We know no reason why any enlarged meaning should be put upon the term, or why, even in the absence of the statute, a license to keep a *coffee-house* should be construed to mean a license to vend spirituous liquors. The statute, however, is imperative. Under license to keep a *coffee-house*, whatever that term may mean, the privilege to sell spirituous liquors shall not be implied or embraced, unless such privilege is expressly specified in the license. Unless the statute be followed the license is without legal authority." See also the title INTOXICATING LIQUORS.

Distinguished from Inn. (See also the titles FIRE INSURANCE; INNS AND INNKEEPERS.) — A *coffee-house* is not an inn, within the meaning of a policy of insurance against fire, enumerating the trade of an innkeeper, with others, as double-hazardous. So held of Grigsby's *Coffee-house*, where country visitors to London lodged as in an inn. Lord Ellenborough said: "Horses, wagons, and coaches come to an inn; there are stables and out-houses attached to it; people are going to these with lights at all hours; hence there is an increased danger of fire, and the trade of an innkeeper is considered double-hazardous. But the trade of a *coffee-house* keeper is of a very different description." Doe v. Laming, 4 Campb. 73, 76, approved in New York Equitable Ins. Co. v. Langdon, 6 Wend. (N. Y.) 627; Rafferty v. New Brunswick F. Ins. Co., 18 N. J. L. 483.

Same — Innkeeper's Lien on Goods of Guest. — A house of entertainment in London, where beds, provisions, etc., are furnished at so much per night, for all persons paying for the same, but which is merely called a tavern and *coffee-house*, and is not frequented by stage-coaches and wagons from the country, and which has no stables belonging to it, is to be considered an inn, and the owner is subject to the liabilities of innkeepers, and has a lien on the goods of his guest for the payment of his bill, and that even where the guest did not appear to have been a traveler, but one who had previously resided in furnished lodgings in London. So held in an action of trover brought by a former guest for goods detained by the landlord for money due for lodging and entertain-

ment, in which action a nonsuit was sustained by the court after argument. Thompson v. Lacy, 3 B. & Ald. 283, 5 E. C. L. 285.

Same — A Mere Eating-house is not an inn, nor is the proprietor liable as an innkeeper; and although the defendant may carry on in another part of his premises the business of an innkeeper, yet a person who enters the restaurant for a meal is not a guest or traveler entitled to the protection afforded against innkeepers. Carpenter v. Taylor, 1 Hilt. (N. Y.) 193; People v. Jones, 54 Barb. (N. Y.) 311; Story on Bailments, § 475, note 6. So as to a mere boarding house. Carpenter v. Taylor, 1 Hilt. (N. Y.) 193.

2. Exemption from Taxation. — In New Orleans v. New Orleans Coffee Co., 46 La. Ann. 86, it was held that an exemption of the manufacturer from taxation did not include a *coffee roaster*. The court in that case said: "The defendant corporation virtually admits that a *coffee roaster* is not a manufacturer, but denies that such a designation can properly be applied to it. A *coffee roaster* is testified by the witness for the defendant corporation to be a person 'who takes a sack of coffee and simply puts it in a roaster and turns that coffee out after it is roasted.'" See generally the title EXEMPTION FROM TAXATION.

3. Webster's Dict.

Chest and Coffin. — "An indictment *de quatuor riscis et cestis*, *Anglicè* chests and *coffers*, is good, because synonymous." Bacon's Abr., Indictment (G), 3; 2 Hale P. C. 183.

4. In the common law it has no technical sense; but as a word of discourse in English it signifies, generally, allied by blood, related in origin, of the same family. Bouvier's Law Dict.

As shown by Burrill, it is used by civil-law writers sometimes for relatives generally, including those both by father and mother; and this even in the same paragraph where it is used in its technical sense of relatives by the mother, thus causing difficulty in translation. See Taylor's Explanation Civil Law 314.

5. 2 Bl. Com. 235.

In the canon law, consanguinity as distinguished from affinity. 4 Reeves Hist. Eng. Law 56-58. As including affinity. 4 Reeves Hist. Eng. Law 56-58. *Agnati*, relations by the father. 2 Bl. Com. 235.

PLEADING AND PRACTICE, title REPLEVIN.) — 1. Judicial knowledge or jurisdiction; the hearing a matter judicially; the right to take notice of and determine a course.¹ 2. (a) An acknowledgment or confession, as an acknowledgment of a fine.² (b) The acknowledgment of the defendant, in replevin,³

1. Webster's Dict.; Burder *v.* Veley, 12 Ad. & El. 233, 40 E. C. L. 48; Comfort *v.* Kittle, 81 Iowa 182, in which case it was held that the substitution of the word *cognizance* in a later statute for "recognizance," from the inapplicability of a *cognizance* to the evident purposes of the statute, was evidently a mistake in transcribing the section.

In Webster *v.* Com., 5 Cush. (Mass.) 400, it is said that *cognizance* is a word of the largest import, embracing all power, authority, and jurisdiction.

Cognizance means the right to take notice of and determine a cause. Clarion County *v.* Western Pennsylvania Hospital, 111 Pa. St. 342.

In Colgate *v.* Hill, 20 Vt. 62, it is said: "To take *cognizance* of a suit is to try it, and try it in the manner prescribed by law."

Judicial Cognizance. — Knowledge upon which a judge is bound to act without evidence. See the title JUDICIAL NOTICE.

Cognizance and Control — Legislative Power. — In Matter of Zborowski, 68 N. Y. 101, it is said in the dissenting opinion of Earl, J.: "The words '*cognizance* and control,' which confer power over sewers, in the street department, are not such as are commonly used to confer legislative authority; they are appropriate words to confer administrative, executive, or judicial authority; they imply the existence, actually or potentially, of the sewers over which *cognizance* and control are to be taken; and it is believed that no case can be found in any statute relating to the city of New York, where these words, or either of them, have conferred other than administrative, executive, or judicial authority." But it was held by the court in that case, that "*cognizance* and control" given by the New York Act of 1865 to the Croton Aqueduct Board, and by the Act of 1870 to their successors the Department of Public Works, meant, in view of former legislation, power to direct the making of sewers.

Distinguished from Powers. — It has been held that "powers" and *cognizance*, as used in the Acts of Congress establishing the judicial system of the United States, are not each of the same meaning, but that the term "powers" denotes the process, the modes of proceeding, while *cognizance* denotes jurisdiction; though in general speech the words have the same meaning, as applied to courts of justice. Kendall *v.* U. S., 12 Pet. (U. S.) 636. See also the title UNITED STATES COURTS.

Cognizable. — In U. S. *v.* Lewis, 36 Fed. Rep. 449, it is said: "A crime is *cognizable* under the authority of the United States when it is triable in its courts by virtue of its laws."

2. **Fines.** — See 2 Bl. Com. 350, where the author describes conveyance of land by fine, which was usually an action of covenant for breach of a pretended agreement to convey. After the *licentia concordandi*, or leave to agree the suit, came the concord, or *cognizance* itself, which is usually an acknowledgment

from the deforciant (or those who keep the other out of possession) that the lands in question are the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the fine is called the *cognizor*, and he to whom it is levied, the *cognizee*. This acknowledgment must be made either openly in the court of common pleas, or before one of the judges of that court, or before commissioners empowered by a writ of *dedimus potestatem*, or before justices of the assize. The judges and commissioners are bound by 18 Edw. I. st. 4 to take care that the *cognizors* are of full age and understanding; and if any be a married woman, she must be examined privately to see whether she acts willingly without compulsion.

3. **Replevin.** — In replevin, if the defendant pleads some matter confessing the taking, but showing lawful title or excuse, such pleading is not (as it would be in other actions) called a plea in bar, but an avowry or a *cognizance*; the former term applying to the case where the defendant sets up right or title in himself; the latter being used when he alleges the right or title to be in another person, by whose command he acted. Comyns' Digest, Pleader, In Replevin, 3 K. 13, 14. The answer to the avowry or *cognizance* is called plea in bar, and then follows replication, rejoinder, etc.; the ordinary name of each pleading being thus postponed by one step. Tyler's Stephen's Pleading, 203, note *g*.

Since *cognizance* in replevin demands return of the goods, it must set up a good title. "In replevin the avowant is as it were actor, and must therefore make a complete title." Lord Hardwicke, in Rogers *v.* Birkmire, Cas. temp. Hardw. 247. In Brown *v.* Bissett, 21 N. J. L. 52, Carpenter, J., said: "But there is a well-settled distinction between a justification in trespass and an avowry in replevin. There is a difference when one claims by virtue of an authority to establish a right or control over the property or person of another, and when it is used defensively, and relied on as an honest excuse. In replevin, the sheriff who avows does not seek simply to excuse the trespass, but he is an actor, sets up a right, seeks to have a return, and ought to make a good title *in omnibus*." See also Goodman *v.* Aylin, Yelv. 148, to same effect. Also Stephens *v.* Houghton, 2 Stra. 847.

Accordingly, where the *New Jersey* statute in regard to attachments against absconding and absent debtors, though it required affidavit by the plaintiff in order to justify the attachment, did not require indorsement of the affidavit on the writ, yet nevertheless in replevin the sheriff could not rely on the usual rule that regularity of process must be presumed. He must in his avowry aver that the plaintiffs in the attachment proceedings made and filed an affidavit pursuant to the statute. Brown *v.* Bissett, 21 N. J. L. 52. So in Stephens *v.* Houghton, 2 Stra. 847, the defendant in replevin having avowed as the bailiff of West-

that he took the goods, with the allegation that he did it legally, by command of another person who had a right to distrain.

COGNOVIT ACTIONEM. (See also the title COGNOVIT, 4 ENCYC. OF PLEADING AND PRACTICE, p. 560.)—A *cognovit actionem*, usually known merely as “cognovit,” is a written confession of the action, subscribed by the defendant but not sealed, authorizing the plaintiff to sign judgment and confession for a named sum.¹

COHABIT—COHABITATION.—For a definition of these terms and full treatment of the statutory offenses, see the title LEWD AND LASCIVIOUS COHABITATION AND CONDUCT. As to what constitutes unlawful cohabitation within the federal statute generally known as the Edmunds Act, see the title BIGAMY, vol. 4, p. 48. As to cohabitation as a proof of marriage, see the title MARRIAGE. See also the titles ADULTERY (AS A CRIME), vol. 1, p. 746; CRIMINAL CONVERSATION; DIVORCE.

COIN. (See also the titles CONSTITUTIONAL LAW; COUNTERFEITING; LEGAL TENDER; MONEY; PAYMENT.)—A piece of metal stamped with certain marks and made current at a certain value. It differs from money as the species differs from the genus. To coin is to stamp metal and convert it into coin.²

minster for an amercement, it was held on demurrer to be an ill avowry, because it was not averred that the defendant was guilty. See *Horton v. Hendershot*, 1 Hill (N. Y.) 118; *Noble v. Holmes*, 5 Hill (N. Y.) 194; *Sturbridge v. Winslow*, 21 Pick. (Mass.) 87.

But since, where authority may be given generally and verbally, it may be pleaded in general terms (Stephen on Pl. 304), a bailiff may make *cognizance* as bailiff where the seizure was for rent in arrear, or as damages feasant, without showing any warrant for that purpose. *Mathews v. Cary*, 3 Mod. 138.

Quare Clausum Fregit.—In this action, the plaintiff cannot traverse command by a third person as owner, averred in defendant's *cognizance*, for to do so would be to admit the truth of the rest of the plea, viz., that the third person was owner; and this would be fatal, because if another than the plaintiff owns the land the plaintiff has no standing in court. See ENCYC. OF PL. AND PR., title TRESPASS. *Trevilian v. Pyne*, 1 Salk. 107.

Making Cognizance Rather than Avowry is a mistake so immaterial that it will not be noticed even on special demurrer thereto. *Brown v. Bissett*, 21 N. J. L. 49. So where avowry is made instead of *cognizance*. *Wheaton v. Sugg*, Cro. Jac. 373.

1. 3 Chitty Gen. Pr. 668, quoted in *Willer v. French*, 27 Ill. App. 81.

A Bond in which it is agreed that it shall be lawful for the obligees to commence an action, proceed to judgment, and upon the judgment issue execution, and that the judgment shall be security for the payment of whatever shall become due, is in legal effect a *cognovit actionem*. *Hurst v. Jennings*, 5 B. & C. 650, 12 E. C. L. 343.

Stamp Act.—“A *cognovit* is a mere acknowledgment of an account, and there is no mutuality;” but if terms be added there is, and it becomes an agreement within the provisions of a stamp act. *Ames v. Hill*, 2 B. & P. 150. See also the title WARRANT TO CONFESS JUDGMENT. And see ENCYC. OF PL. AND PR., title JUDGMENTS.

Distinguished from Warrant of Attorney.—A *cognovit* differs from a warrant of attorney in that the latter is given before suit brought, and is under seal.

A *cognovit* is not discharged by the bankruptcy of the defendant. The court observed that “a *cognovit* is a mere acknowledgment of the amount of damages, and where a man acknowledges the cause of action the plaintiff may sign judgment at any time. This was not like a warrant of attorney.” *Wyborne v. Ross*, 2 Taunt. 68.

2. **Coin.**—“The word *coin* is one of well-settled meaning. The primary sense of the noun, according to Dr. Webster, is ‘the die used for stamping money,’ and the undisputed signification of the verb, according to most if not all the lexicographers, is ‘to stamp metal and convert it into *coin*.’ In Wharton's Law Lexicon (*ad verbum*) it is said: ‘Strictly speaking, *coin* differs from money as the species differs from the genus. Money is any matter, whether metal, paper, beads, shell, etc., which has currency as a medium in commerce. *Coin* is a particular species, always made of metal, and struck according to a certain process called *coining*.’ It was urged at the bar—I do not know whether seriously or not—that printing is stamping, and these notes might therefore literally be said to be *coined*. No such use of the word in any author has been shown. We may say, figuratively, to *coin* a story, meaning to invent one, but never to *coin* the book in which it is printed.” *Sharswood, J.*, in *Borie v. Trott*, 5 Phila. (Pa.) 403.

To Coin Money.—“To *coin* money clearly means to mould into form a metallic substance of intrinsic value and stamp on it its legal value, so as to encourage and facilitate its free circulation and assure stability in the currency.” *Robertson, J.*, in *Griswold v. Hepburn*, 2 Duv. (Ky.) 29; *Thayer v. Hedges*, 22 Ind. 306. “The *coining* of money has never been construed as including the issue of a paper currency. *Coin* and *coinage* are understood to be the stamping of metal in

COINAGE. — Coinage is the business or function of coining money.¹ The

some way so as to give them currency, but it is not applied to any other material." Meyer v. Roosevelt, 25 How. Pr. (N. Y. Supreme Ct.) 105.

In its general sense, to *coin* is to stamp, to impress, to fabricate. Latham's Case, 1 Ct. of Cl. 149.

United States. — *Coin*, in the United States, in the absence of anything to show a contrary intent, means *coin* of the United States. Spencer v. Prindle, 28 Cal. 277.

Counterfeit Coin. (See also the title COUNTERFEITING.) — "A *coin* is a piece of metal stamped and made legally current as money. A counterfeit *coin* is one in imitation of the genuine. The *coins* known to the law are those authorized to be issued from the mints of the United States, and those of foreign countries current here." U. S. v. Bogart, 9 Ben. (U. S.) 315.

Coins, Gold, Silver, and Copper. — Chinese *coin*, known in China as "copper cash," made of copper and lead, is not "*coins*, gold, silver, or copper," within the customs laws, unless intended to be used here as a part of the currency. It is otherwise chargeable with duty as "copper, when old and fit only to be remanufactured." Crocker v. Redfield, 4 Blatchf. (U. S.) 378.

Instrument Adapted for Coining. — This phrase applies to any instrument that may be used in the formation of any part of the *coin*. A die for stamping one side of a *coin* is such. Com. v. Kent, 6 Met. (Mass.) 221. See also INSTRUMENT; and see the title COUNTERFEITING.

To Pay in Current Coin. — Where manufacturers employed a man to make stocking heels at sevenpence per dozen, he to find the labor and work on their premises, using their machine, and it was contracted that settlements should be made weekly, and from the sum due the plaintiff were to be deducted the rent of frame, fines, charges for gas, heat, etc., it was held that this was not a contract to pay wages otherwise than in the current *coin* of the realm. Archer v. James, 2 B. & S. 61, 110 E. C. L. 61.

Indictment — Collective Sense of Word. — In Com. v. Gallagher, 16 Gray (Mass.) 241, it was held that a complaint of larceny sufficiently describes the kind and value of property stolen as "copper *coin* of the value of two dollars and seventy-five cents." The court said: "It is objected to the complaint in the present case, that it does not appear therefrom whether one copper *coin* was stolen or more than one. But we are of opinion that 'copper *coin* of the value of two dollars and seventy-five cents' does not legally mean a copper *coin*, or one copper *coin*, but more than one, and as many as are necessary to constitute the alleged value. It is said, in *Termes de la Ley*, a work of high reputation, that '*coin* is a word collective, which contains in it all manner of the several stamps and portraits of money.' Williams and Tomlins, in their law dictionaries, say that the collective word *coin* contains in it 'all manner of the several stamps and species of money in any kingdom.' And we doubt not that this legal meaning of the single

word *coin* is the same which is understood by people generally, as well as by professional men. It is the meaning given not only in law dictionaries, but by all lexicographers. As the word *coin*, without any prefix, means metallic money generally, so 'copper *coin*,' without any further description, means copper money generally, and not a single *coin*, nor any specific number or kind of *coins*. In the present case, the words 'copper *coin*' have the same meaning as copper *coins*."

Legal Tender. (See also the titles CONSTITUTIONAL LAW; LEGAL TENDER; PAYMENT.) — The meaning of the term "to *coin*," as used in the constitution, providing that Congress shall have power to *coin* money, was the subject of much discussion in the Legal Tender Cases; the advocates of the constitutionality of the legal tender acts contending that the words 'to *coin*' had a broader meaning than the stamping of metals. Latham's Case, 1 Ct. of Cl. 149. See also Hague v. Powers, 39 Barb. (N. Y.) 466. While, on the other hand, it was contended that only metals could be *coined*. Thus Field, J., in his dissenting opinion in the Legal Tender Case, 110 U. S. 462, said: "The meaning of the term 'to *coin* money' is not at all doubtful. It is to mould metallic substances into forms convenient for circulation, and to stamp them with the impress of the government authority indicating their value with reference to the unit of value established by law. *Coins* are pieces of metal of definite weight and value, stamped such by the authority of the government. If any doubt could exist that the power has reference to metallic substances only, it would be removed by the language which immediately follows, authorizing Congress to regulate the value of money thus *coined* and of foreign *coin*, and also by clauses making a distinction between *coin* and the obligations of the general government and of the states." In Shollenberger v. Brinton, 52 Pa. St. 50, Thompson, J., said: "It cannot be necessary to multiply words and adduce definitions to establish the idea that the words 'to *coin* money' embrace the idea of making it of metal. It implies this as plainly as if it had been so said; words could not have made the thought plainer. And they imply necessarily the general process of manufacture, namely, that it was to be accomplished by the use of chemicals, crucibles, and dies, and not by paper, ink, and printing presses. Nobody, whose opinions are worth anything, would deny this; and therefore, so far as the grant goes, we may safely conclude it does not embrace the power to make and issue paper as money. A construction that would substitute printing for *coining*, and paper for metals, as equivalent things, would find, I think, but few advocates." See also Hague v. Powers, 39 Barb. (N. Y.) 446; Maynard v. Newman, 1 Nev. 278; Metropolitan Bank v. Van Dyck, 27 N. Y. 490; Borie v. Trott, 5 Phila. (Pa.) 403; Griswold v. Hepburn, 2 Duv. (Ky.) 29; Thayer v. Hedges, 22 Ind. 306.

1. Abbott's Law Dict.; Meyer v. Roosevelt, 25 How. Pr. (N. Y. Supreme Ct.) 105.

term is also applied to the great mass of metallic currency in circulation.¹

CO-INSURERS. (See the titles INSURANCE; BENEFICIARIES (IN INSURANCE), vol. 3, p. 923.) The term "co-insurers" means fellow insurers.²

COKE. — See COAL.

COLLAPSE. — To "collapse" is defined thus: "To fall together, or into an irregular mass or flattened form, through loss of firm connection or rigidity and support of the parts or loss of the contents; as a building through the falling-in of its sides, or an inflated bladder from escape of the air contained in it."³

COLLAR. — See note 4.

COLLATERAL. — That which is by the side of, assists, co-operates with, is made or given in addition to, some other thing which is presented as the principal.⁵

COLLATERAL INHERITANCE TAX. — A tax levied upon the collateral devolution of property by will or under the intestate law. See the title SUCCESSION TAXES for full treatment.

COLLATERAL SECURITY. (See the title PLEDGE AND COLLATERAL SECURITY.) — Property or contracts transferred as collateral security are called collateral.

1. Abbott's Law Dict. "*Coinage* of the United States" is the exact legal equivalent of "coins coined at the mint of the United States." U. S. v. Otey, 31 Fed. Rep. 68.

2. Chesbrough v. Home Ins. Co., 61 Mich. 333.

3. *Explosion Distinguished from Collapse.* — Louisville Underwriters v. Durland, 123 Ind. 550. In that case the court had to construe a policy of insurance containing a clause exempting the insurer from loss or damage caused by the bursting of boilers, by the *collapsing* of flues, etc. The court said: "But the *collapsing* of a flue is not the explosion or bursting of a boiler. The flue is inside of and forms a part of the boiler — if a flue boiler — but it is not the boiler proper, and may *collapse* and the boiler proper remain intact. But the *collapsing* of a flue is not the explosion of a flue. Webster defines *collapse* thus: 'To fall together suddenly, as the two sides of a hollow vessel; to close by falling or shrinking together; to shrink up; as, a tube in a steam boiler *collapses*.' He defines 'explosion' as follows: 'The act of exploding, bursting with a loud noise, or detonating; a sudden inflaming with force and a loud report; as, the explosion of gunpowder; the shattering of a boiler by a sudden and immense pressure, in distinction from rupture.'" See generally the titles EXPLOSIONS; FIRE INSURANCE.

4. *Dogs.* — Under an act which authorizes "any person to kill any dog or dogs found and being without a *collar*," it is lawful to kill a dog if he is out of the enclosure of his owner, without a *collar*, although under the immediate care of the owner. Tower v. Tower, 18 Pick. (Mass.) 262.

5. *Collateral* in its common use and acceptance means additional, subsidiary. Moffatt v. Corning, 14 Colo. 123.

Collateral means additional or supplemental. Crump v. McMurtry, 8 Mo. 415.

But in Early v. Early, 49 L. J. Ch. 826, 16 Ch. Div. 214, note, it is said that the word *collateral* means "side by side," "parallel," and taken by itself has no such meaning as "secondary," "auxiliary," "subsidiary," or "only to be made use of in aid."

Collateral is defined as security given in ad-

dition to the principal promise or bond. Barnett v. Wing, 62 Hun (N. Y.) 125.

Collateral Facts. — Facts not directly involved or connected with the principal issue or matter in dispute. Rapalje & Lawr. Law Dict.; Bouv. Law Dict. Those facts which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. Such facts are inadmissible as not tending to prove the issue. Greenleaf on Ev., § 52; Taylor on Ev. (8th Eng. ed.), p. 304 *sq.* See also the title EVIDENCE.

Collateral Issue. — (1) A question which is not immediately or mediately a matter in dispute in the proceeding. Rapalje & Lawr. Law Dict.

(2) The issue raised when a convicted criminal pleads anything allowed by law in bar or stay of execution, as that he is not the person found guilty, or a pardon, or pregnancy, which must be tried at once, for which purpose a jury is impaneled. Wharton's Law Lex.; 4 Bl. Com. 396.

Collateral Relations. — See the titles INCEST; MARRIAGE; RELATIONSHIP; SUCCESSION.

Collateral Kindred or Collaterals. — Those who are descended from a common ancestor and not one from the other. 2 Bl. Com. 203.

Collateral Consanguinity. — The relation of those who are descended from the same ancestor, but not one from the other. 2 Bl. Com. 203.

Collateral Ancestors. — In Banks v. Walker, 3 Barb. Ch. (N. Y.) 446, Walworth, J., said: "I am aware that the term '*collateral* ancestors' is sometimes used to designate uncles and aunts, and other *collateral* antecessors of the person spoken of; who are not in fact his ancestors. But the word 'ancestors,' in its ordinary import and meaning, only includes those from whom the person spoken of is lineally descended, either on the father's or the mother's side."

Collateral Descent. — Descent to *collateral* kindred. See Levy v. M'Cartee, 6 Pet. (U. S.) 102. See also the title SUCCESSION.

Collateral Estoppel. — The *collateral* determination of a question by a court having general jurisdiction of the subject. Bouv. Law Dict.; Small v. Leonard, 26 Vt. 209. See the titles ESTOPPEL; RES JUDICATA.

COLLATION — **COLLATIO BONORUM**. (See also the titles **ADVANCEMENT**, vol. 1, p. 760; **HOTCHPOT**.)—A bringing together of goods or property into a common fund; especially of property received of a decedent by way of advancement, for the purpose of a more equitable division among the heirs.¹ In maritime law, "collation" means contribution or average.² A comparison of two things by putting them together.³

COLLECT. (See also the titles **AGENCY**, vol. 1, p. 1025; **ATTORNEY AND CLIENT**, vol. 3, p. 278; **BANKS AND BANKING**, vol. 3, p. 802; **CHECKS**, vol. 5, pp. 1042, 1050. And see **COLLECTION AGENCIES**, and references there given.)—To collect is to gather into one body or place, especially to gather money or revenue from debtors; to demand and receive.⁴

Collateral Limitation.—A limitation in the conveyance of an estate which gives an interest for a specified period, but makes the right of enjoyment to depend on some *collateral* event, as a limitation to a man and his heirs, tenants of the Manor of Dale, or to a woman during widowhood. 4 Kent Com. 129; 1 Washb. R. P. 215. See the titles **ESTATES**; **REMAINDERS AND EXECUTORY INTERESTS**.

Collateral Promise. (See the title **FRAUDS, STATUTE OF**.)—A *collateral* promise is a promise to be responsible for the payment of the debt of a third person, having immediate respect to and founded upon the original liability, without any new consideration moving to the promisor to pay or answer for such debt or liability. *Elder v. Warfield*, 7 Har. & J. (Md.) 395. "The terms original and *collateral* promise * * * are convenient enough to distinguish between the cases, where the direct and leading object of the promise is to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is to subserve or promote some interest or purpose of his own." The former is within the fourth section of the statute of frauds; the latter is not. *Nelson v. Boynton*, 3 Met. (Mass.) 396, 37 Am. Dec. 148; *Clay v. Walton*, 9 Cal. 334. "If the promise is made by one in his own name to pay for goods or money delivered to or services done for another, that is original; it is his own contract on good consideration, and is called original, and is binding on him without writing. But if the language is, 'Let him have money or goods, or do service for him, and I will see you paid,' or, 'I promise you that he will pay,' or, 'If he do not pay, I will,' this is *collateral*, and though made on good consideration, it is void by the statute of frauds." *Stone v. Walker*, 13 Gray (Mass.) 615.

Collateral Warranty. (See also the title **WARRANTY**.)—In *Den v. Crawford*, 8 N. J. L. 106, it is said: "A warranty is *collateral* where he on whom the warranty descends does not claim the land as heir of him by whom the warranty was made." *Citing Co. Litt.* 375*b*, 376*a*, and notes 320 and 328; 2 Bl. Com. 302.

1. **Louisiana**.—*Cooper's Justinian* 574. "The *collation* of goods is the supposed or real return to the mass of the succession which an heir makes of property which he received in advance of his share or otherwise, in order that such property may be divided together with the other effects of the succession."

Cucull's Succession, 9 La. Ann. 96. It corresponds to the hotchpot of the common law, which is supposed to have been derived from it. 2 Bl. Com. 517; 4 Kent Com. 419; *The Ship Henry Ewbank*, 1 Sumn. (U. S.) 421.

Collation is an incident of the action of partition; but the obligation to *collate* cannot be destroyed by the fact that the ancestor had given away everything in his lifetime, to one of his children, to the exclusion of the others. *Benoit v. Benoit*, 8 La. 228.

Grandchildren coming to the partition of their grandfather's estate, with uncles and aunts, are not obliged to *collate* an onerous obligation due by their father. *Destrehan v. Destrehan*, 4 Martin N. S. (La.) 557.

2. *Adams' Gloss.*; *Loccen. De Jur. Mar.*, lib. ii., c. 8, § 1. See the title **GENERAL AVERAGE**.

3. **Collatio Signorum, or Sigillorum**, the mode of testing the genuineness of a seal by comparing it with one known to be genuine. *Adams' Gloss.*; *Bracton*, 389 *b*, 398 *b*; *Fleta*, lib. vi., c. 34, § 5. See generally the title **SEALS**.

4. *Webster's Dict.*

Sale.—In *Purdy v. Independence*, 75 Iowa 356, the court said: "The definition of the word *collect*, as given by the lexicographers, is, to gather; to assemble. When used with reference to the *collection* of money it often implies much more than the mere act of receiving the money. An attorney brings suit to enforce the payment of a demand, and the amount recovered is made by the sale of the defendant's property on judicial process. The term, as applied to such a proceeding, would describe not only the act of receiving the money, but all the means by which the payment was enforced." In that case it was held, where a city officer was entitled to compensation only for *collections* made by him, that the act of receiving money for the sale of city bonds was a *collection*.

Same.—A Power to *Collect* assets, given by statute to a receiver, authorizes him to *collect*, sell, and do whatever is necessary to convert the property into money, in order to apply it to the payment of claims. *Fling v. Goodall*, 40 N. H. 219. See generally the title **RECEIVERS**.

Taxation.—A power given in a city charter to levy and *collect* a special tax does not carry with it a power to *collect* it by a sale of the property on which it is assessed. The power to *collect* may be enforced by actions in the courts. *McInerney v. Reed*, 23 Iowa 410. See the titles **TAXATION**; **TAX SALES**.

Power to Sell.—A direction in a will to an executor to *collect* and "pay over" the residue of the testator's estate, "without sacrificing too much by forcing the sale thereof," gives to the executor the power, by implication, to sell. *Going v. Emery*, 16 Pick. (Mass.) 107, 26 Am. Dec. 645. See also the titles *AGENCY*, vol. 1, p. 930; *POWERS*.

Power Coupled with an Interest.—Where one is authorized "to *collect*, receive, and apply to his own use all or any part of the money due," he has a power coupled with an interest, and is not a mere agent empowered to *collect* debts. The court said: "He is not by any fair construction of the agreement restrained in the mode of *collection*. It would be a narrow construction of the instrument to confine him to the receipt of money only." *Tharp v. Smith*, 2 Watts (Pa.) 389. See the title *AGENCY*, vol. 1, p. 1217.

Collected.—A tax is *collected* when it has been paid by those on whose property it has been levied. *Fitzpatrick v. Flagg*, 5 Abb. Pr. (N. Y. C. Pl.) 213.

Where a mortgage is given for a fine adjudged to the state in a criminal prosecution, the judgment is not "paid or *collected*" so as to preclude an appeal. *Floyd v. State*, 32 Ark. 200.

Suit.—In *People v. Reis*, 76 Cal. 279, it is said that in the absence of anything to show a contrary intent, the word *collect* and its cognates or derivatives are clearly used to signify the obtainment of the money without suit.

Guaranty—Collectibility. (See also the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 405.)—Where a note is guaranteed to be "good and *collectible* after due course of law," if the holder means to resort to the guaranty, he must prosecute with due diligence all the parties to the note. *Moakley v. Riggs*, 19 Johns. (N. Y.) 69, 10 Am. Dec. 196. But where a note was guaranteed simply to be good and *collectible*, it was held not to be necessary to first exhaust legal remedies against the makers of the note. There can be no other evidence that the note was not capable of *collection*. *Marsh v. Day*, 18 Pick. (Mass.) 321; *Sanford v. Allen*, 1 Cush. (Mass.) 473. In the former case suit had been begun. In *French v. Marsh*, 29 Wis. 649, however, it was held necessary under like circumstances to prove due diligence in attempting to *collect* the note by action commenced within a reasonable time after maturity, and that the insolvency of the maker did not excuse the want of such an attempt. In *McDoal v. Yeomans*, 8 Watts (Pa.) 361, insolvency was held to excuse the want of an attempt to *collect* the note from the maker by process. And see *Wheeler v. Lewis*, 11 Vt. 265.

"I guarantee the *collection* of this note," is equivalent to a guaranty that it is *collectible* by due course of law, and the guarantor is not liable until an attempt to *collect* it by process from the makers has been made. *Cumpston v. McNair*, 1 Wend. (N. Y.) 457; *Loveland v. Shepard*, 2 Hill (N. Y.) 139; *Dyer v. Gibson*, 16 Wis. 557.

But where the maker had left the state before the note fell due, it was held that the holder was not bound to pursue the maker,

but might resort at once to the guarantor. The court, by Nelson, J., said: "It is clear, if, according to the true construction of the terms of the guaranty, legal proceedings against the maker must be had before the holder can call upon the guarantor, that nothing can dispense with such proceedings but the act of the guarantor himself. The liability does not arise until the precedent condition is performed. * * * The question then arises whether legal proceedings against the maker are indispensable as a condition precedent, according to the true meaning of the contract. The term *collection* may undoubtedly imply such proceedings; but might not circumstances exist to excuse their omission, independently of any interference of the defendant himself, within the meaning of the contract? The intent of the guaranty was to secure the payment of the note, and a suit at law is only a means of accomplishing it. If the means are expressly prescribed in the contract, as in *Moakley v. Riggs*, 19 Johns. (N. Y.) 69, and *Thomas v. Woods*, 4 Cow. (N. Y.) 173, they must be complied with, being a part of the contract, provided the party is within the jurisdiction of the state. If it is impracticable to use the ordinary means of coercing payment, in consequence of the defendant being gone to parts unknown, or beyond the reach of legal proceedings in the state, a reasonable construction of the terms of the contract and of the intent of the parties would control the implied obligation which, upon the face of the guaranty, was *prima facie* imposed. The term *collection* alone is equivocal, and should receive an interpretation in reference to the subject-matter of the contract, and the situation or condition of the maker. It would be, I think, too much to say, from the terms used, that the parties understood that the only test of liability of the guarantor was a suit at law against the principal. A more reasonable and probable construction would seem to be, that the guarantor intended to warrant that the note could be *collected* in that way—that is, by suit—and which must imply not only ability on the part of the maker to pay, but that he would be in a situation to be sued within the jurisdiction of the state in which the contract was made." *White v. Case*, 13 Wend. (N. Y.) 544.

Power to Receipt—Collection.—The power to enforce the "*collection* of all fines, forfeitures, and penalties," conferred on states' attorneys, includes the right to receive and give receipts therefor, that shall operate as full discharge to the parties paying the same; and also the right to receive the amount of any judgment that may have been rendered for any such fine, etc., and to execute an acquittance therefor. *People v. Christerson*, 59 Ill. 157.

For Collection. (See also the titles *BANKS AND BANKING*, vol. 3, p. 278; *CARRIERS OF GOODS*, vol. 5, p. 223; *CHECKS*, vol. 5, pp. 1043, 1054; *EXPRESS COMPANIES*.)—Common carriers doing business between certain points, and not undertaking personally for the carriage of goods to farther points, but merely engaging to forward them to their destination by the established lines of transportation, are not liable upon the receipt for a bill of goods "for *collection*" from a person beyond the

terminus, in the absence of a special contract creating an additional obligation upon the failure of the other carriers, to whom in the ordinary course of business the bill was intrusted for *collection*, to pay over the amount received by them upon the same. *Lowell Wire Fence Co. v. Sargent*, 8 Allen (Mass.) 189.

Collector. (See also the titles REVENUE LAWS; TAXATION. And see generally the title PUBLIC OFFICERS.)—In a statute providing the mode of execution against a municipal corporation, *collector* "means the officer having the legal custody of and power to disburse the funds of such corporation." *Gabler v. Elizabeth*, 42 N. J. L. 79.

A *collector* of taxes is a public officer within the meaning of an embezzlement act. *State v. Walton*, 62 Me. 106.

"Decision of the *collector*," in the fourteenth section of the Act of Congress of June 30, 1864, which makes the same conclusive unless appealed from within thirty days, etc., is synonymous with "ascertainment and liquidation of the duties by the proper officers of the customs," used in the same section. *U. S. v. Cousinery*, 7 Ben. (U. S.) 251.

Collections of Antiquities. (See also the title REVENUE LAWS.)—In *U. S. v. Terry*, 41 Fed. Rep. 771, it was held that the provision of a tariff, exempting from duty "*collections of antiquities*," does not extend to antiquities not gathered together in a *collection*. The court said: "The phrase 'cabinets of coins' imports a distinct idea; so does the phrase

'*collections of antiquities*.' The latter imports a *collection* of articles where both the antiqueness of the individual articles and the circumstance that they are assembled together into a collection unite to make them attractive or useful or valuable or otherwise desirable. We can easily understand why Congress might restrict the free list to such cabinets and to such *collections*. There is no particular reason why a wealthy individual here who wishes to buy a single pair of lace curtains, of remote antiquity, to hang in his front parlor, should be allowed to import them free; but there might be very good reasons why any one who imported articles that had been brought together to illustrate an art, or an era, or anything else, the assemblage of which into a *collection* made them of value educationally or otherwise, might be allowed to import them free, even though he imported them for sale. A *collection* of that kind, if judiciously made, might be more readily salable as a *collection* than the individual components out of which it is made. At any rate, whatever may have operated on the mind of Congress, or whatever may have been their intention, they do in fact use the words '*collection of antiquities*.' I do not see that I can hold that that phrase correctly describes two rugs, or that it covers, as is claimed in this other case, half a dozen bedspreads and two lace curtains. Neither of these importations is a *collection* gotten together for any particular purpose."

Collect on Delivery.—See C. O. D., and references there given.

COLLECTION AGENCY.

- I. DEFINITION, 209.
- II. LIABILITY OF AGENCY, 209.
- III. MAY LIMIT LIABILITY, 210.
- IV. ATTORNEYS EMPLOYED, 210.

CROSS-REFERENCES.

See also the titles *AGENCY*, vol. 1, p. 930; *ATTORNEY AND CLIENT*, vol. 3, p. 278; *BANKS AND BANKING*, vol. 3, p. 787; *MERCANTILE AGENCIES*.

I. DEFINITION. — A collection agency is a concern whose business it is to collect all kinds of claims, as well as notes, drafts, and other negotiable instruments, on behalf of others, and to render an account of the same.¹

II. LIABILITY OF AGENCY. — An agency of this kind upon receiving a claim for collection guarantees that it will use its best endeavors to collect the same; that where suit is necessary, it will select a competent and reliable attorney for the purpose, and in the event of the negligence, dishonesty, or unauthorized acts of the latter, will save the creditor harmless.²

1. **Term Defined.** — *Dale v. Hepburn*, 11 Misc. Rep. (N. Y. C. Pl.) 286.

2. **Where Attorney of Agency Collects but Fails to Remit.** — The defendants, who were engaged in operating a collection agency, received from the plaintiffs certain drafts for which a receipt was given as follows:

"J. M. Bradstreet & Son, Improved Mercantile Agency. Pittsburgh, June 2, 1865.

"Received from Messrs. Everson, Preston, & Co., four duplicate acceptances for collection against Watt C. Bradford, Memphis, Tenn., amounting in all to \$1,726.37.

"J. M. Bradstreet & Son."

These drafts the defendants sent to one Wood, their agent in Memphis, who collected the money, but becoming embarrassed, failed to pay over the proceeds. In an action by the creditors it was contended on behalf of the defendants that, notwithstanding the express receipt "for collection," the latter did not undertake themselves to collect, but only to remit to a proper and responsible attorney; thus making themselves liable only for diligence in correspondence, and in giving the necessary information to the plaintiffs; or, in other words, that the attorney in Memphis was not their agent for the collection, but that of the plaintiffs; that their business was not the collection of claims due, but simply of furnishing to the business public a reliable statement of the financial condition of mercantile firms. It was held, however, that the defendants were liable, the court saying: "They have their selected agents in every part of the country. From the nature of such ramified institutions we must conclude that the public impression

will be that the agency invited customers on the very ground of its facilities for making distant collections. It must be presumed, from its business connections at remote points and its knowledge of the agents chosen, the agency intends to undertake the performance of the service which the individual customer is unable to perform for himself. There is good reason, therefore, to hold that such an agency is liable for collections made by its own agents when it undertakes the collection by the express terms of the receipt." *Bradstreet v. Everson*, 72 Pa. St. 124, 13 Am. Rep. 665.

Judgment Recovered for Claim but Not Satisfied.

— The plaintiffs, merchants in Philadelphia, delivered to the defendants, a firm engaged in conducting a collection agency, three promissory notes, receiving from the latter a receipt as follows:

"Philadelphia, Sept. 28, 1857.

"Received of Messrs. Morgan & Stidfole the claim below described [setting forth the notes], to be forwarded by us for collection by suit or otherwise at our discretion.

"(Signed) Tener & Davis."

These notes were placed in the hands of a lawyer in Denton, Md., for collection, and he in turn placed them in the hands of another attorney in Baltimore. Judgment was afterwards obtained for the full amount of the note, but never satisfied. In an action by the owners against the agency, to recover the amount of these notes, it was held that the latter, in placing the claim in the hands of an attorney for collection, were liable for the dishonesty or misconduct of such attorney, in the absence of an express stipulation to the contrary, in the

III. MAY LIMIT LIABILITY. — The agency may confine its liability within specified bounds, however, by an express stipulation in the receipt given to the creditor, that the claim shall be "at the risk and on the account" of the latter.¹

IV. ATTORNEYS EMPLOYED — Compensation. — An attorney employed by a collection agency, being the agent of the latter,² must look to his principal

receipt given by them for the claim. *Morgan v. Tener*, 83 Pa. St. 305.

Renewal by Substitution of Securities. — A promissory note, in which blanks had been left for the date, amount, time the note had to run, and the name of the payee, was delivered by the owners to a collection agency, with the understanding that the makers should be allowed to sign such note, in renewal of an old one of the same tenor. The collection agency delivered this note to its attorney, who permitted the maker, in filling in the blanks, to insert certain conditions neither contemplated by the owners nor contained in the old note; the plaintiffs declined to accept this renewal. It was held that they were not bound to do so, and that the collection agency was liable for the unauthorized acts of its attorney. *Weyerhauser v. Dun*, 100 N. Y. 150.

1. Stipulation in Receipt Limiting Liability. — The defendants, proprietors of a collection agency, received from the plaintiffs for collection a claim in the form of an account against certain debtors. This claim the defendants forwarded to an attorney residing in the same county in which the debtors lived. The whole amount of the claim was collected by the attorney, but no account rendered by him either to the defendants or plaintiffs. On the delivery of the account to the defendants, they gave the plaintiffs a receipt to the effect that the account was to be transmitted by mail for collection or adjustment to an attorney, at the risk and on the account of the plaintiffs; the proceeds to be paid over or accounted for to the plaintiffs when received by the defendants from the attorney. At the same time a receipt was signed by the plaintiffs in the books of the defendants stating the amount of the account, and that the claim was to be transmitted by mail to an attorney, at the risk and for the account of the plaintiffs. It was insisted on the part of the plaintiffs that as the defendants held themselves out to the world as a collecting agency, when they received the account of the plaintiffs they undertook either to collect it themselves, or to remit the same to some suitable attorney in that part of the country where the debtors lived to make the collection, and that they became responsible for the negligence or misconduct of the attorney whom they employed for that purpose; but the court, by Cole, J., said: "It well may be that such would be the responsibility of the defendants, were it not for the restrictive clause in the receipts. But that clause, if any effect is given to it, clearly limits that liability; for it provides that the account is to be transmitted to an attorney for collection at the risk of the plaintiffs. Such being the case, we think the defendants are not liable for the act or default of the attorney employed by them, unless in the selection of such attorney they were guilty of gross negligence; for it seems to us it was competent

for the parties, by express contract, to limit the liability which the law would otherwise impose upon the defendants for the acts of the attorney employed by them to make the collection. We are not aware of any principle of law or public policy which condemns such a contract. * * * Notwithstanding the clause in the receipts, it is sought to render the defendants responsible for the loss of the money collected by the attorney; in other words, virtually to make the defendants guarantors of the fidelity and integrity of such attorney, although there is not a particle of proof which tends to show that they were guilty of gross negligence in selecting him." *Sanger v. Dun*, 47 Wis. 615, 32 Am. Rep. 789. See also *Bradstreet v. Everson*, 72 Pa. St. 124, 13 Am. Rep. 665.

2. Attorney Employed by Agency Is Its Agent, Not the Creditor's. — Where an account of indebtedness was delivered to a collection agency with instructions to it to do its utmost to collect it, the claim was sent by the agency to an attorney at the place of residence of the debtor. The debtor had committed several acts of bankruptcy, and the attorney, who was aware of the insolvency of the debtor, persuaded the latter to confess judgment. The money, when collected, was remitted by the attorney to the collection agency, but never received from it by the creditors. Proceedings in bankruptcy were immediately instituted against the debtor by the creditors, and a decree obtained. It was held that an attorney, employed not by the creditors, but by a collection agency which undertakes the collection of the debt, is the agent of the collection agency and not the agent of the creditors, and consequently the knowledge of such attorney of the insolvency of the debtor would not charge the creditors with knowledge of the insolvency so as to render them liable to the assignee in bankruptcy for the money collected by them upon the judgment previously obtained. *Hoover v. Wise*, 91 U. S. 308.

The defendants, residents of New York, placed in the hands of a collection agency in that city a claim against a debtor in Nebraska. The agency forwarded this claim to its attorney at the place of the debtor's residence, and the latter having confessed judgment, a portion was collected upon the execution, and forwarded to New York to the agency, but none of the money so received was ever paid over to the creditors. It developed upon the trial that the debtor had been induced by the attorney to confess judgment, being insolvent at the time, and that such insolvency was known to the attorney. It was held, in an action against the creditor by the debtor's assignee in bankruptcy, that the attorney was the agent of the collection agency, not of the creditor, and that the latter could not be charged with knowledge of the insolvency of

for compensation for professional services, and cannot recover of the creditor.¹

Damages.—But such attorney, *bona fide* believing himself to be obeying instructions and within the scope of his authority, is not liable to the agency for damages which may result without his default, in the discharge of his professional duties.²

Claim Compromised by Attorney of Agency.—Where a judgment is sent by a creditor to a collection agency for collection, and the attorney of the latter compromises the claim contrary to the instructions of the creditor, no recovery can be had of the agency, without proof of actual damage sustained by reason of such unauthorized act of the sub-agent.³

COLLEGES.—See the titles *EDUCATION*; *EXEMPTION FROM TAXATION*; *SCHOOLS*; *UNIVERSITIES AND COLLEGES*.

COLLIERY. (See also the titles *MINES AND MINING*; and see *COAL*.)—A colliery is a place where coals are dug.⁴

his debtor, and had never authorized or ratified any act violative of the bankruptcy. *Hoover v. Greenbaum*, 61 (N. Y.) 305.

1. Action for Professional Services—Liability of Agency.—The defendant placed a draft for collection in the hands of Hubbell & Co., a concern constituting a collection agency, which concern retained the plaintiff as their attorney. It appeared from the evidence that the plaintiff's correspondence and business transactions in the affair had been exclusively confined to Hubbell & Co., and at no time had the plaintiff had any understanding with the defendant as to his compensation. It was held that the collection agency had acted in the capacity of principal in employing the plaintiff, and not as the agent of the defendant, and that no recovery for professional services could be had of the latter. *Dale v. Hepburn*, 11 Misc. Rep. (N. Y. C. Pl.) 286.

2. *Weyerhauser v. Dun*, 100 N. Y. 150.

3. Claim Compromised by Attorney Contrary to Instructions.—The plaintiff had in his possession a judgment against a certain firm in Indiana, which, owing to the insolvency of the judgment debtors, was uncollectible. This claim was placed by the plaintiff in the hands of the defendants, a collection agency, he agreeing to pay them fifteen per cent of the amount of such collection, the defendants to employ their own attorney, and the plaintiff to have no further expense. The claim was sent to an attorney, who effected a compromise with the debtors by receiving the full amount without interest, which sum he sent to the defendants, less agreed charges. The defendants forwarded this amount to the plaintiff, who received and retained the money, but notified the defendants that he would hold them liable for the interest. It was held that a collection agency is liable for the unauthorized act of its attorney; nevertheless no recovery could be had without actual proof of damage resulting from such act. *Talcott v. Cowdry*, 17 Misc. Rep. (N. Y. Supreme Ct.) 333.

4. What Is Included.—*Carey v. Bright*, 58 Pa. St. 85, in which case it was held that the loose movables about a colliery would not pass upon the sale of the colliery. *Sharswood, J.*, said: "Neither was there any error in declining to affirm the seventeenth point, that the sale by Kirk, Baum, Ogle Clark, and Gross,

to the defendants below, of all their interest in the shaft and slope collieries, 'included all the movable property belonging to and used at these places in the mining of coal; and that the word colliery is a collective compound including many things, and is not limited to the lease and fixtures of a tunnel, drift, shaft, slope, or vein from which the coal is mined.' According to the most approved lexicographers, to whose works courts must resort for the meaning of words which have no settled legal construction, a colliery is 'a place where coals are dug.' *Johnson, Webster, ad verbum*. No question appears to have been raised as to whether the articles in dispute were or were not fixtures. It is probable that many things about a colliery, although not actually affixed to the freehold, may come within that category, like the rolls of an iron-mill, or the machinery of a manufactory, whether fast or loose, which is necessary to constitute it, and without which it would not be a mill or manufactory at all. *Voorhis v. Freeman*, 2 W. & S. (Pa.) 116. But the mere loose movables about such an establishment, in the absence of any usage or general understanding, would no more pass than would the tools of a mechanic by the sale of his shop."

"**Colliery** is, however, a word sufficiently wide to include all contiguous and connected veins and seams of coal which are worked as one concern, without regard to the closes and pieces of ground under which they are carried. See *Hodgson v. Field*, 7 East 620. Indeed, it is apparently wide enough to include the engines and machinery in the 'contiguous and connected veins,' as well as those veins themselves. Webster, in defining colliery, refers to 'coalery,' and he defines 'coalery' as a coal mine, coal pit, or place where coals are dug, with the engines and machinery used in discharging the water and raising the coal." *MacSwinney on Mines*, p. 25.

In *Springside Coal Min. Co. v. Grogan*, 53 Ill. App. 65, it is said: "Lexicographers define a mine to be a pit or excavation in the earth, from which ores or mineral substances are taken by digging. A colliery is defined by the same lexicographers to be a mine, pit, or place where coals are dug, with the machinery used in discharging and raising the coal."

Same—Seams of Coal.—In *Hodgson v. Field*,

COLLISIONS.—As to maritime collisions, see the titles NAVIGATION; MARINE INSURANCE. And as to collisions upon railroads, see the titles CARRIERS OF PASSENGERS, vol. 5, p. 474; CROSSINGS; CONTRIBUTORY NEGLIGENCE; MASTER AND SERVANT; STREET RAILROADS.

COLLOQUIUM.—See the title LIBEL AND SLANDER.

COLLUSION. (See also the titles DIVORCE; FRAUD.)—"Collusion" is where two persons, apparently in a hostile position and having conflicting interests, by arrangement do some act in order to injure a third person or deceive a court. It has been defined as an agreement between two or more persons unlawfully to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law.¹

COLOR.—"Color" in law means not the thing itself, but only an appearance thereof; as, color of title means only the appearance of title.²

7 East 620, referred to in *MacSwinney on Mines*, Lord Ellenborough said: "The deed speaks of an intended *colliery*. It seems that the object of the grant was to drain the water from such intended *colliery*, the local extent and limits of which intended *colliery* we have no means of defining; but judging from the nature of such works, there seems no reason to give them any other or narrower limit than the boundaries of the continued property of the grantee, under which the intended *colliery* might be prosecuted by him, without regard to the closes and pieces of ground under which it might be carried, and who might of course be expected to follow the coal through all the contiguous and connected veins and seams of coal which belonged to him." It was held, accordingly, that the grant of the right to maintain sough pits for the intended *colliery* authorized the use of the pits so long as coal was dug from any part of the *colliery*, whether under the tract where the deed mentioned that the mine was to be opened, or not.

1. *Carey v. Houston, etc.*, R. Co., 52 Fed. Rep. 675.

Jurisdiction Obtained by Collusion.—In *Industrial, etc., Co. v. Electrical Supply Co.*, 16 U. S. App. 213, it was held that an order of a Circuit Court, continuing an injunction, must be reversed on the ground that the jurisdiction of the Circuit Court had been obtained by *collusion*. The court said: "That the complainant was culpable in lending the use of his name to promote Tillotson's fraud upon the jurisdiction of the court, with knowledge of his purpose, and was responsible for the negligence—to use no stronger term—of its assistant manager in making oath to the amount of materials used in the construction of the railroad, is undeniable. But this may, perhaps, be palliated in some degree by the fact that it was done under the advice of its attorney, who, it was known, however, was acting in Tillotson's interest. The agreement, nevertheless, was to obtain an object forbidden by law, and therefore fills the definition of *collusion*, which, as is said in *Jessop v. Jessop*, 2 Sw. & Tr. 302, 'may be by keeping back evidence of what would be a good answer, or by agreeing to set up a false case.'" See also the title JURISDICTION. And see ENCYC. OF PL. AND PR., title FRIENDLY SUIT.

Judgment. (See also the title JUDGMENTS AND DECREES.)—In *Baldwin v. New York*, 30 How.

Pr. (N. Y. Supreme Ct.) 300, it is said: "It by no means follows, that on an application of this kind the court is at liberty to interfere with the judgment in every case where it would be reversed upon appeal, although the error was ever so manifest. There must have been *collusion* in obtaining the judgment, or it must have been founded in fraud. *Collusion* is defined by Webster as follows: '1. In law, a deceitful agreement or compact between two or more persons, for the one party to bring an action against the other for some evil purpose, as to defraud a third person of his right; a secret understanding between two parties, who plead or proceed fraudulently against each other, to the prejudice of a third person. 2. In general, a secret agreement and co-operation for a fraudulent purpose.' In *Burrill's Law Dictionary* the word has substantially the same definition. *Bouvier* in his *Law Dictionary* defines the word as follows: '*Collusion*, fraud. An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law; as, for example, where the husband and wife *collude* to obtain a divorce for a cause not authorized by law. It is nearly allied to 'covein.' Second. *Collusion* and fraud of every kind vitiate all acts which are infected with them.' See also the definition of *collusion* in *Tomlin's Law Dictionary*, which is to the same effect as the foregoing."

2. *Broughton v. Haywood*, 61 N. Car. 383.

Color is defined to be guise, appearance, pretense. *McElhanev v. Gilleland*, 30 Ala. 187.

The term **color** means semblance, show, pretense, appearance; and implies, in the language of the law, that the thing to which it is applied has not the real character imputed to it. *Chicago, etc., R. Co. v. Allfree*, 64 Iowa 503.

Color of Right.—In *Price v. Guanine*, 16 Ont. Rep. 267, *Armour, C. J.*, said: "I take the meaning of '*colour* of right,' as used in the Act, to be such semblance or appearance of right as shows that the right is really in dispute, for there may be *colour* of right where there is no right. *Wright v. Mattison*, 18 How. (U. S.) 50." In that case the learned judge refused to follow *Gilbert v. Doyle*, 24 U. C. C. P. 60.

Color of Process.—**Color** of process means process sufficient and apparently valid. *Barfield v. Turner*, 101 N. Car. 357.

In Pleading.—Every pleading by way of confession and avoidance must give "color," *i. e.*, must give the plaintiff credit for having an apparent or *prima facie* right of action, independent of the matter disclosed in the plea to destroy it.¹

COLORE OFFICII.—See COLOR OF OFFICE, *post*; VIRTUTE OFFICII.

COLORED PEOPLE. (See also the titles CARRIERS OF PASSENGERS, vol. 5, pp. 539, 559; CITIZENSHIP, *ante*; CIVIL RIGHTS, *ante*; CONSTITUTIONAL LAW; MARRIAGE; MISCEGENATION; SCHOOLS; SLAVERY. And see BLACK PERSON, vol. 4, p. 576; MULATTO; NEGRO.)—"Colored" people are black people, Africans or their descendants, mixed or unmixed.²

1. 4 ENCYC. OF PLEADING AND PRACTICE, p. 669, which see for a complete treatment.

In *Tate v. Southard*, 3 Hawks (N. Car.) 120, Henderson, J., said: "Giving color in pleading, is giving to your adversary a title which is defective; but not so obviously so that it would be apparent to one not skilled in the law; it must be such as would perplex a layman; it, therefore, draws the consideration of the question from the jury (the lay gents) to the court, which is the object of the pleading."

2. *Van Camp v. Board of Education*, 9 Ohio St. 411, quoting Webster's Dict., in which case it was held, that within a statute providing for separate schools children of three-eighths African and five-eighths white blood, but who were distinctly colored, and generally treated and regarded as colored children by the community, were not entitled to admission in the schools set apart for white youth. The court further said: "A person who has any perceptible admixture of African blood is generally called a colored person. In affixing the epithet colored, we do not ordinarily stop to estimate the precise shade, whether light or dark; though where precision is desired, they are sometimes called light colored, or dark colored, as the case may be."

Person of Color.—Under a *North Carolina* statute it was held that "person of color" meant a person descended from a negro within the fourth degree inclusive. *State v. Dempsey*, 9 Ired. L. (N. Car.) 384.

The term "person of color" means, of African descent. *Heirn v. Bridault*, 37 Miss. 209.

Persons of Color—Exemption from Taxation. (See generally the title EXEMPTION FROM TAXATION.)—A statute exempted from taxation persons of color. In construing this statute, the court said: "According to the common, general, and indeed universal acceptance of the phrase 'persons of color' in this community, it embraces not only all persons descended wholly from African ancestors, and therefore of pure and unmixed African blood, but those who have descended in part only from such ancestors, and have a distinct, visible admixture of African blood. We therefore adopt that construction of the Act in question, and hold that the exemption provided in it applies only to persons proved to be of such descent and also having and disclosing visibly the peculiar and distinctive color of the African race." *Johnson v. Norwich*, 29 Conn. 408.

Confined to Africans.—In *Pierce v. Union Dist. School Trustees*, 46 N. J. L. 79, it is said: "Counsel further urges that since, under the rule of the trustees, an Italian (for

example), as dark as the relator's children, would have been admitted, the exclusion was therefore owing, not to color, but to race, which the statute does not prohibit. But I think the term color, as applied to persons in this country, has had too distinct a history to leave possible such an interpretation of the law. Both in the statute and in the regulations of the respondents, persons of color are persons of the negro race."

In *Clark v. Board of Directors*, 24 Iowa 276, it is said: "The term 'colored race' is but another designation, and in this country but a synonym, for African. Now, it is very clear, that, if the board of directors are clothed with a discretion to exclude African children from our common schools, and require them to attend (if at all) a school composed wholly of children of that nationality, they would have the same power and right to exclude German children from our common schools, require them to attend (if at all) a school composed wholly of children of that nationality; and so of Irish, French, English, and other nationalities which together constitute the American, and which it is the tendency of our institutions and policy of the government to organize into one harmonious people, with a common country and stimulated with the common purpose to perpetuate and spread our free institutions for the development, elevation, and happiness of mankind."

Virginia Statute.—A statute of Virginia defined colored persons as follows: "Every person having one-fourth or more of negro blood shall be deemed a colored person." It was held that this statute did not apply to slaves, but to free persons. *Francis v. Francis*, 31 Gratt. (Va.) 283; *Scott v. Raub*, 88 Va. 721. And it was held in the latter case, where a statute provided that colored persons, before the passage of the Act, who should have undertaken and agreed to occupy the relation of husband and wife, and should be cohabiting together as such at the time of its passage, should be deemed married, that the term "colored persons" applied to all persons usually so known, without regard to the degree of their color. See also the titles MARRIAGE; SLAVES.

Negro. (See also NEGRO.)—In *Jones v. Com.*, 80 Va. 538, it was held that the term "negro" is identical in signification with the term "colored person." The court said: "At the March term of this court, 1877, this court construed the said second section of chapter 103, in a case which arose under the said eighth section of chapter 192 of the Code of 1873. In that case Judge Moncure, in an

COLOR OF OFFICE. (See also the titles ARREST, vol. 2, p. 832; PUBLIC OFFICERS; SHERIFFS; VIRTUTE OFFICII; WARRANTS.)—"Color of office" is when an act is evilly done by the countenance of an officer, and is always taken in the worst sense, being grounded upon corruption to which the office is as a mere shadow of "color."¹

COLOR OF TITLE.—See the titles ADVERSE POSSESSION, vol. 1, pp. 824, 846, 864; CLOUD ON TITLE, *ante*; TAX TITLES.

opinion in which the other judges concurred, said: 'It thus appears that less than one-fourth of her blood is negro blood. If it be but one drop less, she is not a negro; besides, having certainly derived at least three-fourths of her blood from the white race, she derived a portion of the residue from her great-grandmother, who was a brown-skinned woman, and of course not a full-blooded African or negro, whose skin is black and never brown. If any part of the said residue of her blood, however small, was derived from any other source than the African or negro race, then Rowena McPherson cannot be a negro.' See *McPherson v. Com.*, 28 Gratt. (Va.) 940. The term 'negro' being held to be identical in signification with *colored* person." This case was an indictment for miscegenation. See also the title MISCEGENATION.

1. **Color of Office.**—*Winter v. Kinney*, 1 N. Y. 368; *Burrall v. Acker*, 23 Wend. (N. Y.) 608; *Morton v. Campbell*, 37 Barb. (N. Y.) 182; *Richardson v. Crandall*, 48 N. Y. 361; *Wilson v. Unselt*, 75 Ky. 215.

In *Decker v. Judson*, 16 N. Y. 442, the court says: "*Color of office* is defined as characterizing an act wrongfully done by an officer under the pretended authority of his office, and 'grounded upon corruption, to which the office is as a mere shadow of *color*.' 1 Bouv. Law Dict. 244; Wharton's Law Lex. 177; Tomlin's Law Dict. *Color of office*, when applied to the taking by a sheriff or other officer of a written security, *ex vi termini* implies that the security is 'unlawful and unauthorized, and that the legal right to take it is a mere *color* or pretense.' *Burrall v. Acker*, 23 Wend. (N. Y.) 608, *per* Chancellor Walworth." See also *Kelly v. McCormick*, 28 N. Y. 318.

Color of Office is defined as champerty, an act done by an officer under the pretended authority of his office, and grounded upon corruption, to which the office is a mere shadow of *color*. *Griffiths v. Hardenbergh*, 41 N. Y. 464.

The term *color of office* necessarily implies an illegal claim of right or authority. *Burrall v. Acker*, 23 Wend. (N. Y.) 608; *Richardson v. Crandall*, 48 N. Y. 361.

Bad Faith.—A statute provided that no officer should take security by *color of his office* in any other cases than such as are provided by law. In construing this statute, the court said: "*Color of office* is a technical expression. It implies bad faith, corruption, breach of duty. 'It is,' say the law dictionaries, 'when an act is evilly done by the countenance of an office, and is always taken in the worst sense.' Now the proof in the present case is that the officer, in demanding the bond, sought no advantage to himself, but simply desired, as it was natural he should, to protect

himself against loss. The risk he was required to run was not for his benefit, but for the benefit of the attaching creditor." *Chamberlain v. Beller*, 18 N. Y. 117.

Colore Officii Distinguished from Virtute Officii.—In *Gerber v. Ackley*, 37 Wis. 43, it is said: "A distinction is taken by the authorities between an act done *colore officii* and one done *virtute officii*. See note to *Coupey v. Henley*, 2 Esp. N. P. 540; *Seeley v. Birdsall*, 15 Johns. (N. Y.) 267; *Morris v. Van Voast*, 19 Wend. (N. Y.) 283. 'Acts done *virtute officii* are where they are within the authority of the officer, but in doing them he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them.' Pratt, J., in *People v. Schuyler*, 4 N. Y. 187." See also *Bishop v. McGillis*, 80 Wis. 578.

Color of Authority. (See also the titles PUBLIC OFFICERS; SHERIFFS; WARRANTS.)—An officer acting in good faith under a warrant purporting to come from his superior, whom he is bound to obey, is acting under *color* of authority, whether the superior transgresses his power, or the warrant be irregular or not. The court said: "The order or warrant under which the defendants justify purported to have been issued by virtue of an authority derived from the president. This was color of authority, whether the substance existed or not. The argument that *color*, being an accident, cannot exist without substance, may be metaphysically correct, but has too much subtlety for practical application in the construction of statutes. We do not think it necessary to give a definition of '*color of authority*' to suit all cases. For the purposes of this case it is enough to say, that an officer acting in good faith under a warrant purporting to come from his superior, whom he is bound to obey, is acting under *color* of authority, whether his superior transgresses his power, or the warrant be irregular or not." *Hodgson v. Millward*, 3 Grant's Cas. (Pa.) 419.

Money Paid.—Money paid and received by a clerk of the court, without legal authority, is by *color of his office*. *Thomas v. Connelly*, 104 N. Car. 342. In that case it was also held that the clerk did not receive the money by virtue of his office. See also the title CLERKS OF COURTS, *ante*.

Constable.—A constable must be said to have acted under the *color of office*, when, by the assumed but unreal authority of his office, he levies process in his hands on property exempt by law from execution, and retains and sells it after the affidavit required by law has been made. *McElhanev v. Gilleland*, 30 Ala. 187.

COLPORTEUR. (See also the title **HAWKERS AND PEDDLERS.**)—A colporteur has been defined as one who travels for the sale and distribution of religious tracts and books; a hawker and peddler; especially, in modern usage, a peddler of religious books.¹

COM.—“Com.” is a well-understood abbreviation of the word “company.”²

COMBAT.—See note 3.

COMBINATION.—See the titles **CONSPIRACY**, *post*; **LABOR COMBINATIONS**; **MONOPOLIES**; **STRIKES**; **TRADE COMBINATIONS AND CORPORATE TRUSTS**. In patent law, see the title **PATENT LAW**.

COMBINATION POOLS. (See also the title **GAMBLING.**)—See note 4.

COME—COMING.—To move toward or into; to approach;⁵ to appear in court.⁶

COMFIT.—A comfit is a dried sweetmeat; any kind of fruit or root preserved with sugar and dried.⁷

1. Fuller's Will, 75 Wis. 436.

2. Keith v. Sturges, 51 Ill. 142. See also the titles **ABBREVIATIONS**, vol. I, p. 97; **JUDICIAL NOTICE**.

3. **Struggle.** (See also the title **SELF-DEFENSE.**)—In State v. Way, 38 S. Car. 333, the trial judge used the words *combat* and “struggle” in endeavoring to assist the jury to understand his definition of manslaughter. This was objected to. The appellate court said: “We have carefully considered this matter, and for this purpose have carefully examined the charge of the judge as found in the case, to see if this exception was well founded. In candor we are obliged to say that we cannot see its force. *Combat* and ‘struggle’ are not unusual words in our everyday life, and the jury may very well be understood to fully comprehend their meaning.”

4. **Combination Pools.**—In James v. State, 63 Md. 250, Bryan, J., said: “The *combination pools* are somewhat similar to the ‘mutuals.’ In the *combination pools* there must be three contests or races. The person speculating in *combination pools* must select his choice in the races, the same as is done in the mutual; but in order to win, he must have selected the winner in each of the three races. If any one of the horses chosen by him fails, he wins nothing. Any number of persons may select the same *combination*, and if any particular *combination* wins, the persons having selected that *combination* are entitled to the whole amount (less the five per cent. commission to the persons conducting the pool), to be equally divided upon producing their cards or tickets. The sum deposited on each selection of a *combination* is uniform. Persons purchasing these *combination* tickets may decline to name any *combination*, and purchase the field, and should all the *combinations* fail, the pool, less the commission aforesaid, is divided among those holding tickets on the field.” In that case it was held that the sale of pools was not an offense within the Maryland statutes against gambling.

5. Webster's Dict.

The Clause “Come [to Person] from the Part of His Father,” in an intestate act, includes *coming* by gift and devise as well as by descent. Shippen v. Izard, 1 S. & R. (Pa.) 222. Yates, J., said: “It cannot be denied that the words ‘come to,’ in their common acceptation, may with perfect propriety be referred to real or

personal estate derived through any channel, by the voluntary act of the donor, either by will or other gratuitous benevolence taking immediate effect, or by the operation of law.” See also the title **SUCCESSION**.

Coming to Market.—A by-law provided that no person out of market should buy up any provisions or articles of food *coming* to said market. It was held that the words “*coming* to market,” in the by-law, meant, on the way to the market place, with intent to be there offered for sale in market. Boteler v. Washington, 3 Fed. Cas. No. 1685.

Legacy to Married Woman.—In *In re Coward*, L. R. 20 Eq. 179, it was held that a legacy to a married woman, unpaid before her desertion, *came* to her after her desertion.

Come to Knowledge of Counsel.—The words “*come* to the knowledge of counsel,” in a statute regulating mortgages, were held not to apply where counsel knew of it upon a former occasion. *In re Cousins*, 31 Ch. Div. 677.

Whatever Would Be Coming to Him.—In *Aultman v. Fletcher*, 110 Ala. 452, it was held that these words in a contract were equivalent to “the amount that would be due.”

Coming to Settle.—See **SETTLE**.

Come to Reside.—See **RESIDE**; **RESIDENCE**.

6. The word is used in this sense in the introduction to a plea. It is taken from the style of the entry of the proceedings on the record. It formed no part of the *viva voce* pleading, and is not considered as in strictness constituting a part of the plea. Steph. on Pldg. 431 *u.*; 1 Chitty Pldg. 411.

Comes Not—Judgment by Default. (See also **ENCYC. OF PLEADING AND PRACTICE**, title **DEFAULT**, vol. 6, p. 1.)—In *Horner v. O'Laughlin*, 29 Md. 472, it is said: “The terms in the entry of the judgment by default, that the ‘defendant being called *comes not*,’ etc., have been relied on as showing affirmatively that no appearance was ever entered in the case; but such is the form in which judgments of *nil dicit*, after appearance, have always been entered in this state. 2 Harr. Ent. 99. In such an entry the phrase ‘*comes not*’ merely imports a failure of the defendant to *come* and answer the declaration, and not that he has never appeared to the suit.”

7. *Levy v. Robertson*, 38 Fed. Rep. 715. That case was upon the construction of the term as used in the Tariff Act. See also the title **REVENUE LAWS**.

COMFORT. — The word embraces whatever is requisite to give security from want, and furnish reasonable physical, mental, and spiritual enjoyment.¹

COMITY. (See also the title PRIVATE INTERNATIONAL LAW.) — “The comity of nations” is the most appropriate phrase to express the true foundation and extent of obligation of the laws of one nation within the territories of another.²

COMMA. — See note 3.

COMMAND. — See note 4.

COMMENCE. — To “commence” is to cause to begin to be; to perform the first act of; to enter upon; to begin; to originate; to do the first act in anything; to take the first step.⁵

1. **Wills.** (See also the titles WILLS; LEGACIES AND DEVISES.) — *Forman v. Whitney*, 2 Keyes (N. Y.) 168. That case was upon the construction of a will directing that the testator's widow should be supported in *comfort*.

A testator ordered that his wife should have one room in his dwelling-house and a *comfortable* maintenance out of his real estate. It was held that this was a devise of real estate within the meaning of a statute providing that if a devise of real estate be made to a widow, whether for life or otherwise, it should bar her right to dower, unless she dissent in six months. It seems, however, that the court rested its decision rather upon the direction that the widow should have a room in the house than upon the provision for her *comfortable* maintenance. *White v. White*, 16 N. J. L. 202.

A bequest to the testator's widow of “a good and *comfortable* support and maintenance, both as to food, clothing, and nursing in health and sickness at his house,” includes a proper supply of fuel, and the necessary expenses of keeping the house in tenantable and *comfortable* condition. *Conant v. Stratton*, 107 Mass. 474.

A testator, by his will, gave to his wife during her life the income of all his estate, “to be for her *comfort* and support,” expressing a wish that she provide for an unmarried daughter, and that a “house and grounds” be kept “as a home for them.” It was held, that after the daughter's death the wife had the absolute disposal of the income during her life, and that it might be reached by her creditors. *Maynard v. Cleaves*, 149 Mass. 307.

In *In re Peacock's Trusts*, 10 Ch. Div. 490, it was held that a provision for the *comfortable* maintenance of a widow was for her separate use.

Same — Equivalent to Support. — The testator gave his wife the use and improvement of certain estate during her life, providing further that “should it be necessary for her personal *comfort* to use any portion of said property, it is my will that she do so.” It was held that the wife took only a life estate, and that the words “necessary for her *comfort*” must be held to mean, necessary for her support. The court said: “One of the definitions of *comfort*, given in Webster's Dictionary, as applied particularly in law, as well as some other things, is ‘support.’” *Peckham v. Lego*, 57 Conn. 556. See also **SUPPORT**.

2. **Story's Conflict of Laws**, § 38. See also *Holmes v. Remsen*, 20 Johns. (N. Y.) 263.

In *Bailey v. South Carolina Ins. Co.*, 1 Nott & M. (S. Car.) 543, Nott, J., said: “I understand *comity* to mean respect, or what, between individuals, would be called civility or politeness.”

In *Fisher v. Fielding*, 67 Conn. 91, the court said: “What is termed the *comity* of nations is the formal expression and ultimate result of that mutual respect accorded throughout the civilized world by the representatives of each sovereign power to those of every other, in considering the effects of their official acts. Its source is a sentiment of reciprocal regard, founded on identity of position and similarity of institutions.”

3. **Double Comma** [“]. — The use of the double comma following the name of a subscriber of articles of associations of a gravel road company, and under a certain named county and state, designated by a heading as “place of residence,” sufficiently indicates the place of residence of the subscriber to be that county and state. *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51. The court in that case said: “Finally it is objected that the articles of association do not show the residence of the subscribers thereto. The articles are subscribed as follows:

Subscribers' Names.	Place of Residence.	No. of Shares Taken.
N. R. Lindsay	Howard Co., Ind. .	10
Mathew W. Miller .	“ “ “ “ . .	5

There are other names between Lindsay's and Miller's, and also others following Miller's, but the residence of each person is indicated by the double comma, as above shown, to be in the county named. This, we think, is sufficient. The double commas, as above shown, are, by common usage, equivalent to the repetition of the words ‘Howard county, Indiana.’ This is sanctioned, not only by common usage, but by standard literary authority. *Quackenbos' Composition and Rhetoric* 152.” See to the same effect, *Steinmetz v. Versailles*, etc., *Turnpike Co.*, 57 Ind. 457.

4. In *State v. Mann*, 1 Hayw. (N. Car.) 4, it is said by Williams, J.: “The meaning of the word *command*, as applied to the case of principal and accessory, is where a person having control over another, as a master over his servant, orders a thing to be done.” See also the title **ACCESSORIES**, vol. 1, p. 257; **MASTER AND SERVANT**.

5. **Webster's and Century Dictionaries**, quoted in *State v. Hartford F. Ins. Co.*, 99 Ala. 224, in construing a statute providing that cor-

COMMERCE. (See the titles CONSTITUTIONAL LAW; INDIANS; INTER-STATE COMMERCE; NAVIGABLE WATERS; NAVIGATION; SEAMEN; SHIPS AND SHIPPING; TAXATION; TAXATION (CORPORATE).) — "Commerce," in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of

porations should pay a fee before *commencing* business in the state. The court held that the statute did not apply to a business already begun and continuing in operation; that it related only to a business thereafter to be entered upon. See also the titles FOREIGN CORPORATIONS; OCCUPATION, BUSINESS, AND PRIVILEGE TAXES.

Railroads—Street Railroads. — The charters of railroads and street railroads and the conditions upon which municipalities grant their consent to the use of their streets, or financial aid, frequently require that work should be *commenced* upon the road within a certain time. For the construction of these provisions see the titles RAILROADS; STREET RAILROADS; MUNICIPAL AID; MUNICIPAL SECURITIES.

Commencement of Risk. — As to the meaning of the term "*commencement of risk*" within a marine insurance policy, see the title MARINE INSURANCE.

Mechanics' Lien. (See also the title MECHANICS' LIEN.) — An excavation for the foundation is the *commencement* of a building within the meaning of the law. *Mutual Ben. L. Ins. Co. v. Rowand*, 26 N. J. Eq. 392; *Pennock v. Hoover*, 5 Rawle (Pa.) 291; *Brooks v. Lester*, 36 Md. 65.

In *James v. Van Horn*, 39 N. J. L. 363, it is said: "The *commencement* of a building is the doing of some act upon the ground upon which the building is to be erected, and in pursuance of a design to erect, the result of which act should make known to a person viewing the premises, from observation alone, that the erection of a building upon that lot or tract of land has been *commenced*."

Same — Materials. — Where the statute provided that a lien should accrue "from the *commencement* of such labor or the furnishing such materials," it was held that the word *commencement* qualified both phrases used to describe the constituents of the lien, to wit, "such labor" and "the furnishing such materials." *Courtney v. Insurance Co. of North America*, 49 Fed. Rep. 309, 4 U. S. App. 140.

But it has been held that all mechanics' liens for labor performed and material furnished in the construction of a building date from the *commencement* of the building, and not from the date of the first item in the account. The act of furnishing or placing on the ground some material that is afterwards used in the construction of the building is not the "*commencement* of the building." The digging for the cellar or the excavation for the foundation is the *commencement* of the building within the intention and meaning of the statute. *Kansas Mortg. Co. v. Weyerhaeuser*, 48 Kan. 335.

Commencement of Action. — See the titles ACCIDENT INSURANCE, vol. 1, p. 325; FIRE INSURANCE; LIMITATION OF ACTIONS. And see BROUGHT; INSTITUTE. See also, in the

ENCYC. OF PLEADING AND PRACTICE, the titles ACTION, vol. 1, p. 119; TROVER AND CONVERSION.

Same — Institute. (See also INSTITUTE.) — In *Com. v. Duane*, 1 Binn. (Pa.) 608, it is said: "Without entering into a critical examination of the meaning of the word 'institute,' in common parlance, when applied to legal proceedings, it signifies the *commencement* of the proceeding."

Same — Service of Process. — In *Robinson v. Orr*, 16 Ohio St. 284, the court said: "In all suits or proceedings of an adversary character, the court can acquire no jurisdiction of the case for the purposes of trial or judgment until the party defendant is brought before it. And so long as the plaintiff neglects to have process issued, or any other steps taken with a view to bringing in the defendant, and thus giving jurisdiction to the court, his action or suit cannot properly be said to have been *commenced* or to be pending." This statement of the law was quoted with approval in *Bemis v. Rogers*, 8 Neb. 151. Compare *Burton v. Buckeye Ins. Co.*, 26 Ohio St. 469, where, in speaking of a provision in a fire insurance policy, that suit should be *commenced* within a certain time after loss, the court said: "In common parlance, a suit or action would be considered as *commenced*, perhaps, when the first step is taken in court. This, under our law, is the filing of the petition. The proviso in the policy being in the nature of a penal provision, it is by no means clear to me that it should not be interpreted in that sense. If this is the true meaning of the parties, then admittedly the suit was *commenced* in time."

Same — Issuance of Writ. — In the following cases the suing out of the writ was held the *commencement* of the action. *Wilson v. Baptist Education Soc.*, 10 Barb. (N. Y.) 318; *Bronson v. Earl*, 17 Johns. (N. Y.) 65; *Hail v. Spencer*, 1 R. I. 17; *Whitaker v. Turnbull*, 18 N. J. L. 174; *Robinson v. Burleigh*, 5 N. H. 225; *Ross v. State*, 55 Ala. 177; *People v. Clark*, 33 Mich. 112; *Butts v. Turner*, 5 Bush (Ky.) 435; *Underwood v. Tatham*, 1 Ind. 276; *Georgia v. Bolton*, 11 Fed. Rep. 217; *Bisbee v. Evans*, 17 Fed. Rep. 474; *Kirby v. Jackson*, 42 Vt. 552.

The action is *commenced* as soon as the writ is issued. In *re Fawsitt*, 30 Ch. Div. 231; *Clarke v. Bradlaugh*, 8 Q. B. Div. 63.

In *Mason v. Cheney*, 47 N. H. 24, it was held that a suit is to be regarded as *commenced* when the writ is completed with the purpose of making immediate service.

The suit is deemed, for some purposes, to be *commenced* by filing the petition in the District Court. *Hargan v. Burch*, 8 Iowa 309. Strictly, it is *commenced* by the delivery of the original notice to the sheriff, or by the actual service thereof by some other person. *Reed v. Chubb*, 9 Iowa 180.

In *Pindell v. Maydwell*, 7 B. Mon. (Ky.) 314,

exchange become commodities and enter into commerce. It is in this latter and broader sense that the term is used in the Constitution of the United States in that provision which confers the regulation of commerce upon Congress. By force of this provision, the subject, the vehicle, the agent, and their various operations become the objects of commercial regulations. In its widest sense the term includes not only trade, the purchase and sale of the commodities, but includes transportation, navigation, and all commercial intercourse.¹

it is said: "In bringing a suit in chancery, the first step taken by the complainant is to file his petition or bill; and hence writers on this subject frequently speak in general terms of this act as the *commencement* of the suit. But so far as it relates to the defendant, the suing out process against him is the *commencement* of the suit; preferring the bill being only preparatory to this being done."

Same — Filing of Petition. — In *Gosline v. Thompson*, 61 Mo. 471, the filing of the petition was held to be the *commencement* of the action. See *Burton v. Buckeye Ins. Co.*, 26 Ohio St. 469, *supra*, this note.

An action is deemed *commenced* when the petition is filed. *Hargan v. Burch*, 8 Iowa 310.

The filing of a complaint in the proper court, without the issuance of summons thereon, was held the *commencement* of an action in *Primental v. San Francisco*, 21 Cal. 352.

Where the plaintiff filed a petition with the clerk, and indorsed it, "The clerk will not issue upon this until further instructed by me," it was held that the suit was not properly *commenced* until the order was given for the citation. *Maddox v. Humphries*, 30 Tex. 494.

In *Hancock v. Ritchie*, 11 Ind. 48, it was held that the mere suing out of a writ, without delivery to the officer for service, was not the *commencement* of the suit.

In *State Bank v. Bates*, 10 Ark. 120, it was held that the filing of a declaration was not sufficient process; that suit is not *commenced* without the issuance of a writ.

Same — Prosecution for Crime — Removal of Causes. (See also ENCYC. OF PLEADING AND PRACTICE, title REMOVAL OF CAUSES.) — Where a United States statute provided for the removal of certain criminal prosecutions *commenced* in any court of a state, to the Circuit Courts of the United States, it was held that within the meaning of the statute a prosecution was not *commenced* before an indictment was found. *Virginia v. Paul*, 148 U. S. 107. So in *Rawle v. Phelps*, 2 Flipp. (U. S.) 473, it was held that in this connection there is no distinction between the words "brought" and *commenced*. See also *Kaeiser v. Illinois Cent. R. Co.*, 2 McCrary (U. S.) 189; and see *BROUGHT*.

Same — Commenced before a Justice. — A statute provided that in no action or proceeding *commenced* in the court of a justice of the peace should the county be liable to pay any costs. In *Merrimon v. Henderson County*, 106 N. Car. 372, the court, in construing this statute, said: "As to those cases in which the magistrate, after investigation, binds the defendant over to court, we do not understand that the word *commenced* applies to them. Section 895 applies only to cases finally dis-

posed of before the justice, *i. e.*, either by convicting the defendant or acquitting him for want of sufficient evidence to bind over or convict. The word *commenced* applies to cases of which the justice has final jurisdiction, but which are carried by appeal to the Superior Court."

1. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1.

Other Definitions. — *Commerce* is defined as trade, traffic, intercourse. *Groves v. Slaughter*, 15 Pet. (U. S.) 511.

The word *commerce*, as used in the Constitution, includes all its ramifications, and every feature or form which it may assume *Ex p. Crandall*, 1 Nev. 312.

In *Chicago, etc., R. Co. v. Fuller*, 17 Wall. (U. S.) 568, it is said: "*Commerce* is traffic, but it is much more. It embraces also transportation by land and water, and all the means and appliances necessarily employed in carrying it on."

In *In re Greene*, 52 Fed. Rep. 113, it is said: "*Commerce* among the states, within the exclusive regulating power of Congress, 'consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities.' *Mobile County v. Kimball*, 102 U. S. 691-702; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203."

Commerce embraces all transportation, purchase, sale, and exchange of all such commodities as are transported, bought, and sold by the usage of the commercial world. *In re Christian*, cited in *Swift v. Sutphin*, 39 Fed. Rep. 637.

By the term *commerce* is meant not traffic only, but every species of commercial intercourse, every communication by land or by water, foreign and domestic, external and internal. *State v. Delaware, etc., R. Co.*, 30 N. J. L. 478.

Commerce, considered in a legal point of view, consists in the various agreements which have for their objects to facilitate the exchange of the products of the earth or industry of man, with intent to realize a profit. In a narrower sense, it signifies any reciprocal agreement between two persons, by which one delivers to the other a thing which the latter accepts, and for which he pays a consideration. It includes not only traffic but intercourse and navigation. *Crow v. State*, 14 Mo. 247.

In *State v. Morgan*, 2 S. Dak. 50, it is said that the term *commerce*, as employed in section 8 of Article I. of the Constitution of the United States, consists of intercourse and traffic, including in these terms navigation; the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.

In *Mobile County v. Kimball*, 102 U. S. 702, it is said: "*Commerce* with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." *Quoted with approval* in *O'Neil v. Vermont*, 144 U. S. 346; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 574.

And in the *Passenger Cases*, 7 How. (U. S.) 416, it is said that *commerce* consists "in selling the superfluity; in purchasing articles of necessity, as well productions as manufactures; in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight." Nor does it make any difference whether this interchange of commodities is by land or by water. *State Freight Tax Case*, 15 Wall. (U. S.) 275.

In *McGuire v. State*, 42 Ohio St. 534, it is said: "*Commerce* is 'the exchange of merchandise on a large scale between different places or communities; extended trade or traffic.' Webster's Dict. In the sense used in the Constitution, it is the transportation and exchange or traffic in articles or commodities between different states, or between the United States and foreign countries or with the Indian tribes."

In *Welton v. Missouri*, 91 U. S. 280, it is said: "*Commerce* is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities, between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states." *Quoted* in *Campbell v. Chicago, etc., R. Co.*, 86 Iowa 589.

The word *commerce* in its general sense means an interchange of goods, wares, productions, or property of any kind between nations or individuals, either by barter or by purchase and sale; trade, traffic; but the definition given in its connection, as used in the Constitution of the United States, includes intercourse and navigation. *Fuller v. Chicago, etc., R. Co.*, 31 Iowa 207.

Commerce the Equivalent of Intercourse. — In the famous case of *Gibbons v. Ogden*, 9 Wheat. (U. S.) 189, Chief Justice Marshall says: "The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. *Commerce* undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." And this definition of *commerce* as equivalent to intercourse, as used in the Constitution, has been followed by a number of cases. See *Brown v. Maryland*, 12 Wheat. (U. S.) 446; *Lord v. Goodall, etc., Steamship Co.*, 102 U. S. 544; *In re Rahrer*, 140 U. S. 556; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 337; *U. S. v. Holliday*, 3 Wall. (U. S.) 417; *Carson River Lumbering Co. v. Patter-*

son, 33 Cal. 339; *Lin Sing v. Washburn*, 20 Cal. 574; *Mitchell v. Steelman*, 8 Cal. 372; *Bagg v. Wilmington, etc., R. Co.*, 109 N. Car. 281; *State v. Foreman*, 8 Yerg. (Tenn.) 310; *Caldwell v. State, r Stew. & P. (Ala.)* 430.

Trade and Commerce Distinguished. — In *People v. Fisher*, 14 Wend. (N. Y.) 15, it is said: "The question therefore is, is a conspiracy to raise the wages of journeymen shoemakers an act injurious to trade or *commerce*? The words 'trade' and *commerce* are said by Jacob, in his Law Dictionary, not to be synonymous; that *commerce* relates to dealings with foreign nations; trade, on the contrary, means mutual traffic among ourselves, or the buying, selling, or exchange of articles between members of the same community." To the same effect, see *Hooker v. Vandewater*, 4 Den. (N. Y.) 349.

That *commerce* is broader than trade, see *TRAFFIC. State v. Foreman*, 8 Yerg. (Tenn.) 316.

Same — Restraint of Trade. (See also the titles CONSPIRACY; LABOR COMBINATIONS; STRIKES; TRADE COMBINATIONS AND CORPORATE TRUSTS; RESTRAINT OF TRADE.) — A *United States* statute declared that every conspiracy or combination in restraint of trade or *commerce* should be punishable. It was held that the word *commerce* in the statute is not synonymous with "trade," but has the meaning of the word in that clause of the Constitution which grants to Congress power to regulate interstate and foreign *commerce*. *U. S. v. Debs*, 64 Fed. Rep. 724. In that case *Woods, J.*, said: "I am unable to regard the word *commerce* in this statute, as synonymous with 'trade' as used in the common-law phrase 'restraint of trade.' In its general sense, trade comprehends every species of exchange or dealing, but its chief use is 'to denote the barter or purchase and sale of goods, wares, and merchandise, either by wholesale or retail,' and so it is used in the phrase mentioned. But *commerce* is a broader term. It is the word in that clause of the Constitution by which power is conferred on Congress 'to regulate *commerce* with foreign nations, and among the several states, and with the Indian tribes.' Const. U. S., Art. I., § 8. In a broader and more distinct exercise of that power than ever before asserted, Congress passed the enactments of 1887 and 1888, known as the 'Interstate *Commerce* Law.' The present statute is another exercise of that constitutional power, and the word *commerce*, as used in this statute, as it seems to me, need not and should not be given a meaning more restricted than it has in the Constitution. That meaning has often been defined by the Supreme Court. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 195, 197; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *The Daniel Ball*, 10 Wall. (U. S.) 557; *State Freight Tax Case*, 15 Wall. (U. S.) 232, 275; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Ex p. Siebold*, 100 U. S. 371, 395; *Mobile County v. Kimball*, 102 U. S. 691; *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 569; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 657." See also *TRADE*.

Navigation. — In *Gilman v. Philadelphia*, 3 Wall. (U. S.) 724, the court said: "*Commerce* includes navigation. The power to reg-

ulate *commerce* comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." To the same effect are *Scranton v. Wheeler*, 16 U. S. App. 192; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Lord v. Goodall*, etc., *Steamship Co.*, 102 U. S. 544.

Commerce Includes Navigation. — *Henderson v. New York*, 92 U. S. 270; *South Carolina v. Georgia*, 93 U. S. 4; *Sweatt v. Boston*, etc., *R. Co.*, 3 Cliff. (U. S.) 347; *The Daniel Ball*, 1 Brown Adm. 195; *Delaware*, etc., *Canal Co. v. Lawrence*, 2 Hun (N. Y.) 179; *Howell v. State*, 3 Gill. (Md.) 14.

Transportation of Freight. — The transportation of freight is *commerce*. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 189; *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Philadelphia*, etc., *Steamship Co. v. Pennsylvania*, 122 U. S. 326; *Fargo v. Michigan*, 121 U. S. 230; *Carton v. Illinois Cent. R. Co.*, 59 Iowa 148; *Wabash*, etc., *R. Co. v. Illinois*, 118 U. S. 557; *State v. Chicago*, etc., *R. Co.*, 40 Minn. 267.

In *Council Bluffs v. Kansas City*, etc., *R. Co.*, 45 Iowa 338, it is said: "*Commerce* is the interchange or mutual change of goods, productions, or property of any kind, between nations or individuals. Transportation is the means by which *commerce* is carried on; without transportation there could be no commerce between nations or among the states. Any regulation of the transportation of interstate *commerce*, whether it be upon the high seas, the lakes, the rivers, or upon railroads or other artificial channels of communication, affecting *commerce*, operates as a regulation of *commerce* itself. It has been so held by the Supreme Court of the United States. *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Passenger Cases*, 7 How. (U. S.) 283; *Pennsylvania v. Wheeling*, etc., *Bridge Co.*, 18 How. (U. S.) 421; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Almy v. California*, 24 How. (U. S.) 169."

In *Hannibal*, etc., *R. Co. v. Husen*, 95 U. S. 470, it is said transportation is essential to *commerce*, or rather it is *commerce* itself, and every obstacle to it, or burden laid upon it by legislative authority, is regulation.

In *State Freight Tax Case*, 15 Wall. (U. S.) 275, it is said a tax upon freight is a tax upon *commerce*.

Commerce Includes Passenger Travel. — *Fry v. State*, 63 Ind. 562; *People v. Raymond*, 34 Cal. 492.

A tax upon passengers has been held a tax upon *commerce*. *Passenger Cases*, 7 How. (U. S.) 283. *McLean, J.*, said: "*Commerce* is defined to be an exchange of commodities, but this definition does not convey the full meaning of the term. It includes navigation and intercourse." *Henderson v. New York*, 92 U. S. 259.

Same — Transportation of Persons or Property. — *Commerce* among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale,

and exchange of commodities. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596; *Morgan v. Parham*, 16 Wall. (U. S.) 471; *Southern Steamship Co. v. Portwardens*, 6 Wall. (U. S.) 31; *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Henderson v. New York*, 92 U. S. 259.

Telegraphic Communication. (See also the title TELEGRAPH AND TELEPHONE COMPANIES.) — Telegraphic communication has been held *commerce*. The court said: "What is *commerce*? '*Commerce* is intercourse,' say writers and judges. There is no need to attempt here any definition of the word 'intercourse,' nor to consider whether it was used with or without limitation; and if with limitation, what; for the Supreme Court of the United States, by one of its ablest members, has given a plain and comprehensive exposition of the term *commerce*, less general than the mere word 'intercourse' used, without qualification, but sufficient to include all the ramifications of *commerce*. Says Marshall, C. J.: 'It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.' *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1. Is telegraphy any branch of commercial intercourse? To ask the question is to answer it." *Western Union Tel. Co. v. Atlantic*, etc., *State Tel. Co.*, 5 Nev. 108. To the same effect, see *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1.

Logging. (See also the title LOGS AND LUMBER.) — A state statute forbade the driving of logs upon the Connecticut River unless bound into rafts. It was held that this was constitutional. The court said: "Neither a log nor any number of logs floating upon the surface of a stream, uncontrolled and uncontrollable, is navigation or *commerce*." *Harrigan v. Connecticut River Lumber Co.*, 129 Mass. 585.

But in *Carson River Lumbering Co. v. Patterson*, 33 Cal. 339, it was held that a toll on logs floated down a stream from one state to another was a tax on *commerce*.

Immigration. — *Commerce* includes immigration. *Bangor v. Smith*, 83 Me. 422. See also the title IMMIGRATION.

Commercial Agency. (See the title MERCANTILE AGENCY.) — In *State v. Morgan*, 2 S. Dak. 32, it was held that mercantile or commercial agencies were not such legitimate or useful instruments of *commerce* as to put them exclusively under the regulation of Congress.

Coasting Trade. — The power of Congress to regulate the coasting trade is plainly deducible from that clause of the Constitution which has granted to the national government the power to regulate *commerce* among the several states. The term *commerce* includes navigation. *Howell v. State*, 3 Gill (Md.) 14.

Railroad Agents. — A tax upon railroad agents was held a regulation of *commerce*. *McCall v. California*, 136 U. S. 104.

Commerce Distinguished from Manufactures. (See also MANUFACTURE.) — In *Kidd v. Pearson*, 128 U. S. 1, it is said: "No distinction is more popular to the common mind, or more clearly expressed in economic and political

COMMERCIAL. — See note 1.

literature, than that between manufactures and *commerce*. Manufacture is transformation — the fashioning of raw materials into a change of form for use. The functions of *commerce* are different. The buying and selling, and the transportation incidental thereto, constitute *commerce*; and the regulation of *commerce* in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term as given by this court in *Mobile County v. Kimball*, 102 U. S. 691, 702, is as follows: ‘*Commerce* with foreign countries, and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.’ If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining — in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market?’

See also *Mugler v. Kansas*, 123 U. S. 623.

Bridges. (See the title BRIDGES, vol. 4, p. 922.) — A bridge has been held an instrument of interstate *commerce*. *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 218.

Trade Mark. (See also the title TRADE MARKS.) — It seems that the regulation of trade marks does not come within the power of Congress to regulate *commerce*. *Trade Mark Cases*, 100 U. S. 82.

Notice of Arrival of Trains. — In *State v. Indiana, etc., R. Co.*, 133 Ind. 83, it is said: ‘Indeed, the communication of the information possessed by the servants of the company at one point on the line of the road to those at another point on the line cannot in itself be termed *commerce* in the strict sense of the word. *Commerce*, says Webster, is ‘the exchange or buying and selling of commodities; especially the exchange of merchandise on a large scale between different places or communities; extended trade or traffic;’ and it is defined in the Century Dictionary as ‘interchange of goods, merchandise, or property of any kind; trade; traffic; used more especially of trade on a large scale, carried on by transportation of merchandise between different countries, or between different parts of the same country, distinguished as foreign *commerce* and internal *commerce*;’ as, the *commerce* between Great Britain and the United States, or between New York and Boston; to be engaged in *commerce*.’” That case was upon the constitutionality of a statute requiring notice of the time of the arrival of trains to be posted on a blackboard at the station.

Taxation of Commercial Agents. — It has been held that the taxation of commercial agents is a regulation of *commerce*. *Webber v. Virginia*,

103 U. S. 344; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *Welton v. Missouri*, 91 U. S. 275; *Walling v. Michigan*, 116 U. S. 446; *Asher v. Texas*, 128 U. S. 129. See also the title COMMERCIAL TRAVELERS OR DRUMMERS, *post*; INTERSTATE COMMERCE; TAXATION.

1. Commercial Companies. — A railroad company has been held a *commercial* corporation within a bankruptcy act. *Sweatt v. Boston, etc., R. Co.*, 3 Cliff. (U. S.) 339.

Commercial Brokers. — Within the meaning of an internal revenue act, persons who sell goods in their own names, at their own store, on commission, and have possession of the goods as soon as the sales are made, and who deliver or send them off to their customers, are not *commercial* brokers; such brokers are those persons who, as brokers merely, negotiate sales or purchases for others, and not in their own names nor on their own account. *Slack v. Tucker*, 23 Wall. (U. S.) 321. See also FACTORS OR COMMISSION MERCHANTS.

Commercial Paper. — Bills of exchange and promissory notes are *commercial* paper in the strictest sense. *Brooklyn City, etc., R. Co. v. National Bank*, 102 U. S. 14.

Commercial paper means negotiable paper, that is, promissory notes or bills of exchange made by a banker, merchant, or trader, in the due course of his business as such banker, merchant, or trader. *In re Sykes*, 5 Biss. (U. S.) 114.

In *Newport Bank v. Cook*, 60 Ark. 288, it is said: ‘*Commercial* paper is defined to be ‘bills of exchange, promissory notes, bank checks, and other negotiable instruments for the payment of money, which by their form and on their face purport to be such instruments as are by the law merchant recognized as falling under the designation of *commercial* paper.’”

The term as used in a United States bankruptcy law has been construed in the following cases: *In re Hercules Mut. L. Assur. Soc.*, 6 Nat. Bank Reg. 338; *In re Nickodemus*, 3 Nat. Bank Reg. 230; *In re Chandler*, 1 Lowell (U. S.) 478; 4 Nat. Bank. Reg. 213; *In re Clemens*, 2 Dill. (U. S.) 533; *In re Sykes*, 5 Biss. (U. S.) 113.

Commercial Mark. (See also the title TRADE MARKS.) — In *La République Française v. Schultz*, 57 Fed. Rep. 41, it is said: ‘The question raised by this demurrer is whether the word ‘Vichy’ is a trade mark or *commercial* mark, in which case it is claimed that it can receive no protection without registration, or a *commercial* name, as to which no such obligation exists. It is not alleged in the complaint that the word ‘Vichy’ has been registered. Whether such registry is required in the case of a trade or *commercial* mark, it is unnecessary to consider. It is only necessary to inquire whether the word ‘Vichy’ is or is not a *nom commercial*, or *commercial* name. As the two terms, ‘*commercial* mark’ and ‘*commercial* name,’ used in the treaty, are translations of terms used in the civil law of France, it becomes necessary to examine their meaning in said system, in order to understand the distinction between them. The distinction between a trade mark and a *commercial*

COMMERCIAL AGENCY.—See the title *MERCANTILE AGENCY*.

COMMERCIAL AGENTS. (See also the titles *CONSULS*; *MINISTERS AND AMBASSADORS*.)—The terms “consul” and “commercial agent” are practically synonymous when applied to officers in the diplomatic service.¹

COMMERCIAL LAW. (See also the title *UNITED STATES COURTS*.)—“Commercial law” is a phrase employed to denote that branch of law which relates to the rights of property and the relations of persons engaged in commerce. Persons engaged in commercial adventure, wherever they may have their domicile, have business relations throughout the civilized world, from which it results that commercial law is less local and more international than any other system of law except the law of nations.²

cial mark is pointed out by Pouillet in his work on *Marques de Fabrique* (section 6), from which I translate as follows: ‘A trade mark is not a *commercial* mark, and it is with reason that the law mentions both. The trade mark is especially or peculiarly the mark of the manufacturer, of him who creates the product, who manufactures it. The *commercial* mark is that of the dealer, of him who, receiving the product of the manufacturer, sells it, in his turn, to the consumer.’ And again, in section 63: ‘A name of a town, or more generally a name of a locality, may, like an ancestral name, serve as a trade mark; yet here still it is on condition that the name shall be presented under a distinct, special form, always the same. It is this peculiar expression which constitutes the mark, and not the name taken separately and for itself.’ It will thus be seen that our word ‘trade mark’ comprehends both the *marque de fabrique* and *marque de commerce* of France. Browne, *Trade Marks* § 85.”

Commercial Domicil.—There may be a *commercial* domicile acquired by maintenance of a *commercial* establishment in a country, in relation to transactions connected with such establishment. *U. S. v. Chin Quong Look*, 52 Fed. Rep. 203, quoting *Bouvier's Law Dict.* See also *Lau Ow Bew v. U. S.*, 144 U. S. 47. See the titles *CHINESE EXCLUSION ACTS*, vol. 5, p. 1101; *DOMICIL*.

1. *Schunior v. Russell*, 83 Tex. 83, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 764.

2. *Brooklyn City, etc., R. Co. v. National Bank*, 102 U. S. 55, quoting *Bouvier's Law Dict.*

Commercial Law is a phrase employed to denote a branch of law which relates to the rights of property and the relations of persons engaged in commerce. *Brooklyn City, etc., R. Co. v. National Bank*, 102 (U. S.) 55.

This branch of law is a system of jurisprudence acknowledged by all maritime nations; it is a law not peculiar to one state nor dependent upon local authorities, but one arising out of the usages of the *commercial* world; and the

federal courts have held that upon questions of general *commercial law* they are not bound by the decisions of the state courts. *Brooklyn City, etc., R. Co. v. National Bank*, 102 U. S. 31.

But in *Forepaugh v. Delaware, etc., R. Co.*, 128 Pa. St. 226, it is said: “It is argued that the validity of this contract is a question of *commercial law*, and therefore the mere decisions of the New York courts are not binding.

* * * This is the main argument of the plaintiff, and as it is one which is frequently advanced, and affects a number of important questions, it is time to say plainly that it rests upon an utterly inadmissible and untenable basis. There is no such thing as a general *commercial* or general common law, separate from and irrespective of a particular state or government whose authority makes it law.

* * * It is not probable that the doctrine of such a distinction would ever have got a foothold in jurisprudence, and it would certainly have been long ago abandoned, had it not been for the unfortunate misstep that was made in the opinion in *Swift v. Tyson*, 16 Pet. (U. S.) 1. Since then the courts of the United States have persisted in the recognition of a mythical *commercial law*, and have professed to decide so-called *commercial* questions by it, in entire disregard of the law of the state where the question arose. It is argued now that as to such questions the state courts also have similar liberty. It would be sufficient answer to this argument, that such a course, by reading into a contract a new duty not in contemplation of the parties, and not part of it by the law of the place where it is made, is in principle and in practical effect impairing the obligation of the contract, which even the sovereign power of a state is prohibited from doing. But we prefer to rest the matter on the broader ground that the doctrine itself is unsound. The best professional opinion has long regarded it as indefensible on principle, and [it is] thus very recently summed up by the most learned of living jurists.”

COMMERCIAL TRAVELERS OR DRUMMERS.

BY J. BRECKINRIDGE ROBERTSON.

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CROSS-REFERENCES.

As to License Taxes, see the title OCCUPATION, BUSINESS, AND PRIVILEGE TAXES.

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As to other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles AGENCY, vol. 1, p. 930; BAGGAGE, vol. 3, p. 528; BROKERS, vol. 4, p. 959; FACTORS OR COMMISSION MERCHANTS; HAWKERS AND PEDDLERS; INTERSTATE COMMERCE; PAYMENT; SALES; USAGES AND CUSTOMS; WARRANTY.

I. DEFINITION AND DISTINCTIONS. — Commercial travelers or drummers are agents who travel for wholesale merchants and supply the retail trade with goods, or rather take orders for goods to be shipped to the retail merchants.¹

The Essential Difference Between Drummers and Peddlers seems to be that the latter deliver the goods at the time of the contract of sale, while the former merely solicit orders for future delivery.²

Salesmen Making Concurrent Sale and Delivery. — There is also a large number of traveling salesmen who are technically neither drummers nor peddlers, though often confounded with the former. They are such as have their principals' goods themselves in their possession, and make concurrent sale and delivery.³

1. Commercial Travelers Defined. — *State v. Miller*, 93 N. Car. 511, 53 Am. Rep. 469; *Singleton v. Fritsch*, 4 Lea (Tenn.) 93.

In *Emmons v. Lewistown*, 132 Ill. 380, 22 Am. St. Rep. 540, the term "drummer" is defined as "one who sells to retail dealers or others by sample."

In *Ex p. Taylor*, 58 Miss. 478, it is said that drummers "are mere solicitors of orders for others, and differ in no respect from clerks or salesmen except that they are ambulatory in their operations and do not usually carry or deliver the goods sold."

In *City of Kansas v. Collins*, 34 Kan. 434, it was held that "where an agent, such as is usually denominated a 'drummer' or 'commercial traveler,' simply exhibits samples of goods kept for sale by his principal, and takes orders from purchasers for such goods, which goods are afterwards to be delivered by the

principal to the purchasers, and payment for the goods is to be made by the purchasers to the principal on such delivery, such agent is neither a peddler nor a merchant."

2. Distinguished from Peddlers. — In *re Houston*, 47 Fed. Rep. 539; *Emmons v. Lewistown*, 132 Ill. 380, 22 Am. St. Rep. 540; *Cerro Gordo v. Rawlings*, 135 Ill. 36; *Olney v. Todd*, 47 Ill. App. 439; *City of Kansas v. Collins*, 34 Kan. 434; *Com. v. Jones*, 7 Bush (Ky.) 502; *Com. v. Farnum*, 114 Mass. 267; *State v. Hoffman*, 50 Mo. App. 585. But see *Wrought Iron Range Co. v. Johnson*, 84 Ga. 754, where it was held that under *Georgia Code*, § 1631, "every itinerant trader by sample is treated as a peddler." And see the title HAWKERS AND PEDDLERS.

3. Other Traveling Salesmen. — This class will be fully treated of elsewhere in this work. See the titles AGENCY, vol. 1, p. 930; HAWKERS AND

II. NATURE AND SCOPE OF AUTHORITY—1. In General.—The scope of a commercial traveler's authority is well defined, and, as a general rule, extends only to the soliciting of orders for goods.¹

2. Duty Towards Principal.—As with other agents, it is the duty of a commercial traveler to use all reasonable and thorough diligence to further his employer's interests.²

3. Duty of Third Persons.—Third parties dealing with him are bound, at their peril, to ascertain his real powers;³ and the mere statement of the drummer that he is authorized to do any unusual act will not be sufficient to bind his principal.⁴

Acts Within Apparent Scope of Authority.—The principal will, however, be bound by all his drummer's acts done within the apparent scope of his authority.⁵

4. Implied Power.—Like other agents of a similar character, he has implied power to do anything necessary to the successful performance of his duties,⁶ or that is authorized by the usual course of trade in his line of work.⁷

PEDDLERS; SALES; WARRANTY. See also the following cases: *Meyer v. Stone*, 46 Ark. 210, 55 Am. Rep. 577; *Harris v. Simmerman*, 81 Ill. 413; *Grover, etc., Sewing Mach. Co. v. Polhemus*, 34 Mich. 247; *Columbus Sewer Pipe Co. v. Ganser*, 58 Mich. 386, 55 Am. Rep. 697; *Sumner v. Saunders*, 51 Mo. 89; *Brooks v. Jameson*, 55 Mo. 505; *Sampson v. Singer Mfg. Co.*, 5 S. Car. 465.

1. *Ex p. Taylor*, 58 Miss. 478; *Chambers v. Short*, 79 Mo. 204.

Notice to Principal.—But it has been held that a commercial traveler's authority is sufficiently established to charge his principal with notice of what was said and done in respect to liability on a bond at the time of settlement, where he had power to make a contract in his principal's name, take payments thereon, receive a bond for its fulfilment, and settle with the other party to the contract. *Columbus Sewer Pipe Co. v. Ganser*, 58 Mich. 386, 55 Am. Rep. 697. See generally the title AGENCY, vol. I, p. 930.

2. No Violation of Duty to Take Orders for Others.—While the drummer violates his duty if he neglects to use all reasonable and thorough diligence to further the interest of his employers, it has been held that it is no violation of his duty to gratuitously take orders for a house by which he was formerly employed, the orders being unsolicited by him, and in no way prejudicial to the interest of his employers. *Geiger v. Harris*, 19 Mich. 209.

3. Third Parties Must Ascertain Extent of Authority.—*Howe Mach. Co. v. Ashley*, 60 Ala. 496; *Greenhood v. Keator*, 9 Ill. App. 183; *Clark v. Smith*, 88 Ill. 298; *Kornemann v. Monaghan*, 24 Mich. 36; *Chambers v. Short*, 79 Mo. 207.

4. Claim of Authority by Drummer.—The purchaser from a commercial agent is bound to ascertain the agent's powers, and in the absence of actual authority the agent's statement that he had authority is not binding upon the principals. The purchaser has no right to act on anything that did not proceed from the principals, either as actual authority or in some form of binding admission. *Holland v. Van Beil*, 89 Ga. 223; *Greenhood v. Keator*, 9 Ill. App. 183; *Kornemann v. Monaghan*, 24 Mich. 36; *Chambers v. Short*, 79 Mo. 207. Compare *Victor Sewing Mach. Co. v. Rheinschild*, 25 Kan. 534.

5. Apparent Scope of Authority—Arkansas.—*Keith v. Herschberg Optical Co.*, 48 Ark. 138. *Illinois.*—*Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154.

Kansas.—*Babcock v. Deford*, 14 Kan. 408. *New Jersey.*—*Law v. Stokes*, 32 N. J. L. 249, 90 Am. Dec. 655.

Texas.—*Watkins v. Morley*, 2 Tex. App. Civ. Cas., § 723.

Wisconsin.—*McKindly v. Dunham*, 55 Wis. 515, 42 Am. Dec. 740.

Conditions Within Apparent Scope of Authority.—In *Babcock v. Deford*, 14 Kan. 408, where a commercial traveler made certain unauthorized conditions at the time of sale, the court, in deciding for the defendants in a suit brought by the principal for the purchase money, used the following language: "The defendants had no personal acquaintance—no negotiations directly with plaintiff. The entire trade was made between this agent and them. They had no knowledge of the extent or limitations of his authority. If the plaintiff accepted the contract of his agent, he must accept it as a whole, and cannot accept that which suits him and reject the balance. The principal is bound by the representations of his agent; bound by the contracts he makes within the apparent scope of his authority."

A drummer made an unauthorized contract with the purchaser not to sell a similar bill of goods to any other person in the same town, under penalty of forfeiture of the purchase money. The contract was broken, and the purchaser resisted payment. It was held that payment could not be enforced, since the contract was within the scope of his apparent authority. *Watkins v. Morley*, 2 Tex. App. Civ. Cas., § 723. Compare *Taylor Mfg. Co. v. Brown*, (Tex. App. 1889) 14 S. W. Rep. 1071, where it was held that the principal would not be bound by an unauthorized agreement between the drummer and the purchaser for a discount of ten per cent. off list price.

6. Powers Implied.—*Law v. Stokes*, 32 N. J. L. 249, 90 Am. Dec. 655; *Huntley v. Mathias*, 90 N. Car. 101, 47 Am. Rep. 516; *Jackson v. National Bank*, 92 Tenn. 154; *Nicholson v. Pease*, 61 Vt. 534; *Bentley v. Doggett*, 51 Wis. 224, 37 Am. Rep. 827.

7. General Custom.—A custom, however, to bind the principal must be so general that he is necessarily presumed to have notice of it.

Exclusive Right to Sell. — Although not expressly authorized so to do, a drummer may bind his principal by a contract with the purchaser not to sell his principal's goods to any one else in the same town, and such an agreement has been held to be not in restraint of trade.¹

Warranty of Quality. — A drummer has implied authority to warrant the quality of the goods ordered.²

Hire of Horses. — Where it becomes necessary in the performance of his duties, a drummer has the implied authority to hire horses.³

5. Certain Powers Not Implied — To Receive Payment. — One of the most important questions arising in connection with commercial travelers regards the effect of a payment to the agent rather than to the principal. In case of salesmen intrusted with possession of the property to be sold, it is well settled that there is an implied authority to receive payment.⁴ But where the agent is merely a drummer, not intrusted with possession of the property — one of the *indicia* of ownership — the great preponderance of authority denies such a power,⁵ in the absence of a controlling

Thus, the drummer of a St. Louis firm collected a bill from a purchaser and failed to make return of the money. In a suit by his principal against the purchaser a general custom amongst St. Louis wholesale dealers of allowing their drummers to collect was proved, and it was held that there could be no recovery. *Meyer v. Stone*, 46 Ark. 210, 55 Am. Rep. 577.

In *Janney v. Boyd*, 30 Minn. 319, the court said: "With reference to a future trial, and to objections subsequently appearing in the settled case, we observe that a usage, to be binding simply as such, must be established, general, and uniform, as applicable to the particular business with reference to which it is sought to be set up. It must be the mode in which persons in that line do their business, so that the law will presume knowledge of it."

But a Mere Local Usage cannot bind the principal, unless it can be proved that he had notice of it. Thus the fact that in a town where goods were sold by a traveling salesman by sample there prevails a custom for the merchants to pay such salesman for the goods purchased, does not authorize or justify the payment to one — the agent of a non-resident firm — unless it is also shown that the principal had notice of such custom. *Simon v. Johnson*, 101 Ala. 368.

1. Exclusive Right to Sell — Restraint of Trade. — *Keith v. Herschberg Optical Co.*, 48 Ark. 138; *Watkins v. Morley*, 2 Tex. App. Civ. Cas., § 723.

Apparent Scope of Authority. — Where a drummer, in violation of his printed instructions, made a contract not to sell a certain class of goods to any other merchant in the town save the purchaser, who had no notice of the limitations upon his authority, it was held that the contract was binding upon the principal as being within the apparent scope of his agent's authority. *Keith v. Herschberg Optical Co.*, 48 Ark. 138.

2. Power to Warrant Quality. — *Talmage v. Bierhaue*, 103 Ind. 270. See also *Murray v. Brooks*, 41 Iowa 45; *Andrews v. Kneeland*, 6 Cow. (N. Y.) 354.

Right of Purchaser. — In *Gill v. Kaufman*, 16 Kan. 571, it was held that "a purchaser by sample always has the right to refuse to re-

ceive the goods if they fail to correspond with the sample." See the titles SALES; WARRANTY.

3. Hire of Horses. — *Huntley v. Mathias*, 90 N. Car. 101, 47 Am. Rep. 516; *Bentley v. Doggett*, 51 Wis. 224, 37 Am. Rep. 827.

In *Huntley v. Mathias*, 90 N. Car. 101, 47 Am. Rep. 516, the principal was held responsible for the injury to a horse hired by his drummer. But see *Howe Mach. Co. v. Ashley*, 60 Ala. 496. And see also *Nicholson v. Pease*, 61 Vt. 534.

4. A Commercial Agent Will Have Power to Collect when such power is either expressly or impliedly given him by his principal, as where he has possession of the goods and delivers them. See the title PAYMENT. See also the following cases:

England. — *Capel v. Thornton*, 3 C. & P. 352, 14 E. C. L. 343.

California. — *Lumley v. Corbett*, 18 Cal. 494.

Illinois. — *Harris v. Simmerman*, 81 Ill. 413; *Howe Mach. Co. v. Ballweg*, 89 Ill. 318.

Missouri. — *Sumner v. Saunders*, 51 Mo. 89; *Brooks v. Jameson*, 55 Mo. 505; *Rice v. Groffmann*, 56 Mo. 434.

New York. — *Higgins v. Moore*, 34 N. Y. 417.

Oregon. — *Du Bois v. Perkins*, 21 Oregon 189.

Pennsylvania. — *Seiple v. Irwin*, 30 Pa. St. 513.

5. Power of Drummer to Collect — *England.* — *Puttock v. Warr*, 3 H. & N. 979; *Pratt v. Willey*, 2 C. & P. 350, 12 E. C. L. 164; *Hogarth v. Wherley*, L. R. 10 C. P. 630, 14 Moak 474.

Alabama. — *Simon v. Johnson*, 101 Ala. 368, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 355.

Arkansas. — *Meyer v. Stone*, 46 Ark. 210, 55 Am. Rep. 577.

Georgia. — *Holland v. Van Beil*, 89 Ga. 223.

Illinois. — *Greenhood v. Keator*, 9 Ill. App. 183; *Abrahams v. Weiller*, 87 Ill. 179; *Clark v. Smith*, 88 Ill. 298; *Bailey v. Pardridge*, 134 Ill. 188.

Kansas. — *Kane v. Barstow*, 42 Kan. 465.

Massachusetts. — *Clough v. Whitcomb*, 105 Mass. 482; *Clark v. Murphy*, 164 Mass. 490.

Michigan. — *Kornemann v. Monaghan*, 24 Mich. 36.

usage to the contrary.¹

Ratification by Principal. — A power to collect may, however, be implied from the principal's conduct.²

Effect of Notice on Bill or Invoice. — Where a notice is printed upon a bill or invoice, that the drummer is not authorized to collect, there is some conflict of authority as to whether the purchaser will be presumed to have seen it. The better doctrine seems to be, that the question depends, in a large measure, upon the prominence given the notice,³ though it has also been held the

Minnesota. — *Janney v. Boyd*, 30 Minn. 319.

Missouri. — *Butler v. Dorman*, 68 Mo. 298, 30 Am. Rep. 795 (*Rice v. Groffmann*, 56 Mo. 434, *distinguished*); *Chambers v. Short*, 79 Mo. 204; *Keown v. Vogel*, 25 Mo. App. 35.

New Jersey. — *Law v. Stokes*, 32 N. J. L. 249, 90 Am. Dec. 655.

Pennsylvania. — *Seiple v. Irwin*, 30 Pa. St. 513. In this case the court said: "It is undeniable that an agent to whom merchandise has been intrusted, with authority to sell and deliver it, is authorized to receive the price; otherwise the fraud on the purchaser would run into cruelty. This agent's powers were not embraced in that description. He was employed only to make sales. As a check, his employers seem to have retained in their own hands the delivery of the goods and the appointment of the terms of sale. The goods in question were so delivered as to inform the defendants sufficiently of the character of the agency. When the agreement had been made for payment in six months, the contract was complete. The subsequent acceptance of cash, with a deduction of five per centum from the bill, was a new and totally unauthorized arrangement on the agent's part. In making payment the defendants took the risk of his integrity, and they must bear the loss which his unfaithfulness imposed."

A Doctrine Contrary to the Statements in the Text has been laid down in a few cases. Thus, in *Trainer v. Morison*, 78 Me. 160, 57 Am. Rep. 790, it was held that an agent who has authority to contract for the sale of chattels has authority to collect pay for them at the time, or as a part of the same transaction, in the absence of any prohibition known to the purchaser. To the same effect are *Scott v. Hopkins*, (Supreme Ct.) 2 N. Y. St. Rep. 324; *Hoskins v. Johnson*, 5 Sneed (Tenn.) 469; *Collins v. Newton*, 7 Baxt. (Tenn.) 269; *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682, *explained and qualified* in *Nicholson v. Pease*, 61 Vt. 534. See *Daylight Burner Co. v. Odlin*, 51 N. H. 56, 12 Am. Rep. 45. See also *Haughton v. Maurer*, 55 Mich. 323.

1. Usage. — In *Meyer v. Stone*, 46 Ark. 210, 55 Am. Rep. 577, it was held that the principal would be bound by a general and known usage of drummers to collect which had been recognized by the principal.

In *Janney v. Boyd*, 30 Minn. 319, it was held that, "independent of controlling usage to the contrary, the sale of goods by an agent, or the fact that he is or acts as agent to take orders for goods, does not of itself authorize him to receive payment therefor."

2. Implied Ratification. — In *Harris v. Simmerman*, 81 Ill. 413, it was held that an authority to receive the balance due on the

sale of a safe could be implied from the fact that the agent, though unauthorized so to do, had, at the time of the sale, accepted an old safe in part payment, which his principal received without protest.

3. Notice of Lack of Authority. — *Luckie v. Johnston*, 89 Ga. 321; *Trainer v. Morison*, 78 Me. 160, 57 Am. Rep. 790; *Scott v. Hopkins*, (Supreme Ct.) 2 N. Y. St. Rep. 324; *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682; *McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740. See also *Kinsman v. Kershaw*, 119 Mass. 140.

Prominence of Notice. — In *Trainer v. Morison*, 78 Me. 160, 57 Am. Rep. 790, an agent sold a bill of goods, which were duly delivered, accompanied by a bill with the words, "All bills must be paid by check to our order, or in current funds at our office," printed in red at the top. The purchaser paid the agent, who gave him a bill receipted in his principal's name by himself, having a similar notice at the top. The court said: "The defendants did not see the notice, nor, taking into consideration the care ordinarily exercised by prudent men, are they at fault for not observing it. It is not so prominent upon the bill as to become a distinctive feature of it, one that would be likely to attract attention in the hurry of business, and that ought to have been seen by the defendants. It would have been an easy matter for the plaintiff to have inclosed the bill in a letter of advice, calling the attention of the defendants to the fact that he was unwilling to intrust collections to his agent."

In *Putnam v. French*, 53 Vt. 402, 38 Am. Rep. 682, where a bill was rendered having the words "Payable at office" on it, which, however, the purchaser did not see, the court said: "In view of the obscure manner in which those words were written on the bill-head, and of the circumstances under which and the purposes for which, in other respects, that bill was sent, and of the terms of the contract as to whom and when and where payment was to be made, we do not think the defendants were guilty of such negligence in not seeing those words as to be chargeable with notice which they did not in fact have."

In *McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740, a bill was rendered the defendant, having on its face and printed under his address the words, "Agents not authorized to collect," in large, legible print in red ink, as if stamped upon it. Nevertheless, the defendant paid the plaintiff's agent. In delivering the opinion of the court, *Orton, J.*, used the following language: "If these words, so legible and prominent on the face of the bill, would not be notice, it would seem to be impossible to give a purchaser such a notice. By

"grossest negligence" not to see it.¹

Power to Barter. — Nor can a power to take other goods in payment be implied from a commercial traveler's employment, even though he may have express authority to collect.²

Power to Dispose of Samples. — Independent of original authority to do so, a drummer has no power to dispose of the samples furnished by his employer. Such a right is not within the apparent scope of his authority and cannot be implied.³

Power to Indorse. — Even though authorized to collect payment, a commercial traveler may not indorse a check payable to his principal.⁴

Hotel Bills. — Nor will his principal be responsible for a drummer's hotel bills.⁵

III. CONTRACT OF SALE — WHEN COMPLETE. — In the absence of special authority to bind his principal, the drummer can merely solicit and transmit the order, and the contract of sale does not become complete until the order is accepted by his principal.⁶

all authorities he must be presumed to have observed these words, and to have had such notice, when they were so prominent on the face of a bill of goods in his possession, and in which he alone was interested as purchaser. It might as well be said that the contents of any written or printed notice of any kind, or for any purpose, were not presumed to have been brought home to and to be known by a party on his receipt of the notice."

1. Negligence of Purchaser. — In *Law v. Stokes*, 32 N. J. L. 249, 90 Am. Dec. 655, it is said that "not to have seen the directions in the bill-head was the grossest negligence, and to permit a party to defend under the protection of his own carelessness would be to offer a premium for negligence and open the door to fraud, especially so when the party is himself bound to see to it that the person with whom he transacts business as an agent has the authority which he assumes."

2. Barter of Goods. — *Sioux City Nursery, etc., Co. v. Magnus*, 1 Colo. App. 45; *Clough v. Whitcomb*, 105 Mass. 482; *Hayes v. Colby*, 65 N. H. 192. See also *Wheeler, etc., Mfg. Co. v. Givan*, 65 Mo. 89. Compare *Billings v. Mason*, 80 Me. 496.

3. Sale of Samples. — Where a drummer sold his employer's samples and converted the proceeds to his own use, it was held that the property might be recovered back at the suit of the principals. *Savage v. Pelton*, 1 Colo. App. 148; *Kohn v. Washer*, 64 Tex. 131, 53 Am. Rep. 745; *Nicholson v. Pease*, 61 Vt. 534. But see *Bailey v. Partridge*, 134 Ill. 188, which sustains the contrary view, upon the ground, however, of an implied subsequent ratification on the part of the principals.

4. Indorsement of Checks — Liability of Bank. — It has been held that a drummer, authorized to collect accounts and to receive money or checks payable to his principal, has no implied authority to indorse his principal's name on such checks and collect them. Under such circumstances the bank will be held liable to the principal. *Jackson v. National Bank*, 92 Tenn. 154. See also *Holland v. Van Beil*, 89 Ga. 223.

5. Hotel Bills. — *Covington v. Newberger*, 99 N. Car. 523; *Nicholson v. Pease*, 61 Vt. 534.

In *Covington v. Newberger*, 99 N. Car. 523,

it was held that the principal was not responsible for the bill where the hotel-keeper had allowed the drummer to run it up from time to time for months, a custom of drummers to pay in cash being proved. See also *Sampson v. Singer Mfg. Co.*, 5 S. Car. 465.

Board of Horses. — Nor, from analogy to the case of other traveling salesmen, will the principal be responsible for the board of a horse furnished for the drummer's use. See *Grover, etc., Sewing Mach. Co. v. Polhemus*, 34 Mich. 247; *Sampson v. Singer Mfg. Co.*, 5 S. Car. 465.

6. The Contract — When Complete. — *Gill v. Kaufman*, 16 Kan. 571; *Burbank v. McDuffee*, 65 Me. 135; *Clough v. Whitcomb*, 105 Mass. 482; *Bensberg v. Harris*, 46 Mo. App. 404; *McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740. See also *Deane v. Everett*, 90 Iowa 242.

In *Gill v. Kaufman*, 16 Kan. 571, it was held that a contract made in Kansas by the drummer of an Ohio firm, was an Ohio contract.

In *Burbank v. McDuffee*, 65 Me. 135, where the drummer of a New York house, unlicensed as provided by Me. Rev. Stat. 1871, c. 44, § 1, made a sale of goods in Maine, and the payment at suit of the principal was contested on the ground that the contract was unlawful, the court held the defendants bound, since the contract was not completed until accepted, and was therefore made in New York. *Citing Sortwell v. Hughes*, 1 Curt. (U. S.) 244.

In *McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740, the court said: "But the agent did not sell the goods, or even contract to sell them. When the defendant had completed his transaction with Kilbourn, there had been no binding contract made, or any sale, absolute or conditional. The defendant could have countermanded his order at any time before the goods were shipped, and the plaintiffs could have refused to accept the order. Neither party had become bound by anything then done. The order of the defendant was a mere proposal, to be accepted or not as the plaintiffs might see fit, and he could have withdrawn it before its acceptance. The minds of the parties had not met, and there had been no mutual assent or *aggregatio mentium*."

Compare *Banks v. Everest*, 35 Kan. 687,

Cancellation of Contract. — As a corollary it follows that he has no authority to cancel the contract after his principal's acceptance.¹

IV. LIABILITY OF CARRIER FOR LOSS OF SAMPLES. — The well-settled liability of a carrier for the loss or destruction of a passenger's ordinary baggage does not extend to the samples of a drummer,² unless such knowledge of the character of the goods taken as baggage is brought home to the carrier as to imply a special contract.³

Nor Does Additional Payment on account of overweight affect the rule.⁴

COMMISSION. (See also *CHARGE*, vol. 5, p. 886. And see the titles *PUBLIC OFFICERS*; *MILITARY LAW*.) — 1. A "commission" is a warrant of office, a written authority or license granted by a person or persons duly constituted by law for the purpose to a public officer, empowering and authorizing him to execute the duties of the office to which he may be appointed.⁵

2. The term "commission" legally imports a sum allowed as compensation to a servant, factor, or agent, who manages the affairs of others, in recompense for his services.⁶

where it was held that private instructions to a drummer that he should only accept orders subject to the approval of his principal will not affect third parties dealing with him, to whom these instructions have not been made known, nor relieve his principal from liability thereon.

A Question for the Jury. — See also *Finch v. Mansfield*, 97 Mass. 89, where it was held that where the drummer of a Connecticut firm took an order for goods in Massachusetts, the question as to whether the contract of sale became complete in Massachusetts at the time of the order, or in Connecticut at the time of its acceptance, was properly to be left to the jury, being a question of fact as to the extent of the agent's authority.

The Title to the Goods Ordered vests in the purchaser, and the goods are at his risk, immediately upon shipment by the seller. *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154.

1. **Cancellation of Contract.** — In *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154, it was held that the nature of a traveling salesman's employment does not warrant the conclusion, in the absence of proof, that he is authorized to cancel his contract and receive back goods shipped to a customer which prove unsatisfactory. See also *Saladin v. Mitchell*, 45 Ill. 79; *Adrian v. Lane*, 13 S. Car. 183.

2. **Carriers' Liability.** — *Humphreys v. Perry*, 148 U. S. 627; *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460; *Southern Kansas R. Co. v. Clark*, 52 Kan. 398; *Stimson v. Connecticut River R. Co.*, 93 Mass. 83, 93 Am. Dec. 140.

For a Full Discussion of this subject, see the title *BAGGAGE*, vol. 3, p. 533.

3. **Notice to Carrier.** — *Jacobs v. Tutt*, 33 Fed. Rep. 412; *Hoeger v. Chicago*, etc., R. Co., 63 Wis. 100, 53 Am. Rep. 271, 21 Am. & Eng. R. Cas. 308.

4. **Payment for Overweight.** — *Talcott v. Wabash R. Co.*, 66 Hun (N. Y.) 456.

5. *Dew v. Judges*, 3 Hen. & M. (Va.) 43.

A *commission* is a company of persons joined in the exercise of some duty or the charge of some trust. *In re Senate Bill*, 12 Colo. 188.

The word *commission*, *ex vi termini*, imports

a written authority. *U. S. v. Reyburn*, 6 Pet. (U. S.) 365.

Commission in Lunacy. — See the title *INSANITY*.

Del Credere Commission. — See the title *DEL CREDERE COMMISSION*.

In Commission. — In *Greer's Case*, 3 Ct. of Cl. 182, an officer appointed subject to the action of an examining board was held not to be in *commission*.

Distinguished from Grant of Office. — In *State v. Dews*, R. M. Charl. (Ga.) 401, the court, *per* Nicoll, J., says: "But from the organization of the first republican government of this state, officers have been appointed by *commission* (M. & C. 9), a term which, whether regarded according to its ordinary meaning, or its legal sense, imports a delegation of authority, and is defined to be 'a delegation by warrant of an Act of Parliament, or of common law, whereby a jurisdiction, power, or authority is conferred to others.' 4 Inst. 163; *Dew v. Judges*, 3 Hen. & M. (Va.) 31, 43; *Jacobs, Commission*. And our earliest books draw a distinction between a grant of an office and a *commission*, and inform us that the former, as its name implies, is not revocable, but that the latter, which is only the delegation of an authority, is."

6. *Ralston v. Kohl*, 30 Ohio St. 98; *Woolsey v. Jones*, 84 Ala. 88; *Rogers v. Duff*, 97 Cal. 69. See also *WAGES; SALARIES*. And see generally such titles as *AGENCY*, vol. 1, p. 930; *BROKERS*; *REAL ESTATE BROKERS*; *FACTORS OR COMMISSION MERCHANTS*, etc.

Commissions are the allowance for services, trouble, labor, or responsibility in discharging the duties of a trust. *Eckert v. Lewis*, 4 Phila. (Pa.) 225.

The term *commission*, in its business as well as its legal acceptance, means a percentage on price or value. *Brennan v. Perry*, 7 Phila. (Pa.) 243.

Commission Distinguished from Discount. (See also *DISCOUNT*.) — In *Swift*, etc., Co. v. U. S., 18 Ct. of Cl. 57, the court said: "The two words, *commission* and 'discount,' are not synonymous. They are similar, but not identical. *Commission*, in its technical as well as in its

3. A "commission," *c. g.*, to take testimony, is a writ or process, issued by special order of the court, and a seal is essential to its validity.¹

COMMISSIONERS. (See the titles **BOROUGHIS**, vol. 4, p. 722; **COUNTY COMMISSIONERS**; **PUBLIC OFFICERS**; **UNITED STATES COMMISSIONERS**. As to commissioners of roads, see the titles **HIGHWAYS**; **SCHOOLS**; **TOWNS AND TOWNSHIPS**. As to public lands, see the title **PUBLIC LANDS**. As to Indian commissioners, see the title **INDIANS**. As to commissioners in chancery, see the title **REFEREES AND REFERENCES**.)—The term "commissioners" is the legal and appropriate designation of such persons as have a commission, letters patent, or other lawful warrant, to examine any matters or to execute any public office.²

COMMISSION MERCHANTS.—See the title **FACTORS OR COMMISSION MERCHANTS**.

COMMIT.—See note 3.

COMMITMENT. (For full treatment see 4 **ENCYCLOPEDIA OF PLEADING AND PRACTICE**, 566.)—"Commitment correctly describes the process by which a person is confined, under the order of a court, at any time before or after final sentence."⁴

ordinary sense, generally signifies a percentage upon the amount of money involved in the transaction; as distinguished from 'discount,' which is a percentage taken from the face value of the security or property negotiated."

Commission Distinguished from Fees. (See also **FEES**.)—In *Philadelphia v. Martin*, 125 Pa. St. 583, it is said: "Indeed, the meaning of *commissions* or 'percentage,' as established by immemorial legal usage, is so wholly different from the meaning of the word 'fees,' when used to designate compensation for legal services performed by an officer, that it is impossible to mistake the one as meaning that which is signified by the other."

Commission Business. (See also the title **FACTORS OR COMMISSION MERCHANTS**.)—A *commission* business is confined to the making of sales for others, and one partner has no authority to bind his copartner by purchase of goods to be sold in the business. *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 502. See also the title **PARTNERSHIP**.

1. *Tracy v. Suydam*, 30 Barb. (N. Y.) 115. See also the title **DEPOSITIONS**, 6 **ENCYC. OF PLEADING AND PRACTICE**, p. 479.

2. *Morris Canal, etc., Co. v. State*, 14 N. J. L. 428, citing *Jacob's Law Dict.*

Supervisor.—*Commissioner* is sometimes used as synonymous with "supervisor." *State v. Ormsby County*, 7 Nev. 397.

Master and Commissioner.—In *Mann v. Jennings*, 25 Fla. 730, the court refused to set aside a sale because the person appointed to make the sale was entitled *commissioner* instead of master.

3. **Act of Omission.**—"Committed" has been held to include an act of omission. *Holland v. Norwich*, 40 J. P. 517.

Commit Suicide. (See also the titles **ACCIDENT INSURANCE**, vol. 1, p. 284; **LIFE INSURANCE**; **SUICIDE**.)—In *Cooper v. Massachusetts Mut. L. Ins. Co.*, 102 Mass. 230, it is said: "There is no substantial difference of signification between the phrases, 'shall die by his own hand,' 'shall commit suicide,' and 'shall die by suicide.'"

In *Clift v. Schwabe*, 3 C. B. 437, 54 E. C. L.

437, Pollock, C. B., said: "The meaning of *commit* in Johnson, with reference to this use of the word, is to perpetrate, to do a fault, to be guilty of a crime." But see the opinion of Patterson, J., in the same case, showing that the term is not always used in a criminal sense.

4. *People v. Rutan*, 3 Mich. 49.

The words, *commitment*, *committed*, or *committal* "to prison," have been held not to mean "receive into prison," but to mean "when the order is made upon which a person is to be kept in prison." *Mullins v. Surrey*, 51 L. J. Q. B. 145.

In the construction of statutes the word *commit*, in the absence of qualifying words, has a technical signification. Warrants which do not direct the officers to *commit* the parties to prison, but only "to receive them into their custody and safely keep them for further examination," are not *commitments*. *Gilbert v. U. S.*, 23 Ct. of Cl. 219.

In *Lee v. Ionia County*, 68 Mich. 331, it is said: "The terms *committed* and 'discharged' are words of recognized legal meaning, and refer only to the beginning and end of the term of imprisonment." In that case it was held that a statute allowing fees for *commitments* applied only to technical *commitments*, and not to a case where the prisoner was taken out of jail and returned thereto in the course of proceedings against him.

Necessity of Adjudication.—In *Cumington v. Wareham*, 9 Cush. (Mass.) 585, it was held that the sending of a lunatic pauper to the state hospital by the overseers of the poor, without an adjudication by any court or magistrate, was nevertheless a *commitment* of the pauper, within a statute which provided that whenever an insane person should be *committed* to the state hospital in any town in which he had not a legal settlement, such town might recover from the town where he had a legal settlement.

But in *Com. v. Barker*, 133 Mass. 400, it is said: "The word *committed* is to be taken as having a technical meaning, and necessarily implies a warrant or order by a court or mag-

COMMITTEE. (See also the titles INSANITY; HABITUAL DRUNKARDS; SPENDTHRIFTS AND SPENDTHRIFT TRUSTS. And see ENCYCLOPÆDIA OF PLEADING AND PRACTICE, titles INFANTS; NEXT FRIEND.)—The term “committee” means an individual, or a body, to whom others have committed or delegated a particular duty, or who have taken on themselves to perform it, in the expectation of their act being confirmed by the body they profess to represent or act for.¹ It also denotes a person to whom a court has intrusted the charge of the person or estate, or both, of an insane person, habitual drunkard, or spendthrift.

COMMODATUM. (See also LOAN; and the title BAILMENTS, vol. 3, p. 741.)—A loan for use, called in civil law *commodatum*, is a bailment to be used by the bailee temporarily, or for a certain time, without reward. Thus, if a horse be gratuitously loaned for a journey, it is a case of *commodatum*.²

COMMODITY.—The word “commodity” has two significations. In its most comprehensive sense it means convenience, accommodation, profit, benefit, advantage, interest, commodiousness. The word is ordinarily employed in the commercial sense of any movable and tangible thing that is produced or used as the subject of barter and sale.³

istrate directing a ministerial officer to take a person to prison; and that the offense of breaking jail can only be *committed* by those properly thus described, for it is only as to them that the jail is a lawful place of confinement.”

After Sentence.—In *State v. Pearson*, 100 N. Car. 418, it is said: “The word *committed* has a technical sense in criminal procedure. It implies sent to jail or other proper prison, to be there detained and held to answer for a criminal offense preferred, or to be preferred, against the party in the course of procedure, until he shall be discharged according to law. 4 Bl. Com. 296–309; Chit. Cr. Law, 107, 108; Bouv. Law Dict., words ‘to commit, Commitment;’ Bur. Law Dict., word *Commitment*. A person is *committed* to jail by a proper tribunal to answer for a criminal offense; upon conviction, he is sentenced by the judgment of the court to be imprisoned in jail as a punishment; and when put in jail he is then in execution of the judgment.” In that case it was held that a provision of a statute in reference to prison bounds for persons *committed* for misdemeanors other than treason and felony, did not apply to one in execution, as a punishment for a criminal offense.

Commit Distinguished from Arrest.—In *French v. Bancroft*, 1 Met. (Mass.) 504, the court says: “By ‘arrest’ is to be understood, to take the party into custody. It is so used in works of authority. ‘An arrest is the beginning of imprisonment, when a man is first taken and restrained of his liberty by power or color of a lawful warrant.’ Jacob’s Law Dict., ‘Arrest.’ To *commit* was regarded as the separate and distinct act of carrying the party to prison, after having taken him into custody by force of the execution.”

1. *Reynell v. Lewis*, 15 M. & W. 529.

In *In re Scottish Petroleum Co.*, 51 L. J. Ch. 845, Kay, J., said: “I observed in the argument that, according to one’s ordinary idea of the meaning of the word, a *committee* consists of more than one; but I was not right in saying that, because that is not, *ex vi termini*, the necessary meaning of the word. *Committee* simply means a person or persons to whom anything is committed.”

2. *Gaddy v. State*, 8 Tex. App. 128.

3. **Limited Sense.**—*Queen Ins. Co. v. State*, 86 Tex. 265. And in that case it was held that the legislature used the term in the latter sense, in a statute providing against combinations in restraint of trade. It was further held that insurance was not a *commodity* within such a statute.

Same—Personal Property.—Statutes in a number of the Southern states, before the abolition of slavery, prohibited the purchase of *commodities* from slaves, and it has been held that the word in this connection included all species of personal property. *Barnett v. Powell*, Litt. Sel. Cas. (Ky.) 409, 410. In that case it was said: “The only objection which we perceive to have any plausibility in it, and which has been made to this declaration, is, that the article bought of the slave is not one included within the Act of Assembly, under the term *commodity*. The expressions of the Act are: ‘No person whatever shall buy, sell, or receive, of, to, or from any slave, any coin or *commodity* whatever, without the leave or consent of the master or owner of such slave, in writing expressive of the article so permitted to be bought or sold.’ We have no hesitation in saying that the term *commodity* is opposed to ‘coin,’ and that the two words mean the same thing which is now frequently expressed by the vulgar and popular language of ‘money’ and ‘property.’ The term *commodity* is properly used to signify almost any description of article called movable or personal estate, and in this sense it is here intended.”

In *Shuttleworth v. State*, 35 Ala. 417, it is said: “The words ‘article’ and *commodity* are used in this section, mainly, in the same sense. They at least embrace most movable things which can become the subject of commerce between white persons and slaves. A black bottle comes clearly within this definition.”

Same—Wine Roots.—In *Best v. Bauder*, 29 How. Pr. (N. Y. Supreme Ct.) 489, wine roots, or wine plants, were held to be *commodities* within an internal revenue law. The court said: “These plants, if not ‘goods,’ which I think they are, certainly are included in the

COMMODUM.—See note 1.

COMMON. (See **GENERAL**; **PUBLIC**; **ORDINARY**; **USUAL**; and the title **EASEMENTS**. And see references given in note 2.) 1. A profit which a man has in the land of another; as to feed his beasts, catch fish, dig turf, cut wood, or the like. It is chiefly of four sorts: common of pasture, of piscary, of turbary, and of estovers. It may also be either appendant, appurtenant, or in gross.³

term *commodities*; the productions of a country which become an article of sale, or, in the language of Webster in his dictionary, 'in commerce including everything movable that is bought and sold, * * * unless perhaps animals may be excepted. The word includes all the movables which are the objects of commerce.'"

Larger Sense—**Massachusetts Constitution—Taxation.** (See also the title **TAXATION**.)—The constitution of Massachusetts authorized the legislature to impose taxes upon all the inhabitants and residents within the commonwealth, and also to impose reasonable duties and excises upon any produce, goods, wares, merchandise, and *commodities* brought into or produced within the commonwealth. Under this provision it was held that bank stock might be taxed. *Portland Bank v. Apthorp*, 12 Mass. 252. In that case Parker, C. J., said: "It must have been under this general term, *commodity*, which signifies convenience, privilege, profit, and gains, as well as goods and wares, which are only its vulgar signification, that the legislature assumed the right, which has been uniformly, and without complaint, exercised for thirty years, of exacting a sum of money from attorneys and barristers at law, vendue masters, tavern-keepers, and retailers. For every man has a natural right to exercise either of these employments free of tribute, as much as a husbandman or mechanic has to use his particular calling. The money required of them is not a proportional tax; nor is it an excise or duty upon produce, goods, wares, or merchandise. It is a *commodity*, convenience, or privilege, which the legislature has, by contemporaneous construction of the constitution, assumed a right to sell at a reasonable price; and, by parity of reason, it may impose the same conditions upon every other employment or handicraft."

In *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. (U. S.) 632, it was held that a tax upon the stock of corporations was lawful. The court said: "Property taxation and excise taxation, as authorized in the constitution of the state, are perfectly distinct, and the two systems are easily distinguished from each other, if we adopt the definition of the term *commodities* as uniformly given by the courts of the state, and as universally understood by the taxpayers and assessors. If regarded as meaning goods and wares only, there would be much difficulty in the case; but if it signifies 'convenience, privilege, profit, and gains,' as uniformly held by the state court, then all difficulty vanishes, and the case is clear."

In *Gleason v. McKay*, 134 Mass. 424, it is said: "Ever since the adoption of the constitution, the legislature in its practice, and this court in its adjudications, have given a very broad and extensive meaning to this term. It

has been repeatedly held that corporate franchises enjoyed by grant from the government are *commodities*, and subject to an excise. So with corporate franchises granted by a foreign government, which by comity are permitted to be exercised within this commonwealth. So where the legislature has thought, upon considerations of public policy, that certain occupations or callings, of a public or quasi-public character, should be carried on under governmental regulation, it has been usual to impose a reasonable fee for a license." And construing this provision of the constitution, see also *Com. v. People's Five Cents Sav. Bank*, 5 Allen (Mass.) 428; *Portland Bank v. Apthorp*, 12 Mass. 252; *Com. v. Cary Imp. Co.*, 98 Mass. 19; *Connecticut Mut. L. Ins. Co. v. Com.*, 133 Mass. 161; *Com. v. Lancaster Sav. Bank*, 123 Mass. 495.

1. "*Commodum ex Injuria Sua Nemo Habere Debet.*"—This maxim means that no man shall take a benefit of his own wrong. See also the titles **EQUITY**; **FRAUD**; **SPECIFIC PERFORMANCE**, etc.

"*Cujus Est Commodum, Ejus Debet Esse Incommodum.*"—This maxim means that he who has the benefit of a thing ought also to be subject to the disadvantage of it.

See also titles **AGENCY**, vol. 1, p. 930; **ATTORNEY AND CLIENT**, vol. 3, p. 278; **MASTER AND SERVANT**; **HUSBAND AND WIFE**, etc.

2. **Common Bail.**—See the title **BAIL IN CIVIL CASES**, vol. 3, p. 590.

Common Barrator.—See the title **BARRATRY**, vol. 3, p. 859.

Common Care, Diligence.—See the title **NEG-LIGENCE**.

Common Carrier.—See the title **COMMON CARRIERS**.

Common Counts.—See **ENCYC. OF PLEADING AND PRACTICE**, title **ASSUMPSIT**, vol. 2, p. 978.

Common Gambler.—See the title **GAMING**.

Common Highway.—See the title **HIGHWAYS**.

Common Informer.—See the title **INFORMER**.

Common Inns.—See the titles **INNS AND INN-KEEPERS**.

Common Labor.—Some of the Sunday laws prohibit *common* labor upon Sunday. For a construction of this term, see the title **SUNDAY**.

Common Law.—See the title **COMMON LAW**.

Common Libeler.—See the title **LIBEL AND SLANDER**.

Common Nuisance.—See the title **NUISANCES**.

Common Property.—See the titles **COMMUNITY PROPERTY**; **JOINT TENANTS AND TENANTS IN COMMON**; **PARTNERSHIP**.

Common Prostitute.—See **PROSTITUTE**.

Common Right.—See **RIGHT**.

Common Stock.—See the title **STOCK**.

Common Thief.—See the title **LARCENY**.

Commons.—See **BOTE**, vol. 4, p. 734.

3. 2 Bl. Com. 32. *Commons* are little known in the United States, though there are some

2. A "common" is a piece of ground left open for common or public use, for the convenience and accommodation of the inhabitants of the town.¹

regulations and decisions on the subject. 1 Bouv. Inst. 1644. There are a few instances in this country of true *commons*, where the right to the profits of certain public or proprietary land was vested in the inhabitants of a certain town or city. The law on the subject of these rights will be found under the title PROFITS À PRENDRE.

A *common* is a right or privilege which several persons have to the produce of the lands or waters of another. *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 648.

Right of Common is an incorporeal hereditament, "being a profit which one man hath in the land of another, as to feed his beasts, take fish, dig turf, cut wood, or the like." *Smith v. Floyd*, 18 Barb. (N. Y.) 527.

Common of Estovers. (See also ESTOVERS; LANDLORD AND TENANT.)—*Common* of estovers is the right a tenant has of taking necessary wood and timber from the woods of the lord for fuel, fencing, etc. *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 649.

Common of Pasture.—*Common* of pasture is a right of feeding the beasts of one person on the lands of another. *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 649.

Common of Turbary. (See also TURBARY.)—*Common* of turbary is the right which tenants have to cut turf on the lands of the landlord. *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 649.

Common of Piscary is the right which tenants have to take fish in the waters of their landlord. *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 649. See also the title FISH AND FISH-ERIES.

Common Appendant. (See also APPENDANT, vol. 2, p. 430.)—*Common* appendant is a right belonging to the owners or occupants of arable lands. *Smith v. Floyd*, 18 Barb. (N. Y.) 527.

Common Appurtenant. (See also APPURTENANT, vol. 2, p. 520.)—*Common* appurtenant is annexed to lands in other manors. *Smith v. Floyd*, 18 Barb. (N. Y.) 527.

Common in Gross. (See also GROSS.)—*Common* in gross, or at large, is neither appurtenant nor appendant, but is annexed to the person, and is granted by deed or claimed by prescriptive right. *Smith v. Floyd*, 18 Barb. (N. Y.) 527.

Common of Shack.—*Common* of shack is a right of persons occupying arable land lying together, and unclosed, to turn out their cattle to feed *promiscuè* in the open field. *Cheesman v. Hardham*, 1 B. & Ald. 710; *Corbet's Case*, 7 Coke 5.

1. *Cincinnati v. White*, 6 Pet. (U. S.) 431; *Newport v. Taylor*, 16 B. Mon. (Ky.) 699; *Goode v. St. Louis*, 113 Mo. 257; *Cummings v. St. Louis*, 90 Mo. 259. See also *Crawford v. Mobile*, etc., R. Co., 67 Ga. 405; *Bath v. Boyd*, 1 Ired. L. (N. Car.) 194; *Scott v. Des Moines*, 64 Iowa 438; *State v. McReynolds*, 61 Mo. 203.

In *White v. Smith*, 37 Mich. 291, *common* was said to be land in a town or city, belonging or dedicated to the public.

Proper Uses. (See also the titles DEDICATION; PARKS AND PUBLIC SQUARES.)—Where land

had been given to a town for a *common*, and the testator left money for the embellishment of the *common*, and at the time of the testator's death a part of the land in question was occupied by a schoolhouse, it was held that the testator did not intend to condition his bequest upon the removal of all structures from the *common*. The court said: "The acceptance of the Whitcomb bequest by the town did not change the meaning of his will, nor limit or impair the town's rights under the Hosley grant. When Whitcomb made his will, and up to the time of his death, a portion of the *common*, selected by the commissioners in 1890 as a location of the proposed schoolhouse lot, was occupied by the old schoolhouse. He was familiar with the *common*, and the way in which it was and had been used and occupied, and undoubtedly he was also familiar with the terms of the Hosley grant. The Whitcomb legacy was 'for the reclamation and embellishment of the *common*, so called.' Did the testator mean by the word *common* a lawn or park not occupied by buildings, or did he mean the *common* to be used as it had been legally used? The presumption is that he used the word *common* and the words 'reclamation' and 'embellishment' in senses consistent with the legal public uses which the town can make of the common under the Hosley grant, and that he did not intend or attempt to impair or restrict the legal uses of the land under the grant." *Newell v. Hancock*, (N. H. 1892) 35 Atl. Rep. 254.

In *Newport v. Taylor*, 16 B. Mon. (Ky.) 699, it was held that the dedication of land by a proprietor of lands laid out as a town on a navigable river, to be a *common*, conferred the right on the public authorities of the town to build wharves and charge wharfage. The court said: "The second plat, and the statute founded on and referring to it, calls [the slip] a *common*, or an esplanade, to remain a *common* forever. Was the esplanade to be a *common* of pasture, a *common* of piscary, or a *common* of turbary? Was the esplanade, one half of which, or more, was the sterile shore and bank of the river, dedicated forever to this restricted use of a town situated on the bank of a noble river, and seeking and expecting the advantages of that situation? And was not the word *common* understood, and to be understood, not in its technical sense, as being a right or profit which one man may have in the land of another, but in its popular sense, as 'a piece of ground left open for *common* and public use, for the convenience and accommodation of the inhabitants of the town?' * * * We are of opinion that the dedication of the slip of ground in question, as a *common*, by the plat of 1795, and by the Act establishing the town, was a dedication of it as public ground, for the convenience and accommodation of the town and the public, and for such appropriate uses, exclusive of the ferry right in Taylor, and not inconsistent with it, as are to be implied in the dedication of a narrow slip of open ground between the lots and a navigable river, which include the right of

3. "Common" means belonging equally to more than one or to many indefinitely; belonging to the public; general; universal; public; ordinary.¹

constructing wharves and charging wharfage, which has never before been in contest between these parties."

Same — Distinguished from Park. — The owners of certain land, in platting it as a city, dedicated a strip "to be and remain a *common* forever." They brought an action against the city for a misuser of this strip, contending that by *common* was meant a park. It was shown that the strip in question was used by the public for the exchange of merchandise and that the only permanent structure was a transfer, railway track. It was held that this was not a misappropriation of land, and that *common* was not synonymous with "park." *Goode v. St. Louis*, 113 Mo. 257.

Town and City Plat. — A statute provided that whenever the proprietor of land should lay out a city, town, or village, he should have made a map, setting forth all parcels of ground reserved for public purposes, and whether such parcels were intended "for avenues, streets, lanes, *commons*." The court said: "It is shown by this section that by the word *commons* as used in both this Act and the Act previously referred to, [are] meant lands included in or belonging to a town, set apart for public use, and in fact the natural import of the word when used in connection with or with reference to towns and villages is public grounds belonging to or appurtenant to the town or village. The word *commons*, as used in the statute, was certainly never meant to include the farms and farming lands of individuals who happened to reside and own lands in the vicinity of a town or village. It, I think, follows that the County Court, under the Act of the legislature first referred to, only had power to incorporate towns and villages as laid out and surveyed into lots, streets, alleys, or other public grounds and commons belonging thereto, as laid out and designated for public uses, and that any attempt by the county court to incorporate the farming lands of the country, even in the vicinity of a town, would be wholly without authority and inoperative." *State v. McReynolds*, 61 Mo. 210.

Massachusetts. — In many cities and towns of Massachusetts there were set apart at their foundation tracts of land for the general use of the inhabitants, which were variously called *commons*, "common lands," "general fields," the title to which was a joint one in the inhabitants or proprietors. *Rogers v. Goodwin*, 2 Mass. 475; *Mansfield v. Hawkes*, 14 Mass. 440; *Folger v. Mitchell*, 3 Pick. (Mass.) 396.

French and Spanish Villages. (See also the title *SPANISH LAND GRANTS*.) — The term is also applied to the common fields of the French and Spanish villages of the Louisiana Territory. The inhabitants of Upper Louisiana resided in villages almost exclusively and cultivated *common* fields, inclosed by only one fence; each person who cultivated the soil having assigned to him by the syndic of the town a certain portion of land to cultivate. These *common* fields were confirmed to the villages by Act of Congress June 13, 1812. See, in reference to them, *Mackay v. Dillon*, 7 Mo. 7;

Swartz v. Page, 13 Mo. 603; *Robbins v. Eckler*, 36 Mo. 494; *Harrison v. Page*, 16 Mo. 182; *State v. McReynolds*, 61 Mo. 210; *Fine v. St. Louis Public Schools*, 39 Mo. 59; *Vasquez v. Ewing*, 42 Mo. 247; *Chouteau v. Eckhart*, 2 How. (U. S.) 344; *Mackay v. Dillon*, 4 How. (U. S.) 421; *Carondelet v. St. Louis*, 1 Black (U. S.) 179; *Glasgow v. Hortiz*, 1 Black (U. S.) 595; *Dent v. Emmeger*, 14 Wall. (U. S.) 308; *Lavalle v. Strobel*, 89 Ill. 370; *Haps v. Hewitt*, 97 Ill. 498.

1. *Aymette v. State*, 2 Humph. (Tenn.) 158, the court in that case was construing that provision of the Constitution of *Tennessee* which guarantees the right to keep and bear arms for *common* defense. See also *CARRYING WEAPONS*, vol. 5, p. 729.

Held in Common. — A thing is said to be held in *common* when there are more owners than one. *Chambers v. Harrington*, 111 U. S. 350.

Common in the Sense of General. (See also *GENERAL*.) — *Common* is frequently used as equivalent to "general." *Koen v. State*, 35 Neb. 678; *Kirkendall v. Omaha*, 39 Neb. 6.

In the Sense of Ordinary. (See also *ORDINARY*.) — In *Richmond, etc., R. Co. v. Howard*, 79 Ga. 44, it was held that the terms *common* and "ordinary" were equivalents, and that it was not error to use them interchangeably in an instruction upon ordinary care. See also *O'Donnell v. Sweeney*, 5 Ala. 470.

Common Employment. (See the title *FELLOW-SERVANTS*.) — By *common* employment it is meant that the work upon which the servants are engaged is of the same general character. *Johnson v. Armour*, 18 Fed. Rep. 492.

Common Inclosure. (See also the title *FENCES*.) — Section 984, *Mississippi Code of 1880*, which provides that "every owner of cattle, horses," etc., "shall be liable for all injuries and trespasses committed by such animals running at large in a common inclosure, within which more than one person is cultivating land, without the consent of all such persons," does not require a lawful fence for the *common* inclosure, but gives the right of action in the state of case mentioned, without regard to the character of the *common* fence. The court said: "The *common* inclosure is not required to be a lawful fence. No matter how defective or ineffectual it may be as against stock from without, stock are prohibited from running at large in a *common* inclosure, within which more than one person is cultivating land, without the consent of all such persons." *Montgomery v. Handy*, 63 Miss. 46.

Common Inn. (See also the title *INNS AND INNKEEPERS*.) — A *common* inn is defined to be a house for the entertainment of travelers and passengers, in which lodgings and necessities are provided for them and for their horses and attendants. *Cromwell v. Stephens*, 2 Daly (N. Y.) 21.

Common Control. — A statute provided that its provisions should apply to any *common* carrier or carriers engaged in transportation wholly by railroad or partly by railroad and partly by water, when both are used under a *common* control. The court said: "To make

these carriers subject to the Act, the railway and vessel must, as therein provided, be operated or used under a *common* control—a control to which each is alike subject, and by which rates are prescribed and bills of lading given for the carriage of goods over both routes as one." *Ex p. Koehler*, 30 Fed. Rep. 870. See also the title INTERSTATE COMMERCE.

Common Sewer.—A sewer laid by a city, not only to carry off sewage from the streets and houses, but also to divert the waters of a brook, is a *common* sewer within the provisions of a charter authorizing the city to lay such. *Bennett v. New Bedford*, 110 Mass. 434. See also the title DRAINS AND SEWERS.

The Words "Common Proceeding," in an act defining a civil action as "a *common* proceeding in a court of justice by one party against another for the enforcement or protection of a private right, or the redress or prevention of a private wrong," means "that kind of proceeding which is instituted and conducted in a manner common to other civil actions." *Brown v. Crego*, 29 Iowa 323.

Common Tools of a debtor, which are by statute exempt from levy and sale on execution, do not include a lawyer's library. *Lenoir v. Weeks*, 20 Ga. 596. See the title EXEMPTION FROM TAXATION.

Common Sense.—After instructing a jury, in a criminal case, that they are judges of the law as well as the facts, it is error to instruct them that *common* sense is their best guide, without limiting its application to the value and weight of evidence. *Wright v. State*, 69 Ind. 163, 35 Am. Rep. 212.

Common Currency. (See also CURRENCY, and the title MONEY.)—A note payable in *common* currency in Arkansas was held a note payable in Arkansas Bank money. *Dillard v. Evans*, 4 Ark. 175.

Common Usage. (See also ENCYC. OF PLEADING AND PRACTICE, vol. 6, p. 612, title DEPOSITIONS.)—Section 866 of the Revised Statutes of the United States authorized a *dedimus potestatem* to take depositions according to *common* usage; it was held that the words "*common* usage," as used in said section, referred to the usage prevailing in the courts of the state in which the federal court might be sitting. *U. S. v. Cameron*, 5 McCrary (U. S.) 94.

Common School. (See also the titles EDUCATION; SCHOOLS.)—A *common* school is a public school; a free school; one not confined to a class, but open to all in a certain locality. *Le Couteux v. Buffalo*, 33 N. Y. 333; *Jenkins v. Andover*, 103 Mass. 94; *Roach v. St. Louis Public Schools*, 7 Mo. App. 567.

The phrase "*common* schools" and "public schools" are synonymous. *Merrick v. Amherst*, 12 Allen (Mass.) 508.

Same—Studies.—*Common* in this connection is said to have no reference to the studies to be taught. *Roach v. St. Louis Public Schools*, 7 Mo. App. 567. On the other hand, it is held that "*common* school" has a well-settled signification, and is never applied to higher seminaries of learning such as incorporated academies and colleges. *Merrick v. Amherst*, 12 Allen (Mass.) 508. In *Powell v. Board of Education*, 97 Ill. 378, it is said: "Without being able to give any accurate definition of a '*common* school,' it is safe to say that common under-

standing is, it is a school that begins with the rudimental elements of an education, whatever else it may embrace, as contradistinguished from academies or universities devoted exclusively to teaching advanced pupils in the classics, and in all the higher branches of study usually included in the curriculum of the colleges." The words are used with this meaning in the expression "*common*-school education."

Same—Denominational School.—In *People v. Board of Education*, 13 Barb. (N. Y.) 400, it was held that a denominational school was not a *common* school. The court said: "The word *common*, as applied to our schools, bears the broadest and most comprehensive signification. It is equivalent to public, universal, open to all; for such is their character, subject only to such general statutory regulations as are prescribed by the legislature. They are *common* to all children, in the sense that public highways are *common* to all persons who may choose to ride or drive thereon, observing only the law of the road. Thus have they been treated by the legislature in the various enactments on the subject. They have always been kept distinct from academies, colleges, and private seminaries of learning; and especially have they been kept and ought they to be kept free from everything savoring of sectarian influence or control."

Common Form. (See the title PROBATE.)—The proof of a will is said to be in *common* form when the executor presents the will for probate in the absence of the parties in interest, and without citing them, and proceeds, *ex parte*, with his proof; and it is said to be in solemn form when the parties in interest are cited to be present at the probation or approbation of the will. *Straub's Case*, 49 N. J. Eq. 264.

Common Pleas.—By *common* pleas are generally understood such actions as are brought by private persons against private persons, or by the government where the cause of action is of a civil nature. *Dallett v. Feltus*, 7 Phila. (Pa.) 628, in which case it was held that the term "courts of common pleas" was not confined to courts of that name, but included courts of *nisi prius* and district courts.

Common Recovery.—A *common* recovery is a conveyance of record invented to give a tenant in tail an absolute power to dispose of his estate as if he were a tenant in fee. *Lyle v. Richards*, 9 S. & R. (Pa.) 364. See the titles ESTATES; REAL PROPERTY. And see RECOVERY.

Common Assurances.—In 2 Bl. Com. 294, it is said: "A translation or transfer of property being thus admitted by law, it became necessary that this transfer should be properly evidenced, in order to prevent disputes, either about the fact, as whether there was any transfer at all; or concerning the persons, by whom and to whom it was transferred; or with regard to the subject-matter, as what the thing transferred consisted of; or, lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made. The legal evidences of this translation of property are called the *common* assurances of the kingdom; whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or

4. "Common" means frequent, customary, habitual.¹

removed. These *common* assurances are of four kinds: 1. By matter *in pais*, or deed; which is an assurance transacted between two or more private persons *in pais*, in the country; that is (according to the old common law), upon the very spot to be transferred. 2. By matter of record, or an assurance transacted only in the king's public courts of record. 3. By special custom, obtaining in some particular places, and relating only to some particular species of property. Which three are such as take effect during the life of the party conveying or assuring. 4. The fourth takes no effect till after his death; and that is by devise contained in his last will and testament." See also *State v. Farrand*, 8 N. J. L. 335. See the titles **DEEDS; RECORDS; RECORDING ACTS; REAL PROPERTY; USAGES AND CUSTOMS; WILLS.**

In the Sense of Open. (See also the title **TRADE MARK.**)—In *Burland v. Broxburn Oil Co.*, 42 Ch. Div. 274, a trade mark Act provided that in case of an application for registration of a trade mark not used before, in addition to the trade mark, any distinctive word or combination of words, though the same is *common* to the trade, might be registered; it was held that the words "*common* to the trade" must be interpreted to mean "open to the trade," and not limited to the sense "publicly used by more than three persons," given in a subsequent section of the same Act. See *In re Wragg's Trade-Mark*, 29 Ch. Div. 551.

1. *State v. O'Conner*, 49 Me. 598.

The word is used in this sense, in such phrases as "*common* barrator," "*common* drunkard," "*common* gambler," "*common* seller of intoxicating liquors," etc., as to which see the references given in this note and in the first note to this title.

Common Thief. (See also the title **LARCENY.**)—A common thief is one who has been repeatedly convicted of larceny. What shall constitute one a common thief is defined in some states by statute. In *Massachusetts* it is "every person who shall be convicted at the same term of three distinct larcenies." *Haggett v. Com.*, 3 Met. (Mass.) 457; *Com. v. Hope*, 22 Pick. (Mass.) 1. A similar meaning is given to "*common* utterer of counterfeit coin." *Murray v. Com.*, 13 Met. (Mass.) 516; 4 Bl. Com. 100. In *Maryland* the term "*common* thief" has a meaning similar to the other parallel terms enumerated above. A former conviction is not necessary to constitute this offense; the Act only requires that the person shall be habitually and by practice a thief. *World v. State*, 50 Md. 49.

A "Common Gaming Table" was held to mean a public gaming table, in *U. S. v. Smith*, 4 Cranch (C. C.) 635. See also the title **GAMING.**

In *Jenks v. Turpin*, 13 Q. B. Div. 505, a *common* gaming house, it is said, is a house in which a large number of persons are invited, whether publicly or privately, habitually, to congregate for the purpose of gaming.

Common Seller. (See also the title **INTOXICATING LIQUORS.**)—In *State v. Nutt*, 28 Vt. 602, the court said: "The offense of a *common* seller consists in a frequent repetition of the act of selling without authority; and upon *common* principles, there must be such a continuation or rather repetition of unlawful sales as would prove the allegation in the complaint of being a common seller. The eighteenth section of the Act of 1852, however, provides that any number of sales, exceeding five, may subject a person to be adjudged 'a *common* seller.' The offense of being 'a *common* seller' is but one, and is an entire offense; and it may be necessary to prove all of the several and distinct acts of sale which the party has been guilty of, to make out the offense, or a less number may suffice; but we think if a respondent is charged with being 'a *common* seller,' and is convicted and sentenced for that offense, it must be a conclusive bar, up to the time the complaint is made, to any prosecution grounded upon any one act of sale prior to that time, whether it was proved or attempted to be proved on the trial or not. The several sales are constituent parts of one offense, and one, too, of a different character, when measured by the penalty, from that of a single act of sale." It was accordingly held that a conviction as a *common* seller was a bar to a prosecution for single acts, previous to the filing of the complaint on which the defendant was convicted.

Three distinct sales of spirituous liquors are necessary to constitute a *common* seller, under the *Massachusetts* statute. *Com. v. Tubbs*, 1 Cush. (Mass.) 2.

But in *State v. O'Conner*, 49 Me. 598, it was held that no particular number of sales were necessary to be proved to constitute a *common* seller; but that the jury must be satisfied that the selling intoxicating liquors was a *common* and ordinary business of the defendant, and they might so find without the proof of any particular number of sales.

Common Scold. (See also the title **NUISANCES;** and see 4 **ENCYCLOPEDIA OF PLEADING AND PRACTICE**, p. 585.)—In a legal sense a *common* scold is a troublesome and angry woman, who by brawling and wrangling amongst her neighbors breaks the public peace, increases discord, and becomes a public nuisance to the neighborhood. A *common* scold is indictable at common law, and punished by the ducking stool. *U. S. v. Royall*, 3 Cranch (C. C.) 618.

Common Drunkard. (See also the titles **HABITUAL DRUNKARD; INTOXICATION AS A DEFENSE TO CRIME; INTOXICATION AS A DEFENSE TO CONTRACTS.**)—The two phrases "*habitual* drunkard" and "*common* drunkard" have been held synonymous. *Atty.-Gen. v. Savage*, 89 Ala. 9. See also *Com. v. Boon*, 2 Gray (Mass.) 74; *Com. v. Whitney*, 5 Gray (Mass.) 85; *Com. v. McNamee*, 112 Mass. 286.

COMMON CARRIERS.

BY H. DENT MINOR.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *CARRIERS*, 3 *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, p. 812.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ACT OF GOD*, vol. 1, p. 584; *BAGGAGE*, vol. 3, p. 528; *CARRIERS OF GOODS*, vol. 5, p. 154; *CARRIERS OF LIVE STOCK*, vol. 5, p. 427; *CARRIERS OF PASSENGERS*, vol. 5, p. 474; *CONNECTING CARRIERS*; *CONTRACTS OF AFFREIGHTMENT AND CHARTER PARTIES*; *RAILROADS*; *SHIPS AND SHIPPING*.

I. DEFINITION. — According to the generally accepted definition, a common carrier is one who undertakes, for hire or reward, to transport from place to place the goods of those who choose to employ him.¹

1. Common Carrier Defined.—Parker, C. J., in *Dwight v. Brewster*, 1 Pick. (Mass.) 50, 11 Am. Dec. 133. This definition is also found in *Nugent v. Smith*, 1 C. P. Div. 26; *The Propeller Niagara v. Cordes*, 21 How. (U. S.) 22; *Babcock v. Herbert*, 3 Ala. 392, 37 Am. Dec. 695; *Central R., etc., Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334, 23 Am. & Eng. R. Cas. 720; *Schloss v. Wood*, 11 Colo. 290; *Bennett v. Filyaw*, 1 Fla. 453; *Robertson v. Kennedy*, 2 Dana (Ky.) 430, 26 Am. Dec. 466; *Shelden v. Robison*, 7 N. H. 163, 26 Am. Dec. 726; *Elkins v. Boston, etc., R. Co.*, 23 N. H. 275; *Alexander v. Greene*, 7 Hill (N. Y.) 541; *Blanchard v. Isaacs*, 3 Barb. (N. Y.) 388; *Fuller v. Bradley*, 25 Pa. St. 120; *Littlejohn v. Jones*, 2 McMull. L. (S. Car.) 365, 39 Am. Dec. 132; *Chevallier v. Straham*, 2 Tex. 118, 47 Am. Dec. 639; *Doty v. Strong*, 1 Pin. (Wis.) 324, *Burn. (Wis.)* 158, 40 Am. Dec. 773; *Story on Bailments*, § 495; *Smith's Mercantile Law* (Pomeroy's ed.), § 356; 1 *Smith's Lead. Cas.* (8th Am. ed.) 392.

To the elements of the definition contained in the text Mr. Hutchinson adds the proviso that the goods are of the kind which the carrier professes to transport, and that the person applying for carriage consents to the lawful terms prescribed by the carrier. *Hutchinson on Carriers* (2d ed.), § 47.

The employment may be limited to the mere carriage of particular kinds of property and goods; and when this is so, and the fact is known and avowed, the carriers will not be liable as common carriers for any other goods or property intrusted to their agents without their consent. *Per Story, J.*, in *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story (U. S.) 33. See also *Sanford v. American Dist. Tel. Co.*, 13 Misc. Rep. (N. Y. C. Pl.) 88.

Persons holding themselves out to the world as common carriers are bound to act as such in respect to such goods as they profess to carry and have accommodation to carry, on

such goods being tendered to them to be carried, and on a reasonable tender of proper remuneration, without subjecting the person tendering them to any unreasonable conditions. *Garton v. Bristol, etc., R. Co.*, 1 B. & S. 112, 101 E. C. L. 112, *per Cockburn, C. J.*

Any man undertaking for hire to carry the goods of all persons indifferently is a common carrier. *Gisbourn v. Hurst*, 1 Salk. 249. *Approved by Gibson, C. J.*, in *Gordon v. Hutchinson*, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464. See also *Mershon v. Hobensack*, 22 N. J. L. 377; *Verner v. Sweitzer*, 32 Pa. St. 208.

In *The Neaffie*, 1 Abb. (U. S.) 467, Woods, J., afterwards associate justice of the United States Supreme Court, after quoting the definition given in the text, said: "This definition is very broad, and in its application to facts is subject to certain limitations. A better and more precise definition is, 'One who offers to carry goods for any person between certain termini or on a certain route, and who is bound to carry for all who tender him goods and the price of carriage.'" The definition here approved is that given in 1 *Parsons on Shipping*, 245, quoted in *Nugent v. Smith*, 1 C. P. Div. 427, with the addition of the clause "and who is bound," etc.

A common carrier is one who undertakes and exercises as a public employment the transportation or carriage of goods, for persons generally, from place to place, whether by land or by water, and to deliver them at the place appointed, for hire or reward and with or without a special agreement as to price. *McHenry v. Philadelphia, etc., R. Co.*, 4 Harr. (Del.) 448.

A common carrier is one who plies between certain termini and openly professes to carry for hire the goods of all such persons as may choose to employ him. He may profess to carry all descriptions of goods, or particular descriptions only. *Redman's Law of Railway Carriers*, (2d ed. 1880) 1.

A Common Carrier of Passengers is one who undertakes for hire to carry persons who may apply for passage, so long as there is room and there is no legal excuse for refusing.¹ It has been said that a person who conveys passengers only is not a common carrier,² but by this is meant only that a carrier of passengers is not, like a common carrier of goods, responsible at all events, except for losses resulting from act of God or the public enemy.³

II. OTHER CLASSES OF CARRIERS CONSIDERED AND DISTINGUISHED — 1. Car-

Statutory Definitions. — Any person undertaking to transport goods to another place for a compensation is a carrier. One who pursues the business constantly or continuously for any period of time, or any distance of transportation, is a common carrier. 2 Ga. Code 1895, §§ 2263, 2264.

Every one who offers to the public to carry persons, property, or messages, except only telegraph messages, is a common carrier of whatever he thus offers to carry. Cal. Civ. Code 1886, § 2168.

Habitual Employment. — A common carrier is one who undertakes to transport from place to place, for hire, the goods of such persons as think fit to employ him. The business of carrying must be habitual and not casual. An occasional undertaking to carry goods will not make a person a common carrier. *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393, approved in *Nugent v. Smith*, 1 C. P. Div. 27. To the same effect are *Samms v. Stewart*, 20 Ohio 69, 55 Am. Dec. 445; *Story on Bailments*, § 495; 2 Kent's Com. *597.

A contrary conclusion, however, is reached in *Gordon v. Hutchinson*, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464, where it is held that a wagoner who carries goods for hire thereby contracts the responsibility of a common carrier, whether transportation be his principal and direct business or an occasional and incidental employment.

And the rule has been laid down that one who undertakes, for a reward, to carry produce or goods of any sort from one place to another, becomes thereby liable as a common carrier. *Craig v. Childress, Peck*, (Tenn.) 270, 14 Am. Dec. 751; *Turney v. Wilson*, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515; *Moses v. Norris*, 4 N. H. 306.

In Texas it has been held that the distinctive characteristic of a common carrier is that he transports goods for hire for the public generally, and it is immaterial whether this is his usual or occasional occupation, his principal or subordinate pursuit. *Chevallier v. Straham*, 2 Tex. 119, 47 Am. Dec. 639; *Haynie v. Baylor*, 18 Tex. 498.

Holding Out as Criterion. — If a person holds himself out to carry goods for every one as a business, he is a common carrier. The criterion is, whether he carries for particular persons only or whether he carries for every one. If he holds himself out as ready to carry for every one who asks his services, he is a common carrier, but if he carries for particular persons only, that is a mere matter of special contract. *Ingate v. Christie*, 3 C. & K. 61.

Whether Duty to Carry a Criterion. — In *Fish v. Chapman*, 2 Ga. 353, 46 Am. Dec. 393, it is said that the liability to an action for a refusal

to carry is perhaps the safest criterion of the character of the carrier. See also *Fish v. Clark*, 49 N. Y. 122.

In the case of *Piedmont Mfg. Co. v. Columbia, etc.*, R. Co., 19 S. Car. 353, 16 Am. & Eng. R. Cas. 194, *Simpson, C. J.*, speaking for the court, said: "The true test of the character of a party, as to the fact whether he is a common carrier or not, is his legal duty and obligation with reference to transportation. Is it optional with him whether he will or will not carry? or must he carry for all? If it is his legal duty to carry for all alike who comply with the terms as to freight, etc., then he is a common carrier, and is subject to all those stringent rules which for wise ends have long since been adopted and uniformly enforced, both in England and in all the states, upon common carriers. If, on the contrary, he may carry or not, as he deems best, he is but a private individual, and is invested, like all other private persons, with the right to make his own contracts, and when made to stand upon them. While the law has imposed duties and heavy responsibilities upon common carriers which they cannot avoid, limit, or shake off, yet it has never attempted to hamper and surround those who are not common carriers with the stringent rules applicable to carriers, or to prevent them from exercising their own judgment as to the responsibilities which they are willing to assume in a special case."

The duty to carry is one of the results of the relation of common carrier and in no way one of its causes or distinguishing features. If a carrier is sued for a refusal to carry, the first question presented, and the one upon which the case must depend, is whether or not it is a common carrier. The status of the defendant as a common carrier must first be established before the duty to carry can be known to exist. See *Steinman v. Wilkins*, 7 W. & S. (Pa.) 466, 42 Am. Dec. 254.

1. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 29 Am. St. Rep. 827. See the title *CARRIERS OF PASSENGERS*, vol. 5, p. 481.

2. 1 Smith's Lead. Cas. (8th Am. ed.); English notes to *Coggs v. Bernard*, *234.

3. See the title *CARRIERS OF PASSENGERS*, vol. 5, pp. 480, 481.

The term "common carrier" having become associated, by reason of its most ordinary and extensive use, with carriers of goods, the liability of a common carrier of goods, which is a result of the character of such a carrier, came to be regarded as a necessary incident of the character of a common carrier.

In accordance with general usage, where the term "common carrier" is used in this title without qualification, it is to be understood to refer to a common carrier of goods.

riers Not For Hire — *α*. CHARACTER OF SUCH CARRIERS. — Carriers who carry gratuitously are not within the term "common carriers," an essential element, a carrying for hire, being lacking.¹

Liabie as Gratuitous Bailees. — They are therefore not subject to the liabilities imposed upon common carriers, making them insurers of the safe transportation and delivery of goods intrusted to them, but are liable as gratuitous bailees only.²

Degrees of Care — **Gross Negligence.** — It is generally said in the older works that such a carrier is liable only upon proof of "gross negligence,"³ but the doctrine of degrees of negligence is not now accepted as correct in principle or

1. Carriers Without Reward Are Not Common Carriers. — *Whitehead v. Greetham*, 2 Bing. 464, 9 E. C. L. 483; *Littlejohn v. Jones*, 2 McMull. L. (S. Car.) 365, 39 Am. Dec. 132. See also *infra*, this title, *Who Are Common Carriers*.

In *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story (U. S.) 16, the court, by Story, J., said: "I take it to be exceedingly clear that no person is a common carrier in the sense of the law who is not a carrier for hire; that is, who does not receive or is not entitled to receive any recompense for his services. The known definition of a common carrier, in all our books, fully establishes this result." If no compensation is received "he is not, in the sense of the law, a common carrier, but he is a mere mandatary, or gratuitous bailee, and his rights, duties, and liabilities are of a very different nature and character from those of a common carrier."

2. Are Liable Only as Gratuitous Bailees. — In *Pender v. Robbins*, 6 Jones L. (N. Car.) 207, the captain of a vessel received a number of watches which he had undertaken to carry gratuitously, and put them in his chest in the vessel's cabin, the vessel at that time being at anchor in the harbor. During the night the cabin was entered by thieves, the chest removed and broken open, and the watches stolen. The captain was sleeping in the cabin at the time. The court held that, under such circumstances, the captain was liable only for gross negligence, and that the proof failed to show any such want of care on his part as would amount to gross negligence within the rule. See also the title *BAILMENTS*, vol. 3, p. 745.

Coggs v. Bernard. — In the leading case of *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Smith's L. Cas. 199, the defendant, Bernard, undertook to take up several hogsheads of brandy belonging to the plaintiff which were then in a certain cellar in London and to lay them down at another cellar in Waterlane. The declaration stated these facts and further alleged that, owing to the defendant's want of care, one of the hogsheads staved and a great quantity of brandy spilled. The defendant having pleaded not guilty, the jury found for the plaintiff, and the defendant then moved in arrest of judgment on the ground that the declaration did not allege that the defendant was a common porter (or carrier), or that he received any good consideration for his pains. The judges all concurred in holding that the declaration was good, Lord Holt announcing his famous principle that merely intrusting the

goods to the defendant's care was some consideration, and imposed a duty on the defendant, though he also formulated the rule as to degrees of negligence in the same opinion. *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Smith's L. Cas. 199. See also *Southcote's Case*, 4 Coke 84; *Cro. Eliz.* 815; *Hutton v. Osborne*, 1 Sel. N. P. (13th Eng. ed.) 348, 7th Am. ed. 419; *Mobile, etc., R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Robinson v. Threadgill*, 13 Ired. L. (N. Car.) 39.

Applications of Rule — **What Amounts to Negligence.** — In *Colyar v. Taylor*, 1 Coldw. (Tenn.) 372, A. intrusted a sum of money to B., an acquaintance, upon the latter's promise that upon his return home he would deliver it as requested. Upon finding that he could not return as soon as expected, B. turned the money over to C., a neighbor, who was about to start for home, with similar directions as to its delivery, but did so in the presence of witnesses upon a fair ground. C.'s pocket was picked during the journey home and the money was lost. In an action by A. against B. the latter was held liable, first, because the unauthorized delivery was a conversion, and, second, because he had been guilty of gross negligence. His conduct evinced such a degree of heedless incaution and disregard of common prudence as might justly be considered to amount to the grossest negligence. See also *Tompkins v. Saltmarsh*, 14 S. & R. (Pa.) 275; *Tracy v. Wood*, 3 Mason (U. S.) 132; *Bland v. Womack*, 2 Murph. (N. Car.) 373.

In the case of *Fay v. Steamer New World*, 1 Cal. 348, a package of gold dust was sent to San Francisco by a steamer. There was a notice published by the steamer, and known to the shipper, that it would not assume responsibility for such matter and would not accept freight for its transportation. The package was received, however, for transportation, and was carried to the port at San Francisco safely. The boat reached there late at night, and the clerk, who had the package in charge, left it in his office while he made a visit to the city, taking no other precaution for its safety than merely locking the office door. In his absence the package was stolen, and this action was then brought against the steamer for its loss. The court held, however, that the steamer was a mere gratuitous bailee of the package, and that no such negligence was shown as would render it liable for the loss.

3. Degrees of Negligence. — *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Smith's L. Cas. 199. See also the title *BAILMENTS*, vol. 3, p. 742.

expedient in practice; and the tendency of the modern authorities is to discard these artificial distinctions.¹

Standard of Man of Ordinary Prudence.—When a person undertakes gratuitously to carry the goods of another, he becomes bound to exercise reasonable care to prevent loss of or injury to such goods, although what would be reasonable care in such a case might not be the same measure of care necessary to be exercised by a private carrier for hire; the test is always the care that a man of ordinary prudence would have exercised under the same circumstances.²

b. WHAT AMOUNTS TO GRATUITOUS TRANSPORTATION.—The transportation will not be considered as gratuitous where the carrier received compensation for it, though in an indirect manner. In order for the transportation to be gratuitous, there must be no consideration whatever moving to the carrier other than the mere incidental benefit which may arise from having conferred a favor on a shipper.³

1. Doctrine of Degrees of Negligence Criticised—England.—*Grill v. General Iron Screw Collier Co.*, L. R. 1 C. P. 612; *Beal v. South Devon R. Co.*, 3 H. & C. 337; *Wilson v. Brett*, 11 M. & W. 113; *Wyld v. Pickford*, 8 M. & W. 443.

United States.—*Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 494; *The Steamboat New World v. King*, 16 How. (U. S.) 474; *Holladay v. Kennard*, 12 Wall. (U. S.) 254; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357.

Maine.—*Storer v. Gowen*, 18 Me. 177.

Massachusetts.—*Lane v. Boston, etc., R. Co.*, 112 Mass. 455, 22 Am. L. Reg. N. S. 126, note.

Missouri.—*McPheeters v. Hannibal, etc., R. Co.*, 45 Mo. 22.

New Hampshire.—*State v. Boston, etc., R. Co.*, 58 N. H. 410.

New York.—*Perkins v. New York Cent. R. Co.*, 24 N. Y. 196, 82 Am. Dec. 282; *Smith v. New York Cent. R. Co.*, 24 N. Y. 222.

North Carolina.—*McAdoo v. Richmond, etc., R. Co.*, 105 N. Car. 140.

Tennessee.—*Mariner v. Smith*, 5 Heisk. (Tenn.) 208.

Vermont.—*Briggs v. Taylor*, 28 Vt. 180.

See also *Tracy v. Wood*, 3 Mason (U. S.) 132; *Jenkins v. Motlow*, 1 Sneed (Tenn.) 252, 60 Am. Dec. 154; and the title *BAILEMENTS*, vol. 3, pp. 743, 744.

In *Hinton v. Dibbin*, 2 Q. B. 646, 42 E. C. L. 847, 2 G. & D. 36, 6 Jur. 601, Lord Chief Justice Denman observed: "When we find 'gross negligence' made the criterion to determine the liability of a carrier who has given the usual notice, it might perhaps have been reasonably expected that something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made; and it may well be doubted whether, between gross negligence and negligence merely, any intelligible distinction exists." *Austin v. Manchester, etc., R. Co.*, 10 C. B. 454, 70 E. C. L. 454, 11 Eng. L. & Eq. 512; *Armistead v. Wilde*, 17 Q. B. 261, 71 E. C. L. 261; *Beal v. South Devon R. Co.*, 3 H. & C. 341; *Grill v. General Iron Screw Collier Co.*, L. R. 1 C. P. 612.

"Any negligence is gross in one who undertakes a duty and fails to perform it.

The term 'gross negligence' is applied to the case of a gratuitous bailee, who is not liable unless he fails to exercise the degree of skill which he possesses." *Willes, J.*, in *Lord v. Midland R. Co.*, L. R. 2 C. P. 339; *Cashill v. Wright*, 6 El. & Bl. 891, 88 E. C. L. 891; *Giblin v. McMullen*, L. R. 2 P. C. 317.

2. What Care a Carrier Not For Hire Is Bound to Exercise.—*Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Smith's L. Cas. 199; *Philadelphia, etc., R. Co. v. Derby*, 14 Hare (U. S.) 468; *Melbourne v. Louisville, etc., R. Co.*, 88 Ala. 443; *Louisville, etc., R. Co. v. Gerson*, 102 Ala. 409; *Treleven v. Northern Pac. R. Co.*, 89 Wis. 598.

In *Adams Express Co. v. Cressap*, 6 Bush (Ky.) 572, the express company received for transportation a valuable watch which it undertook to carry gratuitously. When the destination was reached, a raid by Confederate soldiers was threatened, and the company therefore sent the watch immediately to the consignee's home, but she was not there, so it was brought back to the office, no notice having been left at the house. The next morning it was again sent and with a like result, and before the owner called for it, the company's office was raided by the soldiery and the watch taken off. The court held that the company was liable on the ground that its failure to leave a notice at the consignee's house was gross negligence and was the proximate cause of the loss. In somewhat similar cases, where the transportation was not gratuitous, it has been held that there was no liability on the carrier's part for such a loss. See *Adams Express Co. v. Darnell*, 31 Ind. 20, 99 Am. Dec. 582; *Howard Express Co. v. Wile*, 64 Pa. St. 201; *infra*, this title, *General Nature of Carrier's Liability*.

3. Must Be No Consideration Whatever.—The cases are numerous in which no consideration was directly paid to the carrier, but in which the transportation was held to be for hire. Thus, where the carrier received goods to be sold at their destination, agreeing to return the proceeds to the shipper, it was held that the carrier was not acting gratuitously in carrying such proceeds for the shipper, but was paid by the freight charges for the original transportation of the goods. *Kemp v. Coughtry*, 11 Johns. (N. Y.) 107. See also *Harrington v. McShane*, 2 Watts (Pa.) 443, 27

Returning Empty Vessels or Boxes. — Where the carrier, under a special contract with the shipper, contracts to return the empty vessels or boxes in which goods have been shipped, its liability for such articles is that of a common carrier, although no specific freight charges are made for their transportation. The compensation lies in the freight charges received when the receptacles were shipped filled with goods.¹

c. PRESUMPTION AS TO COMPENSATION. — When a common carrier agrees to transport goods without any price being fixed upon, a promise to pay what the services are reasonably worth arises, and a secret unexpressed intention on the part of the carrier not to make any charge will not convert his responsibility into that of a gratuitous bailee.²

d. BURDEN OF PROOF AS TO LOSS AND CARE — RES GESTÆ. — Where a person has undertaken to carry goods gratuitously for another, and fails to deliver the goods according to his undertaking, it must be shown, in order to hold the carrier responsible for the loss, that the property was lost by the carrier's negligence, or that a delivery was refused upon request.³ When such a case

Am. Dec. 321; *Emery v. Hersey*, 4 Me. 407, 16 Am. Dec. 268; *Moseley v. Lord*, 2 Conn. 389; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Ohio, etc., R. Co. v. Nickless*, 71 Ind. 271; *Missouri Pac. R. Co. v. Ivy*, 71 Tex. 409, 10 Am. St. Rep. 758.

In *Whitmore v. The Steamboat Caroline*, 20 Mo. 513, the court said that the proof showed "what usually appears in actions of this sort — that persons are willing to have their money carried as a favor, and at the same time to hold the boat liable for its loss. Freight or money must be proportioned to the risk assumed. No owner of a boat would permit her to carry money without a reward compensating for the risk if he was aware that he would be liable in the event of its loss. Persons use the captains or clerks of steamboats to carry money gratuitously, and hire is never heard of until the money is lost, and then some person is hunted up to prove that some times in the course of his life he carried money on a steamboat for hire, and this is showing a usage. * * * Persons cannot trust money with clerks to be carried as a favor, and afterwards, when the money is lost, be permitted to show that it was to be transported for hire. This thing of hire is scarcely ever heard of but in the case of loss; and then to make the boat or owner liable would be great injustice." See also *Chouteau v. Steamboat St. Anthony*, 16 Mo. 216; *Rogers v. Head*, Cro. Jac. 262, reviewed *infra*, p. 242, note 3.

Probability that Favor Will Be Reciprocated Not Compensation. — In *Cincinnati, etc., Mail Line Co. v. Boal*, 15 Ind. 345, it was shown that it had long been a custom for the clerks on boats of the character of the defendants' to receive at one port and carry to another packages of money, with the expectation that the particular boat would be preferred in the selection of a vessel to carry any cargo thus ordered, if the package was accompanied by an order. It was held that this evidence was insufficient to fix the defendants with liability as carriers for hire, because (1) no certain or fixed standard of remuneration was shown, nor that, by the custom, anything could be recovered, nor that any obligation would rest upon the person to whom the money was transmitted to make any return for the labor

and risk incurred; and (2) the custom was not shown to have grown up with the knowledge and consent of the owners of the vessel, or that it was other than a mere accommodation usage which had been indulged in as between those who sent and received such packages and officers of boats.

1. Carrier Returning Empty Tanks, etc. — See *Spears v. Lake Shore, etc., R. Co.*, 67 Barb. (N. Y.) 513, where the carrier entered into an agreement to return oil tanks.

In another case, a party shipping large quantities of grain, in sacks, had agreed with the carrier that no extra charge should be made for hauling the empty sacks back to him. It was held that the carrier was nevertheless a carrier for hire as to such sacks. *Pierce v. Milwaukee, etc., R. Co.*, 23 Wis. 387. See also *Aldridge v. Great Western R. Co.*, 15 C. B. N. S. 582, 109 E. C. L. 582.

2. Gray v. Missouri River Packet Co., 64 Mo. 47.

In *Littlejohn v. Jones*, 2 McMull. L. (S. Car.) 365, 39 Am. Dec. 132, the court, in discussing the question whether the defendant, who was the owner of a private ferry, was to be considered as having incurred in the case the liability of a common carrier, said: "Whether the defendant had made himself so liable was a question which depended upon the habitual employment of the ferry heretofore, inasmuch as there was no proof that the plaintiff paid ferriage or had agreed to pay. An express contract for payment of a specific sum was not necessary to charge the defendant, nor indeed an express contract that he should be paid anything." See also *Knox v. Rives*, 14 Ala. 249, 48 Am. Dec. 97.

It has been said that in case the carrier was a person who did not usually, or even occasionally, engage in the business of carrying goods for hire, the presumption would be that the carriage was gratuitous, unless, from all the circumstances, it appeared that the carrier was to be paid. *Hutchinson on Carriers*, § 20. It appears to be more probable that, in such a case, no presumption either way would arise, but the whole question would be for the jury as one of fact under all the circumstances.

3. Beardslee v. Richardson, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596; *Lamplsey v. Scofield*, 24 Miss. 528.

has been shown, it devolves upon the carrier to account for the loss by showing that the property was lost under such circumstances as to relieve him of responsibility.¹

Res Gestæ. — The statement made by the carrier at the time of a demand and refusal to deliver the property, in which he gives an account of the loss by accident or theft, with the circumstances attending the loss or theft, is part of the *res gestæ*, and as such the carrier is entitled to its benefit as evidence in his favor at the trial.²

2. Carriers for Hire but Not Common Carriers — a. WHO ARE SUCH CARRIERS. — To this class belong those carriers who carry for hire but who lack the second characteristic peculiar to common carriers, namely, a readiness to carry for any and all persons offering to pay their hire and to comply with their reasonable regulations. Such carriers are more properly known as private carriers. This class embraces all carriers who carry for hire but who do not profess to follow this as their usual or ordinary occupation nor hold themselves out to the world as ready to carry for any one applying.³

1. *Beardslee v. Richardson*, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596; *Darling v. Younker*, 37 Ohio St. 493, 41 Am. Rep. 532.

Where the Bailee Gives the Same Care to the Goods Bailed as to His Own. — It has been stated as a general principle that if a person who has undertaken to carry goods gratuitously takes the same care of the goods intrusted to him as of his own, and loss ensues, he is not liable therefor, but he is responsible for a loss resulting from a want of such care. *Anderson v. Foresman*, Wright (Ohio) 598.

The general rule would seem to be that proof of the fact that the carrier lost goods of his own at the same time and in the same way in which the shipper's goods were lost is strong presumptive evidence of his honest intent, but nothing more than mere presumptive evidence. In *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Smith's L. Cas. 199, Lord Holt laid down the rule that the proof of such a fact is conclusive of the carrier's innocence, for, if the bailee "keeps the goods bailed to him, but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them; for the keeping of them as he keeps his own is an argument of his honesty." Compare, as to this view, *Doorman v. Jenkins*, 2 Ad. & El. 256, 29 E. C. L. 80; *Rooth v. Wilson*, 1 B. & Ald. 59; *Tracy v. Wood*, 3 Mason (U. S.) 132; *Knowles v. Atlantic*, etc., R. Co., 38 Me. 55, 61 Am. Dec. 234; *McLean v. Ruth-erford*, 8 Mo. 109; *Bland v. Womack*, 2 Murph. (N. Car.) 373. See, however, *Story on Bailments*, § 63.

2. *Lampley v. Scott*, 24 Miss. 528; *Tompkins v. Saltmarsh*, 14 S. & R. (Pa.) 275.

In *Anderson v. Foresman*, Wright (Ohio) 598, Lane, J., said: "That a person robbed instantly states the fact, institutes a search, and prosecutes the offender, are circumstances for the jury. It would be difficult to establish such facts except by the attending circumstances. Such evidence is competent, as it would be for the plaintiff to show that at the time of the alleged robbery the defendant remained silent, neither instituting search or prosecution."

3. **Private Carriers Defined.** — *Pennewill v. Cullen*, 5 Harr. (Del.) 238; *Self v. Dunn*, 42 Ga. 528, 5 Am. Rep. 544; *Shelden v. Robinson*, 7

N. H. 157, 26 Am. Dec. 726; *Moriarty v. Harnden's Express*, 1 Daly (N. Y.) 227; *Pike v. Nash*, 1 Keyes (N. Y.) 335, 3 Abb. App. Dec. (N. Y.) 610; *Sammis v. Stewart*, 20 Ohio 69, 55 Am. Dec. 445; *Littlejohn v. Jones*, 2 McMull. L. (S. Car.) 366, 39 Am. Dec. 132.

"A private carrier is one who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case for hire or reward." *Pennewill v. Cullen*, 5 Harr. (Del.) 238.

All persons who carry under a special contract, as the driver of a stagecoach occasionally taking packages to carry for compensation, are private carriers. *Beckman v. Shouse*, 5 Rawle (Pa.) 179, 28 Am. Dec. 653.

One who is the owner of a vessel, and who is especially employed to transport a cargo of grain, is not a public carrier, but only a private carrier for hire. *Allen v. Sackrider*, 37 N. Y. 341.

"A common carrier in law has been defined to be one who undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place, as a business, and not as a casual occupation *pro hac vice*. *Gisbourn v. Hurst*, 1 Salk. 249; *Dwight v. Brewster*, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; *Story on Bailments*, § 495. Common carriers by water are the masters and owners of ships and all water crafts, including steam vessels, tow-boats, and other steamboats, belonging to internal as well as coasting and foreign navigation; lightermen, hoymen, ferrymen, canal boatmen, and others engaged in the transportation of goods by water for persons generally for hire. 1 Bell's Com. 467; 2 Steph. N. P. 961. But if the owner of a ship employs it on his own account generally, or if he lets the tonnage, with a small exception, to a single person, and then, for the accommodation of a particular individual, he takes goods on board for freight (not receiving them for persons generally), he will not be deemed a common carrier, for he does not hold himself out as engaged in a public business or employment. *Story on Bailments*, § 501." *Bennett v. Filyaw*, 1 Fla. 451.

Wharfingers, who are also lightermen and carmen, and who carry goods from their wharves for their wharf customers, but not for

Agent Representing Principal as Common Carrier. — Although a person may be only a private carrier, yet if he intrusts his servant or agent with his vehicle or steamboat and sometimes carries for hire, it seems that a party contracting with such agent having apparent authority, in good faith believing him to be a common carrier, is entitled to hold him liable as such.¹

Common Carrier as to Certain Goods, a Bailee for Hire as to Others. — A company or a private person who may be a common carrier with respect to certain classes of goods may become a private carrier or bailee for hire when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his usual business to carry.²

b. LIABILITY OF SUCH CARRIERS. — The liability of this class of carriers is limited to such losses or injuries as result from their negligence or that of their servants; they are bound to exercise ordinary care, but are not insurers of the safety of the goods intrusted to them for transportation.³

strangers, except at special prices; and when they consider the business good, are not common carriers. *Chattock v. Bellamy*, 64 L. J. Q. B. 250.

A person agreeing to cut, prepare, and transport to market dock-sticks, spars, etc., is not, while transporting the timber, acting as a common carrier, and his duty extends no further than to the exercise of ordinary prudence, care, and skill in protecting the property from loss or damage. He is not liable for a loss caused by a flood which ordinary prudence and foresight could not have guarded against. *Pike v. Nash*, 1 Keyes (N. Y.) 335, 3 Abb. App. Dec. (N. Y.) 610.

The case of *Rogers v. Head*, Cro. Jac. 262, was an action by a party against the defendant for the loss of a sum of money which, it was alleged, the defendant undertook to carry and deliver to plaintiff, the latter having undertaken "reasonably to content him for the carriage." The court held the defendant liable as a private carrier for hire, although there was no proof of a specific compensation having been paid him.

Hauling Private Cars. — Where a railroad company undertakes to haul along its line wagons belonging to private traders, it is a private carrier as to such wagons, and the extent of its obligation is to use care and diligence; it is not responsible as a common carrier. *Watson v. North British R. Co.*, 3 Sc. Sess. Cas. (4th ser.) 637, 3 Ry. & C. T. Cas. xvii.

1. Power of Agent of Carrier. — In one case it appeared that the defendant had two negro drivers, one of whom (the older) he occasionally sent with his wagon to carry goods for hire. On the occasion in question he sent the younger driver, who had never been intrusted with the wagon, to haul for others, upon private business of his own and without authority to undertake to carry for any one. This driver nevertheless undertook to carry some books for the plaintiff, and, they having been lost, this action was brought. The trial court held that defendant was chargeable as a common carrier, and instructed the jury that if defendant "had two black drivers, it was immaterial whether he had ever intrusted the younger driver to make contracts for him or not, if he sent him with his wagon and team, and he had been in the habit of hauling for other

people." But this ruling was reversed on appeal for error in the charge mentioned. *Jenkins v. Pickett*, 9 Verg. (Tenn.) 481. See also *Satterlee v. Groat*, 1 Wend. (N. Y.) 272; *Steele v. McTyer*, 31 Ala. 667, 70 Am. Dec. 516.

In the case of *McClure v. Richardson*, Rice L. (S. Car.) 215, 33 Am. Dec. 105, the defendant was the owner of a boat which he used for carrying his own cotton to market, and on which, occasionally, when there was room, he carried cotton for his neighbors. On one of its trips, the boat having on board some of its owner's cotton and some for his neighbors, a party hailed it and asked H., the captain, to take his also, which he consented to do. This last cotton having been destroyed by fire on the route, its owner brought suit to recover from the owner of the boat as a common carrier, and the court held that he was liable as such; that H.'s "employer had used his boat in some measure for the community in which he lived, and, from his course of dealing with it, had held himself out as a common carrier."

2. Common Carrier May Become Private Carrier. — See *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357. See also *Allis v. Voigt*, 90 Mich. 125.

3. Private Carrier Liable for Negligence Only. — *Beck v. Evans*, 16 East 244; *Whalley v. Wray*, 3 Esp. N. P. 74; *Allis v. Voigt*, 90 Mich. 125; *White v. Bascom*, 28 Vt. 268.

"As a private carrier the respondent was bound to use ordinary care — such care and diligence as a reasonably prudent man would exercise in the conduct of his own business or in the preservation of his own property." *U. S. v. Power*, 6 Mont. 271, citing *Angell on Carriers*, § 47; *Story on Bailm.*, § 399; *Ames v. Belden*, 17 Barb. (N. Y.) 515; *Samms v. Stewart*, 20 Ohio 73, 55 Am. Dec. 445.

In the case of *Nelson v. Macintosh*, 1 Stark. 237, 2 E. C. L. 96, a box belonging to one who intended going upon a vessel, but who was accidentally left behind, was broken open by the captain on a suspicion that it contained contraband goods, and its valuable contents were exposed to the view of the passengers, but were afterwards placed in the captain's chest in the cabin, with his own valuables. On the arrival of the vessel at port, the captain and one mate went ashore, leaving the other mate in charge of the vessel, and while they were gone the money was stolen and could never be recovered.

The Burden of Proof in such cases is on the party seeking to recover, to show a loss resulting from the negligence of the carrier; and where there is a material conflict in the evidence, it is for the jury to say whether the carrier, under all the circumstances of the case, exercised the prudence and care which a man of ordinary caution would have exercised under the same conditions.¹

c. ASSUMPTION OF SPECIAL LIABILITY. — While a private carrier is ordinarily liable only for losses shown to have resulted from his own want of care, there is no rule of law to prevent his undertaking to insure the safe delivery

ered. It appeared that, on the night preceding the loss, an excise officer and two young men belonging to the ship slept in the captain's cabin. It was held that the captain had been guilty of a want of ordinary care, and that a verdict for the full value of the property should be rendered against him. See also *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263. Compare *Pender v. Robbins*, 6 Jones L. (N. Car.) 207.

In *U. S. v. Power*, 6 Mont. 271, a party entered into a contract with the United States to transport certain goods to points in Montana. The contract provided that no liability for loss by river risks was assumed by the contractor. It was held that a person so contracting was but a private carrier, whose liabilities were limited to losses resulting from his negligence or that of his servants; and that a loss by fire on board the steamer transporting the goods came within the exemption from liability for loss by river risks incorporated in the contract. As a private carrier, he was bound only to the exercise of reasonable care.

In *Brind v. Dale*, 8 C. & P. 207, 34 E. C. L. 355, where the goods which the carrier undertook to carry in his carts were lost, the court remarked: "I take it that if a man agrees to carry goods for hire, although not a common carrier, he thereby agrees to make good losses arising from the negligence of his own servants, although he would not be liable for losses by thieves, or by any taking by force, or if the owner accompanies the goods to take care of them and was himself guilty of negligence; for it is a rule of law that a party cannot recover if his own negligence was as much the cause of the loss as that of the defendant." See also *Caillif v. Danvers*, 1 Peake N. P. (ed. 1795) 114.

In *Jenkins v. Motlow*, 1 Sneed (Tenn.) 250, 60 Am. Dec. 154, the defendant, the commander and owner of a steamboat then on a trip to New Orleans, received the plaintiff, M., on board as a passenger to that point. M. deposited with the clerk six hundred and fifty dollars in gold, for the carriage of which no extra charge was made. When the boat arrived at New Orleans, the money had been stolen. There was some proof that robberies were frequent on that line. The jury found: "We of the jury hold that the defendant is liable to the plaintiff as mandatary or depository, and that, having failed to use ordinary diligence under the circumstances, we find for the plaintiff," assessing the damages at six hundred and fifty dollars, with interest. On appeal, the verdict and judgment thereon were sustained.

In *Kirtland v. Montgomery*, 1 Swan (Tenn.)

457, the facts of which are set out in the next note *infra*, the court said: "As a general rule, a mandatary [in this case for transportation] whose engagement is merely gratuitous is bound only to ordinary diligence and liable only for gross neglect or breach of good faith. It is, however, a well-settled rule that if a mandatary enter upon the execution or business submitted to him, he is bound to use a degree of diligence and attention adequate to the performance of his undertaking; if he do not, and damage ensue, he is liable to the mandator for his misfeasance." In *Jenkins v. Motlow*, 1 Sneed (Tenn.) 253, 60 Am. Dec. 154, the court, referring to this extract, said: "The word 'ordinary' in this extract is not technical or correct, but the rule as to the liability of a gratuitous bailee is clearly and truly stated."

1. Shipper Must Show Negligence — Question for Jury. — The burden of proof of negligence always rests on the party asserting its existence, and when it appears that the carrier was a private carrier merely, there is no liability except upon affirmative proof of negligence. See the titles NEGLIGENCE; CARRIERS OF GOODS, vol. 5, p. 287.

In *Kirtland v. Montgomery*, 1 Swan (Tenn.) 453, the plaintiff left with S. & Co., at their wharf-boat in Memphis, a sealed package containing two thousand and forty-eight dollars in bank bills, addressed to P. & H., New Orleans, marked "valuable," to be sent by the first boat going down the Mississippi. Soon afterwards the steamboat, of which defendant was the commander and part owner, landed at the wharf-boat of S. & Co., and that firm placed the package in the hands of the chief clerk of the steamer, who promised to carry it to New Orleans and there deliver it. No receipt or bill of lading passed, and nothing was said about compensation. On arriving at New Orleans, the chief clerk handed the package to a Mr. V., to be delivered to P. & H., instructing him to be careful with it, as it probably contained money. V. did not deliver the package, but embezzled it. He was not an agent hired by the boat, but was aiding the clerk for accommodation, and was at that time of good reputation. It was shown to be a common usage for Mississippi steamboats to carry packages of bank bills and the like, but not usual to charge therefor, though charges were sometimes made. When specie was shipped, it was usual to charge for it and to give a bill of lading. Judgment having been rendered by the trial court for the defendant without submitting the matter to the jury, the cause was reversed, the appellate court holding that the case should have been submitted to the jury.

of goods intrusted to him for carriage, and if he does so undertake he will be liable accordingly.¹

Contract Creating Special Liability Strictly Construed. — But such an extended liability is not to be readily presumed;² a mere undertaking to carry the goods safely imposes no higher duty than already existed on his part, and renders him liable for losses caused by his negligence, but for nothing more.³

III. WHO ARE COMMON CARRIERS—1. Generally — The Test to Be Applied in determining whether a person is a common carrier has been declared to be whether he holds out that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried.⁴

Business Limited to Certain Classes of Goods. — It is not necessary, however, that a person should hold himself out as undertaking to carry all classes of goods. He may be a common carrier of particular kinds of property only.⁵

1. Private Carrier May Contract to Insure Safe Delivery. — There is no limit upon the right of any carrier to affect his liability by contract except that he cannot limit his liability for negligence. He may enlarge his liability *ad libitum*. See the title CARRIERS OF GOODS, vol. 5, p. 288; Robinson *v.* Dunmore, 2 B. & P. 416. See also the title CONNECTING CARRIERS.

2. Undertaking Strictly Construed. — An undertaking to insure is therefore not to be extended by construction, but is to be limited to the particular risks covered by it; as, when the carrier insures against losses by breakage, his undertaking will not cover losses by fire. Scaife *v.* Farrant, L. R. 10 Exch. 358. And the express exclusion of a particular risk will not by implication extend the undertaking to all other risks. U. S. *v.* Power, 6 Mont. 271. See also Ames *v.* Belden, 17 Barb. (N. Y.) 513.

3. Undertaking to Carry Safely Not an Insurance. — In the case of Ames *v.* Belden, 17 Barb. (N. Y.) 516, the court, by Hubbard, J., said: "An express provision in a contract for bailment for hire to keep the subject of the trust safely will not enlarge the common-law liability of the bailee. That is an obligation which the law implies, that is, to keep as safely as an ordinarily prudent man would his own goods. 2 Black. Com. 453. Such a provision will not constitute the bailee an insurer of the safety of the thing bailed; and should it be destroyed by inevitable casualty, or stolen without the fault of the bailee, he will not be responsible. Foster *v.* Essex Bank, 17 Mass. 501, 9 Am. Dec. 168."

In the case last cited, Chief Justice Parker, in remarking upon the agreement to keep "safely" the money deposited, as imposing no greater duty than the exercise of ordinary care, said: "Anything more than this would amount to an insurance of the goods, which cannot be presumed to be intended, unless there be an express agreement and an adequate consideration therefor." See also Story on Bailm., § 457; Oakley *v.* Portsmouth, etc., Steam Packet Co., 11 Exch. 618.

4. Holding Out the Test. — Nugent *v.* Smith, 1 C. P. Div. 27, where Brett, J., after laying down the test as stated in the text, proceeded: "The test is not whether he is carrying on a public employment, or whether he carries to a fixed place; but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the

goods of all persons indifferently who send him goods to be carried."

In Schloss *v.* Wood, 11 Colo. 291, the court said: "Whether a person is a common carrier depends wholly upon whether he holds himself out to the world as such, and he can hold himself out as a common carrier by engaging in the business generally, or by announcing or proclaiming it by cards, advertisements, or by any other means that would let the public know that he intended to be a common or general carrier for the public. Kansas Pac. R. Co. *v.* Nichols, 9 Kan. 253, 12 Am. Rep. 494." See also Ingate *v.* Christie, 3 C. & K. 61; Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story (U. S.) 35; Kirby *v.* Adams Express Co., 2 Mo. App. 369; Fish *v.* Clark, 2 Lans. (N. Y.) 176, affirmed in 49 N. Y. 122; U. S. Express Co. *v.* Backman, 28 Ohio St. 144, 14 Am. Ry. Rep. 82; M'Clures *v.* Hammond, 1 Bay (S. Car.) 99, 1 Am. Dec. 598; Moss *v.* Bettis, 4 Heisk. (Tenn.) 661, 13 Am. Rep. 1; Missouri Pac. R. Co. *v.* Harris, 1 Tex. App. Civ. Cas., § 1257; and the title CARRIERS OF GOODS, vol. 5, p. 163.

5. Carriers of Particular Species of Property. — Kansas Pac. R. Co. *v.* Nichols, 9 Kan. 253, 12 Am. Rep. 494, where Valentine, J., said: "At common law, no person was a common carrier of any article unless he chose to be, and unless he held himself out as such; and he was a common carrier of just such articles as he chose to be, and no others. If he held himself out as a common carrier of silks and laces, the common law would not compel him to be a common carrier of agricultural implements, such as plows, harrows, etc. If he held himself out as a common carrier of confectionery and spices, the common law would not compel him to be a common carrier of bacon, lard, and molasses. Tunnel *v.* Pettijohn, 2 Harr. (Del.) 48." See also Wiggins Ferry Co. *v.* East St. Louis Union R. Co., 107 Ill. 451, 20 Am. & Eng. R. Cas. 9; Thomson-Houston Electric Co. *v.* Simon, 20 Oregon 60, 23 Am. St. Rep. 86, 47 Am. & Eng. R. Cas. 51, and the title CARRIERS OF GOODS, vol. 5, p. 162 *et seq.*

Common Carrier Becoming Private Carrier by Special Contract. — A common carrier may become a private carrier or a bailee for hire when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. New York Cent. R. Co. *v.* Lockwood, 17 Wall. (U. S.) 377. See also Kimball *v.* Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567.

Need Not Ply Between Definite Points.—Nor does it appear to be necessary, although the contrary has been sometimes stated, that the carrier should ply between definite points.¹

A Right to Compensation for the carriage of goods is a requisite of the character of a common carrier, for in the absence of such a right the carrier is a mere mandatary.²

Carrying Goods Need Not Be Exclusive Occupation.—It is not essential, in order to constitute any carrier a common carrier of goods, to show that the carriage of goods for hire is his sole and exclusive occupation; he may be under all the duties and responsibilities of a common carrier although his more frequent occupation is some other business.³

In *Honeyman v. Oregon, etc., R. Co.*, 13 Oregon 352, 25 Am. & Eng. R. Cas. 380, 57 Am. Rep. 20, it was held that a railroad company which did not assume to act as a common carrier of dogs along with passengers or others, but at the request of a party consented to carry a dog on a particular occasion, could not be held liable as a common carrier for the subsequent death of the dog while under its charge, even though money had been paid to the company's agent for the transportation, and that an action for the loss of the dog, if maintainable at all, could be brought only upon the special private contract. *Compare Cantling v. Hannibal, etc., R. Co.*, 54 Mo. 385, 14 Am. Rep. 476; *Kansas City, etc., R. Co. v. Higdon*, 94 Ala. 286, 33 Am. St. Rep. 119.

Texas Statute.—The words "common carriers of goods, wares, and merchandise," as used in Tex. Rev. Stat., § 278, are not to be construed as either limiting or extending the class of property to be embraced by the carrier undertaking to transport goods for hire. The terms are used descriptively rather than as of limitation, and are intended to embrace all common carriers, including as well those of live stock as of any other property, and at the same time having no operation to change any rule of common law which would, without the influence of the statute, determine the relation of the carrier to any given or specified kind of property for transportation. *Missouri Pac. R. Co. v. Harris*, 1 Tex. App. Civ. Cas., § 1262.

1. Carrier Need Not Be One Plying Between Specific Points.—In *Parsons on Shipping* 174 the author observes that a ship is not a common carrier unless it plies regularly on some definite route or between certain termini as a packet; that a general ship is not a common carrier. But this view of the law, while it has the partial support of some authorities, is not now accepted. See 3 *Minor's Inst.* (2d ed.) 277. In the case of *Liver Alkali Co. v. Johnson*, L. R. 9 Exch. 338, *affirming* L. R. 7 Exch. 267, it appeared that the defendant was a barge owner, and hired vessels, for the conveyance of goods, to any customer applying therefor. There was a separate agreement as to each barge, and the hiring of a barge was to one party only. There were no certain ports between which defendant's barges plied, but each barge went where its hirer chose to have it sent. The court held that defendant was a common carrier and liable as such; the fact that he had no regular route for his vessels did not affect his character as such. See also *Pennewill v. Cullen*, 5 Harr. (Del.) 238.

Judge Story, speaking with reference to the case of *Brind v. Dale*, 8 C. & P. 207, 34 E. C. L. 355, observes: "What substantial distinction is there in the case of parties who ply for hire in the carriage of goods for all persons indifferently, whether the goods are carried from one town to another or from one place to another within the same town? Is there any substantial difference whether the parties have fixed termini of their business or not, if they hold themselves out as ready and willing to carry goods for any persons whatsoever, to or from any places in the same town or in different towns?" *Story on Bailments*, § 496, *n.*

2. Right to Compensation.—*Knox v. Rives*, 14 Ala. 249, 48 Am. Dec. 97; *Central R., etc., Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334, 23 Am. & Eng. R. Cas. 720; *Louisville, etc., R. Co. v. Gerson*, 102 Ala. 409.

"[It is] exceedingly clear that no person is a common carrier, in the sense of the law, who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a common carrier in all our books fully establishes this result. If no hire or recompense is payable *ex debito justitiæ*, but something is bestowed as a mere gratuity or voluntary gift, then, although the party may transport either persons or property, he is not in the sense of the law a common carrier, but he is a mere mandatary or gratuitous bailee, and, of course, his rights, duties, and liabilities are of a very different nature and character from those of a common carrier. In the present case, therefore, it is a very important inquiry whether, in point of fact, the respondents were common carriers of money and banknotes and checks for hire or recompense or not. I agree that it is not necessary that the compensation should be a fixed sum or known as freight; for it will be sufficient if a hire or recompense is to be paid for the service in the nature of a *quantum meruit* to or for the benefit of the company." *Story, J., in Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story (U. S.) 35. See also *Kirtland v. Montgomery*, 1 Swan (Tenn.) 452.

3. Carrying for Hire Need Not Be the Sole Occupation.—*Steele v. McTyer*, 31 Ala. 667; *Powers v. Davenport*, 7 Blackf. (Ind.) 497, 43 Am. Dec. 100; *Moses v. Norris*, 4 N. H. 304; *Elkins v. Boston, etc., R. Co.*, 23 N. H. 275; *Gordon v. Hutchinson*, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464; *Fuller v. Bradley*, 25 Pa. St. 120; *M'Clures v. Hammond*, 1 Bay (S. Car.) 99, 1 Am. Dec. 598; *Moss v. Bettis*, 4 Heisk. (Tenn.) 666, 13 Am. Rep. 1; *Chevallier v. Stra-*

Single Act of Carrying for Hire Not Conclusive. — One does not, however, become a common carrier by reason of a single undertaking to carry; the fact that a common carrier is one holding himself out as undertaking to carry for all persons indifferently precluding such a result.¹

A Question for the Jury. — Whenever there is a question as to the char-

ham, 2 Tex. 115, 47 Am. Dec. 639; *Philleo v. Sanford*, 17 Tex. 227, 67 Am. Dec. 654; *Haynie v. Baylor*, 18 Tex. 498; *Angell on Car.* (5th ed.), § 70.

In *Harrison v. Roy*, 39 Miss. 396, it appeared that a planter used his wagons for hauling his cotton crop across the country to his market and habitually loaded them on their return trips with goods to be transported for hire. He received certain goods, executing his receipt therefor, and undertaking to deliver them to the consignor in good order, without delay and for the customary charges. It was held that he was liable as a common carrier for any injury to or loss of the goods while being transported. It was insisted by the defendant that he was not a common carrier in any sense, since the undertaking to carry was not a part of his usual or ordinary business, but a mere occasional service. But the court held that his practice in carrying goods, even occasionally, made him a common carrier and liable as such. See also *Gisbourn v. Hurst*, 1 Salk. 249; *Satterlee v. Groat*, 1 Wend. (N. Y.) 272.

1. A Single Undertaking to Carry. — *Varble v. Bigley*, 14 Bush (Ky.) 698, 29 Am. Rep. 435; *Benedict v. Arthur*, 6 U. C. Q. B. 204.

The case of *Elkins v. Boston, etc., R. Co.*, 23 N. H. 275, was an action against a railroad company for the loss of goods shipped on a passenger train of the company, and the only question presented was whether the company could be regarded as a common carrier as to its passenger trains, baggage excepted. There was evidence to show that twice, within two years, the company had carried goods by its passenger trains, but the bills of lading did not provide for carriage on such train, nor was there any understanding that they were to be so carried. It was held that the presumption was that the goods were thus transported for the temporary convenience of the company merely, and the evidence did not show that the company held itself out as a common carrier of goods on its passenger trains. Judgment was therefore given for the defendant, there being no proof of negligence.

Isolated or Occasional Acts of Carrying. — In *Moss v. Bettis*, 4 Heisk. (Tenn.) 664, 13 Am. Rep. 1, which was an action to recover for the loss of goods while being carried, the trial court instructed the jury as follows: "But if the testimony shows that the defendant built a flatboat for the purpose of shipping staves down the Forked Deer river for himself, and after building the boat he had abandoned the idea of shipping his own lumber and entered into a special contract with the plaintiff to ship his load of lumber for him from Chestnut Bluff to Memphis — loaded his boat exclusively with the plaintiff's lumber, and received or proposed to receive no other freight except that of plaintiff — he would be a private and not a common carrier." On appeal, it was held that this charge was erroneous in that "it excludes

the idea that even in an isolated act, or in occasional acts of carrying, a party may assume all the burdens and responsibilities of a common carrier. * * * It is true that common carriers undertake generally, and not as a casual occupation, and for all people indifferently; but in order to make them such, it is not necessary that this should be their exclusive business." *Moss v. Bettis*, 4 Heisk. (Tenn.) 664, 13 Am. Rep. 1.

A wagoner who carries goods for hire is responsible as a common carrier although transportation is only an occasional and incidental employment. *Gordon v. Hutchinson*, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464. This case is cited with approval in 2 Kent's Com. 778, note, where it is said that the rule stated by it seems to be founded on the better policy as applicable to business in this country.

But this case is disapproved in *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393, where it was held that the proprietor of a wagon who had undertaken, upon a single occasion, to carry goods for hire, was not a common carrier. The court quoted the following passage from Story on Bailments, § 495: "To bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*," and declared that "an occasional undertaking to carry goods will not make a person a common carrier; if it did, then it is hard to determine who, in a planting and commercial community like ours, is not one; there are few planters in our own state owning a wagon and team who do not occasionally contract to carry goods. It would be contrary to reason and excessively burdensome, nay, enormously oppressive, to subject a man to the responsibilities of a common carrier who might once a year or oftener, at long intervals, contract to haul goods from one point in the state to another. * * * A special undertaking for one man does not make a wagoner or anybody else a common carrier."

See also *Haynie v. Baylor*, 18 Tex. 498; *Moriarty v. Harnden's Express*, 1 Daly (N. Y.) 227; *Benedict v. Arthur*, 6 U. C. Q. B. 204, and *supra*, this title, *Definition*, and notes thereto.

Loss on First Trip. — One who is a common carrier in fact, however, is none the less liable as such because the trip on which the loss occurred was his first trip. *Fuller v. Bradley*, 25 Pa. St. 120.

A person may become liable as a common carrier for one occasion only, and it is no defense merely to say that he had never carried before. *Chouteaux v. Leech*, 18 Pa. St. 224, 57 Am. Dec. 602; *Moss v. Bettis*, 4 Heisk. (Tenn.) 661, 13 Am. Rep. 1.

acter of a defendant sued as a common carrier, the burden is on the plaintiff to show affirmatively that the defendant held himself out as a common carrier and was in fact such a carrier.¹ The law applicable to common carriers is one of unusual rigor, and the responsibilities of such a relation are not to be cast upon a person unless he has so conducted himself as to have fairly assumed them.²

2. Carriers by Water — *a. GENERALLY.* — Carriers by water are subject to the same duties and liabilities imposed upon other common carriers with respect to the goods intrusted to them; if they hold themselves out as willing, for hire, to carry for the public, they are none the less common carriers because their vehicles of transportation go on water instead of on land.³

1. Burden of Proof — Question for Jury. — *Elkins v. Boston, etc., R. Co.*, 23 N. H. 285. See also the title CARRIERS OF GOODS, vol. 5, p. 357.

In *Schloss v. Wood*, 11 Colo. 287, 35 Am. & Eng. R. Cas. 492, the court held that the question, "Were appellees acting in the premises as common carriers, or forwarders merely?" was one to be submitted to the jury for determination.

2. Shelden v. Robinson, 7 N. H. 157, 26 Am. Dec. 726.

No one can become bound as a common carrier unless he consents to be bound in that character, or has so acted as to justify the belief that he intends to be so bound; and he is not so bound unless he is under a legal obligation to receive and carry the goods, and would be liable to an action if, without reasonable excuse, he refused to receive them. *Varble v. Bigley*, 14 Bush (Ky.) 698, 29 Am. Rep. 435.

3. Are Common Carriers — England. — *Morse v. Slue*, 1 Vent. 190; *Laveroni v. Drury*, 8 Exch. 166, 16 Eng. L. & Eq. 510.

United States. — *Garrison v. Memphis Ins. Co.*, 19 How. (U. S.) 312; *The Propeller Niagara v. Cordes*, 21 How. (U. S.) 23; *The Lady Pike*, 21 Wall. (U. S.) 14; *King v. Shepherd*, 3 Story (U. S.) 349.

Alabama. — *Jones v. Pitcher*, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716; *Sprowl v. Kellar*, 4 Stew. & P. (Ala.) 382.

Connecticut. — *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235; *Clark v. Richards*, 1 Conn. 54; *Richards v. Gilbert*, 5 Day (Conn.) 415; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745; *Hall v. Connecticut River Steamboat Co.*, 13 Conn. 324 (carrier of passengers).

Florida. — *Bennett v. Filyaw*, 1 Fla. 451.

Illinois. — *Dunseth v. Wade*, 3 Ill. 285.

Massachusetts. — *Dwight v. Brewster*, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; *Hastings v. Pepper*, 11 Pick. (Mass.) 41; *Gage v. Tirrell*, 9 Allen (Mass.) 299.

Mississippi. — *Gilmore v. Carman*, 1 Smed. & M. (Miss.) 279, 40 Am. Dec. 96.

New Hampshire. — *Moses v. Norris*, 4 N. H. 304.

New York. — *Colt v. M'Mechen*, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200; *Schieffelin v. Harvey*, 6 Johns. (N. Y.) 170, 5 Am. Dec. 206; *Elliott v. Rossell*, 10 Johns. (N. Y.) 1, 6 Am. Dec. 306; *McArthur v. Sears*, 21 Wend. (N. Y.) 190; *Bowman v. Teall*, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562.

Pennsylvania. — *Bell v. Reed*, 4 Binn. (Pa.) 127, 5 Am. Rep. 398; *Harrington v. McShane*, 2 Watts (Pa.) 443, 27 Am. Dec. 321.

South Carolina. — *Swindler v. Hilliard*, 2 Rich. L. (S. Car.) 286, 45 Am. Dec. 732; *Miles v. James*, 1 McCord L. (S. Car.) 157; *Cohen v. Hume*, 1 McCord L. (S. Car.) 439.

Tennessee. — *Turney v. Wilson*, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515; *Craig v. Childress*, Peck (Tenn.) 270, 14 Am. Dec. 751; *Gordon v. Buchanan*, 5 Yerg. (Tenn.) 71.

Virginia. — *Murphy v. Staton*, 3 Munf. (Va.) 239.

In the case of *Moss v. Bettis*, 4 Heisk. (Tenn.) 661, 13 Am. Rep. 1, a farmer, "after crops were laid by," was accustomed to run boats for himself or any one else who would employ him. He had built a flat-boat to transport to market a cargo of his own staves, but at the instance of the plaintiff abandoned that project and loaded his own and another boat furnished by the plaintiff with the latter's lumber, and undertook to carry it by river to market. The boats struck an obstruction, causing a partial loss of the lumber, and it was held that the defendant was liable as a common carrier. See also *Craig v. Childress*, Peck (Tenn.) 270, 14 Am. Dec. 751.

The Owners of a Flat-boat, who hold themselves out as ready and willing to receive freight from the public generally, are common carriers, although making a single trip and receiving a part of the cargo only; and the receipt of freight by the master of the boat, in violation of the instructions of the owners, will not affect their liability as such carriers. If, however, they did not hold themselves out as willing to carry freight for the public generally, but merely proposed to take the freight of particular persons with whom engagements therefor were made, they are not common carriers, and persons shipping freight under a receipt from the master of the boat given in violation of the private instructions of the owners cannot hold them responsible as common carriers for the safety of such goods. *Steele v. McTyer*, 31 Ala. 667, 70 Am. Dec. 516.

Owner of a General Ship. — "By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship, carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier, with the liability of an insurer against all losses, except only such two irresistible causes as the act of God and public enemies." *Gray, J.*, in *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397. *Citing Molloy*, bk. 2, c. 2, § 2; *Bacon's Abr.*, tit. Carrier; 2 Kent's Com. 598; *Barclay v. Cuculla y Gana*, 3 Doug. 389, 26 E. C. L. 157.

The owners of a ship plying habitually be-

Charterer Using Ship for Transportation Generally. — A person cannot be held liable as a common carrier by mere virtue of the fact that he is the owner of the vessel in which the goods are being transported; if it appears that his vessel is chartered by another who is using it for transportation generally, the party chartering and in control of the vessel is liable and not the owner.¹

The Master of a Steamboat, being the mere servant or agent of the persons operating it, is not liable to shippers as a common carrier.²

Vessels Plying on High Seas. — Whether a vessel plies between ports in the same country or between ports of different countries does not affect its character as a common carrier.³

b. CANAL COMPANIES. — Canal companies are ordinarily common carriers, though not necessarily so; the character of any particular proprietor of a canal boat is to be determined by whether or not he possesses the characteristics necessary to constitute one a common carrier.⁴

tween given ports and carrying the goods of all comers as a general ship are common carriers. *Nugent v. Smith*, 1 C. P. Div. 423, *reversing* 1 C. P. Div. 19.

"When it is said that the owners and masters of ships are deemed common carriers, it is to be understood of such ships as are employed as general ships, or for the transportation of merchandise for persons in general; such as vessels employed in the coasting trade, or in foreign trade, or on general freighting business, for all persons offering goods on freight for the port of destination. * * * But if the owner of a ship employs it on his own account generally, or if he lets the tonnage, with a small exception, to a single person, and then, for the accommodation of a particular individual, he takes goods on board for freight (not receiving them for persons in general), he will not be deemed a common carrier, but a mere private carrier; for he does not, under such circumstances, hold himself out as engaged in a public business or employment." *Story on Bailment*, § 501, *quoted in* *Nugent v. Smith*, 1 C. P. Div. 28. It will be seen, however, from some of the cases set out above, that it has been held that the liability of a common carrier will attach to owners of boats who occasionally carry for hire.

1. Party Chartering the Vessel, and Not the Owner, a Common Carrier. — *Tuckerman v. Brown*, 17 Barb. (N. Y.) 191; *Cutler v. Winsor*, 6 Pick. (Mass.) 335, 3 Kent's Com. 138. See also *Thompson v. Hamilton*, 12 Pick. (Mass.) 425, 23 Am. Dec. 619; *Manter v. Holmes*, 10 Met. (Mass.) 402.

2. Master of Steamer. — *Walston v. Myers*, 5 Jones L. (N. Car.) 174.

3. Elliott v. Rossell, 10 Johns. (N. Y.) 1, 6 Am. Dec. 306. See also *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story (U. S.) 16.

In *Aymar v. Astor*, 6 Cow. (N. Y.) 266, it was held that the rule governing the liability of common carriers did not apply to carriers on the high seas, but in a later case this holding was denied. *McArthur v. Sears*, 21 Wend. (N. Y.) 190. See also *Gordon v. Little*, 8 S. & R. (Pa.) 533, 11 Am. Dec. 632.

In *Elliott v. Rossell*, 10 Johns. (N. Y.) 1, 6 Am. Dec. 306, Kent, C. J., said: "It must be regarded as a settled point in the English law, that masters and owners of vessels are liable in port and at sea and abroad to the whole

extent of inland carriers, except so far as they are exempted by the exceptions in the contract of charter party, or bill of lading, or by statute." See also *Nugent v. Smith*, 1 C. P. Div. 19, 423.

Steam Vessels, whether Engaged in the Coasting Trade or Plying in Navigable Rivers in the interior, are common carriers when they hold themselves out as undertaking to carry for the public. *Clark v. Barnwell*, 12 How. (U. S.) 272; *The Propeller Commerce*, 1 Black (U. S.) 582; *Commander-in-Chief*, 1 Wall. (U. S.) 51; *The Schooner Reeside*, 2 Sumn. (U. S.) 567; *The Schooner Emma Johnson*, 1 Sprague (U. S.) 527; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745; *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398; *Oakey v. Russell*, 6 Martin, N. S. (La.) 58; *Parker v. Flagg*, 26 Me. 181, 45 Am. Dec. 101; *Powell v. Myers*, 26 Wend. (N. Y.) 591; *Pardee v. Drew*, 25 Wend. (N. Y.) 459; *McGregor v. Kilgore*, 6 Ohio 358, 27 Am. Dec. 260; *Bowman v. Hilston*, 11 Ohio 303; *Hart v. Allen*, 2 Watts (Pa.) 114; *Warden v. Greer*, 6 Watts (Pa.) 424; *Suindler v. Hilliard*, 2 Rich. L. (S. Car.) 286, 45 Am. Dec. 732; *M'Clures v. Hammond*, 1 Bay (S. Car.) 99, 1 Am. Dec. 598; *Porterfield v. Humphreys*, 8 Humph. (Tenn.) 497.

4. Canal Companies. — That they are generally regarded as common carriers, see *Arnold v. Halenbake*, 5 Wend. (N. Y.) 33; *Parsons v. Hardy*, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; *De Mott v. Laraway*, 14 Wend. (N. Y.) 225, 28 Am. Dec. 523; *Bowman v. Teall*, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562; *Humphreys v. Reed*, 6 Whart. (Pa.) 435; *Fuller v. Bradley*, 25 Pa. St. 120; *Harrington v. Lyles*, 2 Nott & M. (S. Car.) 88; *Spencer v. Daggett*, 2 Vt. 92; *Hyde v. Trent*, etc., Nav. Co., 5 T. R. 389; *Trent Nav. v. Wood*, 3 Esp. N. P. 127. See also *Williams v. Branson*, 1 Murph. (N. Car.) 417, 4 Am. Dec. 562.

In *Flautt v. Lashley*, 36 La. Ann. 106, it was held that a boat used by its owners for their own purposes and those of others who agree to pay certain rates for the transportation of their goods from one point to another, and which is not shown to have been held out as a common carrier, cannot be declared to be such at the instance of one of the agreeing parties. See also *Beckwith v. Frisbie*, 32 Vt. 559.

A., the owner of a canal boat, which he usually employed in transporting goods for

A Company Owning and Maintaining for Its Own Profit a Canal, open to the public for navigation on the payment of tolls, is not a common carrier subject to responsibility as an insurer; it is bound only to exercise reasonable care that its canal may be used without danger, and is not responsible for accidents not arising from a want of such care on its part.¹

c. TOWBOATS.—According to the weight of authority, the owner of a towboat is not a common carrier, and is not, therefore, to be regarded as an insurer, a contract of towage requiring only the exercise of such care and skill as prudent navigators usually employ in similar services.² In some jurisdictions, however, it is maintained that the proprietors of towboats are common carriers, and that the vessel towed is property carried for hire, which the person undertaking to tow is bound to carry safely to its destination, unless prevented by uncontrollable accident.³

himself, agreed with B., a common carrier, to transport a cargo of goods furnished by B. It was held that the contract did not render A. a common carrier as to the cargo, although he knew that the freight which composed it was made up of the goods of various persons delivered to and received by B. as a common carrier, the court declaring that the liability of A. was to be determined by the business in which he was engaged, and not by that of B., and considering that his engagement to transport the goods did not amount to such a holding out to the public as to constitute him a common carrier. *Fish v. Clark*, 49 N. Y. 122, *affirming* 2 Lans. (N. Y.) 176.

1. Company Owning Canal but Not Running Boats Is Not a Common Carrier.—A canal boat, in all respects suitable for navigating the defendants' canal, and properly managed, while making a trip struck a stone in the bottom of the canal, and with its cargo was sunk. It appeared that the same boat, not the property of the defendants, had made previous trips in safety during the same season, one of which was only a week before this accident. It was in evidence that the stone did not look as if it had been long in the water; but it was not visible to persons on the boat or on shore, and there was no evidence as to how it came to be in the canal or of the probable cause of its being there, or that the defendants or their officers knew it was there. It was held that the defendants were not liable in the absence of proof that they had failed to use reasonable care and caution in keeping the canal in a suitable condition for safe navigation, and that the facts of the case did not create a presumption of negligence. *Exchange F. Ins. Co. v. Delaware, etc., Canal Co.*, 10 Bosw. (N. Y.) 180. In this case Robertson, J., said: "But there is no consideration of public policy to enlarge the liability of the owners of a canal beyond the employment of reasonable diligence. Unless they owned the canal boats, they could reap no benefit from either the simulated or real destruction of them or their cargoes, and therefore there is no reason for putting them on a footing with common carriers so as to render them insurers. No case has been cited which goes this length."

2. Towboats Not Common Carriers—*United States*.—*Transportation Line v. Hope*, 95 U. S. 297; *The Propeller Burlington*, 137 U. S. 386; *The J. P. Donaldson*, 167 U. S. 603; *The*

Neaffie, 1 Abb. (U. S.) 465; *Munks v. Jackson*, 29 U. S. App. 482, 66 Fed. Rep. 571.

Kentucky.—*Varble v. Bigley*, 14 Bush (Ky.) 698, 29 Am. Rep. 435.

Maryland.—*Pennsylvania, etc., Steam Nav. Co. v. Dandridge*, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543.

New York.—*Alexander v. Greene*, 3 Hill (N. Y.) 9; *Wells v. Steam Nav. Co.*, 2 N. Y. 208.

Pennsylvania.—*Leonard v. Hendrickson*, 18 Pa. St. 40, 55 Am. Dec. 587; *Hays v. Millar*, 77 Pa. St. 238, 18 Am. Rep. 445.

See also *The Julia*, 14 Moo. P. C. 210; *Lush*, 224; *The Minnehaha*, 15 Moo. P. C. 133, *Lush*, 335; 7 Jur. N. S. 1257; *Symonds v. Pain*, 6 H. & N. 709.

For a Full Discussion of this subject, see the title TUGS AND TOWAGE.

Real Nature of Contract of Towage.—In *The Steamer Webb*, 14 Wall. (U. S.) 406, the court, by Strong, J., said: "It must be conceded that an engagement to tow does not impose either an obligation to insure or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance or that there has been negligence or unskillfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services."

3. Owners of Towboats Held Common Carriers.—*Smith v. Pierce*, 1 La. 349. See also *White v. Steam-tug Mary Ann*, 6 Cal. 462, 65 Am. Dec. 523; *Ashmore v. Pennsylvania Steam Towing, etc., Co.*, 28 N. J. L. 180; *Walston v. Myers*, 5 Jones L. (N. Car.) 174.

In *Bussey v. Mississippi Valley Transp. Co.*, 24 La. Ann. 165, 13 Am. Rep. 120, *Howe, J.*, after referring to the conflict of opinion upon this point, said: "Such conflict of authority might be very distressing to the student but for the fact that when these writers and cases cited by them are examined, the discrepancy, except in the decision in *Brown v. Clegg*, 63 Pa. St. 51, 3 Am. Rep. 522, is more imaginary than real. There are two very different ways in which a steam towboat may be employed,

d. FERRYMEN — Are Common Carriers. — As to goods or other property intrusted to their care for transportation, ferrymen are common carriers, and are insurers of the safe carriage and delivery of such property to and from the points between which they assume to carry.¹ But this general doctrine requires limitation, and the better view appears to be that a ferryman is liable as a common carrier only in cases where he is intrusted with complete possession and control of the property being carried, and is not so where his boat is used merely as a toll bridge, the owner of the property carried retaining entire possession and control of it.²

The Proprietor of a Private Ferry, owned and operated by him for his own personal use, and for those of certain customers, at his will, is not a common carrier.³ But he may so use it, although it may be on a road not opened by public authority or maintained by public labor, as to subject himself to the liability of a common carrier, if he undertakes, for hire, to convey across the river all persons indifferently, with their carriages and their goods.⁴

3. Carriers by Land — a. CARTERS AND EXPRESSMEN. — Ordinarily, carters and expressmen engaged in carrying freight to and from a depot or warehouse, or between places in the same locality, or between different localities, are common carriers and liable as such.⁵

and it is likely that Mr. Story [Story on Bailments, § 496] was contemplating one method, and Mr. Kent [2 Kent's Com. 599] the other. In the first place, it may be employed as a mere means of locomotion under the entire control of the towed vessel; or the owner of the towed vessel and goods therein may remain in possession and control of the property thus transported to the exclusion of the bailee; or the towing may be casual merely, and not as a regular business between fixed termini. * * * And it might well be said that under such circumstances the towboat or tug is not a common carrier. But a second and quite different method of employing a towboat is where she plies regularly between fixed termini, towing for hire and for all persons barges laden with goods, and taking into her full possession and control and out of the control of the bailor the property thus transported. Such is the case at bar. It seems to satisfy every requirement in the definition of a common carrier. * * * We must think that in all reason the liability of the defendants under such circumstances should be precisely the same as if, the barge being much smaller, it had been carried, cargo and all, on the deck of their tug."

In *Sproul v. Hemmingway*, 14 Pick. (Mass.) 1, 25 Am. Dec. 350, it was held that there was no liability on the part of a vessel which was under the charge of a towboat, for injuries resulting from a collision between such vessel and another ship; that the vessel in tow, being wholly under the charge and control of the towboat, could not be responsible for such an occurrence, whatever might be its liability to the shippers whose goods it then had on board.

1. Ferrymen Common Carriers. — *Babcock v. Herbert*, 3 Ala. 392, 37 Am. Dec. 695; *Fisher v. Clisbee*, 12 Ill. 344; *Powell v. Mills*, 37 Miss. 691; *Sanders v. Young*, 1 Head (Tenn.) 219, 73 Am. Dec. 175.

In *Wilson v. Hamilton*, 4 Ohio St. 722, the court, by Ranney, J., said: "We have been wholly unsuccessful, after very careful research, in finding where it was even doubted

that a ferryman, occupying a position in a line of public travel, and holding himself out for general employment, was not a common carrier, and, as such, subject to all the liabilities incident to that position. That he is such is unqualifiedly asserted by the best text-writers, and enforced in a large number of decided cases. *Angell on Carriers*, §§ 82, 130; *Story on Bailm.*, § 496; 2 Kent's Com. 599; *Smith v. Seward*, 3 Pa. St. 342; *Pomeroy v. Donaldson*, 5 Mo. 36; *Cohen v. Hume*, 1 McCord L. (S. Car.) 444; *Rutherford v. McGowen*, 1 Nott & M. (S. Car.) 19; *Garner v. Greene*, 8 Ala. 96; *Trent v. Cartersville Bridge Co.*, 11 Leigh (Va.) 544; *Fisher v. Clisbee*, 12 Ill. 344; *Walker v. Jackson*, 10 M. & W. 161."

2. Ferryman a Common Carrier Only When in Complete Control. — *Harvey v. Rose*, 26 Ark. 3, 7 Am. Rep. 595; *White v. Winnisimmet Co.*, 7 Cush. (Mass.) 156; *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32, 11 Am. Rep. 650.

For a Full Discussion of This Question, with a complete collection of authorities, see the title *FERRIES*.

3. Private Ferry. — *Self v. Dunn*, 42 Ga. 528, 5 Am. Rep. 544.

4. This is a question of fact to be determined by the jury, and their verdict will not be disturbed on appeal except for misdirection by the court or plain error in their finding. *Littlejohn v. Jones*, 2 McMull. L. (S. Car.) 365, 39 Am. Dec. 132.

5. Carters, etc., Are Ordinarily Common Carriers. — *Richards v. Westcott*, 2 Bosw. (N. Y.) 589 (city expressman); *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460; *Jones v. Voorhees*, 10 Ohio 145; *McHenry v. Philadelphia, etc., R. Co.*, 4 Harr. (Del.) 448; *Verner v. Sweitzer*, 32 Pa. St. 208; *Story on Bailm.*, § 496, note.

A carter who takes goods from a railroad office at the end of its line and transfers them to a connecting line is not a common carrier, but a mere agent of the first road, though he is in the habit of advancing its freight charges and collecting them, with his own transfer charges, from the connecting carrier. *Hooper v. Chicago, etc., R. Co.*, 27 Wis. 81, 9 Am.

A Question of Fact — Holding Out. — But the character of any particular carter or expressman may depend upon the extent to which he held himself out as willing to carry for the public, and in such cases it is a question of fact for the jury as to whether he so held himself out as to become a common carrier.¹

A Wagoner May Be Held Liable as a Common Carrier where he holds himself out as willing and undertaking to carry goods for any one between designated points or generally for hire.² But a single isolated undertaking to carry for hire

Rep. 439. But compare *Parmelee v. Lowitz*, 74 Ill. 116, 24 Am. Rep. 276, where it is held that a carrier who undertakes to carry a trunk from the depot of the railroad to the owner's residence is responsible for all losses, except such as result from inevitable accident, that may occur while the trunk is in his possession.

Draymen, Carters, and Porters, who undertake, for hire, to carry goods as a common employment, from one part of a town or city to another, are common carriers. *Robertson v. Kennedy*, 2 Dana (Ky.) 431, 26 Am. Dec. 466; *Powers v. Davenport*, 7 Blackf. (Ind.) 497, 43 Am. Dec. 100; *Campbell v. Morse*, Harp. L. (S. Car.) 468. The same is true of carters engaged in carrying between two towns or localities. *Gordon v. Hutchinson*, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464; *Lecky v. McDermott*, 8 S. & R. (Pa.) 500. So, also, a city expressman, operating wagons in a city, is a common carrier, and as such liable for a theft of goods by one of his drivers. *Robinson v. Cornish*, (City Ct.) 13 N. Y. Supp. 577.

In *Brind v. Dale*, 2 M. & Rob. 80, 8 C. & P. 207, 34 E. C. L. 355, it was held that a town carman, not conveying goods from any one known terminus to another, nor at any fixed rate or regular periods, nor the goods of several persons at the same time, who merely plied his occupation in the streets, undertaking jobs as he could get them, was not a common carrier, and not liable as such; that there must be something more definite as to the points between which he assumed to carry and the character of the facilities he could offer, in order to constitute him a common carrier. The holding of this case is criticised in *Story on Bailments*, § 496, note, where it is said, with reference to it: "What substantial distinction is there in the case of parties who ply for hire in the carriage of goods for all persons indifferently, whether the goods are carried from one town to another, or from one place to another within the same town? Is there any substantial difference whether the parties have fixed termini of their business or not, if they hold themselves out as ready and willing to carry goods for any persons whatsoever, to or from any places in the same town or in different towns?"

1. Character May Depend upon Circumstances. — *Schloss v. Wood*, 11 Colo. 287, 35 Am. & Eng. R. Cas. 492. In this case, the defendant, who was attempted to be charged as a common carrier for the loss of goods intrusted to him, was engaged in the business of hauling goods from the railroad station to an inland town, where he had an office where freight bills were collected and custom solicited. The trial court charged directly that he was responsible as a common carrier, but the case was reversed on appeal on the ground that the question

should have been submitted to the jury as to whether he was a common carrier or not.

Hackmen. — A person owning and operating a hack for the carriage of passengers and their baggage is a common carrier, and as such bound to the exercise of the highest care and skill to prevent injury. *Bonce v. Dubuque St. R. Co.*, 53 Iowa 278, 36 Am. Rep. 221.

Truckmen. — A partnership describing themselves as "truckmen and forwarding agents," whose principal business is that of moving heavy furniture or machinery, for hire, and who hold themselves out as ready to serve all who apply and pay their charges, are common carriers with respect to such goods as they make a business of carrying. *Jackson Architectural Iron Works v. Hurlburt*, 15 Misc. Rep. (N. Y. C. Pl.) 93.

2. Wagoners. — *Harrison v. Roy*, 39 Miss. 396; *Haynie v. Baylor*, 18 Tex. 498. See also, in this connection, *Moses v. Boston, etc., R. Co.*, 24 N. H. 71, 55 Am. Dec. 222.

In *Gordon v. Hutchinson*, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464, it was held that a wagoner who, at his own request, undertakes to carry goods for another for hire, is a common carrier, whether the transportation of goods be his principal and direct business or a mere occasional employment incidental to his business as a farmer or one following a similar occupation. In this case the defendant, a farmer, being about to go to L. from B. with a load of his own property, requested a merchant at B. to employ him to haul a load of merchandise on his return trip, as his wagon would otherwise be unemployed on the home trip. The merchant engaged him to haul a lot of merchandise back to B. for him, and on the route some of it was damaged. The court held that the farmer was, as to such merchandise, a common carrier, and liable as such. See also *Powers v. Davenport*, 7 Blackf. (Ind.) 497, 43 Am. Dec. 100; *Chevallier v. Strahan*, 2 Tex. 115, 47 Am. Dec. 639.

In a later case, however, the same court held that such a wagoner was not a common carrier to the extent of rendering him liable for a refusal to carry. *Steinman v. Wilkins*, 7 W. & S. (Pa.) 466, 42 Am. Dec. 254. In this case the same judge who delivered the opinion in the case just reviewed, speaking for the court with reference to the duty, in England by custom of the realm, of a common carrier to carry for any one who might apply for transportation, said: "But it is by no means certain that our ancestors brought the principle with them from the parent country as one suited to their condition in a wilderness. We have no trace of an action for refusing to carry, and it is notorious that the wagoners, who were formerly the carriers between Philadelphia and Pittsburgh, frequently refused to load at the current price."

would not constitute him a common carrier nor render him liable as such; ¹ though there is authority for a different view.²

b. TRANSFER COMPANIES.—Transfer companies pursuing the business of transferring baggage or freight to and from railroad or steamship depots, or between different parts of towns or cities, are common carriers and subject to liability as such.³

c. RAILROAD COMPANIES—(1) *As to Baggage and Freight*—Common Carriers as to Freight Trains.—Railroad companies are common carriers in every instance as regards their freight trains; they are so by virtue of their undertaking, and their advertising themselves as willing, to carry for all those who will pay their charges, and also by virtue of their character as quasi-public institutions.⁴

Farmer Hauling at Certain Seasons.—In another case, the defendant, who was sued for the loss of goods he had attempted to carry to a certain destination, was a farmer by occupation, but at some seasons of the year, when his farm did not require his attention, he used some of his wagons for the transportation of the goods of such parties as might choose to employ him. The court held that he was liable as a common carrier; the fact that he carried only during certain seasons of the year might limit his status as a common carrier to such seasons, but would not affect his character as such during those periods. It was said that it is not necessary that one should hold himself out continuously as willing to carry, in order to constitute him a common carrier, if the other elements necessary to that character were present. *Chevallier v. Strahan*, 2 Tex. 115, 47 Am. Dec. 639. See also *Jenkins v. Pickett*, 9 Yerg. (Tenn.) 481, as to the power of an agent of the wagoner to render his master liable as a common carrier with respect to a single undertaking to carry goods.

1. Wagoner—Single Isolated Undertaking to Carry.—In *Fish v. Chapman*, 2 Ga. 353, 46 Am. Dec. 393, approved in *Nugent v. Smith*, 1 C. P. Div. 27, a farmer was employed to haul certain goods from the terminus of the central railroad to the town of Macon. It did not appear that he held himself out as ready to carry for any one offering to employ him; he was merely employed for this special trip. On the journey the goods were lost by the upsetting of the wagon while being ferried across a river. The court, in holding that the wagoner was not a common carrier, and was therefore not liable except upon proof of negligence, referred to the case of *Gordon v. Hutchinson*, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464, and said: "This decision no doubt contemplates an undertaking to carry generally without a special contract, and does not deny to the undertaker the right to define his liability. There are cases in Tennessee and New Hampshire which favor the Pennsylvania rule, but there can be but little doubt that that case is opposed to the principles of the common law, and its rule wholly inexpedient." Compare *Harrison v. Roy*, 39 Miss. 396. See also *Fish v. Clark*, 2 Lans. (N. Y.) 176, 49 N. Y. 122; *Allen v. Sackrider*, 37 N. Y. 341. See also *Elkins v. Boston*, etc., R. Co., 23 N. H. 275, holding that a railroad company does not become a common carrier of goods on its passenger trains by the mere fact of its having carried goods on such trains once or twice.

2. See *Gordon v. Hutchinson*, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464; and *supra*, this title, *Definition*, and notes thereto.

3. **Are Common Carriers.**—*Da Ponte v. New Orleans Transfer Co.*, 42 La. Ann. 696; *Richards v. Westcott*, 2 Bosw. (N. Y.) 589; *Verner v. Sweitzer*, 32 Pa. St. 208. See also the title *TRANSFER COMPANIES*.

Is Not a Connecting Carrier.—A transfer company, transferring freight from one connecting line to another, or from the depot of the last of several connecting carriers to the consignee, is not "a connecting carrier," but merely the agent of one of the connecting lines or of the consignee. See *Nanson v. Jacob*, 12 Mo. App. 125, affirmed 93 Mo. 331, 32 Am. & Eng. R. Cas. 553. And see the title *CONNECTING CARRIERS*.

4. **Railroads—England.**—*Pegler v. Monmouthshire R., etc., Co.*, 6 H. & N. 644, 39 L. J. Exch. 249; *Richards v. London, etc., R. Co.*, 7 C. B. 839, 62 E. C. L. 839, 18 L. J. C. P. 251; *Crouch v. London, etc., R. Co.*, 14 C. B. 255, 78 E. C. L. 255, 23 L. J. C. P. 73; *Palmer v. Grand Junction R. Co.*, 4 M. & W. 749.

Alabama.—*Selma, etc., R. Co. v. Butts*, 43 Ala. 385, 94 Am. Dec. 694; *Mobile, etc., R. Co. v. Prewitt*, 46 Ala. 63, 7 Am. Rep. 586; *Southwestern R. Co. v. Webb*, 48 Ala. 585.

California.—*Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323.

Connecticut.—*Fuller v. Naugatuck R. Co.*, 21 Conn. 570.

Georgia.—*Falvey v. Georgia R. Co.*, 76 Ga. 597, 2 Am. St. Rep. 58.

Illinois.—*Chicago, etc., R. Co. v. Thompson*, 19 Ill. 578.

Massachusetts.—*Thomas v. Boston, etc., R. Corp.*, 10 Met. (Mass.) 472, 43 Am. Dec. 444.

New Jersey.—*Rogers Locomotive, etc., Works v. Erie R. Co.*, 20 N. J. Eq. 379.

New York.—*Camden, etc., R., etc., Co. v. Burke*, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488.

Oregon.—*Thomson-Houston Electric Co. v. Simon*, 20 Oregon 60, 23 Am. St. Rep. 86, 47 Am. & Eng. R. Cas. 51.

Pennsylvania.—*Eagle v. White*, 6 Whart. (Pa.) 505, 37 Am. Dec. 434.

South Carolina.—*Piedmont Mfg. Co. v. Columbia, etc., R. Co.*, 19 S. Car. 353, 16 Am. & Eng. R. Cas. 194; *Avinger v. South Carolina R. Co.*, 29 S. Car. 265, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 524.

Tennessee.—*East Tennessee, etc., R. Co. v. Nelson*, 1 Coldw. (Tenn.) 272.

Vermont.—*Kimball v. Rutland, etc., R. Co.*, 26 Vt. 247, 62 Am. Dec. 567; *Noyes v. Rutland*,

Public Character Renders Them Liable to Public Control. — In this latter character they are subject to special limitations by law as to their rates and charges and as to the manner of the discharge of their public duties.¹

As to Baggage. — Such companies are common carriers as to the baggage of their passengers carried on their passenger trains, and as to all property not actually baggage but which is accepted by them as such with knowledge of its character.²

Articles Carried on Passenger Trains. — As to other articles carried on passenger trains, whether with their consent or otherwise, they are not chargeable as common carriers unless an undertaking as such can be clearly shown; it cannot be presumed from the mere fact of carriage.³

etc., R. Co., 27 Vt. 110; *Jones v. Western Vermont R. Co.*, 27 Vt. 399, 65 Am. Dec. 206.

"The introduction of railroads into the state has been followed by their construction over the great lines of travel of passengers and transportation of merchandise; and the proprietors of these novel and important modes of travel and transportation, which have received so much public favor, have become the carriers of great amounts of merchandise. They advertise for freight; they make known the terms of carriage; they provide suitable vehicles, and select convenient places for receiving and delivering goods; and, as a legal consequence of such acts, they have become common carriers of merchandise, and are subject to the provisions of the common law which are applicable to carriers." *Thomas v. Boston, etc., R. Corp.*, 10 Met. (Mass.) 472, 43 Am. Dec. 444. See also *Sandford v. Catawissa, etc., R. Co.*, 24 Pa. St. 378, 64 Am. Dec. 667; *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407, 13 Am. Rep. 457.

In *Norway Plains Co. v. Boston, etc., R. Co.*, 1 Gray (Mass.) 263, 61 Am. Dec. 423, the court, by Shaw, C. J., said: "That railroad companies are authorized by law to make roads as public highways, to lay down tracks, place cars upon them, and carry goods for hire, are circumstances which bring them within all the rules of the common law and make them eminently common carriers. * * * Being liable as common carriers, the rule of the common law attaches to them, that they are liable for losses occurring from any accident which may befall the goods during the transit, except those arising from the act of God or a public enemy."

Where it is optional with a railway company whether it will carry on the business of a common carrier or not, if it elects to do so it is subject to all the liabilities of carriers at common law. *Palmer v. Grand Junction R. Co.*, 4 M. & W. 749, 7 D. P. C. 232, 1 H. & H. 489, 3 Jur. 559.

Where Road Is in Process of Construction. — In the case of *Little Rock, etc., R. Co. v. Glidewell*, 39 Ark. 487, 18 Am. & Eng. R. Cas. 539, one A. sued a railroad company for the loss of goods. The company pleaded that at the time the goods were transported it was not engaged in the carrying business, its road not being fully opened for traffic, and that its servants were not authorized to contract for their carriage. The evidence showed that the road was in process of construction; the company had no agent at the station where the goods were received, but it was in the habit of carry-

ing, for pay, goods and passengers on flat cars in a construction train over the completed part of the road; that the conductor received the goods properly marked, and that at the terminus they were delivered to a stranger by mistake, and thereby lost to the owner. It was held that the company was liable.

1. Character as Special Public Carriers. — See *Scotfield v. Lake Shore, etc., R. Co.*, 43 Ohio St. 571, 54 Am. Rep. 846, 23 Am. & Eng. R. Cas. 612. This was a case in which the railroad company attempted to make a special rate to oil companies shipping more than a certain quantity of oil over its road. The effect of the rate was to give the oil syndicate a tremendous advantage, owing to the fact that it alone could ship the requisite quantity to obtain the special rate. The case was a suit to restrain the defendant company from further discrimination. The court sustained the complainant's bill on the theory that the defendant company was a quasi-public institution, and as such subject to special control by the state; that it was a common carrier, and was bound, even under the common law, to treat all persons alike, without favor to any. See this subject discussed under the title FREIGHT. See also *Norway Plains Co. v. Boston, etc., R. Co.*, 1 Gray (Mass.) 263, 61 Am. Dec. 423.

Term Does Not Include Private Sidings or Switches. — A corporation organized to construct and operate a saw-mill and a short railway connecting it with the nearest railroad, which constructs a logging railroad on its private property and operates it for private purposes entirely, does not become a common carrier by doing so, nor is it charged with the duties and responsibilities of such carrier, notwithstanding a constitutional provision declaring all railroads common carriers. *Wade v. Litcher, etc., Cypress Lumber Co.*, 74 Fed. Rep. 517; Const. of La., art. 244.

2. Camden, etc., R., etc., Co. v. Burke, 13 Wend. (N. Y.) 611, 28 Am. Dec. 488. See the title BAGGAGE, vol. 3, p. 528, where the whole subject is examined.

3. Carriage of Goods on Passenger Trains. — In *Elkins v. Boston, etc., R. Co.*, 23 N. H. 275, it was held that evidence that the conductor on one of the defendant's passenger trains carried goods and eggs to market for an individual does not show that the company are common carriers by such trains, where it does not appear that the conductor rendered such services by virtue of any authority derived from the company, or that any compensation was received by him, either for the company or himself.

Goods Transported on Cars of Other Lines. — A railroad company is liable as a common carrier for the loss of goods being transported by it over its lines, although in the cars of another company; the former company is not merely the agent of the company whose cars it is hauling, but sustains a contractual relation with the owner of the goods therein.¹

(2) *As to Passengers.* — Railroad companies are common carriers of passengers.² Their liability as such is not that of an insurer of the passenger's safety, however, the extent of their duty to passengers being to exercise the highest practicable degree of care to protect them from injury.³

(3) *As to Branch Lines.* — Where a railroad company is invested by its charter with power to construct branches to its main line, and such branches are constructed and operated for the purpose of general transportation, the company becomes a common carrier as to such branches and subject to the rules governing such carriers; but the question as to whether such branches were constructed and were actually used for purposes of general transportation, so as to make the company a common carrier as to them, is one of fact, to be determined by the jury.⁴

(4) *When Company Merely Furnishes the Motive Power.* — When the railroad company is not properly the carrier at all, but merely furnishes its track and motive power for hauling the carriages of its hirer from place to place on its line, it is not subject to the duties and liabilities of a common carrier, but is to be regarded in such a case as a private carrier merely, subject to liability only for the want of ordinary care.⁵

In *Butter v. Hudson River R. Co.*, 3 E. D. Smith (N. Y.) 571, a traveler on a passenger train took a package to the baggage master, who refused to check it as baggage, knowing that it was not such, but received it, nevertheless, for transportation. It was held that the company was liable for the loss, whether the freight was paid in advance or not. Compare, however, *Humphreys v. Perry*, 148 U. S. 627, 54 Am. & Eng. R. Cas. 29.

A private arrangement between a railroad company and an express company for the transportation of light freight will not relieve the railroad company from liability as a common carrier for packages received on the cars from persons having no notice of the arrangement, and it is immaterial whether the article was given at the cars to the agent of the express company or to a baggage master or other agent of the railroad company. *Langworthy v. New York, etc., R. Co.*, 2 E. D. Smith (N. Y.) 195.

1. While Hauling Goods in Cars of Another Company. — See the titles *CONNECTING CARRIERS*; *CARRIERS OF GOODS*, vol. 5, p. 161. See also *infra*, this title, *While Hauling Cars of Other Companies*.

2. See Thomson-Houston Electric Co. v. Simon, 20 Oregon 60, 47 Am. & Eng. R. Cas. 51; *Nashville, etc., R. Co. v. Messino*, 1 Sneed (Tenn.) 220; *Shoemaker v. Kingsbury*, 12 Wall. (U. S.) 369; and the title *CARRIERS OF PASSENGERS*, vol. 5, pp. 480, 481.

But a railroad company is a carrier of passengers only as to its passenger trains. It does not become such a carrier as to its freight trains, although it may occasionally carry passengers on them as a matter of accommodation, and although in such cases it charges the usual fare. *Murch v. Concord R. Corp.*, 29 N. H. 9, 61 Am. Dec. 631.

3. See the title CARRIERS OF PASSENGERS, vol. 5, p. 474.

4. As to Branch Roads. — *Avinger v. South Carolina R. Co.*, 29 S. Car. 265, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 526. See also *Schloss v. Wood*, 11 Colo. 287, 35 Am. & Eng. R. Cas. 492. In the first case cited, the court, by Simpson, C. J., said: "Suppose, for instance, that the defendant owned a body of timber land some miles from its main track, and that for its own purposes in procuring cross ties, stringers, and other lumber for repairs, it should construct a track to said lands, using its engines and cars thereon for the transportation of said lumber to the main track and for no other purpose, could it be claimed that the company would become a common carrier thereon and be bound to receive and transport all freight that might be offered? We think not. The question in such cases must turn on the object and purpose of the branch constructed and the road operated; and this is a question of fact, dependent not simply, as we have said, upon the use, but upon the character of the use."

5. When Not a Common Carrier — Circus Trains. — In *Coup v. Wabash, etc., R. Co.*, 56 Mich. 111, 18 Am. & Eng. R. Cas. 542, 56 Am. Rep. 374, a railroad company contracted with the proprietor of a traveling circus to furnish men and motive power for the transportation of his circus in special cars owned by him, such cars to be operated under the management, direction, and control of the proprietor or his representative, but to run according to the rules, regulations, and time-tables of the company to various points on the line of the railroad, with the privilege of stopping at places and for the times stated for exhibitions; all at greatly reduced rates. The court held that the railroad did not, in such case, sustain the relation of common carrier, and was therefore entitled, under the circumstances of the case, to stipulate against any liability whatever. At most, it was liable only for negligence. It did not

(5) *Effect of Statutory Declarations.* — Where, as in many of the states, railroad companies are declared by statute to be common carriers and liable as such, it is not necessary, in an action against such a company to hold it liable as a common carrier, that it be alleged or proved that the defendant company is a common carrier.¹

d. RECEIVERS OF RAILROADS. — Receivers appointed by the court or trustees under a mortgage, operating the road by virtue of their appointment or mortgage authority, are liable as common carriers, although there is no personal liability attaching to the receivers except for their negligence.²

e. STREET RAILWAY COMPANY. — Under the principles stated, it has been held that a street railway company, though ordinarily a carrier of passengers exclusively, may become a common carrier of goods by the practice of allowing passengers or others to put freight in its cars to be carried for extra hire.³

f. CAR-SWITCHING COMPANY. — A company engaged in the business of switching cars exclusively, having tracks connecting railways with manufactories, may be held liable as a common carrier with regard to goods loaded in cars handled by it.⁴

g. EXPRESS COMPANIES — Are Common Carriers. — Express companies making a business of carrying packages, large or small, for hire, are common carriers

profess, and was under no obligation, to undertake such transportation.

In *Chicago, etc., R. Co. v. Wallace*, 66 Fed. Rep. 506, 24 U. S. App. 589, which was an action to recover the value of certain property injured or destroyed by the derailment of the defendant's train, the declaration charged the defendant as a common carrier. It appeared that the plaintiff was the owner of a circus and had a special contract with the defendant, by which the latter agreed to run a special train, consisting of certain specified cars, on a special schedule. The plaintiff was to do his own loading and unloading, and expressly agreed to assume all risk of accident. The court held that the defendant was not chargeable as a common carrier, since it did not hold itself out as a carrier of wild animals, etc., nor as carrying on such special schedules or trains; that the defendant could only be charged upon the special contract, and that being valid, the stipulation against liability would preclude a recovery. See also *Robertson v. Old Colony R. Co.*, 156 Mass. 525; *Watson v. North British R. Co.*, 3 Sc. Sess. Cas. (4th series) 637, 3 Ry. & C. T. Cas. 17.

1. When Statute Declares Railroad Companies Common Carriers. — *Denver, etc., R. Co. v. Cahill*, 8 Colo. App. 158.

The court will take judicial knowledge of the fact that a railroad company owning and operating a railroad is a common carrier, under the laws of *Georgia*. *Caldwell v. Richmond, etc., R. Co.*, 89 Ga. 550.

2. Receivers or Trustees. — As to receivers, see *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 350; *Paige v. Smith*, 99 Mass. 395; *Nichols v. Smith*, 115 Mass. 332. See also the title RECEIVERS (RAILROAD).

As to the liability of trustees, see *Sprague v. Smith*, 29 Vt. 421, 70 Am. Dec. 424; *Rogers v. Wheeler*, 2 Lans. (N. Y.) 486, affirmed 43 N. Y. 598.

3. Street Railway Company. — In an action to recover damages of a street railway company for the loss of merchandise delivered to one of

its conductors for transportation on the platform of a car, for which money was paid by the owner to the conductor, the testimony of two other persons that they had paid money at other times to the defendant's conductors for the like transportation of merchandise, with the knowledge of the superintendent of the road, is competent evidence to show, and, in the absence of anything to prove the contrary, sufficient evidence to warrant the jury in finding, that the defendant company had assumed the business of common carriers of merchandise on their cars. *Levi v. Lynn, etc., R. Co.*, 11 Allen (Mass.) 300, 87 Am. Dec. 713. See also *Citizens' St. R. Co. v. Twiname*, 111 Ind. 587; *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 38 Am. St. Rep. 753.

4. Car-switching Company. — In *Peoria, etc., R. Co. v. Chicago, etc., R. Co.*, 109 Ill. 135, 18 Am. & Eng. R. Cas. 506, 50 Am. Rep. 605, the defendant railroad company's principal business was switching cars for other railroad companies. Its tracks were connected with those of the other railroads by a transfer switch, and with mills, elevators, and manufactories in and around the city where its business was transacted. The plaintiff corporation brought a car, loaded with freight, to the city and placed the same on the transfer track, with orders to the defendant to ship the same to a certain distillery, to which place it was taken and unloaded. When unloaded it was taken by the defendant, without orders from the plaintiff, to a sugar refinery, to be loaded and then switched to the transfer track for shipment. On the same day the sugar refinery was burned and also the car. It was held that the defendant was liable, as a common carrier, to the plaintiff for the value of the car so destroyed. See also *Missouri Pac. R. Co. v. Wichita Wholesale Grocery Co.*, 55 Kan. 525; and *supra*, this title, *General Nature of Carrier's Liability — While Hauling Cars of Other Companies*; and the title CONNECTING CARRIERS.

with all the duties and responsibilities accompanying that relation.¹

Name Immaterial. — The name or style under which they assume to carry on their business is immaterial where their real business is that of a common carrier. They cannot evade their common-law liabilities by calling themselves "express forwarders" or by attempting to appear as agents only.²

Variation of Liability by Special Contract. — Nor can they secure exemption from liability by special agreements as to the character in which they contract, except as to losses not the result of the negligence of themselves or their agents.³

1. Express Companies Are Common Carriers — *United States.* — Kentucky Bank *v.* Adams Express Co., 93 U. S. 174.

Alabama. — Southern Express Co. *v.* Crook, 44 Ala. 468, 4 Am. Rep. 140.

Georgia. — Southern Express Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783.

Illinois. — Baldwin *v.* American Express Co., 23 Ill. 197, 74 Am. Dec. 190, 26 Ill. 504; Gulliver *v.* Adams Express Co., 38 Ill. 503.

Massachusetts. — Buckland *v.* Adams Express Co., 97 Mass. 129, 93 Am. Dec. 68; Lowell Wire Fence Co. *v.* Sargent, 8 Allen (Mass.) 189.

Minnesota. — Christenson *v.* American Express Co., 15 Minn. 270, 2 Am. Rep. 122.

New York. — Haslam *v.* Adams Express Co., 6 Bosw. (N. Y.) 235; Read *v.* Spaulding, 5 Bosw. (N. Y.) 395; Sherman *v.* Wells, 28 Barb. (N. Y.) 403; Sweet *v.* Barney, 23 N. Y. 335. See also Russell *v.* Livingston, 19 Barb. (N. Y.) 346.

Ohio. — U. S. Express Co. *v.* Backman, 28 Ohio St. 144.

Pennsylvania. — Verner *v.* Sweitzer, 32 Pa. St. 208.

South Carolina. — Stadhecker *v.* Combs, 9 Rich. L. (S. Car.) 193.

Tennessee. — Southern Express Co. *v.* Womack, 1 Heisk. (Tenn.) 256.

Virginia. — Southern Express Co. *v.* McVeigh, 20 Gratt (Va.) 264.

See also the title EXPRESS COMPANIES.

"There are considerations justifying a strict application of the law of common carriers to express companies. They profess to employ trustworthy agents who are charged with the safe custody and speedy transit and delivery of all packages put in their charge. The effect of these inducements is, in some measure, to supersede the forwarding merchant and to limit the liability of railroad and steamboat companies, who may be as faithful and are certainly as responsible agents. If they shall, by the promise of decided advantages over the usual modes of transportation, secure most of the business generally intrusted to common carriers, the public is concerned that they should be held to a rigid fulfilment of the promise. They cannot attain a greater speed than the railroad and steamboat which conveys them, and there is no proof that they are, in other respects, more trustworthy carriers. The only advantage which, in truth, they can offer is the safer custody and more certain delivery of goods to the consignee without storage. These temptations may induce the public to employ them at an increased rate, and they have no reason to complain of an exact application of the rule of law which enforces the

responsibility which they voluntarily assume. We should be regardless of the great interests daily committed by the public to express companies with a confidence induced by their tempting offers if their liability for a safe carriage and delivery is not rigidly enforced." Stadhecker *v.* Combs, 9 Rich. L. (S. Car.) 193. See also Southern Express Co. *v.* Glenn, 16 Lea (Tenn.) 472.

2. Cannot Escape Liability by Change of Names. — Buckland *v.* Adams Express Co., 97 Mass. 129, 93 Am. Dec. 68; Kentucky Bank *v.* Adams Express Co., 93 U. S. 174; Christenson *v.* American Express Co., 15 Minn. 270, 2 Am. Rep. 122; Russell *v.* Livingstone, 19 Barb. (N. Y.) 346; Read *v.* Spaulding, 5 Bosw. (N. Y.) 395, affirmed 30 N. Y. 630, 86 Am. Dec. 426; Place *v.* Union Express Co., 2 Hilt. (N. Y.) 27; U. S. Express Co. *v.* Backman, 28 Ohio St. 144. Compare Hersfield *v.* Adams, 19 Barb. (N. Y.) 577.

"We are unable to see any valid reason for the suggestion that the defendants are not to be regarded as common carriers. The name or style under which they assume to carry on their business is wholly immaterial. The real nature of their occupation and of the legal duties and obligations which it imposes on them is to be ascertained from a consideration of the kind of service which they hold themselves out to the public as ready to render to those who may have occasion to employ them. * * *

They exercise the employment of receiving, carrying, and delivering goods, wares, and merchandise for hire on behalf of all persons who may see fit to require their services. In this capacity they take property from the custody of the owner, assume entire possession and control of it, transport it from place to place, and deliver it at a point of destination to some consignee or agent there authorized to receive it. This statement embraces all the elements essential to constitute the relation of common carriers on the part of the defendants towards the persons who employ them." Buckland *v.* Adams Express Co., 97 Mass. 124, 93 Am. Dec. 68.

A company doing business under the name of a "transportation company" is to be held liable as a common carrier, if it in fact transacts business as such. Mercantile Mut. Ins. Co. *v.* Chase, 1 E. D. Smith (N. Y.) 115.

3. Special Contract Will Not Exempt from Liability for Negligence. — Kentucky Bank *v.* Adams Express Co., 93 U. S. 174; Read *v.* Spaulding, 5 Bosw. (N. Y.) 395.

In reference to this claim made by express companies, the court, by Bigelow, C. J., in Buckland *v.* Adams Express Co., 97 Mass. 130, 93 Am. Dec. 68, said: "But this argument,

Dispatch Companies.—A dispatch company, although not owning or controlling any means of conveyance itself, but engaging, in its own behalf, in the business of transporting goods through the agency and over the lines of other carriers of its own selection and employed by it, is a common carrier and subject to all the responsibilities attaching to that character.¹ The sub-carriers employed by it are its agents and those of its consignees or shippers.²

h. DISTRICT TELEGRAPH COMPANIES.—Companies of this kind exist in all cities, their business being the delivery of messages or of small parcels for their customers. As to messages sent by them, they are under the same liability as telegraph companies, and are responsible only for such losses as result from their negligence.³

As to Parcels Which They Are Employed to Deliver, and which come within the class of business they hold themselves out as conducting, their liability is that of a common carrier, though no special contractual relations may be shown to have existed between them and the customer.⁴

i. COMMON CARRIERS OF MONEY.—The liability of any carrier as a common carrier for the loss of money or currency delivered to it for transportation must depend upon whether or not it held itself out as undertaking generally to carry such articles; there is no presumption that an ordinary carrier assumes to act as a common carrier in the transportation of money, and the assumption of that status must be affirmatively proved by the party alleging it.⁵

though specious, is unsound. Its fallacy consists in the assumption that at common law, in the absence of any express stipulation, the contract with an owner or consignor of goods delivered to a carrier for transportation necessarily implies that they are to be carried by the party with whom the contract is made, or by servants or agents under his immediate direction and control. But such is not the undertaking of the carrier. The essence of the contract is that the goods are to be carried to their destination unless the fulfilment of this undertaking is prevented by the act of God or the public enemy. This, indeed, is the whole contract, whether the goods are carried by land or water, by the carrier himself or by agents employed by him."

1. Dispatch Companies as Common Carriers.—*Merchants' Dispatch Transp. Co. v. Bloch*, 86 Tenn. 392, 6 Am. St. Rep. 847; *Merchants' Dispatch, etc., Co. v. Cornforth*, 3 Colo. 280, 25 Am. Rep. 757.

In the first of the above cases the court observed: "This instruction properly treats the defendant as a common carrier. The duties which it undertakes and which it holds itself out to the public as willing to undertake and perform give it that character. In very many cases it has been expressly adjudged to be a common carrier, and in others such has been assumed to be its character without a discussion of the question." *Citing Robinson v. Merchants' Despatch Transp. Co.*, 45 Iowa 470; *Stewart v. Merchants' Despatch Transp. Co.*, 47 Iowa 229, 29 Am. Rep. 476; *Wilde v. Merchants' Despatch Transp. Co.*, 47 Iowa 247, 29 Am. Rep. 479; *Bancroft v. Merchants' Despatch Transp. Co.*, 47 Iowa 262, 29 Am. Rep. 482; *Merchants' Despatch Transp. Co. v. Bolles*, 80 Ill. 473.

2. Merchants' Despatch Transp. Co. v. Bloch, 86 Tenn. 396, 6 Am. St. Rep. 847.

3. See the title TELEGRAPHS AND TELEPHONES.

4. Liable as Common Carrier.—*Sanford v. American Dist. Tel. Co.*, 13 Misc. Rep. (N. Y. C. Pl.) 88.

In *American Dist. Tel. Co. v. Walker*, 72 Md. 454, 35 Am. & Eng. Corp. Cas. 91, 20 Am. St. Rep. 479, the plaintiffs had hired a buggy and horses, and, on returning, stopped at the office of the District Telegraph Company and asked for a boy who could drive the horses back to the livery stable. A boy was sent out who took charge of the horses, but owing to his negligence or incompetence, the horses ran away while he was driving them, and injured themselves and the vehicle. In an action to recover damages therefor it was held that the company was liable for the damages thus occasioned, and that the plaintiffs, although they were merely bailees for hire as to the horses and buggy, could maintain the action to recover such damages. See also *Newton v. Pope*, 1 Cow. (N. Y.) 109; *Harker v. Dement*, 9 Gill (Md.) 13, 52 Am. Dec. 670; *Brind v. Dale*, 2 M. & Rob. 80, 8 C. & P. 207, 34 E. C. L. 355; *Searle v. Laverick*, L. R. 9 Q. B. 122.

5. No Presumption that Ordinary Carrier Is a Carrier of Money.—*Chicago, etc., R. Co. v. Thompson*, 19 Ill. 578; *Lee v. Burgess*, 9 Bush (Ky.) 652; *Shelden v. Robinson*, 7 N. H. 157, 26 Am. Dec. 726; *Sewall v. Allen*, 6 Wend. (N. Y.) 335, *reversing* 2 Wend. (N. Y.) 327; *Kuter v. Michigan Cent. R. Co.*, 1 Biss. (U. S.) 35. *Compare Kirtland v. Montgomery*, 1 Swan (Tenn.) 450, where the carrier was held liable for the loss of bank bills, it appearing that it was the established usage of the defendant to accept money packages for carriage. *Compare also Farmers', etc., Bank v. Champlain Transp. Co.*, 16 Vt. 52, 42 Am. Dec. 491, 18 Vt. 140, 23 Vt. 186, 56 Am. Dec. 68.

The driver of a stagecoach, in the general employ of the proprietors of the coach, and in the habit of transporting packages of money for a small compensation which is uniform

Proof of Authority of Agent Receiving Money for Transportation. — And since it is not ordinarily the business of a railroad company to take money or bank bills as freight, before it can be made liable for such articles there must be proof that its agent was authorized to receive them; proof that he was authorized to receive "goods and freight" generally is not enough to show an authority to accept bank bills at ordinary freight rates.¹

Carrier Undertaking to Sell and Return Proceeds. — Where a carrier undertakes to transport goods of the shipper to market, and there to sell them and then bring back the proceeds, it seems that he is a common carrier in returning such proceeds.²

j. OTHER CARRIERS. — A Stagecoach Line is a carrier of passengers, and is not ordinarily a common carrier of goods; but an established practice of carrying for passengers packages which are not baggage will subject it to liability as a common carrier with respect to such packages.³

whatever may be the amount of the package, is a bailee for hire, answerable for ordinary negligence, and not subject to the responsibilities of a common carrier, there being no evidence to show him a common carrier further than the fact that he took such packages of money as were offered. But having received money for transportation, the burden of proof is on him to excuse a nondelivery; and evidence to show that third persons have admitted that another package of money was stolen from the stage on the same day when he received the money in question is not competent evidence to be submitted to a jury to prove a loss. *Shelden v. Robinson*, 7 N. H. 157, 26 Am. Dec. 726.

Proof of Undertaking to Be Common Carrier as to Money Must Be Clear. — Where there is no proof that the carrier has held itself out as willing to carry money, or that it has at any time carried such articles or has so undertaken in the particular case, no contract to carry them as a common carrier can be implied from the fact that the carrier has held itself out as a common carrier of goods, wares, and merchandise generally. *Chicago, etc., R. Co. v. Thompson*, 19 Ill. 578. See also *Lee v. Burgess*, 9 Bush (Ky.) 652.

The charter of a railroad company, granted at a time when it was not incumbent on common carriers to carry money, and requiring it to transport "all merchandise and property," does not make it a common carrier of money; nor does transporting money for an express company under a special contract have that effect. *Kuter v. Michigan Cent. R. Co.*, 1 Biss. (U. S.) 35.

A steamboat company, incorporated for the transportation of goods, wares, and merchandise, is not a common carrier of packages of bank bills, unless it is shown that it has made the carriage of such packages a part of its ordinary business. Accordingly such a company is not liable for the loss of a package of bank bills intrusted to the master of one of their boats, it appearing that he had been forbidden by his employers to carry money, that he had never knowingly carried any, and that it was the usage for persons sending money to pay the master personally therefor, the company charging freight on specie only. *Sewall v. Allen*, 6 Wend. (N. Y.) 335.

1. Agent Receiving Money Must Be Specially Authorized. — *Chicago, etc., R. Co. v. Thompson*, 19 Ill. 578.

Rule Opposed. — A different view from that of the text is taken in *Farmers', etc., Bank v. Champlain Transp. Co.*, 23 Vt. 186, 56 Am. Dec. 69. It was there held that a common carrier was *prima facie* liable, as such, on all contracts for carrying made by the captains of its vessels within the general contracting power of the corporation carrier, and if the carrier seeks to evade responsibility by alleging that the contract was made without authority, it has the burden of proof to show such fact, or to show that the contract was a private one made with the captain to whom credit had been exclusively given. *Citing Butler v. Basing*, 2 C. & P. 614, 12 E. C. L. 289.

2. Carrier Undertaking to Sell Goods and to Return Proceeds. — The master of a vessel, employed in the transportation of goods between Albany and New York, received on board a quantity of flour to be carried to New York and there sold in the usual course of that carrying business, for which the ordinary freight was to be paid. The flour was sold at New York, by the master, for cash. While the vessel was lying at the dock, the cabin was broken open and the money stolen from the master's trunk while he and his crew were absent. It was held that the owners of the vessel were answerable for the money to the shippers of the flour, although no commission, or a distinct compensation beyond the usual freight, was allowed for the sale of the goods and the bringing back of the money, such being the duty of the master in the usual course of the employment, where no special instructions were given. *Kemp v. Coughtry*, 11 Johns. (N. Y.) 107. It is questionable whether this decision is the law since *Sewall v. Allen*, 6 Wend. (N. Y.) 335, reversing 2 Wend. (N. Y.) 327. See also *Farmers', etc., Bank v. Champlain Transp. Co.*, 18 Vt. 140, 23 Vt. 200, 56 Am. Dec. 68.

3. Stagecoach Line. — *Powell v. Mills*, 30 Miss. 231, 64 Am. Dec. 158; *Merwin v. Butler*, 17 Conn. 138; *Dibble v. Brown*, 12 Ga. 217, 56 Am. Dec. 460; *Jones v. Voorhees*, 10 Ohio 145; *Beckman v. Shouse*, 5 Rawle (Pa.) 179, 28 Am. Dec. 653; *Peixotti v. McLaughlin*, 1 Strobh. L. (S. Car.) 468, 47 Am. Dec. 563.

"Prima Facie, the proprietors of a stagecoach used for carrying the mail, passengers and their baggage, are not to be considered common carriers as to articles not strictly within their line of business, in the technical sense of that term. They may, however,

Parties Engaged in Moving Safes and Machinery, and who hold themselves out as willing to move such articles for any one who tenders their proper compensation, are common carriers as to such goods while engaged in their removal from one place to another.¹

4. **Who Are Not Common Carriers** — *a. GENERALLY.* — In addition to those classes of carriers who are not common carriers because of the fact that they do not carry for hire,² or do not hold themselves out to the world as willing to carry for all offering to pay their hire,³ there is a third class, on which it has been attempted to fix the liability of common carriers, but which have been held to be not subject to such liability for the reason that they are not properly carriers at all, being merely furnishers of motive power or of a road-bed or passage way, or mere warehousemen. To this last class belong proprietors of toll bridges, boom companies, telegraph, telephone, and similar companies,⁴ and, according to some authorities, towboat companies.⁵

b. OWNER OF TOLL BRIDGE. — The owner of a toll bridge is not a common carrier; he is not a carrier in any sense, but occupies a relation analogous to that of the proprietor of a turnpike, and he is bound merely to the exercise of reasonable care in maintaining his bridge in proper repair for the safe passage of travelers.⁶

c. WHARFINGERS. — Wharfingers who carry goods from their wharfs for their wharf customers, but not for strangers except under special circumstances, are not common carriers.⁷

d. IRRIGATION COMPANY. — An irrigation company, engaged in supplying water for irrigation purposes, is not a common carrier, and no liability on its part can exist on the theory that it is under the same obligations as a common carrier with regard to the water it undertakes to supply.⁸

e. LOG OR BOOM COMPANY. — A log or boom company engaged in the business of driving or floating logs down a stream is in no sense a carrier, and therefore is not liable as a common carrier.⁹

f. FORWARDING MERCHANTS. — Mere forwarding merchants, who act as agents and warehousemen in receiving and forwarding goods for transportation, and assume to pay the freight, etc., but who have no interest in the freight nor in the vehicles by which the goods are transported, are mere warehousemen and are not common carriers; they are liable only upon proof of

make themselves such, either by special contract in a particular case or by their general course of business. It is clearly established by the testimony in this case that the plaintiffs had been constantly in the habit of conveying trunks containing goods and other small packages, from one point to another, and receiving pay for the same. They are indeed brought fully within the operation of the above rule." *Powell v. Mills*, 30 Miss. 240, 64 Am. Dec. 158, citing *Dwight v. Brewster*, 1 Pick. (Mass.) 53, 11 Am. Dec. 133.

1. **Safe and Machinery Movers.** — *Jackson Architectural Iron Works v. Hurlburt*, 15 Misc. Rep. (N. Y. C. Pl.) 93.

2. See *infra*, this title, *Carriers Not for Hire*.

3. See *supra*, this title, *Carriers for Hire, but Not Common Carriers*.

4. See *infra*, this section.

5. See *Leonard v. Hendrickson*, 18 Pa. St. 40, 55 Am. Dec. 587; *Brown v. Clegg*, 63 Pa. St. 51, 3 Am. Rep. 522; *Wells v. Steam Nav. Co.*, 2 N. Y. 204; and *supra*, this section, *Carriers by Water — Towboats*.

6. **Owner of Toll Bridge.** — *Grigsby v. Chapell*, 5 Rich. L. (S. Car.) 445. The court, by

Evans, J., said: "The owner of a bridge is not a common carrier, for, in general, he has no possession or control over the goods. He is not like a stage owner or a railroad company. In these cases the passenger is passive, the government of the stage or the car is under the driver or the engineer. But in crossing a bridge the acts and conduct of a passenger are regulated by his own will. * * * He is more like the owner of a turnpike road, and his liabilities are analogous." See also the title *BRIDGES*, vol. 4, pp. 943, 951.

7. **Wharfingers.** — *Chattock v. Bellamy*, 15 Reports 340, 64 L. J. Q. B. 250. Compare *Maving v. Todd*, 1 Stark. 72, 2 E. C. L. 37; *Cobban v. Downe*, 5 Esp. N. P. 41; *British Columbia, etc., Spar, etc., Co. v. Nettleship*, L. R. 3 C. P. 499. See also the title *WHARFS AND WHARFINGERS*.

8. **Irrigation Company.** — *Wyatt v. Larimer, etc., Irrigation Co.*, 1 Colo. App. 480.

9. **Log or Boom Companies.** — *Mann v. White River Log, etc., Co.*, 46 Mich. 38, 41 Am. Rep. 141. See also *Pike v. Nash*, 3 Abb. App. Dec. (N. Y.) 610; and the title *BOOM COMPANIES*, vol. 4, p. 717.

negligence as a proximate cause of the loss or injury complained of.¹

g. TELEGRAPH COMPANIES. — It was at one time attempted to class telegraph companies as common carriers,² but the view universally adopted now is that they can in no sense be regarded as common carriers; they are like common carriers in that they are bound to serve impartially all those applying to them, but they are liable for improper transmission of messages only upon proof of negligence.³

h. MAIL CARRIERS. — To constitute any carrier a common carrier, subject to the unusual responsibilities of that relation, there must be some privity of contract between such carrier and the party attempting to hold him responsible.⁴ For this reason a carrier of the mails is not liable to the sender of a letter as a common carrier.⁵

5. Carrier Distinguished from Forwarder — Forwarder Defined and Characterized. — A forwarder is one who, for a compensation, takes charge of goods intrusted or directed to him and forwards them; that is, starts them on their way to their place of destination by the ordinary and usual means of conveyance or accord-

1. Forwarding Merchants. — *Platt v. Hibbard*, 7 Cow. (N. Y.) 497; *Denny v. New York Cent. R. Co.*, 13 Gray (Mass.) 481, 74 Am. Dec. 645; *Maybin v. South Carolina R. Co.*, 8 Rich. L. (S. Car.) 240, 64 Am. Dec. 753. See also *Schloss v. Wood*, 11 Colo. 287, 35 Am. & Eng. R. Cas. 492 (question for jury); *Teall v. Sears*, 9 Barb. (N. Y.) 317; *Stannard v. Prince*, 64 N. Y. 300; *Wade v. Wheeler*, 3 Lans. (N. Y.) 201; *Story on Bailments*, § 502.

A common carrier received goods in his sloop to be carried from New York to Troy, where, in obedience to the shipper's instructions, he transferred them to a boat in the canal, bound farther north; he was to receive no further reward for their transportation beyond Troy. The goods having been lost by the upsetting of the canal boat, it was held that the defendant, the sloop owner, was not liable, being a mere forwarder from Troy on. *Ackley v. Kellogg*, 8 Cow. (N. Y.) 224. See also *Roberts v. Turner*, 12 Johns. (N. Y.) 232, 7 Am. Dec. 311; *Brown v. Dennison*, 2 Wend. (N. Y.) 593.

2. Telegraph Companies. — See *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589; *Kirby v. Western Union Tel. Co.*, 4 S. Dak. 105, 439, 46 Am. St. Rep. 765; *Western Union Tel. Co. v. Texas*, 105 U. S. 460 (this last, however, was a case as to taxation of such companies).

3. Smith v. Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126, 8 Am. & Eng. Corp. Cas. 20; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 232; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; *Breese v. U. S. Telegraph Co.*, 45 Barb. (N. Y.) 292, 31 How. Pr. (N. Y.) 86; *Baldwin v. U. S. Telegraph Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Gillis v. Western Union Tel. Co.*, 61 Vt. 461, 15 Am. St. Rep. 917, 25 Am. & Eng. Corp. Cas. 568; *Western Union Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715, 5 Am. & Eng. Corp. Cas. 182.

As to telephone companies, see *American Rapid Tel. Co. v. Connecticut Telephone Co.*, 49 Conn. 352, 44 Am. Rep. 237, 1 Am. & Eng. Corp. Cas. 378. See also the title TELEGRAPHS AND TELEPHONES.

4. Central R., etc., Co. v. Lampley, 76 Ala. 357, 23 Am. & Eng. R. Cas. 725, 52 Am. Rep.

334; *Foster v. Metts*, 55 Miss. 77, 30 Am. Rep. 504.

5. Central R., etc., Co. v. Lampley, 76 Ala. 357, 23 Am. & Eng. R. Cas. 725, 52 Am. Rep. 334. In this case the court, by Clopton, J., said: "Between a contractor for carrying the public mails and the sender of letters there is no privity of contract, and the contractor has no right to and receives no remuneration from the sender. The government undertakes the transmission of the mails, and receives pay therefor by the postage charged. The contractor's contract is with the government, and by it his compensation is paid. He owes a duty, not to the sender of letters as an individual, but to the integral public, springing from his agreement to carry the mails. The public mail is not the proper subject of a common carrier's charge, and the extraordinary responsibility attached by law to such employment does not attach to a mail contractor. He does not become an insurer of the safe transportation of mail matter; the extent of his liability is the same as that of a bailee for hire."

See further, as sustaining the view of the text, *Powell v. Mills*, 30 Miss. 231, 64 Am. Dec. 158; *Foster v. Metts*, 55 Miss. 77, 30 Am. Rep. 504; *Hutchins v. Brackett*, 22 N. H. 252, 53 Am. Dec. 248; *Wiggins v. Hathaway*, 6 Barb. (N. Y.) 632; *Conwell v. Voorhees*, 13 Ohio 523, 42 Am. Dec. 206; *Schroyer v. Lynch*, 8 Watts (Pa.) 453; *Bolan v. Williamson*, 2 Bay (S. Car.) 551; *Dunlop v. Munroe*, 7 Cranch (U. S.) 242, 2 Kent's Com. (ed. 1889) 610.

Compare Sawyer v. Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445.

See also, in this connection, *Bishop v. Williamson*, 11 Me. 495; *Fitzgerald v. Burrill*, 106 Mass. 446; *Ford v. Parker*, 4 Ohio St. 576; *Christy v. Smith*, 23 Vt. 663; *Story on Bailments*, § 463.

When the government assumed control of the post-office (stat. 12 Car. II.), it was held that the postmaster was not liable for the loss of a letter with exchequer bills in it, and that postmasters enter into no contract with individuals, and receive no hire, like common carriers, in proportion to the value of the letters under their charge, but only a general compensation from government, and are,

ing to special instructions he may have received. His compensation is limited to remuneration for the care and trouble incurred by him, and to the charges paid by him in receiving, keeping, and duly forwarding. When he has placed the goods in course of transportation by a proper conveyance, his duty is at an end. He has no interest in and receives no part of the compensation paid for the carriage and due delivery of the goods, nor any interest or concern in the vessel or other conveyance used for the transportation.¹

He Is Not an Insurer of the safety of the goods during transportation or before, but is liable only for his own negligence or that of his agents.²

Characters of Carriers and Forwarders Combined.—The same person or corporation may act both as forwarder and as carrier; the two are now usually combined as one, but the liability remains distinct.³

Whether Carrier or Forwarder Depends on Circumstances.—Whether or not any person or company intrusted with property for transportation is responsible as a carrier, or as a forwarder only, must depend upon the circumstances and conditions affecting each case.⁴

IV. GENERAL NATURE OF CARRIER'S LIABILITY — 1. **Is an Insurer.** — Under the common law and where there is no special contract affecting the rights and duties of the parties, a common carrier is liable absolutely and at all events for a failure to deliver the property intrusted to it safely to the con-

ing for patronage, as such, and in that name contracting with owners to forward goods from

therefore, not liable as common carriers. *Laire v. Cotton*, 1 *Ld. Raym.* 646.

1. *Place v. Union Express Co.*, 2 *Hilt. (N. Y.)* 19; *Roberts v. Turner*, 12 *Johns. (N. Y.)* 232, 7 *Am. Dec.* 311.

See the title FORWARDING MERCHANTS.

2. **Forwarder Not an Insurer.**—*Hooper v. Wells*, 27 *Cal.* 11, 85 *Am. Dec.* 211; *Christenson v. American Express Co.*, 15 *Minn.* 270, 2 *Am. Rep.* 122; *Roberts v. Turner*, 12 *Johns. (N. Y.)* 232, 7 *Am. Dec.* 311.

3. **Same Person May Be Both Forwarder and Carrier.**—See *Teall v. Sears*, 9 *Barb. (N. Y.)* 317; *Schloss v. Wood*, 11 *Colo.* 287, 35 *Am. & Eng. R. Cas.* 492; *Clarke v. Needles*, 25 *Pa. St.* 338.

A common carrier to whom, as such, goods are tendered for transportation, cannot, without the shipper's knowledge and consent, receive them as a forwarder merely. *Mellier v. St. Louis, etc., Transp. Co.*, 14 *Mo. App.* 281.

4. **Whether Carrier or Forwarder.**—See *Blossom v. Griffin*, 13 *N. Y.* 569, 67 *Am. Dec.* 75; *Kreuder v. Woolcott*, 1 *Hilt. (N. Y.)* 223; *Roberts v. Turner*, 12 *Johns. (N. Y.)* 232, 7 *Am. Dec.* 311. See also *Parmelee v. Western Transp. Co.*, 26 *Wis.* 439.

An express company received a package, agreeing to "forward and deliver at destination if within their route, and, if not, to deliver to the connecting express, stage, or other means of conveyance, at the most convenient point." It was held that if the goods were to go beyond its line it was liable only as forwarder. *Plantation No. 4 v. Hall*, 61 *Me.* 517. And the general rule is that a carrier receiving goods for transportation over its own line and to a point beyond is liable only as a forwarder after the goods have left its line and been by it safely delivered to the next succeeding carrier. *Burroughs v. Norwich, etc., R. Co.*, 100 *Mass.* 26, 1 *Am. Rep.* 78. See the title CONNECTING CARRIERS.

Parties doing business under the name and style of a "transportation company," advertis-

ing for patronage, as such, and in that name contracting with owners to forward goods from New York to Chicago, for a compensation agreed upon as an equivalent for the entire service, are to be deemed carriers and not forwarders merely, although they employ the conveyances of third parties only in the performance of the contract. *Mercantile Mut. Ins. Co. v. Chase*, 1 *E. D. Smith (N. Y.)* 115.

In another case, goods were shipped from New York to Charleston for the plaintiffs, doing business in Columbia, S. C., to the care of the South Carolina Railroad Company, whose course of business it was to receive and forward goods so addressed. It was held that the company were not liable as common carriers until the goods were received by them for carriage; that, considering them as forwarding agents, the rule as to their liability was not the same as that which applied to them as common carriers; that, considering them as forwarding agents, they would be liable for refusing to receive, unless they showed good excuse for not receiving; and after receiving, they would be liable for not taking all the care which a prudent man would take about his own business. *Maybin v. South Carolina R. Co.*, 8 *Rich. L. (S. Car.)* 240, 64 *Am. Dec.* 753.

A receipt given by parties who were carriers as well as forwarders stated that the goods were received to be forwarded. The goods were burned up in the warehouse of such parties before the transportation commenced. It was held that the parties were responsible as carriers, and not as forwarders only. The fact that the receipt was in writing would not exclude evidence of the circumstances under which it was given and of an antecedent parol agreement to carry plaintiff's goods generally. These circumstances and agreement showed that the words "to be forwarded" were not used in their technical sense when put in the receipt. *Blossom v. Griffin*, 13 *N. Y.* 569, 67 *Am. Dec.* 75.

signee or owner. Its liability is not limited to losses which are the result of its negligence, but extends to any loss however caused, excepting only those losses or injuries caused by an act of God or the public enemy or through the shipper's negligence.¹

1. Carrier Liable as Insurer — England. — *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Smith's L. Cas. 199; *Forward v. Pittard*, 1 T. R. 27, 1 Rev. Rep. 146; *Nugent v. Smith*, 1 C. P. Div. 19, 423; *Riley v. Horne*, 5 Bing. 217, 15 E. C. L. 422.

United States. — *Burritt v. Rench*, 4 McLean (U. S.) 325; *Pendall v. Rench*, 4 McLean (U. S.) 259; *Holladay v. Kennard*, 12 Wall. (U. S.) 254; *Dusar v. Murgatroyd*, 1 Wash. (U. S.) 17.

Alabama. — *Louisville, etc., R. Co. v. McGuire*, 79 Ala. 395; *Jones v. Pitcher*, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716.

Arkansas. — *Packard v. Taylor*, 35 Ark. 402, 37 Am. Rep. 37.

California. — *Hooper v. Wells*, 27 Cal. 161, 85 Am. Dec. 211; *Bohannon v. Hammond*, 42 Cal. 227.

Connecticut. — *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235.

Delaware. — *Culbreth v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 392.

Florida. — *Clyde Steamship Co. v. Burrows*, 36 Fla. 121.

Georgia. — *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393; *Cooper v. Berry*, 21 Ga. 526, 68 Am. Dec. 468.

Illinois. — *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760; *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Dec. 83; *Chicago, etc., R. Co. v. Shea*, 66 Ill. 471; *Chicago, etc., R. Co. v. Sawyer*, 69 Ill. 285, 18 Am. Rep. 613.

Indiana. — *Bansemmer v. Toledo, etc., R. Co.*, 25 Ind. 434, 87 Am. Dec. 367; *Adams Express Co. v. Darnell*, 31 Ind. 20, 99 Am. Dec. 582; *Louisville, etc., R. Co. v. Nicholai*, 4 Ind. App. 119.

Kentucky. — *Bland v. Adams Express Co.*, 1 Duv. (Ky.) 232, 85 Am. Dec. 623; *Robertson v. Kennedy*, 2 Dana (Ky.) 431, 26 Am. Dec. 466; *Hall v. Renfro*, 3 Metc. (Ky.) 51.

Louisiana. — *Van Hern v. Taylor*, 7 Rob. (La.) 201, 41 Am. Dec. 279; *Cranwell v. Ship Fanny Fosdick*, 15 La. Ann. 436, 77 Am. Dec. 190; *Berje Texas, etc., R. Co.*, 37 La. Ann. 468.

Maine. — *Parker v. Flagg*, 26 Me. 181, 45 Am. Dec. 101; *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462, 92 Am. Dec. 606.

Maryland. — *Fergusson v. Brent*, 12 Md. 9, 71 Am. Dec. 582.

Massachusetts. — *Claffin v. Boston, etc., R. Co.*, 7 Allen (Mass.) 341.

Mississippi. — *Neal v. Saunderson*, 2 Smed. & M. (Miss.) 572, 41 Am. Dec. 609; *Gilmore v. Carman*, 1 Smed. & M. (Miss.) 279, 40 Am. Dec. 96; *Whitesides v. Thurlkill*, 12 Smed. & M. (Miss.) 599, 51 Am. Dec. 128; *Powell v. Mills*, 30 Miss. 231, 64 Am. Dec. 158; *Bennett v. Byram*, 38 Miss. 17, 75 Am. Dec. 90; *Southern Express Co. v. Moon*, 39 Miss. 822; *Mobile, etc., R. Co. v. Weiner*, 49 Miss. 725.

Missouri. — *Daggett v. Shaw*, 3 Mo. 264, 25 Am. Dec. 439; *Davis v. Wabash, etc., R. Co.*, 89 Mo. 340, 26 Am. & Eng. R. Cas. 315, *reversing* 13 Mo. App. 449.

New Hampshire. — *Moses v. Boston, etc., R. Co.*, 24 N. H. 71, 55 Am. Dec. 222.

New Jersey. — *New Brunswick Steamboat, etc., Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 394.

New York. — *Colt v. M'Meehan*, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200; *De Mott v. Laraway*, 14 Wend. (N. Y.) 225, 28 Am. Dec. 523; *Parsons v. Hardy*, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *McKinney v. Jewett*, 90 N. Y. 267, 9 Am. & Eng. R. Cas. 209, *affirming* 24 Hun (N. Y.) 19; *Howe v. Oswego, etc., R. Co.*, 56 Barb. (N. Y.) 121; *Heineman v. Grand Trunk R. Co.*, 31 How. Pr. (Buffalo Super. Ct.) 430, Sheld. (N. Y.) 95.

North Carolina. — *Harrell v. Owens*, 1 Dev. & B. L. (N. Car.) 273; *Boner v. Merchants' Steamboat Co.*, 1 Jones L. (N. Car.) 211.

Ohio. — *Welsh v. Pittsburg, etc., R. Co.*, 10 Ohio St. 65, 75 Am. Dec. 490.

Pennsylvania. — *Simpson v. Hand*, 6 Whart. (Pa.) 311, 36 Am. Dec. 231; *Leonard v. Hendrickson*, 18 Pa. St. 40, 55 Am. Dec. 587; *Willock v. Pennsylvania R. Co.*, 166 Pa. St. 184, 45 Am. St. Rep. 674, 61 Am. & Eng. R. Cas. 278.

South Carolina. — *Ewart v. Street*, 2 Bailey L. (S. Car.) 157, 23 Am. Dec. 131; *Smyrl v. Niolon*, 2 Bailey L. (S. Car.) 421, 23 Am. Dec. 146.

Tennessee. — *Turney v. Wilson*, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515; *Craig v. Childress*, Peck (Tenn.) 270, 14 Am. Dec. 751 (reasons stated at length); *Lewis v. Ludwick*, 6 Coldw. (Tenn.) 368, 98 Am. Dec. 454; *Nashville, etc., R. Co. v. David*, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594; *Watson v. Memphis, etc., R. Co.*, 9 Heisk. (Tenn.) 255.

Texas. — *Texas Express Co. v. Scott*, (Tex. 1883) 16 Am. & Eng. R. Cas. 111; *Chevallier v. Straham*, 2 Tex. 115, 47 Am. Dec. 639 (quoted from *supra*, this note).

Vermont. — *Day v. Ridley*, 16 Vt. 48, 42 Am. Dec. 489; *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 349.

Virginia. — *Murphy v. Staton*, 3 Munf. (Va.) 239; *Friend v. Woods*, 6 Gratt. (Va.) 189, 52 Am. Dec. 119; *Farish v. Reigle*, 11 Gratt. (Va.) 697, 62 Am. Dec. 666, 3 Minor's Inst. (2d ed.) 278 *et seq.*

Wisconsin. — *Strohn v. Detroit, etc., R. Co.*, 23 Wis. 126, 99 Am. Dec. 114; *Wood v. Crocker*, 18 Wis. 345, 86 Am. Dec. 773.

The Rule Stated. — In the case of *Chevallier v. Straham*, 2 Tex. 115, 47 Am. Dec. 639, the court said: "He [*i. e.*, the carrier] is liable for all losses except such as may arise from the act of God or the enemies of the country, or the fault of the party complaining. *Dusar v. Murgatroyd*, 1 Wash. (U. S.) 17; *Smyrl v. Niolon*, 2 Bailey L. (S. Car.) 422, 23 Am. Dec. 146. He is an insurer against all losses not

Liability Founded in Public Policy as Well as in Contract. — The liability of a common carrier does not rest wholly on contract between it and the shipper. It is a liability imposed by law, and exists independently of any special contract, having its foundation in the policy of the law arising out of the hardship which would result to shippers from the adoption of any other rule; it is upon this legal obligation to carry and deliver safely that a carrier is chargeable for the loss of property intrusted to it for transportation.¹

Rule Extends to All Classes of Common Carriers. — This rule of liability is not confined to any particular class of carriers, but extends to carriers of all kinds who are common carriers, whether they carry by water, by railroad, or by wagon,² though a partial exception exists in the case of carriers of live stock.³

2. Common-law Liability Always Presumed. — In the absence of proof to the

embraced in the excepted cases. As is well expressed in the dissenting opinion of Mr. Justice Nott, in *Cook v. Gourdin*, 2 Nott & M. (S. Car.) 19: 'No force, however great; no accident, however inevitable; no fraud, however beyond his control, will excuse him.' He is liable not only for losses occasioned by secret theft or embezzlement, but for those inflicted by highway robbery, by the spoliation and outrages of mobs, rioters, and insurgents. The most resistless and destructive conflagration, if occasioned by human agency, without any negligence whatever on the part of the carrier, will furnish no valid ground of exemption." See also *Philleo v. Sanford*, 17 Tex. 231, 67 Am. Dec. 654; *Texas, etc., R. Co. v. Morse*, 1 Tex. App. Civ. Cas., § 411.

Burden of Proof on the Carrier. — Where a carrier undertakes to carry goods to a certain destination, it is its duty to deliver them there at all events, unless they are lost by an act of God or the public enemy. If a loss from either of such causes is alleged, the burden is on the carrier to prove that fact affirmatively. *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 269. See the title ACT OF GOD, vol. 1, p. 597.

Liable Although It May Have Had a Right to Refuse the Goods. — If a common carrier has reasonable grounds for refusing to receive goods offered to it for transportation, it may do so. But if it once receives them, it becomes immediately liable as an insurer, and can only exonerate itself from liability by showing a loss by an act of God or the public enemy, or the shipper's negligence. *Porcher v. North-eastern R. Co.*, 14 Rich. L. (S. Car.) 181. See the same principle applied as to a carrier of passengers in a celebrated case. *Pearson v. Duane*, 4 Wall. (U. S.) 605.

Under Georgia Statute. — The Georgia Code, § 2066, provides that "one who pursues the business constantly or continuously, for any period of time, or any distance of transportation, is a common carrier, and, as such, is bound to use extraordinary diligence. In cases of loss the presumption of law is against him, and no excuse avails him, unless it was occasioned by the act of God or the public enemies of the state." The measure of extraordinary diligence is "that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property." Code of Georgia, § 2062. See *Richmond, etc., R. Co. v. White*, 88 Ga. 805, 55 Am. & Eng. R. Cas. 685.

1. Liability Not Dependent on Contract. — *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Smith's L. Cas. 199; *Riley v. Horne*, 5 Bing. 217, 15 E. C. L. 422; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Thurman v. Wells*, 18 Barb. (N. Y.) 500. See *Johnson v. East Tennessee, etc., R. Co.*, 90 Ga. 810; *Delaware, etc., R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Am. St. Rep. 442, 41 Am. & Eng. R. Cas. 187; *Arnold v. Jones*, 26 Tex. 335, 82 Am. Dec. 617; *Wood v. Crocker*, 18 Wis. 345, 86 Am. Dec. 773.

In *Riley v. Horne*, 5 Bing. 220, 15 E. C. L. 423, the court, by Best, C. J., said: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier which immediately rises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen that no person would be so rash as to attempt to prove that they had happened when they had not; namely, the act of God and the king's enemies."

There Must Be a Contractual Relation of some kind, however, in order to give rise to the legal obligation to carry safely. It may arise by implication from the acceptance of the goods for carriage or from the mere fact that the carrier has undertaken to carry. If no contractual relation exists between the carrier and the party complaining, or some one who acted for him, there is nothing upon which the obligation of the carrier can be predicated. See *supra*, this title, *Mail Carriers*.

In *England* it is held that no action will lie in favor of a shipper and against a connecting line for the reason that there is no privity of contract between them. See the title CONNECTING CARRIERS.

2. Houston, etc., Nav. Co. v. Dwyer, 29 Tex. 376. See *supra*, this title, *Carriers by Water*.

3. See the title CARRIERS OF LIVE STOCK, vol. 5, p. 427.

contrary, the liability of a carrier is always presumed to be its common-law liability, and any party attempting to show a greater or less liability must assume the burden of proving the contract by which the common-law liability was affected.¹

3. Exceptions to General Rule of Liability — *a.* IN CASE OF CARRIERS OF LIVE STOCK. — The general rule of the common law, under which the carrier is liable as an insurer, does not apply strictly to carriers of live stock. Animals, while being carried on trains, are susceptible to so many injuries arising from their inherent viciousness or restlessness, that a carrier is, as to them, not liable for injuries thus arising.²

b. IN CASE OF PERISHABLE GOODS. — The rule which relieves the carrier from its strict liability in carrying live stock operates to relieve it from liability for the loss of goods, where such loss results from the inherent character of such goods, and not from any want of care on its part, as where the goods are of a perishable nature.³

Duty in Such Cases. — Even when the carrier is not liable as insurer, owing to the peculiar character of the goods being carried, as where they are, from their nature, peculiarly liable to be injured, it is still bound to give them all reasonable care and attention during the transit;⁴ though this rule does not extend

1. Presumption of Common-law Liability. — New Jersey R., etc., *Co. v. Pennsylvania R. Co.*, 27 N. J. L. 100; *Park v. Preston*, 108 N. Y. 434; *Pittsburgh, etc., R. Co. v. Barrett*, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 257; *Graham v. Davis*, 4 Ohio St. 376, 62 Am. Dec. 285; *New Jersey Steam Nav. v. Merchants' Bank*, 6 How. (U. S.) 344; *Peoria, etc., R. Co. v. U. S. Rolling Stock Co.*, 136 Ill. 643, 29 Am. St. Rep. 348, 49 Am. & Eng. R. Cas. 81. And see the title CARRIERS OF GOODS, vol. 5, p. 353 *et seq.*

Where a common carrier undertakes, by the contract expressed in the bill of lading, to deliver the goods at their destination, without stipulating that he shall not be liable for losses resulting from any cause, his undertaking will not amount to an absolute undertaking, and he will not be liable for losses resulting from an act of God or a public enemy. *Neal v. Saunderson*, 2 Smed. & M. (Miss.) 572, 41 Am. Dec. 609.

The defendants, safe movers, are not relieved from liability as common carriers for an injury to machinery being moved by them merely because plaintiff insisted on their continuing work after dark, they having a right to stop if they chose, and having failed to stipulate against such liability. *Jackson Architectural Iron Works v. Hurlburt*, 15 Misc. Rep. (N. Y. C. Pl.) 93.

Where Special Contracts Are the Carrier's Rule. — The rule of the text is not affected by proof that the carrier was accustomed always to give to shippers a receipt limiting its common-law liability. *London, etc., F. Ins. Co. v. Rome, etc., R. Co.*, 68 Hun (N. Y.) 598. See also CARRIERS OF GOODS, vol. 5, p. 288 *et seq.*

2. See the title CARRIERS OF LIVE STOCK, vol. 5, p. 427, where the subject is discussed at length.

3. Perishable Goods. — See opinion of Bramwell, B., in *Kendall v. London, etc., R. Co.*, L. R. 7 Exch. 373, 41 L. J. Exch. 184; *Boyd v. Dabois*, 3 Campb. 133; *Hunter v. Potts*, 4 Campb. 203; *Nugent v. Smith*, 1 C. P. Div. 423, 45 L. J. C. P. Div. 697, *reversing* 1 C. P.

Div. 19, 24 W. R. 237; *Alston v. Herning*, 11 Exch. 822; *Brass v. Maitland*, 6 El. & Bl. 471, 88 E. C. L. 471; *Rohl v. Parr*, 1 Esp. N. P. 445; *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83; *Vail v. Pacific R. Co.*, 63 Mo. 230; *McGraw v. Baltimore, etc., R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188.

Where there is a great press of business, the carrier may discriminate in favor of perishable goods in determining which consignments it will carry first. *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6. See the title CARRIERS OF GOODS, vol. 5, p. 252.

The common-law rule making carriers liable for loss or damage to goods, except such as result from the act of God or the public enemy, does not apply to a loss which results from deterioration in quantity or quality, or from any inherent natural infirmity, or tendency to damage, or decay of perishable articles, or ordinary wear or tear, or rubbing, in course of transportation, where these things occur without negligence on the part of the carriers; nor are they liable for injuries that arise from bad packing by the shippers. *Truax v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 233.

4. Care During Transit. — *Peck v. Weeks*, 34 Conn. 145; *Notara v. Henderson*, L. R. 5 Q. B. 346, L. R. 7 Q. B. 225 (failure to spread out and dry beans which had become wet by an accident to the vessel); *Kinnick v. Chicago, etc., R. Co.*, 69 Iowa 665, 27 Am. & Eng. R. Cas. 55; *Davidson v. Gwynne*, 12 East 381.

Where, in the course of transportation, certain furs were wet, through an accident to the boat, it was held that it was the carrier's duty to unpack them and allow them to dry immediately, and for a failure to do so the carrier was liable for the damage which such attention would have averted. *Chouteaux v. Leech*, 18 Pa. St. 224, 57 Am. Dec. 602. So where coffee was wet. *Bird v. Cromwell*, 1 Mo. 81, 13 Am. Dec. 470.

So where dressed meat was being carried, and, owing to a delay of the vessel, the ice in which it was packed melted away, it was held

so far as to require a carrier by water to suspend a voyage to care for the damaged goods to the probable injury of the remainder of the cargo.¹

c. IN CASE OF DELAY IN TRANSMISSION OF GOODS. — The common-law rule rendering common carriers liable as insurers does not extend to cases of loss resulting from delay in the transmission of goods. The reason upon which the rule is founded fails when applied to such cases, and all that can be required of the carrier is, that it shall exercise due care and diligence to guard against delay, and to forward the goods to their destination.²

d. LOSSES CAUSED BY SHIPPER'S NEGLIGENCE. — Where it appears that the proximate cause of the loss or injury to the goods was the negligence of the shipper in marking or packing them, or in some other respect, the carrier cannot be held responsible.³

4. While Hauling Cars of Other Companies. — A railroad company engaged in the general business of carrying freight is bound to receive and haul over its line, when requested to do so, the cars of other companies,⁴ and with respect to such cars and their contents it will be subject to the same duties and liabilities as in the transportation of ordinary freight carried in its own cars. In the event of a loss or injury, it will be responsible as a common carrier.⁵

that the carrier was liable for the damage resulting from its failure to supply ice, it appearing that it was practicable to have done so. *Sherman v. Inman Steamship Co.*, 26 Hun (N. Y.) 107; *Peck v. Weeks*, 34 Conn. 145.

Failing to Repair Casks Containing Oil. — The rule of the text has been applied also to a case where a loss was caused by the carrier's failing to wet certain casks containing oil in order to prevent their leaking. The fact that loss from leakage was one of the special exceptions in the bill of lading releasing the carrier from liability would not affect the case, where the carrier had agreed to keep the casks wet. *Hennewell v. Taber*, 2 Sprague (U. S.) 1. Also to a case where the carrier, after becoming aware that a cask of brandy which was being carried was leaking, failed to take any steps to prevent further leakage. *Beck v. Evans*, 16 East 244; *Cox v. London*, etc., R. Co., 3 F. & F. 77. See also, in this connection, *The Brig Collenberg*, 1 Black (U. S.) 170; *Leech v. Baldwin*, 5 Watts (Pa.) 446; *Warden v. Greer*, 6 Watts (Pa.) 424; *Gowdy v. Lyon*, 9 B. Mon. (Ky.) 112.

1. No Duty to Delay and Repair Damage where Other Cargo Would Be Injured. — *The Steamboat Lynx v. King*, 12 Mo. 272, 49 Am. Dec. 135; *Notara v. Henderson*, L. R. 5 Q. B. 346. See also *The Propeller Niagara v. Cordes*, 21 How. (U. S.) 7; *The Bark Gentleman*, 1 Olc. Adm. 110; *The Steamship America*, 8 Ben. (U. S.) 491; *Bloeker v. Whittenburg*, 12 La. Ann. 410; *Rogers v. Murray*, 3 Bosw. (N. Y.) 357; *The Gentleman*, 1 Blatchf. (U. S.) 196.

2. *Truax v. Philadelphia*, etc., R. Co., 3 Houst. (Del.) 233; *Pittsburgh*, etc., R. Co. v. *Hollowell*, 65 Ind. 188, 32 Am. Rep. 63.

For a full discussion of the authorities on this question, see the title CARRIERS OF GOODS, vol. 5, p. 244.

In *Gulf*, etc., R. Co. v. *Levi*, 76 Tex. 337, *reversing* (Tex. 1889) 12 S. W. Rep. 677, 40 Am. & Eng. R. Cas. 115, the court, after stating the reason upon which the common-law doctrine that a common carrier is an insurer is based (see *supra*, this section, *Is an Insurer*), proceeded: "The same reasons do not apply

when the thing is actually transported and delivered, although, when delivered, it may be greatly diminished in value by a fall in the market price, or its value partially or entirely destroyed by reason of its inherent perishable nature, which has worked its partial or entire destruction while in transit."

In *Geismer v. Lake Shore*, etc., R. Co., 102 N. Y. 563, 55 Am. Rep. 837, 26 Am. & Eng. R. Cas. 287, the court, by Earl, J., said: "A railroad carrier stands upon the same footing as other carriers, and may excuse delay in the delivery of goods by accident or misfortune not inevitable or produced by the act of God. All that can be required of it in any emergency is that it shall exercise due care and diligence to guard against delay and to forward the goods to their destination. And so it has been uniformly decided. *Wibert v. New York*, etc., R. Co., 12 N. Y. 245; *Blackstock v. New York*, etc., R. Co., 20 N. Y. 48, 75 Am. Dec. 372. In the absence of special contract, there is no absolute duty resting upon a railroad carrier to deliver the goods intrusted to it within what, under ordinary circumstances, would be a reasonable time. Not only storms and floods and other natural causes may excuse delay, but the conduct of men may also do so."

3. See the title CARRIERS OF GOODS, vol. 5, p. 368. See also *American Express Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 561.

4. Railroad Company Bound to Haul Cars of Other Companies. — *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212, 1 Am. & Eng. R. Cas. 101; *Rae v. Grand Trunk R. Co.*, 14 Fed. Rep. 401, 9 Am. & Eng. R. Cas. 470; *Texas*, etc., R. Co. v. *Carlton*, 60 Tex. 397, 15 Am. & Eng. R. Cas. 350. See also *Peoria*, etc., R. Co. v. *Chicago*, etc., R. Co., 109 Ill. 135, 18 Am. & Eng. R. Cas. 506, 50 Am. Rep. 605. And see the title CARRIERS OF GOODS, vol. 5, p. 161.

5. Liability for Such Cars. — *Missouri Pac. R. Co. v. Chicago*, etc., R. Co., 25 Fed. Rep. 317, 23 Am. & Eng. R. Cas. 718; *Hannibal*, etc., R. Co. v. *Swift*, 12 Wall. (U. S.) 262; *Peoria*, etc., R. Co. v. *Chicago*, etc., R. Co., 109 Ill. 135, 18 Am. & Eng. R. Cas. 506, 50 Am. Rep. 605; *East St. Louis Connecting R. Co. v. Wabash*,

When Bound to Carry Goods in Cars in Which Tendered. — But a company is not bound to carry goods tendered by a connecting line, in the same cars in which they are when tendered, except under special circumstances where a change of cars would be necessarily harmful, and it is no proof of negligence to show that such a change of cars was made.¹

5. Carriers of Passengers. — Carriers of passengers are common carriers with respect to the baggage of their passengers² and with respect to their passengers or those desiring passage on their trains. But their liability to passengers for personal injuries is limited to cases where their negligence in the discharge of some duty is the proximate cause of the injury; they are not insurers of the safety of their passengers.³

If a Carrier of Passengers Undertakes to Carry Goods for Hire, it becomes subject, with respect to such goods, to the liability of a common carrier of goods, except in a case where the compensation for the carriage is so grossly inadequate as to render the application of such a rule of liability an injustice; in such a case it is liable as a bailee merely.⁴

etc., R. Co., 123 Ill. 594, 32 Am. & Eng. R. Cas. 522, reversing 24 Ill. App. 279; Peoria, etc., R. Co. v. U. S. Rolling Stock Co., 136 Ill. 645, 29 Am. St. Rep. 348, 49 Am. & Eng. R. Cas. 81, reversing 28 Ill. App. 79; Vermont, etc., R. Co. v. Fitchburg R. Co., 14 Allen (Mass.) 462, 92 Am. Dec. 785; Austin v. St. Louis, etc., Packet Co., 15 Mo. App. 197; New Jersey R., etc., Co. v. Pennsylvania R. Co., 27 N. J. L. 100; Mallory v. Tioga R. Co., 39 Barb. (N. Y.) 488.

It has been held that when the railroad company merely furnishes the motive power and the roadbed, and contracts to haul the cars of the shipper, it is not liable as a common carrier of the goods in such cars, and that it is liable only for losses resulting from its negligence. East Tennessee, etc., R. Co. v. Whittle, 27 Ga. 535, 73 Am. Dec. 741; Ohio, etc., R. Co. v. Dunbar, 20 Ill. 623. See also Kimball v. Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567. But this is not the better doctrine except when it appears that all control over the goods was taken from the carrier and confided to agents of the shipper. Mallory v. Tioga R. Co., 39 Barb. (N. Y.) 488; New Jersey R., etc., Co. v. Pennsylvania R. Co., 27 N. J. L. 100. In this last case the court said: "The point was incidentally made * * * that this was not a case of carrying at all, but was analogous to that of towing a boat upon a water navigation, where the party supplying the motive power does not receive the boat into his custody or exercise any control over it other than such as results from the act of towing; in which case it has been held that the common-law liability of carrier does not attach. Caton v. Rumney, 13 Wend. (N. Y.) 387. This doctrine has been denied or doubted in Smith v. Pierce, 1 La. 349. But however the rule may be in cases of towing boats under these circumstances, the analogy does

not hold good in the present case. Here the defendants received the car to take over their road and had exclusive charge of it, though they took it on its own trucks."

In Missouri Pac. R. Co. v. Chicago, etc., R. Co., 25 Fed. Rep. 317, 23 Am. & Eng. R. Cas. 718, it was held that where a railroad company receives loaded cars from another road for transportation, it is liable as a common carrier in case they are destroyed *en route* by fire. But if destroyed by fire after delivery to the consignee, or after they have been tendered to him, the company is not liable if not in fault. In the latter case its duties are only those of warehousemen.

Hauling Locomotive. — In Terre Haute, etc., R. Co. v. Chicago, etc., R. Co., 150 Ill. 502, the defendant company undertook to transport an engine over its road between certain points for a fixed price per mile; the owners of the engine to furnish the engine driver and fireman, but its time of starting and stopping, its side-tracking and the like, were to be under the control of the defendant company. A conductor of the defendant having disobeyed an order of the train-dispatcher, a collision occurred whereby the engine was damaged. It was held that the defendant company was liable for the damage thus caused.

1. Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co., 61 Fed. Rep. 160, affirming 51 Fed. Rep. 465, 51 Am. & Eng. R. Cas. 145; McAlister v. Chicago, etc., R. Co., 74 Mo. 351, 7 Am. & Eng. R. Cas. 373. See the title CONNECTING CARRIERS.

2. See the title BAGGAGE, vol. 3, p. 546.

3. See the title CARRIERS OF PASSENGERS, vol. 5, p. 474.

4. Passenger Carriers as Carriers of Goods. — Bean v. Sturtevant, 8 N. H. 146, 28 Am. Dec. 389.

COMMON LAW.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles CONFLICT OF LAWS; CONSTITUTIONAL LAW; CRIMINAL LAW; EVIDENCE; FOREIGN LAWS; JUDICIAL NOTICE; PRESUMPTIONS; STATES; UNITED STATES COURTS; USAGES AND CUSTOMS.

I. SCOPE OF TITLE. — The treatment of this subject is intended to include only a discussion of the general and fundamental principles of the common law as it exists in *England* and the *United States*; and no attempt has been made to incorporate into the article the effect of that law upon specific subjects which may be investigated under their proper titles in this work.

II. DEFINITION AND USE OF TERM — 1. Definition. — By the common law are meant those maxims, principles, and forms of judicial proceeding which have no written law to prescribe or warrant them, but which, founded on the laws of nature and the dictates of reason, have, by usage and custom, become interwoven with the written laws, and by such incorporation form a part of the municipal code of each state or nation which has emerged from the loose and erratic habits of savage life to civilization, order, and a government of law.¹

2. How the Term Is Used — a. GENERALLY. — The term "common law" is to be understood to mean the common law of England, and not of any particular state.²

b. IN THE UNITED STATES CONSTITUTION. — It is well established that the framers of the Constitution of the United States, in providing that the right of trial by jury should be observed in suits at "common law," contemplated not merely suits which the common law recognized among its old and settled proceedings, but those suits in which legal rights were to be ascertained and determined in contradistinction to equity and admiralty jurisprudence.³

1. *State v. Lafferty*, Tappan (Ohio) 113.

Other Definitions. — Common law is that system of law or form of the science of jurisprudence which has prevailed in *England* and in the *United States of America*, in contradistinction to other great systems, such as the Roman or civil law. Bouv. Law Dict. 348.

The common law, in its broadest and most general signification, means those rules or precepts of law in any country, or that body of its jurisprudence, which is of equal application in all places, as distinguished from local laws and rules. Abb. Law Dict. 253.

"The common law is reason dealing by the light of experience in human affairs." 1 Bl. Com. 472.

Common law, in the widest sense of the word, is that part of the law of England which before the Judicature Acts was administered by the common-law tribunals, as opposed to equity, or that part of the law of England which was administered by the Court of Chancery. Sweet's Law Dict. 173.

2. *Parsons v. Bedford*, 3 Pet. (U. S.) 446.

3. Trial by Jury "in Suits at Common Law" — Seventh Amendment United States Constitution. — *Parsons v. Bedford*, 3 Pet. (U. S.) 433; *Fenn v. Holme*, 21 How. (U. S.) 481; *Klever v. Sewall*, 65 Fed. Rep. 395; *Scott v. Billgerry*, 40 Miss. 119; *Creighton v. Hershfield*, 1 Mont. 639; *Chumaseo v. Potts*, 2 Mont. 242; *Reubens v. Joel*, 13 N. Y. 488; *Barlow v. Daniels*, 25 W. Va. 512; *In re Booth*, 3 Wis. 13.

The Term Used in Treaty with Foreign Nation. — In *Forbes v. Scannell*, 13 Cal. 243, it is said that the phrase "common law," as used in the act of Congress consummating the treaty with China, and applied to the arbitrament of controversies between citizens of the United States, means that general body of law which is constituted by those general principles and those general usages which are to be found, not in the legislative acts of any particular state, but that generally recognized and long established law which forms the substratum of the laws of every state; and that we may look to American as well as English jurists to ascertain what this law is, for neither the opinions nor

The term "common law" here alluded to is likewise to be taken to mean that system as it prevails in the mother country, and not as it exists in any individual state.¹

In the Judiciary Act of 1887 the same meaning is to be attached to the term.²

3. Its Influence upon Statutes. — Statutes are to be expounded with reference to the principles of the common law, and the legislative intent is not presumed to have been to make any innovation upon that law, farther than necessity required.³

Legislative Intent to Govern. — When a legislative intent, however, is unmistakably to legislate upon a subject of common-law jurisdiction, the latter will be abrogated by legal intendment; ⁴ but statutes having this purpose in view must be strictly construed.⁵

Repeal of Statute. — But upon the repeal of such abrogating statute the common law is thereby restored to its former state.⁶

Cumulative Remedies. — And where a remedy is provided by statute, one having existed at common law, such remedies thereby become cumulative, and the plaintiff may elect between them.⁷

Where a Purely Statutory Right Is Asserted and there exists no specific statutory remedy, the courts will employ analogous common-law remedies to attain the ends of justice.⁸

Where the Common Law Gives No Right of Action, the court is unable to interpose and supply such defect by furnishing a remedy.⁹

III. ORIGIN AND GROWTH — 1. In England. — The English common law is

precedents of judges can be said, with strict propriety, to be the law — they are only evidence of law. See also 7 Opinions of Attorneys-General 504; Executive Docts., 1st session, 33d Congress.

Constitution is Based upon the Common Law. — In *Murray v. Chicago*, etc., R. Co., 62 Fed. Rep. 24, Shiras, J., said: "The adoption of the Constitution did not deprive the people of the several colonies of the protection and advantages of the common law. The Constitution itself recognizes the fact of the continued existence of the common law, and indeed it is based upon the principles thereof, and its correct interpretation requires that its provisions shall be read and construed in the light thereof."

Unexplained Terms Used in Constitution or Statutes. — In *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116, Smith, J., said: "It is a general rule that where terms used in the common law are contained in a statute, or the Constitution, without an explanation of the sense in which they are there employed, they should receive that construction which has been affixed to them by the former."

1. U. S. v. *Wonson*, 1 Gall. (U. S.) 5.

2. *Brisenden v. Chamberlain*, 53 Fed. Rep. 307.

3. *Cadwallader v. Harris*, 76 Ill. 370; *Goodwin v. Thompson*, 2 Greene (Iowa) 329; *Hooper v. Baltimore*, 12 Md. 464; *Keech v. Baltimore*, etc., R. Co., 17 Md. 32.

4. *State v. McGrew*, 11 Iowa 112.

5. **Statutes in Derogation of Common Law Construed Strictly.** — *Wilbur v. Crane*, 13 Pick. (Mass.) 284; *Gibson v. Jenney*, 15 Mass. 205; *Sibley v. Smith*, 2 Mich. 486; *Esterey's Appeal*, 54 Pa. St. 192; *Hearn v. Ewin*, 3 Coldw. (Tenn.) 399.

Contra. — The rule of the common law that

the statutes in derogation thereof are to be construed strictly does not apply in the following states: *Arkansas, California, Colorado, Dakota, Idaho, Iowa, Kansas, Kentucky, Nebraska, New York, Ohio, Oregon, South Carolina, Utah, Washington, Wyoming.* 1 *Stimson's Am. Stat. Law* 137.

6. *Com. v. Churchill*, 2 Met. (Mass.) 118; *Virginia Valley Ins. Co. v. Barley*, 16 Gratt. (Va.) 363.

7. *People v. Craycroft*, 2 Cal. 243, 56 Am. Dec. 331; *Candee v. Hayward*, 37 N. Y. 653.

8. *Hightower v. Fitzpatrick*, 42 Ala. 597.

When a Case Arises Which Is Not Affected by Any Statute, the facts therein being fully established, the question first to be considered is, Does there exist any clear and well-defined principle of the common law which directly and immediately controls it, and determines the rights and obligations of the parties? If no such principle be found to exist, the question next presents itself, Is there any principle of the common law which, by analogy, should govern it? If both of these sources fail in furnishing a determinate solution of the controversy, resort must next be had to the principles of natural justice, which form the basis of a great portion of the common law; and should these principles be discovered to apply in a full and determinate manner to all the circumstances of the case, they are adopted and determine the rights of the parties. But should these sources prove inadequate, the case is regarded as without redress at the common law, and relief can only be sought through new legislation by statute, to decide future questions of a similar nature. *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667.

9. *Osborn v. Gillett*, L. R. 8 Exch. 88, 42 L. J. Exch. 53, 28 L. T. N. S. 197.

derived from immemorial usage and custom, originating from the acts of Parliament not recorded, or which have been destroyed or lost. It is a system of jurisprudence founded on the principles of justice, and denominated by Blackstone "the perfection of reason." The evidences of its existence are the treatises of men learned in the law and the judicial records of the courts of justice of England.¹

2. In the United States.—The common law of the United States is composed partly of the common law of England and partly of the usages which have grown up in, and are indigenous to, the United States. When the ancestors of the people of the United States emigrated from the mother country, they brought with them such principles only as they deemed expedient for the situation in which they were about to place themselves,² together with

1. Chase, C. J., in *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

Inception and Progress of Common Law in England.—The *lex non scripta*, or unwritten law, includes not only general customs, or the common law properly so called, but also the particular customs of certain parts of the kingdom, and likewise those particular laws that are by custom observed only in certain courts and jurisdictions; these customs are as old as the primitive Britons, and continued down through the several mutations and governments of inhabitants to the present time, unchanged and unadulterated. In the time of Alfred the local customs of the several provinces of the kingdom had grown so various that he found it expedient to compile his *Dome-Book*, or *liber judicialis*, for the general use of the whole kingdom. This book is said to have been extant as late as the reign of Edward IV., but is now lost. It probably contained the principal maxims of the common law, the penalties for misdemeanors, and forms of judicial proceedings. By the influx of the Danes into England this code of Alfred in many of the provinces fell into disuse, or was mixed and debased with other laws of a coarser alloy, principal among which were, first, the Mercian Laws; second, West-Saxon Laws; and, third, the Danish Law. These are the laws which gave rise to that collection of maxims and customs which is now known by the name of the "Common Law;" a name either given to it in contradistinction to other laws, as the statute law, the civil law, the law merchant, and the like; or, more probably, as the law common to all the realm. And these maxims and customs are of higher antiquity than memory or history can reach, nothing being more difficult than to ascertain the precise beginning and the first spring of an ancient and long-established custom. The common law is distinguishable into three kinds: 1. General customs; 2. Particular customs; and 3. Particular laws. The authority of the maxims and rules of the common law rests upon general reception and usage, and the only method of proving that this or that maxim is a rule of the common law is by showing that it has always been the custom to observe it. These customs and maxims are to be known, and their validity to be determined, by the judges in the several courts of justice; they are the depositories of the laws; the living oracles who must decide in all cases of doubt, and who are bound by oath to decide according to

the law of the land. Their knowledge of that law is derived from experience and study, and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law. The doctrine of the law, then, is this: that precedents and rules must be followed, unless flatly absurd or unjust. 1 Blackstone 64-83.

The Common Law is "not the product of the wisdom of some one man, or society of men, in any one age, but of the wisdom, counsel, experience, and observation of many ages of wise and observing men. * * * Where the subject of any law is single, the prudence of one age may go far at one essay to provide a fit law; and yet, even in the wisest provisions of that kind, experience shows us that new and unthought-of emergencies often happen that necessarily require new supplements, abatements, or explanations. But the body of laws that concern the common justice applicable to a great kingdom is vast and comprehensive, consists of infinite particulars, and must meet with various emergencies, and therefore requires much time and much experience, as well as much wisdom and prudence, successively to discover defects and inconveniences, and to apply apt supplements and remedies for them; and such are the common laws of England, namely, the productions of much wisdom, time, and experience." Sir Matthew Hale, in Preface to Rolle's Abridgment.

Some of Its Principles Arose from the Feudal System.—In *Key v. Vattier*, 1 Ohio 132, Burnet, J., said: "Some of the finest principles and rules of the common law took their rise under the same [feudal] system, and grew out of a state of things that has ceased to exist, and some of them from circumstances that have long been forgotten; but this is no argument against their policy or their obligatory effect."

2. Guardians of Poor v. Greene, 5 Binn. (Pa.) 554.

Constituent Parts of American Common Law.—In *Browning v. Browning*, 3 N. Mex. 371, Brinker, J., in considering what constitutes the common law as recognized in the United States, said: "First, in those states which were a part of the original colonies, and which have not by legislation adopted statutes passed prior to a particular date, the unwritten law, and such general British statutes, applicable to their condition, as were in force at the time of

such English statutes as were amendatory of the common law as it existed at the time of their emigration.¹

The Flexibility of the Common Law consists, not in a change of great and general truths, but in the application of old principles to new cases, and in the modification of rules flowing from them, to such cases as they arise; thus enabling it to be adapted to the ever-varying conditions and emergencies of human society.²

Principles of the Common Law Invariable. — But while the rules of the common law and the result of the application of its principles will vary with the facts to which it is applied or the condition under which such application is made, the fundamental principles of the law remain immutable.³

the formation of the colonial governments, and such as were afterwards adopted, expressly or tacitly, constituted the common law; second, in those states which have adopted the common law, and the British statutes passed and in force prior to the date fixed in the act of adoption, and were of a general nature, and suitable to their situation, such common law and statutes constitute their common law; and third, in those states and territories which were not of the original colonies, and which have not in terms adopted any English statutes, but have adopted the common law, the unwritten or common law of England, and the acts of Parliament of a general nature, not local to Great Britain, which had been passed and were in force at the date of the war of the Revolution, and not in conflict with the Constitution or laws of the United States, nor of the state or territory, and which were suitable to the wants and condition of the people, are the common law of such states and territories."

Judicial Notice Taken of Common Law of England. — In *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143, Shepley, J., said: "We are in the habit of taking notice of the common law of England without proof; not, however, because it is the common law of a foreign country, but because that common law has become a law to us, and we look to it without proof, as to our own law."

Equity a Part of Our Common Law. — In *Pennock's Estate*, 20 Pa. St. 268, 59 Am. Dec. 718, Lowrie, J., said: "Certainly, the principles of equity are part of our common law. It is the very essence of common or customary law that it consists of those principles and forms which grow out of the customs and habits of the people. It is therefore involved in its very nature that only so much of the English law as is adapted to our circumstances and customs is properly recognized as part of our common law."

1. See *infra*, *English Statutes — In General*.

2. *Hurtado v. California*, 110 U. S. 516; *Hightower v. Fitzpatrick*, 42 Ala. 597; *Hill v. Smith*, 27 Cal. 476; *Penny v. Little*, 4 Ill. 307; *Woodman v. Pitman*, 79 Me. 456, 1 Am. St. Rep. 342; *Hale, etc., Gold, etc., Min. Co. v. Storey County*, 1 Nev. 104; *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 587; *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667; *Bell v. State*, 1 *Swan* (Tenn.) 42; *Jacob v. State*, 3 *Humph.* (Tenn.) 514.

Common Law Not Exclusively Applicable to One Country. — In *People v. Randolph*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 174, it is said that "The principles of the common law * * *

are not exclusively applicable or suited to one country or condition of society, but on the contrary by reason of their properties of expansibility and flexibility, their application to many is practicable. The adoption of that law in the most general terms, by the government of any country, would not necessarily require or admit of an unqualified application of all its rules without regard to local circumstances, however well settled and generally received those rules might be. Its rules are modified upon its own principles, and not in violation of them. Those rules being founded in reason, one of its oldest maxims is that where the reason of the rule ceases the rule also ceases."

In *Woodman v. Pitman*, 79 Me. 456, 1 Am. St. Rep. 342, Peters, C. J., said: "The inexhaustible and ever-changing complications in human affairs are constantly presenting new questions and new conditions, which the law must provide for as they arise; and the law has expansive and adaptive force enough to respond to the demands thus made of it; not by subverting, but by forming new combinations and making new applications out of its already established principles, the result produced being only 'the new corn that cometh out of the old fields.'"

3. *People v. Randolph*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 174.

Common Law Flexible and Adaptive. — In *Jacob v. State*, 3 *Humph.* (Tenn.) 493, Turley, J., says: "The common law has been aptly called the *lex non scripta*, because it is a rule prescribed by the common consent and agreement of the community, as one applicable to its different relations, and capable of preserving the peace, good order, and harmony of society, and rendering unto every one that which of right belongs to him. Its sources are to be found in the usages, habits, manners, and customs of a people; its seat in the breast of the judges who are its expositors and expounders. Every nation must of necessity have its common law, let it be called by what name it may, and it will be simple or complicated in its details, as society is simple or complicated in its relations. A few plain and practical rules will do for a wandering horde of savages, but they must and will be much more extensively ramified when civilization has polished, and commerce and arts and agriculture enriched, a nation. The common law of a country will, therefore, never be entirely stationary, but will be modified and extended by analogy, construction, and custom, so as to embrace new relations springing up from time to time from an amelioration or change of

The Common Law Forms the Basis of Our Jurisprudence, and rights and liabilities, except so far as modified by statute, must be decided in accordance with its principles.¹

IV. WHAT THE COMMON LAW INCLUDES — 1. Generally — a. GENERAL CUSTOMS AND PARTICULAR LAWS.—In *England*, the common law, in its most comprehensive sense, is said to embrace general customs pervading the whole realm, particular customs prevailing only in certain places, and particular laws which have been by degrees incorporated into the common law to a certain extent. But, in its more ordinary acceptance, the common law includes only general customs and particular laws, and not customs of particular places. It is in this sense that the common law has been introduced into the *United States*.²

b. CHRISTIANITY AS A PART OF THE COMMON LAW — (1) In England.—In England the sanctity and inviolability of the principles of revealed religion have long been recognized and embodied in the maxim, as stated in an early case by Lord Chief Justice Hale, that "Christianity is parcel of the laws of England," and that to cast obloquy upon its precepts is to speak in subversion of the law.³

What the Maxim Is Intended to Include.—So that while it is well settled that Christianity forms a constituent element of the English common law, to the extent that it will not be permitted openly to revile or ridicule its teachings,⁴ yet such restrictions are not intended to embrace as reprehensible, sincere and conscientious disputes between learned men upon particular controverted points incident to its doctrines.⁵

society. The present common law of England is as dissimilar from that of Edward the 3d as is the present state of society. And we apprehend that no one could be found to contend that hundreds of principles, which have in more modern times been examined, argued, and determined by the judges, are not principles of the common law because not found in the books of that period. They are held to be great and immutable principles, which have slumbered in their repositories because the occasion which called for their exposition had not arisen. The common law, then, is not like the statute law, fixed, and immutable but by positive enactment, except where a principle has been adjudged as the rule of action."

1. *Van Maren v. Johnson*, 15 Cal. 312; *Penny v. Little*, 4 Ill. 301; *Hemingway v. Scales*, 42 Miss. 1, 2 Am. Rep. 586, 97 Am. Dec. 425; *Bogardus v. Trinity Church*, 4 Paige (N. Y.) 178.

Common Law the Source of Jurisdiction in Civil and Criminal Cases.—In *State v. Pulle*, 12 Minn. 164, *Wilson, C. J.*, said: "The common law, so far as it is applicable to our situation and government, is, as a general rule, the law of this country. Every state, with perhaps one exception, has adopted it, either tacitly or by express statutory enactment. * * * That it is the law of this state, controlling both the rights and the remedies of parties in actions between individuals, either on a contract or for a tort, cannot be doubted, for the courts have recognized and acted on this fact ever since the organization of our territorial government; and we find no evidence which satisfies us that either the state or territory intended to repudiate the common law as the source of jurisdiction in either criminal or civil cases."

2. *Minor's Inst.* 33, 34; 1 Bl. Com. 62.

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The common law includes those principles, usages, and rules of action which observation and experience in the nature of man, the condition of society, and the affairs of life, have commended to enlightened reason as best calculated for the government and security of persons and property. *Greene, J.*, in *People v. Randolph*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 177; *Morgan v. King*, 30 Barb. (N. Y.) 13.

3. *Taylor's Case*, 1 Vent. 293, 3 Keb. 607.

4. *Rex v. Waddington*, 1 B. & C. 26, 8 E. C. L. 12; *Rex v. Woolston*, 2 Stra. 834; *Taylor's Case*, 1 Vent. 293, 3 Keb. 607. See also *Drury v. Defontaine*, 1 Taunt. 131.

Premises Let for Blasphemous Lectures.—Where the defendant had contracted to let his premises to the plaintiff, to the end that the latter should thereon deliver lectures to the effect that the teachings of Christ were defective, and that the Bible was not inspired, *Kelly, C. B.*, said: "There is abundant authority for saying that Christianity is part and parcel of the law of the land, and that, therefore, to support and maintain publicly the proposition * * * above mentioned is a violation of the first principles of the law, and cannot be done without blasphemy." *Cowan v. Milbourn*, L. R. 2 Exch. 230.

Openly Reviling Christianity.—Upon the indictment of one for blasphemous discoursing upon the miracles of Christ, the doctrine of Christianity was declared to be a part of the law of the land, and that the court would decline to suffer it to be debated whether to write against Christianity in general was not an offense punishable in the temporal courts at common law. *Rex v. Woolston*, 2 Stra. 834.

5. *Rex v. Woolston*, 2 Stra. 834. See the title **BLASPHEMY AND PROFANITY**, vol. 4, p. 580.

(2) *In the United States.*—In the United States the authorities are by no means uniform upon this question. In some of the states the rule established by the English courts, that the Christian religion does enter into, and form a part of, the common law, has been adhered to.¹

To the Contrary, it has been held that in America there has never been any union of the church and state; that the legislative control lies exclusively over things temporal, and that neither Christianity nor any other system of religion constitutes a part of our common law.²

An Intermediate Ground, and the one best sustained by both reason and authority, is that acts conducive to the subversion of the Christian faith, or which are calculated to bring into contempt or ridicule its tenets and symbols, and contumelious attacks upon its laws and institutions, are temporal offenses; not

1. *Charleston v. Benjamin*, 2 Strobb. L. (S. Car.) 521, 49 Am. Dec. 608.

Must Not Interfere with the Rights of Conscience.—In *Shover v. State*, 10 Ark. 259, Johnson, C. J., said: "This system of religion [Christian] is recognized as constituting a part and parcel of the common law, and as such all of the institutions growing out of it, or in any way connected with it, in case they shall not be found to interfere with the rights of conscience, are entitled to the most profound respect, and can rightfully claim the protection of the law-making power of the state."

Christianity a Part of the Law of the Land.—In *Mohney v. Cook*, 26 Pa. St. 347, Lowrie, J., said: "The declaration that Christianity is part of the law of the land is a summary description of an existing and very obvious condition of our institutions. We are a Christian people, in so far as we have entered into the spirit of Christian institutions, and become imbued with the sentiments and principles of Christianity; and we cannot be imbued with them, and yet prevent them from entering into and influencing more or less all our social institutions, customs, and relations, as well as all our individual modes of thinking and acting. It is involved in our social nature that even those among us who reject Christianity cannot possibly get clear of its influence, or reject those sentiments, customs, and principles which it has spread among the people, so that, like the air we breathe, they have become the common stock of the whole country, and essential elements of its life."

In *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 406, Strong, J., said: "Christianity is a part of the common law of this state. In saying this I utter no new doctrine. It was part of the common law of England long before this state was settled. There is a multitude of decisions to this effect to be found in the books, and it has been decided in England that it is an indictable offense at common law to write or speak of Christianity contemptuously or maliciously." See also *Granger v. Grubb*, 7 Phila. (Pa.) 355; *Bell v. State*, 1 Swan (Tenn.) 42.

2. *Bloom v. Richards*, 2 Ohio St. 387; *Specht v. Com.*, 8 Pa. St. 315, 49 Am. Dec. 518; *State v. Chandler*, 2 Harr. (Del.) 553.

Christianity Has Received no Sanction as Law.—In *Board of Education v. Minor*, 23 Ohio St. 211, 13 Am. Rep. 233, Welch, J., in discussing the maxim that Christianity is a part of the common law of this country, said: "Those who make this assertion can hardly be serious,

and intend the real import of their language. If Christianity is a law of the state, like every other law, it must have a sanction. Adequate penalties must be provided to enforce obedience to all its requirements and precepts. No one seriously contends for any such doctrine in this country, or, I might almost say, in this age of the world. The only foundation—rather, the only excuse—for the proposition that Christianity is part of the law of this country is the fact that it is a Christian country, and that its constitutions and laws are made by a Christian people."

North Carolina.—In *Melvin v. Easley*, 7 Jones L. (N. Car.) 365, Manly, J., said: "In England there is a Christian ritual established by law, with parliamentary provisions for inculcating it privately and publicly, and a consequent right in the government to decide matters of faith and matters pertaining to established rites. In our state there is nothing of the sort; with the single exception that officers of the state must be Christians there is no privilege or disability on account of religion. The state confesses its incompetency to judge in spiritual matters between men or between man and his Maker, and leaves in all a perfect religious liberty to worship God as conscience dictates, or not to worship him at all, if they can so content themselves. Both peoples are equally Christian, and governed in their affairs, national and personal alike, by the principles of Christian morality; but the one, through its government, deems it proper to co-operate with the ministers of religion in fostering and enforcing; the other abjures all power to interfere, and leaves spiritual matters exclusively in the hands of the teachers of religion."

In Louisiana.—In *State v. Bott*, 31 La. Ann. 663, 33 Am. Rep. 224, Manning, C. J., said: "It has been frequently said that Christianity is a part of the law of the land, and while in a certain sense and for certain purposes it may be true in those states which adopted and have retained the common law, it must be remembered that system never prevailed, nor had any lodgment in this state, save the brief period between the acquisition of this country by the United States and the Act of 1805, when the criminal part of that system was in force."

Treaty.—The doctrine that Christianity constitutes no part of our common law finds support in the ratification by the United States Senate of the treaty with Tripoli. 8 U. S. Stat. at Large, art. xi., p. 155. See the title SUNDAY.

because Christianity is a part of the law, but for the reason that such acts tend to a breach of the peace, and so jeopardize the public welfare.¹

c. ECCLESIASTICAL LAW — (1) *In England*. — The courts of ecclesiastical jurisdiction are, in England, regular tribunals, and that branch of the law administered therein is a part of the common law of that country.²

(2) *In the United States*. — The weight of authority in this country is to the effect that the canon and civil laws, as administered in the ecclesiastical courts of England, were brought over with our ancestors, and have been adopted and used here wherever applicable,³ though this has been

1. **Attacks on Christianity — Temporal Offenses.** — *Com. v. Kneeland*, 20 Pick. (Mass.) 206; *Andrew v. New York Bible, etc., Soc.*, 4 Sandf. (N. Y.) 156; *People v. Ruggles*, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; *Updegraph v. Com.*, 11 S. & R. (Pa.) 394; *Zeisweiss v. James*, 63 Pa. St. 465, 3 Am. Rep. 558. See also Rep. of N. Y. State Convention, 1821, pp. 462, 574.

Acts Which Tend to Ridicule Religion or Bring It into Contempt Will Be Restrained. — In *Lindenmuller v. People*, 33 Barb. (N. Y.) 548, Allen, J., delivering the opinion of the court, said: "Christianity is a part of the common law * * * in a qualified sense, not to the extent that would authorize a compulsory conformity in faith and practice to the creed and formula of worship of any sect or denomination, or even in those matters of doctrine and worship common to all denominations styling themselves Christian, but to the extent that entitles the Christian religion and its ordinances to respect and protection, as the acknowledged religion of the people. Individual consciences may not be enforced; but men of every opinion and creed may be restrained from acts which interfere with Christian worship, and which tend to revile religion and bring it into contempt. The belief of no man can be constrained, and the proper expression of religious belief is guaranteed to all; but this right, like every other right, must be exercised with strict regard to the equal rights of others; and when religious belief or unbelief leads to acts which interfere with the religious worship and rights of conscience of those who represent the religion of the country, as established, not by law, but by the consent and usage of the community, and existing before the organization of the government, their acts may be restrained by legislation, even if they are not indictable at common law. Christianity is not the legal religion of the state, as established by law."

May Claim Protection from Insult and Reviling. — In *Harvey v. Boies*, 1 P. & W. (Pa.) 12, Gibson, C. J., said: "Christianity has been indefinitely said to be a part of the law of the land. The law undoubtedly avails itself of the obligations of Christianity as instruments to accomplish the purposes of justice. * * * Christianity is indeed recognized as the predominant religion of the country, and for that reason are not only its institutions, but the feelings of its professors, guarded against insult from reviling or scoffing at its doctrines; so far, it is the subject of special favor. But further the law does not protect it."

Bequest Discriminating Against Christianity. — In *Vidal v. Girard*, 2 How. (U. S.) 108, where personal property had been bequeathed in trust for the erection of a college with the pro-

viso that no ecclesiastic, missionary, or minister of any sect should be permitted to hold services, or even to enter the precincts of such college, it was contended that such a stipulation was contrary to the policy of the law, as being subversive of the doctrines of Christianity, Story, J., delivering the opinion, said: "Although Christianity be a part of the common law of the state, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public." See the title **BLASPHEMY AND PROFANITY**, vol. 4, p. 580.

2. *Reg. v. Millis*, 10 Cl. & F. 671; *Catterall v. Catterall*, 1 Rob. Ec. Rep. 580; *Le Barron v. Le Barron*, 35 Vt. 364; 1 Black. Com. 79.

3. **Ecclesiastical and Common Law Adopted Coincidentally.** — In *Le Barron v. Le Barron*, 35 Vt. 364, Poland, C. J., said: "The adoption of the common law of England, by the legislature of the state, was an adoption of the whole body of the law of that country (aside from their parliamentary legislation), and included those principles of law administered by the courts of chancery and admiralty, and the ecclesiastical courts (so far as the same were applicable to our local situation and circumstances, and not repugnant to our constitution and laws), as well as that portion of their laws administered by the ordinary and common tribunals."

Ecclesiastical Law So Far as Applicable Has been Adopted. — In *Crump v. Morgan*, 3 Ired. Eq. (N. Car.) 91, 40 Am. Dec. 447, which was an action for divorce where a marriage had been contracted by fraud, Ruffin, C. J., said: "It is an entire mistake to say that the canon and civil laws, as administered in the ecclesiastical courts of England, are not parts of the common law. Judge Blackstone, following Lord Hale, classes them among the unwritten laws of England, and as parts of the common law which by custom are adopted and used in peculiar jurisdictions. 1 Bl. Com. 79; Hale's His. Com. Law. 27, 32. They were brought here by our ancestors as parts of the common law, and have been adopted and used here in all cases to which they were applicable, and whenever there has been a tribunal exercising a jurisdiction to call for their use. They govern testamentary causes and matrimonial causes. Probate and re-probate of wills stand upon the same grounds here as in England, unless so far as statutes may have altered it." See also *Ward v. Vickers*, 2 Hayw. (N. Car.) 164.

Erection of "Churches of England" in America. — Where certain land was devised in the town

doubted.¹ It is well settled, however, that the constant practice of the Court of Chancery is to be guided by the decisions of the ecclesiastical courts of England.²

d. LAW MERCHANT — (1) *In England*. — The accepted doctrine in England is that the law merchant constitutes a branch of the jurisprudence of that nation.³

(2) *In the United States*. — So it is held in the United States that, the custom of merchants having been incorporated into the common law of England, and the latter being generally prevalent throughout this country, the law merchant, so far as applicable and not repugnant to our circumstances and constitution, forms a part of our common law.⁴

of Pawlet, "for a glebe for the Church of England, as by law established," it was held to be essential to the taking effect of such devise that a society of Episcopalians should have been regularly established, according to the rules of that sect, and erected by the crown as an Episcopal church (that is, the Church of England), in the town of Pawlet, prior to the Revolution; but this being proved, that the common law, so far as it related to the erection of churches of the Episcopal persuasion of England, the right to present or collate such churches, and the capacity of the parsons thereof to take in succession, was fully recognized and adopted. *Pawlet v. Clark*, 9 Cranch (U. S.) 292.

1. *New York*. — In *Burtis v. Burtis*, Hopk. (N. Y.) 557, 14 Am. Dec. 563, Chancellor Sanford said: "By the constitution of the state [New York], adopted in 1777, such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony, as together formed the law of the colony April 19, 1775, were declared to be the law of this state. The law of the colony was thus adopted as the law of the state. The law of England concerning divorces and matrimonial causes, not forming a part of the law of the colony, did not become the law of the state. * * * The English law concerning divorces and causes of divorce, as it exists now and as it existed while this state was a colony, is chiefly the ecclesiastical law, and not the common law of that country. It is administered by judges and courts whose jurisdiction has never existed either in the state or the colony of New York; and it was evidently regarded by our ancestors of the colony and the state as no part of the common law which they adopted." See also *Guardians of Poor v. Greene*, 5 Binn. (Pa.) 554.

2. *Mix v. Mix*, 1 Johns. Ch. (N. Y.) 110; *Denton v. Denton*, 1 Johns. Ch. (N. Y.) 364; *Lewis v. Lewis*, 3 Johns. Ch. (N. Y.) 519; *North v. North*, 1 Barb. Ch. (N. Y.) 244, 43 Am. Dec. 778; *Wood v. Wood*, 2 Paige (N. Y.) 114; *Griffin v. Griffin*, 47 N. Y. 134.

3. *Law Merchant*. — In *Barnett v. Brandao*, 6 M. & G. 665, 46 E. C. L. 665, Denman, C. J., said: "The law merchant forms a branch of the law of England; and those customs which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as a part of it, upon a principle of convenience, and for the benefit of trade and commerce."

In *Edie v. East-India Co.*, 2 Burr. 1216, the court said: "People do not sufficiently distinguish between customs of different sorts. The true distinction is between general customs (which are part of the common law), and local customs (which are not so). This custom of merchants is the general law of the kingdom, part of the common law."

4. *Phipps v. Harding*, 70 Fed. Rep. 474; *Mims v. Central Bank*, 2 Ala. 294; *Donegan v. Wood*, 49 Ala. 243, 20 Am. Rep. 275; *Piatt v. Eads*, 1 Blackf. (Ind.) 80; *Patterson v. Carrell*, 60 Ind. 129; *Stagg v. Linnenfeller*, 59 Mo. 336; *Nash v. Harrington*, 2 Aik. (Vt.) 9, 16 Am. Dec. 672.

Law Merchant Will Be Judicially Noticed. — In *Cook v. Renick*, 19 Ill. 598, Caton, C. J., said: "The law merchant first originated in custom among commercial men, who, by common consent, adopted such rules and regulations as they found the wants and necessities of commerce required; and as commerce was extended it spread itself over the kingdom till it became as universal as any principle of the common law. At first, the courts did not take judicial notice of it, but required proof to show what it was, when they would recognize and enforce it. Soon, however, it began to insinuate itself into the common law, by the courts taking judicial notice of it, till its fibres became so intimately interwoven with the body of the common law itself that no one could draw the line of demarkation between the two; and the common law ever improving and adapting itself to the requirements of commerce and the wants of the subject, finally, by progressive judicial decisions, the law merchant, or at least that portion of it which was of universal application throughout the realm, was recognized by the courts without proof of its existence, and from that time forth it became absorbed by and really constituted a part of the common law."

Law Merchant to Be Interpreted in Each State by the Local Tribunals Thereof. — In *Forepaugh v. Delaware, etc., R. Co.*, 128 Pa. St. 217, 15 Am. St. Rep. 672, Mitchell, J., said: "The so-called commercial law derives all its force from its adoption as part of the common law, and a decision on the commercial law of a state stands upon precisely the same basis as a decision upon any other branch of the common law. The only ground upon which any foreign tribunal can question either is that it does not agree with the premises or the reasoning of the court. But the same ground would enable it to question a decision upon a statute because a different construction seemed to it

2. English Statutes — *a.* IN GENERAL. — It may be stated as a general rule that English statutes passed before the emigration of our ancestors, in aid or amendment of the common law, applicable to our condition, and not repugnant to our institutions and form of government, constitute a part of our common law.¹

nearer the true intent of the legislative language, and this it is universally conceded no foreign court can do. There is no difference in principle. The decisions of a state court upon its common law and on its statutes must stand unquestioned, because it is the only authority competent to decide, or they must be alike questionable by any tribunal which may choose to differ with its reasons or its conclusion."

1. English Statutes Before Planting of Colonies in United States — *United States*. — Patterson *v.* Winn, 5 Pet. (U. S.) 240; Van Ness *v.* Pacard, 2 Pet. (U. S.) 144; *Ex p.* Watkins, 7 Pet. (U. S.) 568.

Alabama. — Carter *v.* Balfour, 19 Ala. 814; Horton *v.* Sledge, 29 Ala. 478; Matthews *v.* Ansley, 31 Ala. 20; Pierson *v.* State, 12 Ala. 149.

California. — Norris *v.* Harris, 15 Cal. 226.

Connecticut. — State *v.* Cummings, 33 Conn. 260, 89 Am. Dec. 208.

Illinois. — See Hunt *v.* Chicago, etc., Ry. Co., 20 Ill. App. 289.

Indiana. — Swift *v.* Tousey, 5 Ind. 196.

Maryland. — State *v.* Buchanan, 5 Har. & J. (Md.) 356, 9 Am. Dec. 534.

Missouri. — Baker *v.* Crandall, 78 Mo. 584 47 Am. Rep. 126.

Nevada. — Hamilton *v.* Kneeland, 1 Nev. 40. See also *Ex p.* Blanchard, 9 Nev. 101; Evans *v.* Cook, 11 Nev. 69.

New York. — Bogardus *v.* Trinity Church, 4 Paige (N. Y.) 178; Lansing *v.* Stone, 37 Barb. (N. Y.) 15; Van Rensselaer *v.* Hays, 19 N. Y. 68, 75 Am. Dec. 278; Miller *v.* Miller, 18 Hun (N. Y.) 512.

South Carolina. — Pemble *v.* Clifford, 2 McCord L. (S. Car.) 31.

Tennessee. — Simpson *v.* State, 5 Verg. (Tenn.) 356. See also Porter *v.* State, Mart. & Y. (Tenn.) 226.

Virginia. — Com. *v.* Lodge, 2 Gratt. (Va.) 580.

Wisconsin. — Coburn *v.* Harvey, 18 Wis. 148.

In Delaware the constitution of 1776, adopted upon the separation of that colony from Great Britain and its organization into an independent state government, provides that: "The common law of England, as well as so much of the statute law as has been heretofore adopted in practice in this state, shall remain in force unless they shall be altered by a future law of the legislature, such parts only excepted as are repugnant to the rights and privileges contained in this constitution, and the declaration of rights, etc., agreed to by this convention." Del. Laws, Appendix, p. 89; Clawson *v.* Primrose, 4 Del. Ch. 652. "The object of this clause was to secure to the people in their transition from a colonial to an independent political state a jurisprudence already complete, and adequate immediately to define and to protect their rights of person and property, and of citizenship generally, without awaiting the slow growth of a

new system to be thereafter matured by legislation and judicial decision. They had already in their colonial state, as subjects of Great Britain, an established jurisprudence in the common law of England. It was a system of jurisprudence to which our ancestors of that day were deeply attached. They had esteemed it, throughout their colonial condition, to be their birthright as English subjects, and their safest rule of conduct, so declaring it in several legislative acts. See Preamble to Act of 1719, 1 Del. Laws 64." Clawson *v.* Primrose, 4 Del. Ch. 652.

Massachusetts. — In Com. *v.* Knowlton, 2 Mass. 530, the court says: "Our ancestors, when they came into this new world, claimed the common law as their birthright, and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law, thus claimed, was the common law of their native country, as it was amended or altered by English statutes in force at the time of their emigration. Those statutes were never re-enacted in this country, but were considered as incorporated into the common law. Some few other English statutes, passed since the emigration, were adopted by our courts, and now have the authority of law derived from long practice. To these may be added some ancient usages, originating probably from laws passed by the legislature of the colony of the Massachusetts Bay, which were annulled by the repeal of the first charter, and, from the former practice of the colonial courts, accommodated to the habits and manners of the people. So much, therefore, of the common law of England as our ancestors brought with them, and of the statutes then in force, amending or altering it — such of the more recent statutes as have been since adopted in practice and the ancient usages aforesaid — may be considered as forming the body of the common law of Massachusetts." See also Com. *v.* Leach, 1 Mass. 59; Com. *v.* Hunt, 4 Met. (Mass.) 122; Com. *v.* Churchill, 2 Met. (Mass.) 118; Powell *v.* Brandon, 24 Miss. 343; Sackett *v.* Sackett, 8 Pick. (Mass.) 309; Baker *v.* Mattocks, Quincy (Mass.) 70; Com. *v.* Chapman, 13 Met. (Mass.) 68.

In Michigan it is held that that state was never a common-law colony, and that while the common law has been recognized and incorporated into its jurisprudence, it is to be understood to be the common law of England, unaffected by any statute. Matter of Lamphere, 61 Mich. 105.

Wisconsin. — In Spaulding *v.* Chicago, etc., R. Co., 30 Wis. 110, 11 Am. Rep. 550, it is said that the rule that the English statutes passed prior to the Revolution and adapted to the circumstances of the colonists form a part of the common law of this country is merely one of convenience and subject to exceptions. The English statutes enacted a short time before the

b. STATUTES ENACTED PRIOR TO 4 JAC. I.—In some of the states all statutes and acts of the British parliament which were passed prior to the fourth year of James the First are declared to be a part of the law of the state.¹

Revolution, and which were in fact never recognized as constituting a part of the law of this country, are not now to be treated as a part of that law.

In *Coburn v. Harvey*, 18 Wis. 147, Paine, J., said: "The phrase 'the emigration of our ancestors' is too indefinite to establish any fixed time which excluded subsequent English statutes from being considered a part of the common law of some at least of the colonies. For our ancestors did not all emigrate, nor were the colonies all established, at any one time. And the reason given for adopting the common law with all the statutes amending it prior to a certain time, and excluding statutes passed afterwards, unless expressly adopted, precludes the idea of fixing the same time for all the colonies. * * * It is very obvious from this that in applying the general principle each colony would fix the beginning of its colonial existence as the dividing line between those English statutes which were and those which were not a part of its common law. And we have come to the conclusion that in applying this general rule to a state which, like this, had no political existence before the Revolution, it must, in harmony with the reasoning of these cases, be held that when our territorial legislature and the framers of our Constitution recognized the existence here of the common law, they must be held to have had reference to that law as it existed, modified and amended by English statutes passed prior to the Revolution. As before shown, there was no one time applicable to all the colonies, and there is no reason to assume that we should adopt the commencement of one colony rather than another as the time applicable to us."

New Hampshire.—The statute law of England as it existed at the organization of the provincial government, so far as the same is consistent with our institutions, constitutes the law of New Hampshire, unless it be repugnant to the Constitution of that state and the United States, or unless altered or repealed by some statutory or legislative enactment. *State v. Rollins*, 8 N. H. 550; *State v. Moore*, 26 N. H. 455, 59 Am. Dec. 354; *Houghton v. Page*, 2 N. H. 44, 9 Am. Dec. 30.

New Mexico.—In *Browning v. Browning*, 3 N. Mex. 371, Brinker, J., said: "We are therefore of opinion that the legislature intended * * * to adopt the common law, or *lex non scripta*, and such British statutes of a general nature, not local to that kingdom nor in conflict with the Constitution or laws of the United States nor of this territory, which are applicable to our condition and circumstances, and which were in force at the time of our separation from the mother country." *Bent v. Thompson*, 5 N. Mex. 408. See also *Leitensdorfer v. Webb*, 1 N. Mex. 34.

In Iowa the statutes of Great Britain are held to have been adopted as constituting a part of the common law of that state from the time of the union of the English crown with that of Scotland, which event took place in 1707. *O'Ferrall v. Simplot*, 4 Iowa 381.

In **Pennsylvania** it is held that no acts of parliament passed since the settlement of that state are in force there, unless the colonies are expressly named therein. *Morris v. Vanderen*, 1 Dall. (Pa.) 67; *Lyle v. Richards*, 9 S. & R. (Pa.) 330. See also *Report of Judges*, 3 Binn. (Pa.) 595; *Respublica v. Mesca*, 1 Dall. (Pa.) 75; *Boehm v. Engle*, 1 Dall. (Pa.) 15; *Girard v. Philadelphia*, 4 Rawle (Pa.) 333, 26 Am. Dec. 145.

English Construction of English Statutes.—In *Cathcart v. Robinson*, 5 Pet. (U. S.) 264, Marshall, C. J., said: "The rule which has been uniformly observed by this court in construing statutes is to adopt the construction made by the courts of the country by whose legislature the statute was enacted. This rule may be susceptible of some modification, when applied to British statutes which are adopted in any of these states. By adopting them they become our own as entirely as if they had been enacted by the legislature of the state. The received construction in England at the time they are admitted to operate in this country, indeed to the time of our separation from the British empire, may very properly be considered as accompanying the statutes themselves and forming an integral part of them. But however we may respect subsequent decisions, and certainly they are entitled to great respect, we do not admit their absolute authority. If the English courts vary their construction of a statute which is common to the two countries, we do not hold ourselves bound to fluctuate with them."

1. **Colorado.**—*Herr v. Johnson*, 11 Colo. 393; *Chilcoat v. Hart*, (Colo. 1896) 45 Pac. Rep. 391.

Illinois.—*McCool v. Smith*, 1 Black (U. S.) 459; *Penny v. Little*, 4 Ill. 301; *Fisher v. Deering*, 60 Ill. 114; *Swift v. Philadelphia*, etc., R. Co., 64 Fed. Rep. 59; *Crouch v. Hall*, 15 Ill. 263.

Indiana.—*Dawson v. Coffman*, 28 Ind. 220; *Piatt v. Eads*, 1 Blackf. (Ind.) 81.

New York.—*Bogardus v. Trinity Church*, 4 Paige (N. Y.) 198; *Lansing v. Stone*, 37 Barb. (N. Y.) 16; *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278. See also *Canal Com'rs v. People*, 5 Wend. (N. Y.) 423.

Virginia.—*Scott v. Lunt*, 7 Pet. (U. S.) 596.

Wyoming.—1 *Stimson's Am. Stat. Law* 136.

In *Cox v. Morrow*, 14 Ark. 603, Watkins, C. J., said: "In 1816 the territorial legislature of Missouri formally adopted and declared in force the common law of England of a general nature, and all statutes of the British parliament in aid of, or to supply, the defects of the common law made prior to the fourth year of James the First, and of a general nature, and not local to that kingdom, and with common law and statutes were not contrary to the laws of that territory, and not repugnant to nor inconsistent with the Constitution and laws of the United States, as the rule of decision in that territory, until altered or repealed by the legislature; and that statutory adoption has ever since continued to be in force under the

c. STATUTES ENACTED PRIOR TO JULY 4, 1776. — In several states the fourth of July, 1776, has been adopted as the time when English statutes shall cease to affect the common law.¹

3. Effect of English Decisions — *a.* RENDERED PRIOR TO THE AMERICAN REVOLUTION. — English decisions are freely used in deciding cases in the federal and state courts in the United States, and are deemed of great value in these tribunals; and where such decisions were rendered prior to the war of the Revolution they form a part of the common law of the United States and are binding upon American courts.²

Should Be Well Established. — But though binding, they do not constitute the law itself, but are only evidence of what the law is, and hence should be clear and unequivocal.³

b. RENDERED SUBSEQUENT TO THE AMERICAN REVOLUTION. — On the other hand, it is equally well settled that decisions of English courts rendered since that time, though entitled to respect, and at times regarded as persua-

territorial and state governments in Arkansas. Having thus introduced the common law, without, indeed, the benefit of any of the judicious statutory reforms in England since the fourth year of James the First, when we administer that law, or what is left of it, consistent with our own codifications, we do so not because it is the law of England, but because it is part of our own law." See also *Duke v. Harper*, 66 Mo. 51, 27 Am. Rep. 314; *Baker v. Crandall*, 78 Mo. 584, 47 Am. Rep. 126; *Stagg v. Linnenfelter*, 59 Mo. 336; *Reaume v. Chambers*, 22 Mo. 36.

Reason for the Selection of 4 Jac. I. — In *Penny v. Little*, 4 Ill. 301, *Douglass, J.*, delivering the opinion of the court, uses this language: "The common law is a beautiful system, containing the wisdom and experience of ages. Like the people it ruled and protected, it was simple and crude in its infancy, and became enlarged, improved, and polished as the nation advanced in civilization, virtue, and intelligence. Adapting itself to the condition and circumstances of the people, and relying upon them for its administration, it necessarily improved as the condition of the people was elevated. Is it to be presumed, then, that our legislature, in adopting the common law of England and the British statutes in its aid prior to the fourth of James, intended to exclude all the improvements in the common law, since that period? * * * If we are to be restricted to the common law as it was enacted at fourth James, rejecting all modifications and improvements which have since been made, by practice and statutes, except our own statutes, we will find that system entirely inapplicable to our present condition, for the simple reason that it is more than two hundred years behind the age. Why, then, it may be asked, did our legislature fix the fourth James I., instead of the date of the Declaration of Independence, or of the formation of our Constitution, as the period for transplanting the common law of England into this country? The history of our own country furnishes the answer. That was the period at which the first territorial government was established in America, and with it the common law of England as it then existed. From that period we must look to American legislation and the reports of American courts

for improvements and modifications in the common law."

Ohio. — In 1793 a statute was adopted from Virginia, declaring that the common law of England, and all statutes made in aid of the common law prior to the fourth year of James I., which were of a general nature, should be a rule of decision, until repealed, within the territory. This statute was repealed by the Act of 1805, but by the first section of the same act it was re-enacted, and again repealed in 1806. Since that time no legislation upon the subject has taken place, so that in all cases where English statutes contravene or change the common law, and are not so incorporated into it as to become a part and parcel of the system, they are without effect in Ohio, unless there be some direct legislative adoption of them. *Crawford v. Chapman*, 17 Ohio 452; *Lindsley v. Coats*, 1 Ohio 245. See also *Helfenstine v. Garrard*, 7 Ohio pt. I 276.

1. Rhode Island. — By the General Laws of 1896, p. 1108, § 3, it is provided that such English statutes introduced prior to the Declaration of Independence, and which have continued to be practiced under it, shall be deemed a part of the common law, and remain in force until otherwise specially provided.

Florida. — By the Rev. Stat. 1892, p. 130, § 59, the statute law of England of a general, and not a local, nature, down to the fourth of July, 1776, is declared to be in full force, provided such statutes be not inconsistent with the Constitution and laws of the United States and of Florida. See *Hart v. Bostwick*, 14 Fla. 173.

Nevada. — In *Ex p. Blanchard*, 9 Nev. 101, which was an action upon an indictment for conducting a lottery, there being in Nevada no statutory prohibition against lotteries, *Belknap, J.*, said: "By statute 10 and 11 Wm. III., c. 17, all lotteries are declared to be public nuisances. * * * This statute remained in force in England at the time of the declaration of American independence, and being applicable to our situation, constitutes a part of the common law of the United States." See also *Hamilton v. Kneeland*, 1 Nev. 40.

2. *Robert v. West*, 15 Ga. 122; *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534. See also *Cox v. Morrow*, 14 Ark. 603.

3. *Robert v. West*, 15 Ga. 122.

sive, are not authoritative, and will be disregarded should the exigency so require.¹

In Construing a Statute Common to Both Countries, if the English courts vary from a former interpretation, no obligation is thereby imposed upon American tribunals to fluctuate with them.²

V. PRESUMPTION AS TO EXISTENCE — 1. In General. — The common law is presumed to exist in those states of the Union which were originally colonies of England, or were carved out of such colonies; and the same presumption prevails in those states which have been established in territory acquired since the Revolution, when such territory was not at the time of its acquisition occupied by an organized and civilized community, but where the population, upon the establishment of the government, was formed by emigration from the original states.³

2. Exceptions — a. LOUISIANA. — The jurisprudence of Louisiana being founded upon, and derived from, a system different from that of the other states,⁴ no presumption will be indulged that the common law exists there.⁵

Jurisdiction in Criminal Matters. — The criminal statute of 1805, introducing the common law of England in criminal cases, was held to adopt that law as an entire system in all matters touching crimes and misdemeanors.⁶ But this

1. *Cathcart v. Robinson*, 5 Pet. (U. S.) 264; *Chicago City v. Robbins*, 2 Black (U. S.) 418; *Johnson v. Fall*, 6 Cal. 359, 65 Am. Dec. 518; *Bowie v. Duvall*, 1 Gill & J. (Md.) 176; *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534; *Koontz v. Nabb*, 16 Md. 549; *Greenwood v. Greenwood*, 28 Md. 369; *Marks v. Morris*, 4 Hen. & M. (Va.) 463; *Stump v. Napier*, 2 Yerg. (Tenn.) 35.

Such Decisions Have No Force as Binding Rules. — In *Com. v. York*, 9 Met. (Mass.) 93, 43 Am. Dec. 373, Shaw, C. J., said: "If we consult English decisions made since the Revolution, it is not because they have any binding force as rules, but because they are expositions of the rules and principles of the common law, by men of great experience and judgment in the knowledge and application of the same laws which we are seeking to expound. And if we read the digests and treatises of reputable authors published since we ceased to be English subjects, it is because they contain the authentic records of the precedents and judicial proceedings which furnish the evidence of the common law."

In *Livingston v. Jefferson*, 1 Brock. (U. S.) 203, Marshall, C. J., said: "It has been said that the decisions of British courts made since the Revolution are not authority in this country. I admit it. But they are entitled to that respect which is due to the opinions of wise men who have maturely studied the subject they decide."

Where New Conditions Arise, Our Courts Will Disregard English Decisions. — In *Sayward v. Carlson*, 1 Wash. 29, Stiles, J., said: "The common law grew with society, not ahead of it. As society became more complex, and new demands were made upon the law by reason of new circumstances, the courts originally, in England, out of the storehouse of reason and good sense, declared the 'common law.' But since courts have had an existence in America, they have never hesitated to take upon themselves the responsibility of saying what is the common law, notwithstanding current English decisions, especially upon questions involving

new conditions. Therefore, we have the 'common law,' as declared by the highest courts of this, that, and the other state, and by the courts of the United States, sometimes varying in each."

2. *Cathcart v. Robinson*, 5 Pet. (U. S.) 264.

3. *Norris v. Harris*, 15 Cal. 226; *Goodwin v. Morris*, 9 Oregon 322.

4. *Garner v. Wright*, 52 Ark. 385; *State v. Bott*, 31 La. Ann. 663, 33 Am. Rep. 224.

Laws in Force Prior to Admission to the Union. — Where the Roman, Spanish, and French civil laws were in force, prior to the admission of Louisiana to the Union, which laws were repealed by the Act of 1828 of that state, it was held that such repealing act embraced only the positive written or statute laws of those nations, such as were introductory of new rules, and did not abrogate the general principles of law which had been established or settled by the decisions of courts of justice. *Reynolds v. Swain*, 13 La. 194. See also *Arayo v. Currel*, 1 La. 528, 20 Am. Dec. 286.

5. *Peet v. Hatcher*, 112 Ala. 514; *Norris v. Harris*, 15 Cal. 226; *Sloan v. Torrey*, 78 Mo. 623; *White v. Knapp*, 47 Barb. (N. Y.) 549.

6. Legislation Adopting English Criminal Law.

— In *State v. McCoy*, 8 Rob. (La.) 545, 41 Am. Dec. 301, King, J., said: "The legislature, in adopting the common-law rules of proceeding, method of trial, etc., adopted the system as it existed in 1805, modified, explained and perfected by statutory [English] enactments, so far as those enactments are not found to be inconsistent with the peculiar character and genius of our government and institutions. It will not be contended that those principles and rules of the common law which had been abrogated and had ceased to exist in England previously to 1805 were introduced by our statute. On the other hand, the system would have been incomplete and inefficient for the purposes contemplated by the legislature, if they had not adopted the substitutes established by parliament for the rules of the common law which had been abolished. If this interpretation be incorrect, the

view has been receded from, and it is now well settled that by that act it was only intended to incorporate into the jurisprudence of the state the common-law definitions of offenses declared by that act to be crimes, the method of prosecution on indictments, mode of conducting trials, rules governing evidence, and other common-law proceedings in criminal prosecutions; and that there exist no crimes in Louisiana save those expressly made so by statute.¹

Judicial Notice Taken of the Existence of the Common Law in a Sister State.— But the courts will take cognizance of the fact that the common-law system of jurisprudence prevails in the other states of the Union.²

b. TEXAS.—The presumption of the existence of the common law can only be indulged with regard to the states which antecedent to their entrance into the Union were subject to the laws of England; hence it will not be indulged with reference to Texas, which was a part of the Spanish possessions of this continent.³

c. INDIAN TERRITORY.—Before the purchase of the Indian Territory by the United States government, it was a part of a territory settled by the subjects, and governed by the laws, of other nations than England and America, and hence no presumption obtains as to the existence there of the common law.⁴

3. In the Original Colonies.—In the absence of proof to the contrary, the

legislature have been guilty of the absurdity of enacting laws for the protection of life and property, without furnishing the means of bringing offenders to justice. We must presume that it was intended to give effect to those laws and to provide means for their enforcement adequate to the ends which were in view."

1. *State v. Smith*, 30 La. Ann. 846; *State v. Depass*, 31 La. Ann. 487; *State v. Gaster*, 45 La. Ann. 636. See also *Franklin's Succession*, 7 La. Ann. 395.

Common-law Nomenclature—Use of—Effect.—In *Louisiana*, where the common law has never been adopted, it was made a question as to whether the use of the common-law denomination for a process, for example, *mandamus*, *certiorari*, and the like, was not in effect an adoption of the English practice; it was held that, the practice in Louisiana courts being necessarily conducted in the English language, common-law names had of necessity been employed, but that their use should be considered as a mere translation of the names rather than as emanations from the English jurisprudence, and could not be considered as introducing the latter into the practice of the state. *Agnes v. Judice*, 3 Martin (La.) 182; *Abat v. Whitman*, 7 Martin N. S. (La.) 162. See also the title *ENGLISH LANGUAGE*, 7 ENCYC. OF PL. AND PR. 720.

2. Louisiana—Judicial Notice of Common Law in Sister States.—In *Copley v. Sanford*, 2 La. Ann. 335, 46 Am. Dec. 548, Slidell, J., said: "Such * * * are the relations of this state with the other states of this Union, and such are the daily necessities of the administration of justice, that it would be wrong for us at this day to say that this court will not take judicial notice of what the common law is, and that, instead of searching for it ourselves in the commentaries of such authors as Blackstone and Kent, whose works are daily quoted in this tribunal, and the perusal of which the

court has made a prerequisite of admission to the bar, we will only notice it when proved as a fact by the testimony of witnesses." See also *Sandidge v. Hunt*, 40 La. Ann. 766; *Kling v. Sejour*, 4 La. Ann. 128.

3. *Flato v. Mulhall*, 72 Mo. 522; *Castleman v. Jeffries*, 60 Ala. 380; *Norris v. Harris*, 15 Cal. 226; *Garner v. Wright*, 52 Ark. 385.

4. Property Rights Between Citizens of Indian Nation—Presumption.—In an action by the husband to recover the personalty of his deceased wife, both parties being citizens of the Creek nation of Indians, it was held that no presumption would be indulged as to the existence of the common law in such nation, and the court said: "It is common knowledge, of which the court should take judicial notice, that the domestic relations of the Indians of this country have never been regulated by the common law of England, and that that law is not adapted to the habits, customs, and manners of the Indians. It would be an extremely anomalous proceeding for the court, by indulging in an obviously false presumption, to put in force in the Creek nation the English common law relating to the husband's right to his wife's property after that law in the particular mentioned has been abrogated in the country of its origin and in nearly every state and territory of the Union." *Davison v. Gibson*, 56 Fed. Rep. 443. To the same effect are *Du Val v. Marshall*, 30 Ark. 230; *James v. James*, 81 Tex. 373; *Garner v. Wright*, 52 Ark. 385. See also *Johnson v. State*, 60 Ark. 308.

Rule of Decision in Federal Courts.—In *Pyeatt v. Powell*, 51 Fed. Rep. 551, 10 U. S. App. 200, it was held that, in a controversy arising between residents of the Indian Territory and citizens of a state, in the absence of proof as to the laws, rules, or customs obtaining in that territory, the common law will in the federal courts, furnish the rule of decision and the guide of action.

presumption of the existence of the common law prevails in the territory of the original colonies.¹

Presumption in Territory Newly Acquired. — The same presumption will be indulged as to all newly acquired territory originally settled by Englishmen or their American descendants.²

Presumption in Other Territory. — But no such presumption applies to those states in which a government already existed at the time of their accession to this country.³

When Origin of State Is Unknown. — Where no proof is adduced as to what law exists in another state, and no such judicial knowledge can be had of the origin of such state as would raise the presumption of the prevalence there of the common law, it will be presumed that the *lex fori* is the law of such state.⁴

4. In Sister States — *a. GENERALLY.* — In the absence of proof to the contrary, the courts of one state will presume the common law to prevail in a sister state.⁵

1. Original Colonies — Common Law Presumed to Exist. — *Stokes v. Macken*, 62 Barb. (N. Y.) 145; *Cressey v. Tatom*, 9 Oregon 541; *Cubbedge v. Napier*, 62 Ala. 518; *Inge v. Murphy*, 10 Ala. 885; *Hanchett v. Rice*, 22 Ill. App. 442; *Johnson v. Chambers*, 12 Ind. 102.

In Colorado it is held that as that portion of North America never was subject to British dominion, the common law of England never obtained lodgment there, except by express legislative enactment. *Herr v. Johnson*, 11 Colo. 393.

2. Newly Acquired Territory — Prevalence of Common Law. — In *Norris v. Harris*, 15 Cal. 226, Field, C. J., said: "A similar presumption must prevail as to the existence of the common law in those states which have been established in territory acquired since the Revolution, where such territory was not at the time of its acquisition occupied by an organized and civilized community; where, in fact, the population of the new state upon the establishment of government was formed by emigration from the original states. As in British colonies, established in uncultivated regions by emigration from the parent country, the subjects are considered as carrying with them the common law so far as it is applicable to their new situation, so, when American citizens emigrate into territory which is unoccupied by civilized man, and commence the formation of a new government, they are equally considered as carrying with them so much of the same common law, in its modified and improved condition under the influence of modern civilization and republican principles, as is suited to their new condition and wants."

By the Ordinance of 1787, the common law was declared to be in force over that portion of North America known as the Northwest Territory. *O'Ferrall v. Simplot*, 4 Iowa 381; *Johnson v. Chambers*, 12 Ind. 102.

3. Flato v. Mulhall, 72 Mo. 522; *Buchanan v. Hubbard*, 119 Ind. 187; *Marsters v. Lash*, 61 Cal. 622; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Savage v. O'Neil*, 44 N. Y. 298.

In *Norris v. Harris*, 15 Cal. 226, Field, C. J., in discussing the presumption of the existence of the common law upon the emigration of English subjects to a new and unsettled country, said: "No such presumption can apply to states in which a government already ex-

isted at the time of their accession to the country, as Florida, Louisiana, and Texas. They had already laws of their own, which remained in force until by the proper authority they were abrogated and new laws were promulgated. With them there is no more presumption of the existence of the common law than of any other law. They were independent of the English law in their origin, and hence no presumption of the existence of the common law of England can be indulged. In countries conquered and ceded to England the common law has no authority without positive enactment, and for the same reason, that they were not part of the mother country, but distinct dominions."

4. Peet v. Hatcher, 112 Ala. 514.

5. Presumption that Common Law Prevails in Sister States — *Alabama.* — *Goodman v. Griffin*, 3 Stew. (Ala.) 160; *Dunn v. Adams*, 1 Ala. 527, 35 Am. Dec. 42; *Mims v. Central Bank*, 2 Ala. 294; *Shepherd v. Nabors*, 6 Ala. 631; *Inge v. Murphy*, 10 Ala. 885; *Averett v. Thompson*, 15 Ala. 678; *Reese v. Harris*, 27 Ala. 301; *Connor v. Trawick*, 37 Ala. 289; *Borum v. King*, 37 Ala. 606; *McDougald v. Carey*, 38 Ala. 320; *Rutledge v. Townsend*, 38 Ala. 706; *Howard v. Gilbert*, 39 Ala. 726; *Walker v. Walker*, 41 Ala. 353; *McAnally v. O'Neal*, 56 Ala. 299; *Cubbedge v. Napier*, 62 Ala. 518; *Peet v. Hatcher*, 112 Ala. 514. See also *Hinson v. Wall*, 20 Ala. 298; *Ellis v. White*, 25 Ala. 540.

Arkansas. — *Newton v. Cocke*, 10 Ark. 169; *Hydrick v. Burke*, 30 Ark. 124; *Peel v. January*, 35 Ark. 331, 37 Am. Rep. 27; *Thorn v. Weatherly*, 50 Ark. 237. See also *Tatum v. Hines*, 15 Ark. 180; *Hall v. Pillow*, 31 Ark. 32; *Garner v. Wright*, 52 Ark. 385.

California. — *Thompson v. Monrow*, 2 Cal. 99, 56 Am. Dec. 318; *Norris v. Harris*, 15 Cal. 253; *Hickman v. Alpaugh*, 21 Cal. 226; *Marssters v. Lash*, 61 Cal. 622. See also *Hill v. Grigsby*, 32 Cal. 56.

Georgia. — *Selma, etc., R. Co. v. Lacy*, 43 Ga. 461; *Woodruff v. Saul*, 70 Ga. 271; *Patillo v. Alexander*, 96 Ga. 60.

Illinois. — *Crouch v. Hall*, 15 Ill. 264; *Tinkler v. Cox*, 68 Ill. 119; *Van Ingen v. Brabrook*, 27 Ill. App. 401; *Selz v. Guthman*, 62 Ill. App. 624.

Indiana. — *Stout v. Wood*, 1 Blackf. (Ind.

The Court Will Follow Its Own Precedents.—Yet where the decision turns upon the construction of the common law in such sister state, the court will follow its own precedents in expounding the general rules of the common law applicable to the particular transaction.¹

Old Rules Must Give Way to Existing Conditions.—Where no remedy is known according to the old rules and practices of the common law, the court will adapt its proceedings to existing conditions, and will not, by a too close adherence to old rules, allow justice to be defeated.²

The Common Law Is the Law of the Land, however, when once established by the decisions of the courts of last resort,³ and should not be overruled unless

71; *Titus v. Scantling*, 4 Blackf. (Ind.) 89; *Trimble v. Trimble*, 2 Ind. 76; *Blystone v. Burgett*, 10 Ind. 28, 68 Am. Dec. 658; *Johnson v. Chambers*, 12 Ind. 102; *Mendenhall v. Gately*, 18 Ind. 149; *Crake v. Crake*, 18 Ind. 156; *Buckinghouse v. Gregg*, 19 Ind. 401; *Smith v. Muncie Nat. Bank*, 29 Ind. 158; *Schurman v. Marley*, 29 Ind. 458; *Lichtenberger v. Graham*, 50 Ind. 288; *Alford v. Baker*, 53 Ind. 279; *Patterson v. Carrell*, 60 Ind. 129; *Smith v. Peterson*, 63 Ind. 243; *Robards v. Marley*, 80 Ind. 185; *Rogers v. Zook*, 86 Ind. 237; *Buchanan v. Hubbard*, 119 Ind. 187; *Gates v. Newman*, (Ind. App. 1897) 46 N. E. Rep. 654. See also *Cone v. Cotton*, 2 Blackf. (Ind.) 82; *Doe v. Collins*, 1 Ind. 24; *Engler v. Ellis*, 16 Ind. 475.

Kansas.—*St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176.

Louisiana.—*Copley v. Sanford*, 2 La. Ann. 335, 46 Am. Dec. 548; *Sandidge v. Hunt*, 40 La. Ann. 766; *Kling v. Sejour*, 4 La. Ann. 128.

Maine.—*Carpenter v. Grand Trunk R. Co.*, 72 Me. 388, 39 Am. Rep. 340. See also *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143.

Massachusetts.—*Thurston v. Percival*, 1 Pick. (Mass.) 415; *Chase v. Alliance Ins. Co.*, 9 Allen (Mass.) 311. See also *Cluff v. Mutual Ben. L. Ins. Co.*, 13 Allen (Mass.) 308; *Legg v. Legg*, 8 Mass. 99.

Michigan.—*High, Appellant*, 2 Dougl. (Mich.) 515; *Crane v. Hardy*, 1 Mich. 63; *Gordon v. Ward*, 16 Mich. 360; *Ellis v. Maxsom*, 19 Mich. 186, 2 Am. Rep. 81. See also *Worthington v. Hanna*, 23 Mich. 530.

Minnesota.—*Brimhall v. Van Campen*, 8 Minn. 13, 82 Am. Dec. 118; *Mohr v. Miesen*, 47 Minn. 228.

Missouri.—*Wilson v. Cockrill*, 8 Mo. 1; *Maria v. Atterberry*, 9 Mo. 370; *Warren v. Lusk*, 16 Mo. 102; *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331; *Lucas v. Ladew*, 28 Mo. 342; *Bundy v. Hart*, 46 Mo. 460, 2 Am. Rep. 525; *Morrissey v. Wiggins Ferry Co.*, 47 Mo. 521; *Flato v. Mulhall*, 72 Mo. 522; *Meyer v. McCabe*, 73 Mo. 236; *White v. Chaney*, 20 Mo. App. 389. See also *Johnson v. Dicken*, 25 Mo. 580; *State v. Swope*, 72 Mo. 399; *Sloan v. Torrey*, 78 Mo. 623; *Clark v. Barnes*, 58 Mo. App. 667.

New Jersey.—*Waln v. Waln*, (N. J. 1896) 34 Atl. Rep. 1068.

New York.—*Bradley v. Mutual Ben. L. Ins. Co.*, 3 Lans. (N. Y.) 341; *Throop v. Hatch*, 3 Abb. Pr. (N. Y. Supreme Ct.) 23; *Holmes v. Broughton*, 10 Wend. (N. Y.) 75, 25 Am. Dec. 536; *Wright v. Delafield*, 23 Barb. (N. Y.) 498;

White v. Knapp, 47 Barb. (N. Y.) 549; *Stokes v. Macken*, 62 Barb. (N. Y.) 145; *Whitford v. Panama R. Co.*, 23 N. Y. 468; *Ruse v. Mutual Ben. L. Ins. Co.*, 23 N. Y. 516; *People v. Brady*, 56 N. Y. 182; *Meadville First Nat. Bank v. New York Fourth Nat. Bank*, 77 N. Y. 320. See also *Sherrill v. Hopkins*, 1 Cow. (N. Y.) 103; *Robinson v. Dauchy*, 3 Barb. (N. Y.) 20; *Abell v. Douglass*, 4 Den. (N. Y.) 305.

North Carolina.—*Brown v. Pratt*, 3 Jones Eq. (N. Car.) 203; *Griffin v. Carter*, 5 Ired. Eq. (N. Car.) 413.

Oregon.—*Goodwin v. Morris*, 9 Oregon 322; *Cressey v. Tatam*, 9 Oregon 541.

Pennsylvania.—See *Brown v. Camden, etc., R. Co.*, 83 Pa. St. 316.

Texas.—*Crosby v. Huston*, 1 Tex. 203.

1. *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26; *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574. See also *Ray v. Western Pennsylvania Natural Gas Co.*, 138 Pa. St. 576.

Local Tribunal Must Expound Its Own Common Law.—In *Forepaugh v. Delaware, etc., R. Co.*, 128 Pa. St. 217, 15 Am. St. Rep. 672, *Mitchell, J.*, said: "The law of Pennsylvania consists of the Constitution, treaties, and statutes of the United States, the Constitution and statutes of this state, and the common law, not of any or all other countries, but of Pennsylvania. There is a common law of England, and a common law of Pennsylvania mainly founded thereon, but with certain differences, and the only tribunal competent to pass authoritatively on such differences is a Pennsylvania court."

2. *Walworth v. Holt*, 4 Myl. & C. 635; *Lyle v. Richards*, 9 S. & R. (Pa.) 322.

3. *Henry v. Salina Bank*, 5 Hill (N. Y.) 535; *Thomason v. Dill*, 34 Ala. 175; *Gray v. Gray*, 34 Ga. 499. See also *Sydnor v. Gascoigne*, 11 Tex. 449.

Precedents Once Established Should Be Followed.

—In *Norway Plains Co. v. Boston, etc., R. Co.*, 1 Gray (Mass.) 263, 61 Am. Dec. 423, *Shaw, C. J.*, said: "It is one of the great merits and advantages of the common law that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail when the practice and course of business to which they apply should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. These general principles of equity and policy are rendered precise, specific, and adapted to practical use by usage, which is the proof of

changed by legislative enactment;¹ and this even though wrongly applied, if rights have vested under such decisions.²

b. PRESUMED TO BE THE SAME AS IN STATE OF FORUM.—It is well settled that the courts of the several states will not take judicial cognizance of the laws of a sister state at variance with the common law, but will, in the absence of proof to the contrary, presume the common law prevailing in such other states to be the same as their own.³

But This Presumption May Be Rebutted, and when it is so rebutted by evidence to the contrary, the common law will be administered as it really exists, and not in accordance with the former presumption.⁴

5. In Foreign Country.—As a general rule, where no proof to the contrary is adduced, the common law will be presumed to prevail in a foreign country.⁵

their general fitness and common convenience, but still more by judicial exposition; so that when, in a course of judicial proceeding by tribunals of the highest authority, the general rule has been modified, limited, and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases under like circumstances."

Courts Must Enforce Common Law, though Its Reason Has Failed.—In *Powell v. Brandon*, 24 Miss. 343, Yerger, J., said: "Whenever a principle of the common law has been once clearly and unquestionably recognized and established, the courts of the country must enforce it until it be repealed by the legislature, as long as there is a subject-matter for the principle to operate upon; and this, too, although the reason, in the opinion of the court, which induced its original establishment may have ceased to exist. This we conceive to be the established doctrine of the courts of this country, in every state where the principles of the common law prevail. Were it otherwise, the rules of law would be as fluctuating and unsettled as the opinions of the different judges administering them might happen to differ in relation to the existence of sufficient and valid reasons for maintaining and upholding them."

1. *Lemp v. Hastings*, 4 Greene (Iowa) 448. See also *New York*, etc., R. Co. v. *Ketchum*, 34 How. Pr. (N. Y. Ct. App.) 302; *Bane v. Wick*, 6 Ohio St. 13; *Dugan v. Hollins*, 13 Md. 149.

2. *Fisher v. Horicon Iron, etc., Co.*, 10 Wis. 351.

3. **Common Law of Sister States Presumed to Be Same as in State of Forum**—*Alabama*.—*Goodman v. Griffin*, 3 Stew. (Ala.) 160; *Cubbedge v. Napier*, 62 Ala. 518. See also *Connor v. Trawick*, 37 Ala. 289.

Arkansas.—See *Thorn v. Weatherly*, 50 Ark. 237.

Colorado.—*Martin v. Hazzard Powder Co.*, 2 Colo. 596.

Indiana.—*Schurman v. Marley*, 29 Ind. 458. See also *Stout v. Wood*, 1 Blackf. (Ind.) 71; *Buckinghouse v. Gregg*, 19 Ind. 401.

Kansas.—*St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176.

Maine.—*Carpenter v. Grand Trunk R. Co.*, 72 Me. 388, 39 Am. Rep. 340.

Massachusetts.—*Thurston v. Percival*, 1 Pick. (Mass.) 415. See also *Legg v. Legg*, 8 Mass. 99.

Michigan.—*High, Appellant*, 2 Dougl. (Mich.) 515. See also *Jones v. Palmer*, 1 Dougl. (Mich.) 379.

Minnesota.—*Brimhall v. Van Campen*, 8 Minn. 13, 82 Am. Dec. 118.

Missouri.—*Wilson v. Cockrill*, 8 Mo. 1; *Warren v. Lusk*, 16 Mo. 102; *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331; *White v. Chaney*, 20 Mo. App. 389.

New York.—*Abell v. Douglass*, 4 Den. (N. Y.) 305; *Holmes v. Broughton*, 10 Wend. (N. Y.) 75, 25 Am. Dec. 536; *Ruse v. Mutual Ben. L. Ins. Co.*, 23 N. Y. 516; *People v. Brady*, 56 N. Y. 182; *Throop v. Hatch*, 3 Abb. Pr. (N. Y. Supreme Ct.) 27; *Seymour v. Sturgess*, 26 N. Y. 134; *Bradley v. Mutual Ben. L. Ins. Co.*, 3 Lans. (N. Y.) 341. See also *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Pomeroy v. Ainsworth*, 22 Barb. (N. Y.) 119; *Sherrill v. Hopkins*, 1 Cow. (N. Y.) 103.

Pennsylvania.—See *Brown v. Camden, etc., R. Co.*, 83 Pa. St. 316.

4. *St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176. See also *Peet v. Hatcher*, 112 Ala. 514.

Common Law of One State Differs from That of Another.—In *U. S. v. Worrall*, 2 Dall. (U. S.) 384, Chase, J., said: "Each colony judged for itself what parts of the common law were applicable to its new condition, and in various modes, by legislative acts, by judicial decisions, or by constant usage, adopted some parts and rejected others. Hence, he who shall travel through the different states will soon discover that the whole of the common law of England has been nowhere introduced; that some states have rejected what others have adopted, and that there is, in short, a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one state is not the common law of another, but the common law of England is the law of each state so far as each state has adopted it."

In *Alabama* it is held that while the common law will, in the absence of proof to the contrary, be presumed to prevail in a sister state, yet where changes or modifications have been made by judicial decisions in such state those decisions must be regarded as guides, and the common law of the forum cannot be administered. *Inge v. Murphy*, 10 Ala. 885.

5. Presumed to Prevail in Foreign Countries.—*Hanna v. Grand Trunk R. Co.*, 41 Ill. App. 116; *High, Appellant*, 2 Dougl. (Mich.) 515; *Bradley v. Mutual Ben. L. Ins. Co.*, 3 Lans.

Limitation of the Rule. — This presumption, however, has been said to apply only to England,¹ and of course to her dependencies, *c. g.*, Canada;² though this point has, in a recent case, been decided otherwise.³

6. National Common Law. — It is well settled that the common law constitutes no part of our national jurisprudence. The several states composing the federal government are sovereign and independent, possessed of their own customs, usages, and common law, and no principle pervades the union which has not the authority of, and is not embodied in, the constitution or laws of the national government. The common law could be incorporated into the federal system only by legislative adoption.⁴

District of Columbia. — At the time the District of Columbia was created by act of Congress the common law of England prevailing in Maryland necessarily remained and continued in force in that part of the District ceded by

(N. Y.) 341. See also *Johnson v. Chambers*, 12 Ind. 102; *White v. Perley*, 15 Me. 470; *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *Savage v. O'Neil*, 44 N. Y. 298; *Stokes v. Macken*, 62 Barb. (N. Y.) 145.

In *Mims v. Central Bank*, 2 Ala. 294, it was held that the state courts will not judicially notice the law of a foreign country at variance with the common law. See also *Monroe v. Douglass*, 5 N. Y. 447; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538.

In *Savage v. O'Neil*, 44 N. Y. 298, the court said: "There is no proof what the laws of Russia in reference to the property and rights of married women were, and there is no presumption that the common law was in force there. Such a presumption is indulged by our courts only in reference to England and the states which have taken the common law from England. The courts cannot take notice of the laws of Russia unless they are proved, and in the absence of proof our own laws must of necessity furnish the rule for the guidance of our courts."

1. *Savage v. O'Neil*, 44 N. Y. 298.

2. *Canada.* — *Dempster v. Stephen*, 63 Ill. App. 126; *Carpenter v. Grand Trunk R. Co.*, 72 Me. 388, 39 Am. Rep. 340.

3. **Damages for Personal Injuries Sustained in Foreign Country — Presumption.** — In an action for the recovery of damages for injuries sustained by reason of the negligence of the defendant, a corporation engaged in operating a railway between El Paso, Texas, and sundry points in Mexico, the tort having been committed in the latter country, the court said: "Where the action is given by statute, and is not one that arose at common law, it becomes necessary for the plaintiff to establish the existence of a law in the foreign state that gives the right of action, as well as in the state where the case is tried. However, where the wrong is one for which a remedy was given at common law, the presumption will prevail that the common law is in force in the foreign state, and the remedy will be applied." *Mexican Cent. R. Co. v. Mitten*, (Tex. Civ. App. 1896) 36 S. W. Rep. 282.

4. **No National Common Law.** — *Wheaton v. Peters*, 8 Pet. (U. S.) 658; *Bucher v. Cheshire R. Co.*, 125 U. S. 558; *Kendall v. U. S.*, 12 Pet. (U. S.) 613; *U. S. v. Hudson*, 7 Cranch (U. S.) 32; *U. S. v. Coolidge*, 1 Wheat. (U. S.) 415; *U. S. v. Worrall*, 2 Dall. (U. S.) 384; *Moore v. U. S.*, 91 U. S. 270; *In re Barry*, 42 Fed. Rep.

113; *Murray v. Chicago, etc., R. Co.*, 62 Fed. Rep. 24; *Lorman v. Clarke*, 2 McLean (U. S.) 568; *People v. Folsom*, 5 Cal. 374; *Faust v. Judge*, 30 Mich. 266. See also *Bains v. The Schooner James*, 1 Baldw. (U. S.) 544; *Forepaugh v. Delaware, etc., R. Co.*, 128 Pa. St. 217, 15 Am. St. Rep. 672.

In *Gatton v. Chicago, etc., R. Co.*, (Iowa 1895) 63 N. W. Rep. 589, *Kinne, J.*, quotes the following language from the opinion of Mr. Justice Chase in *U. S. v. Worrall*, 2 Dall. (U. S.) 384: "If, indeed, the United States can be supposed for a moment to have a common law, it must, I presume, be that of England; and yet it is impossible to trace when or how the system was adopted or introduced. * * * He who shall travel through the different states will soon discover that the whole of the common law has been nowhere introduced — some states have rejected what others have adopted — and that there is, in short, a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one state is not the common law of another. But the common law of England is the law of each state so far as each state has adopted it."

Exception to General Rule — Construction of Statutes and Constitution. — In *Smith v. Alabama*, 124 U. S. 465, *Matthews, J.*, said: "There is no common law of the United States in the sense of a national customary law, distinct from the common law of England, as adopted by the several states each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. * * * There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority." See also *Phipps v. Harding*, 70 Fed. Rep. 468; *Murray v. Chicago, etc., R. Co.*, 62 Fed. Rep. 24.

Maryland to the United States.¹

Common Law Furnishes the Guide in Federal Courts. — But though the federal government possesses no system of common law of its own, yet when a common-law right is asserted, the United States courts, in adjudicating such right, will have regard to, and administer, the common law of the state in which the controversy arose.²

VI. EXTENT OF ADOPTION — 1. In General —*a.* ONLY AS SUITED TO CHANGED CONDITIONS OF COLONISTS. — The common law of *England* is not to be taken in all respects to be that of *America*. Our ancestors brought with them from the mother country its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their needs and suitable to their situation and circumstances.³

1. District of Columbia. — *U. S. v. Simms*, 1 Cranch (U. S.) 252; *Ex p. Watkins*, 7 Pet. (U. S.) 568; *Kendall v. U. S.*, 12 Pet. (U. S.) 613; *State v. Cummings*, 33 Conn. 260, 89 Am. Dec. 208. See also *McKenna v. Fisk*, 1 How. (U. S.) 249.

District of Columbia — Territories — Existence of Common Law. — The English common law has been adopted by the several states so far as considered beneficial and suitable to their condition and circumstances (see *infra*, this title, *Extent of Adoption*), but there has been no express adoption of any system of laws, either by the United States Constitution or statutes, and the theory of our government does not justify the conclusion that it has succeeded to any such system. The bulk of governmental power was relegated to the several states; but by the United States Constitution it is reserved to Congress to exercise exclusive control over the District of Columbia (art. 1, § 8) and the territories (art. 4, § 3) of the United States — hence, over this area the federal government is sovereign, and the nation here has succeeded to the common law. *Swift v. Philadelphia*, etc., R. Co., 64 Fed. Rep. 59.

2. Federal Courts Administer State Common Law. — In *Lorman v. Clarke*, 2 McLean (U. S.) 568, the court said: "No foreign principle attaches to the federal court when exercising its powers within a state. It gives effect to the local law under which the contract was made, or by virtue of which the right is asserted. And this independently of any act of Congress adopting the modes of proceedings at common law of the state courts." See also *Gardner v. Collins*, 2 Pet. (U. S.) 58; *U. S. v. Morrison*, 4 Pet. (U. S.) 124; *Green v. Neal*, 6 Pet. (U. S.) 291; *Wheaton v. Peters*, 8 Pet. (U. S.) 658; *Kendall v. U. S.*, 12 Pet. (U. S.) 526; *Swift v. Tyson*, 16 Pet. (U. S.) 1; *M'Keen v. Delancy*, 5 Cranch (U. S.) 22; *Polk v. Wendal*, 9 Cranch (U. S.) 87; *Lee County v. Rogers*, 7 Wall. (U. S.) 181; *Olcott v. Supervisors*, 16 Wall. (U. S.) 678; *Lane v. Vick*, 3 How. (U. S.) 464; *Smith v. Kernochen*, 7 How. (U. S.) 108; *Nesmith v. Sheldon*, 7 How. (U. S.) 812; *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297; *Webster v. Cooper*, 14 How. (U. S.) 488; *Pease v. Peck*, 18 How. (U. S.) 595; *Morgan v. Curtenius*, 20 How. (U. S.) 1; *League v. Egery*, 24 How. (U. S.) 264; *Suydam v. Williamson*, 24 How. (U. S.) 427; *Elmwood v. Marcy*, 92 U. S. 289; *State Railroad Tax Cases*, 92 U. S. 575; *South Ottawa v. Perkins*, 94 U. S. 260; *Fairfield v.*

Gallatin County, 100 U. S. 47; *Burgess v. Seligman*, 107 U. S. 20; *Bucher v. Cheshire R. Co.*, 125 U. S. 555; *Pyeatt v. Powell*, 51 Fed. Rep. 551; *People v. Folsom*, 5 Cal. 374; *Dawson v. Shaver*, 1 Blackf. (Ind.) 204; *Faust v. Judge*, 30 Mich. 266. See also *Lamar v. Micou*, 114 U. S. 218; *Pennington v. Gibson*, 16 How. (U. S.) 65; *Robinson v. Campbell*, 3 Wheat. (U. S.) 222.

In *U. S. v. Lancaster*, 2 McLean (U. S.) 431, the court said: "The federal government has no jurisdiction of offenses at common law. Even in civil cases the federal government follows the rule of the common law as adopted by the states respectively. It can exercise no criminal jurisdiction which is not given by statute, nor punish any act criminally, except as the statute provides."

3. English Common Law Not Adopted in Entirety — *United States*. — *Chisholm v. Georgia*, 2 Dall. (U. S.) 435; *Van Ness v. Pacard*, 2 Pet. (U. S.) 137; *Patterson v. Winn*, 5 Pet. (U. S.) 233; *Wheaton v. Peters*, 8 Pet. (U. S.) 591; *Pawlet v. Clark*, 9 Cranch (U. S.) 292. See also *U. S. v. Coolidge*, 1 Gall. (U. S.) 488; *Livingston v. Jefferson*, 1 Brock. (U. S.) 211; *U. S. v. Worral*, 2 Dall. (U. S.) 384; *Kendall v. U. S.*, 12 Pet. (U. S.) 523; *In re Barry*, 42 Fed. Rep. 113.

Alabama. — *State v. Cawood*, 2 Stew. (Ala.) 363; *Carter v. Balfour*, 19 Ala. 814; *Harkness v. Sears*, 26 Ala. 493, 62 Am. Dec. 742; *Barlow v. Lambert*, 28 Ala. 704, 65 Am. Dec. 374; *Horton v. Sledge*, 29 Ala. 478.

Arkansas. — *Cox v. Morrow*, 14 Ark. 603.

California. — *Norris v. Harris*, 15 Cal. 226; *Van Maren v. Johnson*, 15 Cal. 308; *Reed v. Eldredge*, 27 Cal. 347.

Colorado. — *Chilcott v. Hart*, (Colo. 1896) 45 Pac. Rep. 391.

Connecticut. — *Wilford v. Grant*, *Kirby (Conn.)* 114; *Fitch v. Brainerd*, 2 Day (Conn.) 163; *Card v. Grinman*, 5 Conn. 164; *Baldwin v. Walker*, 21 Conn. 181. See also *State v. Danforth*, 3 Conn. 114; *State v. Cummings*, 33 Conn. 260, 89 Am. Dec. 208.

Delaware. — *Clawson v. Primrose*, 4 Del. Ch. 664; *State v. Williams*, 9 Houst. (Del.) 508.

Illinois. — *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Sans v. People*, 8 Ill. 327; *Stuart v. People*, 4 Ill. 395; *Penny v. Little*, 4 Ill. 301; *Boyer v. Sweet*, 4 Ill. 120; *Seeley v. Peters*, 10 Ill. 130; *Plumleigh v. Cook*, 13 Ill. 669; *Gerber v. Grabel*, 16 Ill. 217; *Fisher v. Deering*, 60 Ill. 114; *Guest v. Reynolds*, 68 Ill.

Judicial Decisions and the usages and customs of the respective states must, in general, determine how far the common law has been introduced and sanctioned.¹

b. STATUS OF COLONISTS. — Upon the settlement of a new country by colonists from another, such colonists remaining subject to the former government, they carry with them the general laws of the mother country which are applicable to the settlers in the new territory;² such laws are binding upon the colonists without re-enactment until altered by common consent or

478, 18 Am. Rep. 570; *Thompson v. Reynolds*, 73 Ill. 11; *Lavalle v. Strobel*, 89 Ill. 370.

Indiana. — *Fuller v. State*, 1 Blackf. (Ind.) 66; *Piatt v. Eads*, 1 Blackf. (Ind.) 82; *Dawson v. Shaver*, 1 Blackf. (Ind.) 204; *Craft v. State Bank*, 7 Ind. 219; *Johnson v. Chambers*, 12 Ind. 102; *Dawson v. Coffman*, 28 Ind. 220. See also *Doe v. Collins*, 1 Ind. 24.

Iowa. — *Wagner v. Bissell*, 3 Iowa 396; *O'Ferrall v. Simplot*, 4 Iowa 381; *State v. Twogood*, 7 Iowa 252; *Estes v. Carter*, 10 Iowa 400. See also *Gatton v. Chicago*, etc., R. Co., (Iowa 1895) 63 N. W. Rep. 589.

Kansas. — *Harrington v. Miles*, 11 Kan. 480, 15 Am. Rep. 355; *Parsons v. Lindsay*, 41 Kan. 336.

Kentucky. — *Lathrop v. Commercial Bank*, 8 Dana (Ky.) 121, 33 Am. Dec. 481.

Maine. — *Winthrop v. Dockendorff*, 3 Me. 156; *Colley v. Merrill*, 6 Me. 50.

Maryland. — *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534; *Dashiell v. Atty.-Gen.*, 5 Har. & J. (Md.) 392, 9 Am. Dec. 572; *State v. State Bank*, 6 Gill & J. (Md.) 206.

Massachusetts. — *Com. v. Churchill*, 2 Met. (Mass.) 118; *Com. v. York*, 9 Met. (Mass.) 93, 43 Am. Dec. 373; *Sackett v. Sackett*, 8 Pick. (Mass.) 309; *Boynnton v. Rees*, 9 Pick. (Mass.) 528; *Com. v. Leach*, 1 Mass. 59; *Com. v. Knowlton*, 2 Mass. 530. See also *Com. v. Chapman*, 13 Met. (Mass.) 68; *Baker v. Mattocks*, Quincy (Mass.) 70; *Com. v. Hunt*, 4 Met. (Mass.) 111; *Going v. Emery*, 16 Pick. (Mass.) 107.

Michigan. — *Stout v. Keyes*, 2 Dougl. (Mich.) 184, 43 Am. Dec. 465; *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Perrin v. Lepper*, 34 Mich. 292; *Matter of Lamphere*, 61 Mich. 105. See also *High*, Appellant, 2 Dougl. (Mich.) 515.

Minnesota. — See *State v. Pule*, 12 Minn. 164.

Mississippi. — *Noonan v. State*, 1 Smed. & M. (Miss.) 562; *Powell v. Brandon*, 24 Miss. 343; *Vicksburg*, etc., R. Co. v. Patton, 31 Miss. 156, 66 Am. Dec. 552.

Missouri. — *Reaume v. Chambers*, 22 Mo. 36. See also *Duke v. Harper*, 66 Mo. 51, 27 Am. Rep. 314.

Montana. — *Territory v. Virginia Road Co.*, 2 Mont. 96.

Nevada. — *Ex p. Blanchard*, 9 Nev. 101; *Hamilton v. Kneeland*, 1 Nev. 40; *Evans v. Cook*, 11 Nev. 69; *Clark's Estate*, 17 Nev. 124; *Reno Smelting*, etc., *Works v. Stevenson*, 20 Nev. 269, 19 Am. St. Rep. 364.

New Hampshire. — *Houghton v. Page*, 2 N. H. 42, 9 Am. Dec. 30; *State v. Rollins*, 8 N. H. 550; *State v. Moore*, 26 N. H. 448, 59 Am. Dec. 354.

New Mexico. — See *Leitensdorfer v. Webb*, 1

N. Mex. 34; *Browning v. Browning*, 3 N. Mex. 371; *Bent v. Thompson*, 5 N. Mex. 408.

New York. — *People v. Randolph*, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 174; *Canal Com'rs v. People*, 5 Wend. (N. Y.) 423; *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 587; *Myers v. Gemmel*, 10 Barb. (N. Y.) 537; *Morgan v. King*, 30 Barb. (N. Y.) 9; *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278. See also *Perry v. Perry*, 2 Paige (N. Y.) 501; *Stafford v. Ingersol*, 3 Hill (N. Y.) 38; *Lansing v. Stone*, 37 Barb. (N. Y.) 15.

Ohio. — *Lindsley v. Coats*, 1 Ohio 243; *Bloom v. Richards*, 2 Ohio St. 387; *Cleveland*, etc., R. Co. v. Keary, 3 Ohio St. 201; *Kerwhacker v. Cleveland*, etc., R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; *State v. Williams*, 24 Ohio L. J. 435.

Oklahoma Territory. — *McKennon v. Winn*, 1 Okla. 327.

Pennsylvania. — *Shewel v. Fell*, 3 Yeates (Pa.) 17; *Guardians of Poor v. Greene*, 5 Binn. (Pa.) 554; *Lyle v. Richards*, 9 S. & R. (Pa.) 322; *Pennock's Estate*, 20 Pa. St. 268, 59 Am. Dec. 718; *Morris v. Vanderen*, 1 Dall. (Pa.) 67. See also *Flanagan v. Philadelphia*, 42 Pa. St. 219.

Tennessee. — *Porter v. State*, Mart. & Y. (Tenn.) 226; *Fields v. State*, 1 Yerg. (Tenn.) 156; *Stump v. Napier*, 2 Yerg. (Tenn.) 45; *Simpson v. State*, 5 Yerg. (Tenn.) 356; *McCorry v. King*, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165.

Vermont. — *Nash v. Harrington*, 2 Aik. (Vt.) 9, 16 Am. Dec. 672; *Martin v. Bigelow*, 2 Aik. (Vt.) 184, 16 Am. Dec. 696; *Le Barron v. Le Barron*, 35 Vt. 365.

Virginia. — *Com. v. Callaghan*, 2 Va. Cas. 460.

Washington. — *Sayward v. Carlson*, 1 Wash. 29.

West Virginia. — *Cunningham v. Dorsey*, 3 W. Va. 293; *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629.

Wisconsin. — *Connecticut Mut. L. Ins. Co. v. Cross*, 18 Wis. 109; *Coburn v. Harvey*, 18 Wis. 147; *Kellogg v. Chicago*, etc., R. Co., 26 Wis. 272, 7 Am. Rep. 69.

1. *Wheaton v. Peters*, 6 Pet. (U. S.) 591.

2. *Blankard v. Galdy*, 2 Salk. 411; *Dutton v. Howell*, 1 Show. P. C. 31; *Bogardus v. Trinity Church*, 4 Paige (N. Y.) 178; *Canal Com'rs v. People*, 5 Wend. (N. Y.) 423.

Whatever of the common law was brought over by the colonists, such statutes passed since the emigration and since adopted in practice, and such usages as probably originated from the laws of the colonial legislature constitute the common law of *Massachusetts*, except as changed by statute. *Com. v. Knowlton*, 2 Mass. 530. See also *Com. v. Leach*, 1 Mass. 60.

legislative enactment.¹

Common Law of Colony May Differ from That of the Mother Country. — But the common law of England will not be presumed to prevail in the identical manner in which it is in force there; ² when circumstances and conditions are naturally different, the courts will not hesitate to make such modifications as the situation requires.³

Common Law of Each State Not Necessarily the Same. — And so the common law of one state is not necessarily that of another, as each state adopts such parts as are desirable, and suitable to its needs.⁴

2. By State Constitutions. — Many of the states have incorporated the common-law system of jurisprudence into their constitutions.⁵

1. *Boehm v. Engle*, 1 Dall. (Pa.) 15; *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278.

2. *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143.

Statutes Repealed Prior to Emigration. — In *Baldwin v. Walker*, 21 Conn. 168, it is held that although we have adopted such of the common law of England as was operative as law in that country when our ancestors emigrated therefrom, yet that no law which had been abrogated or repealed prior to their leaving the mother country was brought over with them.

3. *Dawson v. Coffman*, 28 Ind. 220; *Kansas City, etc., R. Co. v. Smith*, 72 Miss. 677, 48 Am. St. Rep. 579; *Com. v. Lehigh Valley R. Co.*, 165 Pa. St. 162; *Seeley v. Peters*, 10 Ill. 130.

Adoption of the Common Law Has Been Partial and Disjointed. — In *Cox v. Morrow*, 14 Ark. 603, *Watkins, C. J.*, said: "Our English ancestors who colonized America brought with them certain fundamental principles of the common law, such as right of trial by jury and the privilege of habeas corpus, which were essential to the enjoyment of civil liberty in England, as they are here. But it cannot be said that the great body of the common law, or the English statutes passed in aid of it, prevailed in the colonies, * * * and it cannot be presumed that it prevails now entire in any of the states of this Union. Even if the periods of its adoption could be ascertained, and a distinction taken between the common and statute law of England, we must know, as matter of legal history, that in every American state many of its leading features have been abrogated or changed by legislation, or essentially modified by local common law or usage. Of so much of the common law as has been expressly adopted, or is tacitly recognized, the reported decisions of the courts in England ought to be regarded as its expositors. But even such adoption is partial and disjointed; nor are the decisions of the courts of this country, federal as well as state, in harmony with one another or with those of the courts in England, upon a variety of purely common-law questions. Even in cases involving commercial law, where uniformity is so much to be desired, the decisions of each state, liable to be influenced by local considerations not appreciable in another, cannot there be always safely followed as precedents."

4. *U. S. v. Worrall*, 2 Dall. (U. S.) 384.

Common Law Not Uniform Throughout the

States. — In *Wheaton v. Peters*, 8 Pet. (U. S.) 591, *McLean, J.*, said: "No one will contend that the common law as it existed in England has ever been in force in all its provisions in any state in this Union. It was adopted so far only as its principles were suited to the condition of the colonies; and from this circumstance we see, what is common law in one state is not so considered in another. The judicial decisions, the usages and customs of the respective states, must determine how far the common law has been introduced and sanctioned in each."

Common Law Is Founded on Popular Custom. — In *Effinger v. Lewis*, 32 Pa. St. 367, *Lowrie, C. J.*, delivering the opinion, said: "Common law grows out of the general customs of the country, and consists of definitions of these customs and of those ancillary principles that naturally accompany them, or are deduced from them. The common law of one country or century is not necessarily the common law of another, because customs change. * * * Common law, then, is founded on popular custom, and when the judges declare it, they merely discover and declare what they find existing in the life of the people as the rule of their relations."

5. Constitutions — *Alabama.* — Const., art. 17, sched. 1; *Pollard v. Hagan*, 3 How. (U. S.) 212; *Barlow v. Lambert*, 28 Ala. 704, 65 Am. Dec. 374.

Delaware. — Const. 1776, art. 25; *Clawson v. Primrose*, 4 Del. Ch. 643.

Kentucky. — Const. 1850, art. 8, § 8.

Maryland. — Declaration of Right, art. 5.

Massachusetts. — Const., part 2, art. 6; *Com. v. York*, 9 Met. (Mass.) 93, 43 Am. Dec. 373; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

Michigan. — Const., sched., § 1.

New Hampshire. — Const., part 2, art. 89; *State v. Rollins*, 8 N. H. 550.

New York. — Const. art. 1, § 17. See also *Kernochan v. New York El. R. Co.*, (Super. Ct.) 8 N. Y. Supp. 648.

Texas. — The common law adopted by constitution (art. 16, § 48) as a rule of decision in criminal cases. *Grinder v. State*, 2 Tex. 339; *Republic v. Smith*, Dall. (Tex.) 407.

West Virginia. — Const., art. 8, § 21; *Northwestern Bank v. Machir*, 18 W. Va. 271; *State v. Allen*, 8 W. Va. 680.

Wisconsin. — Const. art. 14, § 13; *Coburn v. Harvey*, 18 Wis. 148; *Kellogg v. Chicago, etc., R. Co.*, 26 Wis. 223, 7 Am. Rep. 69; *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278.

3. By Statutory Enactment. — The common law of England, so far as applicable, and not inconsistent with the constitution and laws of the United States, or of any state, has been adopted and declared to be in force in many states.¹

VII. HOW ESTABLISHED AND PROVED — 1. Of a Sister State. — The mode of proof adopted to establish the common law of a sister state is the oral testimony of disinterested and intelligent witnesses,² or the books containing the reports of the cases adjudged in the courts of that state.³ These are simply evidence, however, not the law itself, and should be clear and unequivocal.¹

2. Of a Foreign Country. — The unwritten law of a foreign country is likewise to be proved by the testimony of experts.⁵

VIII. COMMON LAW IN RELATION TO CRIMES — 1. In Federal Courts. — The federal courts cannot resort to the common law as a source of criminal jurisdiction; the crimes and offenses which are cognizable by those courts are such only as are expressly, or by necessary implication, designated by law, and Congress must define these crimes, prescribe their punishment, and confer the jurisdiction to try them.⁶

1. Statutes — Alabama. — Pollard *v.* Hagan, 3 How. (U. S.) 212; State *v.* Cawood, 2 Stew. (Ala.) 360; Barlow *v.* Lambert, 28 Ala. 704, 65 Am. Dec. 374; Burt *v.* State, 39 Ala. 617; Ferguson *v.* Selma, 43 Ala. 398; Carter *v.* Balfour, 19 Ala. 814; Wiley *v.* Ewing, 47 Ala. 418.

Arkansas. — Grande *v.* Foy, Hempst. (U. S.) 105.

Colorado. — Herr *v.* Johnson, 11 Colo. 393; Chilcott *v.* Hart, (Colo. 1896) 45 Pac. Rep. 391.

Kansas. — Sattig *v.* Small, 1 Kan. 170; State *v.* Hillyer, 2 Kan. 17; Harrington *v.* Miles, 11 Kan. 480, 15 Am. Rep. 355; Kansas Pac. R. Co. *v.* Nichols, 9 Kan. 235, 12 Am. Rep. 494; State *v.* Jefferson County, 11 Kan. 66; Tousley *v.* Galena Min., etc., Co., 24 Kan. 332.

Missouri. — Reaume *v.* Chambers, 22 Mo. 36.

Nevada. — Vansickle *v.* Haines, 7 Nev. 249. See also Reno Smelting, etc., Works *v.* Stevenson, 20 Nev. 260, 19 Am. St. Rep. 364.

New Mexico. — Browning *v.* Browning, 3 N. Mex. 371.

South Carolina. — Edwards *v.* Charlotte, etc., R. Co., 39 S. Car. 472, 39 Am. St. Rep. 746.

Texas. — Foster *v.* Champlin, 29 Tex. 22; Courand *v.* Vollmer, 31 Tex. 397; Diamond *v.* Harris, 33 Tex. 634.

See also 1 Stimson's Am. Stat. Law, § 1003.

2. Oral Testimony of Qualified Witnesses. — M'Rae *v.* Mattoon, 13 Pick. (Mass.) 53; McDeed *v.* McDeed, 67 Ill. 545; Greasons *v.* Davis, 9 Iowa 219; Woodbridge *v.* Austin, 2 Tyler (Vt.) 364, 4 Am. Dec. 740.

3. Books of Reports. — Inge *v.* Murphy, 10 Ala. 885; Sidney *v.* White, 12 Ala. 728; Cubbedge *v.* Napier, 62 Ala. 518; McDeed *v.* McDeed, 67 Ill. 548; Billingsley *v.* Dean, 11 Ind. 331; State *v.* Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534; Com. *v.* Churchill, 2 Met. (Mass.) 118; Cragin *v.* Lamkin, 7 Allen (Mass.) 395; Ames *v.* McCamber, 124 Mass. 85. See also Penobscot, etc., R. Co. *v.* Bartlett, 12 Gray (Mass.) 244, 71 Am. Dec. 753; 1 Minor's Inst. (3d ed.) p. 35; 1 Bl. Com., p. 63.

In Com. *v.* York, 9 Met. (Mass.) 93, 43 Am. Dec. 373, Shaw, C. J., in speaking of the common law, said: "We must seek for the evidence of it in judicial records, precedents, and decisions, and those digests, treatises, and commentaries of learned and experienced men

which have acquired respect and confidence by long usage and general consent."

"The reports of judicial decisions contain the most certain evidence, and the most authoritative and precise application of the rules of common law. Adjudged cases become precedents for future cases resting upon analogous facts, and brought within the same reason; and the diligence of counsel and the labor of judges are constantly required, in the study of the reports, in order to understand accurately their import and the principles they establish." 1 Kent's Com. 473.

4. Robert *v.* West, 15 Ga. 122; State *v.* Buchanan, 5 Har. & J. (Md.) 358, 9 Am. Dec. 534. See also Henry *v.* Salina Bank, 5 Hill (N. Y.) 535.

5. Ennis *v.* Smith, 14 How. (U. S.) 400.

6. Federal Courts Have No Common-law Criminal Jurisdiction — *In re* Greene, 52 Fed. Rep. 104; U. S. *v.* Ravara, 2 Dall. (Pa.) 297; *Ex p.* Bollman, 4 Cranch (U. S.) 93; U. S. *v.* Hudson, 7 Cranch (U. S.) 32; U. S. *v.* Coolidge, 1 Wheat. (U. S.) 415, reversing 1 Gall. (U. S.) 488; U. S. *v.* Reid, 12 How. (U. S.) 361; Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. (U. S.) 568; U. S. *v.* Britton, 108 U. S. 199; U. S. *v.* Armstrong, 2 Curt. (U. S.) 446; Hubbard *v.* Northern R. Co., 3 Blatchf. (U. S.) 84; U. S. *v.* Wilson, 3 Blatchf. (U. S.) 435; U. S. *v.* Barney, 5 Blatchf. (U. S.) 294; Anonymous, 1 Wash. (U. S.) 84; *Ex p.* Cabrera, 1 Wash. (U. S.) 232; U. S. *v.* Magill, 1 Wash. (U. S.) 463; U. S. *v.* Bevans, 3 Wheat. (U. S.) 336; Livingston *v.* Jefferson, 1 Brock. (U. S.) 211; U. S. *v.* Lancaster, 2 McLean (U. S.) 431; U. S. *v.* Babcock, 4 McLean (U. S.) 113; U. S. *v.* Scott, 4 Biss. (U. S.) 29; U. S. *v.* Shepard, 1 Abb. (U. S.) 431; U. S. *v.* Copper-smith, 4 Fed. Rep. 198; U. S. *v.* Lewis, 36 Fed. Rep. 449; U. S. *v.* Hare, 2 N. Y. Wheel. Cr. Cas. (U. S. Cir. Ct.) 283; Manchester *v.* Massachusetts, 139 U. S. 240; U. S. *v.* Eaton, 144 U. S. 677.

In U. S. *v.* Worrall, 2 Dall. (U. S.) 384, the court said: "The common law, therefore, of one state is not the common law of another; but the common law of England is the law of each state so far as each state has adopted it; and it results from that position, connected with the Judicial Act, that the common law

Adoption by Congress of Common-law Offenses. — But when Congress, in the exercise of powers conferred upon it by the Constitution, adopts or creates common-law offenses, the federal courts may properly look to that system of jurisprudence for the meaning and definition of such crimes, if they are not clearly defined in the act creating them.¹

2. In State Courts. — No categorical rule can be laid down touching the right of state courts to punish for common-law offenses. In some of the states the common law is held to extend to things of a criminal, as well as those of a civil, nature,² in others a contrary view has been taken,³ while a third group have settled the difficulty by express legislative enactment.⁴

will always apply to suits between citizen and citizen, whether they are instituted in a federal or state court. But the question recurs, when and how have the courts of the United States acquired a common-law jurisdiction in criminal cases? The United States must possess the common law themselves before they can communicate it to their judicial agents. Now, the United States did not bring it with them from England; the Constitution does not create it, and no act of Congress has assumed it. * * * Upon the whole, it may be a defect in our political institutions, it may be an inconvenience in the administration of justice, that the common-law authority relating to crimes and punishments has not been conferred upon the government of the United States, which is a government in other respects also of a limited jurisdiction; but judges cannot remedy political imperfections, nor supply any legislative omission. I will not say whether the offense is at this time cognizable in a state court. But certainly Congress might have provided by law for the present case, as they have provided for other cases of a similar nature; and yet, if Congress had ever declared and defined the offense, without prescribing a punishment, I should still have thought it improper to exercise a discretion upon that part of the subject."

In *U. S. v. Ramsay*, Hempst. (U. S.) 481, in discussing the rights of the United States Circuit Court to punish one indicted for an offense not expressly made punishable by Congress, the court said: "This is a question for the consideration of the legislative department, and this court is only authorized to try and punish such crimes as Congress expressly or by necessary implication have visited with known and certain penalties, and the court has no common-law jurisdiction in that respect. The defects in the criminal code of the United States have been severely felt, but it is for Congress, not this court, to interpose and apply the corrective."

1. In *re* Greene, 52 Fed. Rep. 104; *U. S. v. Armstrong*, 2 Curt. (U. S.) 446; *U. S. v. Coppersmith*, 4 Fed. Rep. 198.

Corporation Created by Congress — Jurisdiction of State Court. — Under the Constitution of the United States the courts of the several states have exclusive jurisdiction of common-law offenses committed against a corporation created by the Congress and situated within the boundary of the state. Although Congress has a potential right to make a crime an offense against the federal government, and thereby give exclusive jurisdiction thereof to the United States courts, the mere possession of such right

without any exercise thereof would not oust the prior jurisdiction. *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

2. Common Law as to Crimes Exists — Alabama. — *State v. Cawood*, 2 Stew. (Ala.) 360.

Connecticut. — *State v. Danforth*, 3 Conn. 112.

Illinois. — *Smith v. People*, 25 Ill. 17, 76 Am. Dec. 780; *Thompson v. Reynolds*, 73 Ill. 11.

Massachusetts. — *Com. v. Newell*, 7 Mass. 245; *Com. v. Harrington*, 3 Pick. (Mass.) 26; *Com. v. Ayer*, 3 Cush. (Mass.) 150.

Minnesota. — *Benson v. State*, 5 Minn. 19; *State v. Pulle*, 12 Minn. 164.

Nevada. — *Ex p. Blanchard*, 9 Nev. 101.

New Hampshire. — *State v. Rollins*, 8 N. H. 550.

New York. — *Brockway v. People*, 2 Hill (N. Y.) 558.

South Carolina. — *State v. Council*, Harp. L. (S. Car.) 53; *State v. Bosse*, 8 Rich. L. (S. Car.) 276.

3. Common Law as to Crimes Does Not Exist. — *Georgia.* — *William v. State*, 18 Ga. 356.

Indiana. — *Hackney v. State*, 8 Ind. 494; *Beal v. State*, 15 Ind. 378; *State v. Ohio*, etc., R. Co., 23 Ind. 362; *Jones v. State*, 59 Ind. 229; *Stephens v. State*, 107 Ind. 185; *Ledgerwood v. State*, 134 Ind. 81; *State v. Sullivan County Agricultural Soc.*, 14 Ind. App. 369. See also *McJunkins v. State*, 10 Ind. 140; *Jennings v. State*, 16 Ind. 335; *Marvin v. State*, 19 Ind. 181.

Iowa. — In Iowa the common law has been neither expressly repealed nor adopted, and though its principles have been recognized as rules of decision in both civil and criminal cases, yet no common-law offenses exist, and hence cannot be punished under the provisions of that law alone, but must be provided for by express statutory enactment. *Estes v. Carter*, 10 Iowa 400; *State v. Twogood*, 7 Iowa 252.

Kansas. — *State v. Young*, 55 Kan. 349.

Michigan. — *Matter of Lamphere*, 61 Mich. 105.

Ohio. — *Key v. Vattier*, 1 Ohio 132; *Young v. State*, 6 Ohio 435; *Winn v. State*, 10 Ohio 345; *Vanvalkenburg v. State*, 11 Ohio 404; *Matthews v. State*, 4 Ohio St. 540; *Smith v. State*, 12 Ohio St. 466, 80 Am. Dec. 355; *Mitchell v. State*, 42 Ohio St. 383, *overruling State v. Lafferty*, Tappan (Ohio) 113.

Oregon. — *State v. Vowels*, 4 Oregon 324; *State v. Gaunt*, 13 Oregon 115.

4. Legislation as to Adoption of Common Law of Crimes — Arkansas. — *Mansfield Dig.*, § 568.

Colorado. — *Mills's Anno. Stat.*, § 1457; *Code Crim. Pro.*, § 610.

COMMONWEALTH. (See also the title STATES.)—See note 1.

COMMONWEALTH'S ATTORNEY.—See the title PROSECUTING ATTORNEY.

COMMORANCY. (See also the title RESIDENCE.)—"Commorancy" is defined as meaning residence, temporary or for a short time.²

COMMOTION.—See note 3.

COMMUNICATE.—To impart mediately or immediately; ¹ to converse.⁵

COMMUNICATION.—That which is communicated or imparted.⁶

COMMUNITY.—A society of people living in the same place, under the same laws and regulations, and who have common rights and privileges.⁷

Florida.—Rev. Stat. 1892, § 2369.

Mississippi.—Gen. Stat. 1892, § 1452.

Missouri.—Rev. Stat. 1889, p. 1540.

Montana.—Comp. Stat., p. 583, § 278; Territory v. Ye Wan, 2 Mont. 478; Territory v. Flowers, 2 Mont. 531.

New Jersey.—Gen. Stat., p. 1083, § 192.

Tennessee.—Milliken & Vertrees's Code, § 5948.

Texas.—Code Crim. Pro., §§ 27, 725; State v. Odum, 11 Tex. 12; Grinder v. State, 2 Tex. 338; Chandler v. State, 2 Tex. 305; Hyde v. State, 16 Tex. 445, 67 Am. Dec. 630.

1. **Variance.**—In Gorman v. Steed, 1 W. Va. 1, it was held that a writ which purports to run in the name of the *commonwealth* of West Virginia should be quashed, as the constitution provides that writs shall run in the name of the state of West Virginia.

2. Pullen v. Monk, 82 Me. 415, in which case it was further held that the term implied something less than a regular residence; a man may be a resident in one place and *commorant* in another at the same time. See also Ames v. Winsor, 19 Pick. (Mass.) 248. The word *commorant* has been held to apply to laborers in logging swamps, living during the logging season in camps. Wright v. Smith, 74 Me. 495. See also Wade v. Bessey, 76 Me. 414. But river drivers are not *commorant* in the respective towns through which they pass. Gilman v. Inman, 85 Me. 105, in which case it is said that the etymological signification of the term implies an abiding or tarrying for some appreciable though temporary duration less than a permanent residence.

3. **Civil Commotion.** (See also the title FIRE INSURANCE.)—Insurance policies frequently except losses occurring through insurrections, riots, or civil *commotion*. In Langdale v. Mason, 1 Bennett's Fire Ins. Cas. 16, Lord Mansfield says: "I think a civil *commotion* is this, an insurrection of the people for general purposes, though it may not amount to a rebellion where there is a usurped power." Quoted in Portsmouth Ins. Co. v. Reynolds, 32 Gratt. (Va.) 622.

In Spruill v. North Carolina Mut. L. Ins. Co., 1 Jones L. (N. Car.) 126, the court defines *commotion* as being a tumult.

4. **Fires by Railways.** (See the title FIRES.)—Under a statute which makes a railroad company liable for any injury done to any building or other property by fire *communicated* by a locomotive engine, the liability of the railroad is not confined to cases where the very particles of fire which fall upon and kindle the flame in the building injured emanate directly from the engine, without the intervention of any other object; it includes

all injury resulting from fire originating in the engine and extending by natural and ordinary means. Hart v. Western R. Corp., 13 Met. (Mass.) 99; Perley v. Eastern R. Co., 98 Mass. 418; Safford v. Boston, etc., R. Co., 103 Mass. 584.

5. **Jury.** (See the title JURY AND JURY TRIAL.)—A law requiring the officers in charge of a jury to be sworn not to *communicate* with the jurors nor to permit any one else to *communicate* with them, is sufficiently complied with where the officers are sworn not to converse with the jurors, etc. Scott v. State, 7 Lea (Tenn.) 232.

6. Webster's Dict.

Transactions and Communications with a Deceased Person.—Statutes removing the disqualification of the parties interested to testify usually except transactions and *communications* with deceased persons. For the construction of these terms see the title WITNESSES.

Privileged Communications.—See the titles LIBEL AND SLANDER; PRIVILEGED COMMUNICATIONS.

Letter.—Under a statute making it a misdemeanor to send an indecent letter or *communication* to a female, an indictment for sending an indecent letter and *communication* is not bad. "There is nothing incongruous or inconsistent in describing it as a letter and *communication*, for it was both." Larison v. State, 49 N. J. L. 256. See also the titles OBSCENITY; POSTAL LAWS.

A question, contained in interrogatories for the deposition of a witness outside the state, whether he had had any *communications* with the defendant on the subject-matter of the deposition, and if so what *communications*, does not include the ground covered by a second question, whether he had received or seen any letters respecting the same matter, and if so what were their contents. The terms *communications* and "letters" did not mean the same thing. Amherst Bank v. Conkey, 4 Met. (Mass.) 459. See generally LETTER.

Communication of Marriage.—In Moody v. Baker, 5 Cow. (N. Y.) 354, it is said: "By a *communication*, or treaty of marriage, must, I think, be understood, that the parties had contracted to marry each other." See also the title LIBEL AND SLANDER.

7. Wharton's Law Lexicon.

In Sherrod v. Langdon, 21 Iowa 522, it is said: "Nor does *community* mean three or four farmers or neighbors, but the society or public generally where plaintiffs [sheep-growers] herd."

The Constitution of Colorado provided that no appropriation should be made for charitable or benevolent purposes to any person, corpora-

tion, or *community* not under the absolute control of the state. It was held that an appropriation for the relief of destitute farmers in one section of the state was unconstitutional under this provision. *In re Relief Bills*, 21 Colo. 62. The court in that case said: "The friends of this bill contend that the words of section 34, 'not under the absolute control of the state,' relate back and qualify the word 'appropriation;' that the appropriation to be valid must be under the absolute control of the state. The attorney-general, on the contrary, contends that such qualifying words refer only to 'corporation or *community*.' According to his view, the corporation or *community* receiving aid must be under the absolute control of the state. The word *community* as used in this section, it is claimed, means a society of people having common rights, privileges, or interests, either political or ecclesiastical, and that it does not apply to any particular neighborhood or section of the country. In our judgment, the construction contended for by the friends of this bill should not be indulged: first, for the reason that under the ordinary and usual rule of construction the qualifying words 'not under the absolute control of the state' should be held to refer to the first preceding subject to which they can be consistently applied, to wit, 'person, corporation, or *community*,' rather than to be carried back to the word 'appropriation;' second, no sufficient reason appears for requiring the appropriation to be under the absolute control of the state, while there are strong arguments in favor of limiting the beneficiaries to those institutions and associations under state control. An examination of the proceedings of the constitutional convention with reference to this section, in the light of the facts as they then existed, furnishes a strong if not a conclusive argument in support of the conclusion indicated. The section as first introduced reads as follows, without the parenthetical clause: 'No appropriation shall be made for charitable, educational, or benevolent purposes, to any person or community [not under the absolute control of the state], nor to any denominational or sectarian institution, corporation, or asso-

ciation.' The words in brackets, 'not under the absolute control of the state,' were inserted as an amendment to the provision as originally drafted. This amendment was essential in order that the state might support the educational and other institutions established and fostered by the territorial government. There being no disposition to withhold state aid from these institutions, the amendment became necessary in order that such aid might be extended in the future. It is clear that the section as originally prepared absolutely prohibited the state from extending aid for charitable, educational, or benevolent purposes, and it seems equally clear that the amendment was not for the purpose of changing the original intent of the section, except in so far as the same became necessary to authorize the support of those persons, corporations, etc., which were then or might in the future be brought under the control of the state."

Confidence of the Community. — A physician of a country village, in an agreement transferring his practice and good-will to another physician for a certain sum, stipulated "that no other physician, for the space of four years, will establish himself in this place as a competitor, unless the increased population of the place should warrant it, or unless [the purchaser] should commit some act which shall forfeit to him the confidence of the *community*." It was held that the agreement was not too uncertain and insensible to support an action. "The *community*," said the court, "by forfeiting whose confidence the plaintiff was to lose his right to recover against the defendant, interpreted according to the subject-matter, would probably be held to be the population residing in the village and its vicinity, among which the defendant practiced his profession at the time of his contract with the plaintiff. Conduct on the part of the plaintiff, which should lead to a forfeiture of the confidence of the *community* in him, might reasonably be construed to be incompetency, immorality, or acts of such a nature as to induce reasonable persons to forbear employing him in the practice of his profession." *Gilman v. Dwight*, 13 Gray (Mass.) 356, 359.

COMMUNITY PROPERTY.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *HUSBAND AND WIFE*, *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 10, p. 191.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles: *ACCESSION*, vol. 1, p. 247; *ADVANCEMENTS*, vol. 1, p. 760; *CONFLICT OF LAWS*, *post*; *DIVORCE*; *ELECTION*; *EXECUTORS AND ADMINISTRATORS*; *FOREIGN LAWS*; *HUSBAND AND WIFE*; *PRESCRIPTION*; *RECORDING ACTS*; *SEPARATE PROPERTY OF MARRIED WOMEN*.

I. HISTORY — *Where the Law Prevails.* — Community of matrimonial gains prevails in *Louisiana, Texas, New Mexico, Arizona, Californic, Nevada, Idaho, and Washington.*

The Central Idea of This System — an equal division between the spouses of the matrimonial gains — is said to have been borrowed from the Spanish law. But, aside from *Louisiana and New Mexico*, all that can be said to have been borrowed from or suggested by foreign jurisprudence is the equity of an equal division between the spouses of the gains made by them during their marriage. Each state and territory has worked out this central purpose in its own way, and by its own methods; and while the development has not always been consistent with the underlying equity of the system, the main purpose has never been entirely lost sight of; for this reason there are many characteristics common to all the community property states and territories; but coupled with these common characteristics are widely divergent local differences.¹

1. History. — "This community (the community of *acquets* and gains) silently and unperceptibly acquired a place among the usages of Spain. It was first recognized in *El Fuero Juzgo*." 1 Burge's *Col. and For. Laws*, p. 418.

"That this code (*El Fuero Juzgo*) was composed in the seventh century, is a fact which appears to be generally admitted; but the historians of the laws of Spain are unable to agree as to its authors, and as to the time when it was first promulgated. * * *

"The result of these learned controversies seems to be that the *Fuero Juzgo* arose from the amalgamation of the Roman and Gothic law. The time when this fusion, which must have been gradual, took place, cannot now be accurately determined; nor is it possible to ascertain to which of the Gothic kings the laws

embodied in this collection are to be attributed. We know, however, a fact of incomparably greater importance, to wit, that the *Fuero Juzgo* became the general law of Spain, and that from the moment of its promulgation, Roman and Goth, Vandal and Suevi, previously governed by their own laws, became subject to its authority. The *Fuero Juzgo* is the most ancient code of Teutonic origin which has preserved its influence even to this day." Schmidt's *Civil Law of Spain and Mexico*, pp. 28, 29.

The community of *acquets* and gains was recognized in the subsequent codes and legislation of Spain. *Institutes of Aso and Manuel*, translated by Johnson; *While's Recopilacion*, p. 60.

The *communio bonorum* may have been a part

II. NATURE OF THE COMMUNITY.—The community is either conventional or legal.

The Conventional Community is created by the marriage contract.¹

The Legal Community is imposed by the law upon the married pair.² Its central idea is an equal division of the marital gains between the spouses or their heirs on a dissolution of the marriage.

Marital Partnership.—The community is sometimes called the marital partnership. It is not, however, a partnership in the usual acceptation of that term.³ But for the purpose of classification merely, and to keep distinct in legal contemplation, separate from community rights and obligations, the marital

of the Roman law at an early period, but before the compilation of the Digest it had fallen into disuse. 1 Burge's Col. and For. Laws, p. 263.

"The doctrine of the community of *acquets* and gains was unknown to the Roman law; and, although now common, we believe, to the greater number of the European nations, its origin cannot be satisfactorily traced. The best opinion appears to be that it took its rise with the Germans, among whom, at a very early period of their history, the wife took, by positive law, the one third of all the gains made during coverture. It is very probable that it was the real or presumed care and industry of the wife which first produced this legislation; and in an early state of society the facts most probably fully justified such a rule." *Cole v. His Executors*, 7 Martin N. S. (La.) 41, 18 Am. Dec. 241.

Arizona.—The law of community was adopted by statute in 1865. *Stiles v. Lord*, (Arizona, 1886) 11 Pac. Rep. 315.

California.—The system is borrowed from Spanish law. *Packard v. Arellanes*, 17 Cal. 537; *Noe v. Card*, 14 Cal. 577; *Scott v. Ward*, 13 Cal. 472; *Beard v. Knox*, 5 Cal. 256, 63 Am. Dec. 125; *In re Buchanan's Estate*, 8 Cal. 510.

Louisiana.—The law of community, derived from the Spanish laws and amended by the codes of 1808, 1824, and 1870, has had an unbroken existence from the earliest history of the state. *Saul v. His Creditors*, 5 Martin N. S. (La.) 569, 16 Am. Dec. 212.

Nevada.—Community of property was established by statute on March 7, 1865; before that time the rights of married persons were regulated by the common law. *Lake v. Bender*, 18 Nev. 361.

New Mexico.—The Spanish civil law still survives as the basis of its jurisprudence, and the Spanish community has suffered few changes.

Texas.—The statutory community is regarded as a survival of the wreck of Spanish jurisprudence. *Cartwright v. Hollis*, 5 Tex. 165.

Washington.—The first act establishing the community property system was approved and became a law on December 2, 1869. Laws of 1869, p. 378. Prior thereto, the common law, modified by statute, had regulated the rights of married persons. The act of 1869 gave the rents, issues, and profits of separate property to the community, and to the husband was given "the entire management and control of common property, with the like absolute power of dis-

position as of his own estate." This act continued in force until November 29, 1871. Laws of 1871, p. 67. The latter act expressly recognized as separate property purchases made with separate funds, and designated by deed or inventory as separate property; but gave to the wife as her separate property the rents, issues, and profits of her separate estate, and her personal earnings "when the same shall be necessary for the support of herself and children" on account of the failure or disability of the husband; and first introduced into the laws of the territory the innovation requiring the joinder of the wife in conveyance of community real estate. The act of 1871 continued in force until the 5th day of November, 1873. On the 14th day of November, 1873, the Territorial Legislature re-enacted the act of 1869. (It will be noticed that from November 9th to November 14th, 1873, there was no community property law in force.) The act of 1873 continued in force until November 14th 1879, when the present law was enacted. Laws of 1879, p. 77. The latter act first introduced into the community property law of the territory the innovation giving to the owner of separate estate its rents, issues, and profits as separate property, and re-enacting the other innovation first found in the act of 1871, requiring the joinder of the wife in conveyances of community real estate. *Abbott's Real Property Statutes* (Wash.) 471-486.

1. Conventional Community.—The right to regulate by marriage contract the acquisitions made during the marriage is recognized in *Louisiana* (Civ. Code, arts. 2392-2399), *California* (Civ. Code, §§ 158, 159, 178); *Nevada* (Gen. Stat. 1885, §§ 517, 518, 524), *Idaho* (Rev. Stat. 1887, §§ 2508, 2509, 2510, 2511), and *Washington*. In this last state the agreement as to the status of the property acquired during marriage is limited to take effect after the death of either spouse. Code of Washington, 1896, § 2156; *Hill's Code*, vol. 1, § 1401.

2. The Civil Code of Louisiana, art. 2399 (2369), provides: "Every marriage contracted in this state superinduces of right partnership or community *acquets* or gains if there be no stipulation to the contrary."

3. Not Strictly Speaking a Partnership.—The Civil Code of *Louisiana*, art. 2807 (2778), provides: "The community of property created by marriage is not a partnership; it is the effect of a contract governed by rules prescribed for that purpose in this code."

"The matrimonial union is not a partnership; it is a community of property." *Bartoli v. Huguenard*, 39 La. Ann. 411.

partnership is sometimes, by a legal fiction, treated as a distinct legal entity — as the centre of certain defined rights and obligations; ¹ but the community as such cannot hold property, or contract, or sue or be sued.

The Husband Is Its Sole Representative, master, and manager, and in his name and through him must all its rights and obligations be asserted and enforced. ²

Scope of Title. — The legal community is the subject of this article.

III. THE COMMUNITY, HOW FORMED—1. **A Valid Marriage Necessary.** — Community of property between husband and wife presupposes a marriage, and a void marriage will not be followed by a community of *acquets* and gains. ³

Concubinage. — Nor can a mere concubine or mistress claim a community interest in the acquisitions of her paramour. ⁴

Common-Law Marriage. — Property acquired by persons living together as husband and wife, but not in fact married, is not community property; the rights

1. In What Respects Similar to a Partnership.

— But it has been likened in some of its features to a partnership. In *Gulf, etc., R. Co. v. Goldman*, 87 Tex. 567, the court said: "In this state there is much analogy between the relations of husband and wife as to property matters and those of ordinary partners. The analogy is not complete, for the husband, save in exceptional cases, has the sole power to bind the community and is alone bound by contracts relating thereto; and the legal title to the community is generally vested in him, she having a mere equity." See also *Childers v. Johnson*, 6 La. Ann. 634; *Holyoke v. Jackson*, 3 Wash. Ter. 235; *Mabie v. Whittaker*, 10 Wash. 662, citing 3 AM. AND ENG. ENCYC. OF L. (1st ed.) 350; *Brotton v. Langert*, 1 Wash. 73.

"Like other partnerships, it [the partnership of *acquets*] must be contemplated as an ideal being, *être moral*, distinct from the persons who compose it, having its rights and its obligations, its assets and its liabilities, its debtors and its creditors;" each partner must account for what has been drawn from it for his individual benefit. *Childers v. Johnson*, 6 La. Ann. 641.

"By the provisions of the husband and wife acts, passed in 1879 and previously, the husband and wife are considered as constituting together a compound creature of the statute, called a community. This creature is sometimes, though inaccurately, denominated a species of partnership. It probably approaches more nearly to that kind of partnership called *universal* than to any other business relationship known to the civil or common law. * * * It is like a partnership, in that some property coming from or through one or other or both of the individuals forms for both a common stock which bears the losses and receives the profits of its management, and which is liable for individual debts; but it is unlike, in that there is no regard paid to proportionate contribution, service, or business fidelity; that each individual, once in it, is incapable of disposing of his or her interest; and that both are powerless to escape from the relationship, to vary its terms, or to distribute its assets or its profits. In fixity of constitution a community resembles a corporation. It is similar to a corporation in this also, that the state originates it and that its powers and liabilities are ordained by statute. * * * It is *sui generis*, a creature of the statute." *Greene, C. J., in Holyoke v. Jackson*, 3 Wash. Ter. 239.

To the same effect, see *Brotton v. Langert*, 1 Wash. 73.

From the language of *Greene, C. J.*, quoted *supra*, it should not be inferred that the community is a distinct legal entity in the same sense as a corporation. The legislature in enacting the statute providing for community of property between the spouses simply intended to impress upon such property certain legal qualities not possessed by other property; but there was a clear absence of any intent to create a separate legal entity. To treat the community as an entity is a convenient legal fiction, nothing more.

Conjugal and Conventional Community Distinguished. — "The conjugal partnership, though agreeing in some, differs in many essential particulars from the conventional. The only object of the latter is gain. The former has higher and more important purposes essential in fact to the welfare and even the very existence of society; the acquisition of profits being but an incident to the union. *Febrero Novissimo*, tom. 1, p. 106. In the conventional there is equality between the partners, and their gains are in proportion to their respective shares of stock and services. But not so in the conjugal. The division is equal, although one may have brought in the greater part, if not all, of the property from which the profits are derived, or may have contributed all his skill, industry and services unaided by the other and perhaps embarrassed by his or her idle or wasteful habits. *Id.*" *Wheat v. Owens*, 15 Tex. 242, 65 Am. Dec. 164.

2. Suits. — Whether the community is to be viewed in the light of a legal entity or not, it is certain no suit can be brought either by or against this ideal being. The husband is its sole representative during its existence. *Kelly v. Robertson*, 10 La. Ann. 303.

3. Valid Marriage Necessary. — Where a marriage between a white person and a mulatto is absolutely void, because forbidden by law, it is incapable of producing the civil effects of even a putative marriage; and no community is superinduced by such a union. It is not necessary to institute a direct action to annul such a marriage; its nullity may be alleged by way of exception or defense. *Minvielle's Succession*, 15 La. Ann. 342; *Summerlin v. Livingston*, 15 La. Ann. 519.

4. Concubinage. — *Liula's Succession*, 44 La. Ann. 61; *Stans v. Baitey*, 9 Wash. 115.

which such parties may have against each other, or in the property acquired, during the existence of their union, cannot be adjusted by the rules governing the community between husband and wife.¹

2. The Putative Marriage of the Civil Law — *a. RECOGNIZED IN LOUISIANA AND NEW MEXICO* — **Good Faith.** — The putative marriage of the civil law is recognized in Louisiana and New Mexico and is followed by the civil effects of a valid marriage in favor of the spouse who acts in good faith in contracting the marriage. If both act in good faith, the community of *acquets* will follow as to both.²

Distinguished from Common-Law Marriage. — The putative marriage of the civil law must not be confounded with the so-called common-law marriage. The latter rests upon the intent of the parties to take each other as husband and wife, which intent is not evidenced by a formal ceremony; while the former requires that it be "celebrated with the prescribed solemnities," and the parties, or at least one of them, must act in good faith. It is not a real marriage, because of some "dissolving impediment," such as a former undissolved marriage.

b. RULE IN TEXAS — **Spanish-American Law.** — In Texas, under the regime of the Spanish-American law, the putative marriage of the civil law was recognized.³

1. So-called Common-Law Marriage. — Stans v. Baitey, 9 Wash. 115.

2. Putative Marriage of the Civil Law. — 1 Burge's Col. and For. Laws, p. 279.

The Civil Code of *Louisiana* (arts. 117, 119) provides: "The marriage which has been declared null produces, nevertheless, its civil effects, as it relates to parties and their children, if it has been contracted in good faith." And art. 118 (120) declares that "if only one of the parties acted in good faith the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage."

Division Between Legal and Putative Wives. — By the Spanish law, in case of bigamy the second wife who contracts the marriage in good faith shares the gains and *acquets* with the first; she is not in fault, and on account of her good faith, though the marriage be null, is recognized as entitled to her rights in the community. The first wife, because her marriage has never been dissolved is also entitled to her community rights, and the entire estate will be equally divided between the legal wife and the putative wife. *Patton v. Philadelphia*, 1 La. Ann. 98.

The same rule prevails under the Civil Code of *Louisiana*. *Abston v. Abston*, 15 La. Ann. 137; *Hubbell v. Inkstein*, 7 La. Ann. 252.

"Having reached that conclusion [that both the parties acted in good faith in contracting the marriage], we must now determine whether the civil effects produced by that marriage included or superinduced a partnership or community of *acquets* between the parties as contemplated by the law-maker in article 3399 of the Civil Code. Our reports are about barren of adjudications precisely in point, and the discussion must therefore be met as a comparatively new question in our jurisprudence. But as article 117 of our code" (see *supra*) "has been taken literally from article 201 of the Code Napoléon, we have directed our investigation to the construction of the article which has prevailed under that system. Our researches

have led us to the conclusion that, where both the parties to a marriage subsequently declared null, were in good faith, one of the civil effects was the legal community or partnership of *acquets* and gains which results from a lawful marriage; and that the relative rights of the parties must be tested under the same laws which govern the community rights *inter sese* of lawfully married spouses." In a former suit between the same parties the marriage considered in this case was held to be a nullity, on the ground that the wife "was incapacitated from contracting a lawful marriage at the time that she attempted to marry the defendant Benson." The present suit was instituted to judicially enforce the civil effects resulting from the marriage under the provisions of articles 117 and 118 of the Civil Code *supra*. *McCaffrey v. Benson*, 40 La. Ann. 10.

When the husband contracts a second marriage, knowing that his first wife is still living and undivorced, the entire community property is divided between the first and the putative wives, and none of the community property will pass to his issue, who are thus excluded from all inheritance except that of his separate property. *Jerman v. Teneas*, 44 La. Ann. 620.

3. Recognition in Texas of Putative Marriages. — *Smith v. Smith*, 1 Tex. 621, 46 Am. Dec. 121; *Lee v. Smith*, 18 Tex. 142.

In the case first cited, under a statute providing that administration shall be granted first to the surviving husband or wife, the appellee (the putative wife) claimed the right to administer as the surviving wife of the deceased. On the hearing it was attempted to be shown that the deceased had been married in the state of Missouri, which marriage had not been dissolved at the time of his alleged marriage to the appellee. The court said: "But granting that the foreign marriage was fully established, we are of opinion that the claim of the appellant [the first wife] to the administration cannot be sustained. The record

Introduction of Common Law.—In 1840 the common law was introduced and the civil law displaced; but still the courts of that state seem disposed to recognize the community rights of a wife who marries in good faith, even though the marriage be void.¹

shows that on the 22d day of February, 1830, * * * the deceased and the appellee were married *in facie ecclesiæ* by the actual priest of the city of San Antonio. This marriage was not impeachable for want of any formality, but was in full compliance with the laws regulating the marriage ceremonial, and if made in good faith on the part of the appellee, imposed upon her all the obligations, and invested her with all the rights, of a lawful wife, so long as she continued ignorant of any annulling impediment on the part of her husband which would dissolve such a marriage, although such an impediment might have in fact existed. The second marriage having been contracted before the introduction of the common law, the rights and obligations flowing from it depend on the principles of Spanish jurisprudence, and * * * the appellee under the circumstances of this case is under the laws of Spain entitled to all the rights of a lawful wife of the deceased. * * * In this work [referring to the *El Diccionario de Legislacion*], putative matrimony is defined to be a marriage which, being null on account of some dissolving impediment, is held, notwithstanding, for a true marriage because of its having been contracted in good faith by both or one of the spouses being ignorant of the impediment. Good faith is always presumed, and he who would impede its effects must prove that it did not exist. To make the good faith perfect it is necessary that the marriage should have been celebrated with the prescribed solemnities; that the spouses may have been ignorant of the annulling vice, and that their ignorance be excusable. Even after such marriage is annulled it produces the civil effects of true matrimony as well with respect to the spouses as with respect to the offspring. * * * Again, 'putative matrimony may be converted into a true marriage if, after celebration, the impediment ceases to exist. In the case, for example, that a man be married to a second wife, living the first, if afterwards this one die, the second wife, who was ignorant of the first marriage of her husband, may, at her pleasure, select either to live with him or be separated and marry another.'" The court held in conclusion that the first wife having secured a divorce, and the putative wife continuing to live with her husband, the putative marriage ripened into a perfect marriage; and the appellee was held to be entitled to administration as the surviving wife.

In the second case cited the wife, the validity of whose marriage was passed upon in *Smith v. Smith*, 1 Tex. 621, 46 Am. Dec. 121, claimed a community right as wife in the property acquired during her marriage with the deceased. The proofs showed that the deceased husband was married to Harriet Stone in 1822 in Missouri, by whom he had three children before 1828. He then abandoned his wife and went to Texas, where, in 1832 or 1833, he contracted the second marriage mentioned in *Smith v. Smith*, 1 Tex. 621 46 Am. Dec. 121.

The first wife obtained a divorce some time prior to 1833. The court said: "This is a suit in effect by the children of the first marriage for partition and distribution of this property [the property acquired by the husband during his stay in Texas] between them and the wife and children of the second marriage or the survivors of them. There was a decree for partition recognizing in effect the right of the second wife to one half and the children of both marriages to the other half of the property. * * * But the second marriage of Smith with Maria Jesusa Delgado was not null and void in law with reference either to the wife or children of that marriage. In Spanish law such marriage is designated as putative, and the consort who enters into such matrimony ignorant that her partner has a wife or husband living is in law not only innocent of crime, but has all the rights, incidents, and privileges pertaining to lawful marriage, and these are continued as long as there is ignorance of the former or of impediment to the second marriage. This putative was converted into a real marriage after the removal of the impediment by the divorce obtained at the instance of the first wife."

The decree of the court granting to the putative wife a community interest was affirmed.

1. Introduction of the Common Law.—*Morgan v. Morgan*, 1 Tex. Civ. App. 315. In this case the court held the second marriage to be void, because of the nullity of the decree of divorce between the husband and his first wife. The second wife offered to prove her good faith in contracting the marriage in question, and upon that basis claimed a community right in the acquisitions made during the union. The court said: "The status of property acquired by a man and woman living together as husband and wife without having been lawfully married has been the subject of doubt and litigation almost from the time Texas became an independent republic." After reviewing the Texas cases at length, the court proceeds: "It will thus be seen that the strong tendency of our judges in the past has been to hold that property acquired in this state under our community laws, by a man and woman living together as husband and wife, should belong to them in equal shares, whether they were legally married or not; and why should this not be so, especially when they have attempted to enter into a marriage contract and believed that they were lawfully husband and wife? In such cases, by attempting to enter into the marriage contract, they agreed, as far as they had the power to agree, that they would live together as husband and wife, and that all property that they might thereafter acquire should be community property, and belong to them in equal portions. Such is the meaning of the contract they attempted to make, under our law. How, then, can it be said that the property acquired in pursuance of such a contract shall belong to one of the parties more than the other? What right has the husband

Basis of Doctrine. — This recognition is based upon the same equity that underlies the right of the spouse acting in good faith in a putative marriage, but it has no basis of positive law to rest upon. The common law, which furnishes the basis of the jurisprudence of Texas, gives no recognition to a marital right of property resting upon the basis of a void marriage, but this peculiar doctrine has much to recommend it where good faith is established.

Adultery. — This state has given recognition to a right, akin to a community right and in legal effect the same, in a woman not married to, but living in open adultery with, a paramour. This peculiar right is derived, not so much from the law of community as from the peculiar public-land and immigration laws prevailing in this state.¹ Several cases in this state, which seem, at first view, to recognize a community interest in persons whose marriages were void, are really cases where the marriages were held to be valid because the presumption in favor of innocence and the legality of the marriage, where the parties held themselves out as married and were recognized and reputed to be husband and wife, overcame the feeble proof to the contrary.²

IV. SEPARATE ESTATE — 1. In General. — The law of community divides the property of married persons into the separate property of the husband, and

to all of the property, to the exclusion of the wife; or what right has the wife to all of the property, to the exclusion of the husband? Suppose a wife so situated should, by her own exertions, acquire property towards which the husband did not contribute anything; would it be contended that this property became his property? How, then, can it be that where the property is acquired by the joint labors of both, each in the eye of the law contributing one-half thereto, it shall belong only to the husband? It will not do to refer to the decisions in common-law states to sustain the proposition that the woman, under such circumstances, has no right to any part of the property so acquired. In those states, by entering into the marriage contract, she understood that all the property they might acquire while living together should belong to the husband, but in this state she understood that their rights in the property they might accumulate should be equal. The decree of the court below was reversed for its refusal to admit the offered evidence to show the good faith of the appellant in contracting the marriage, and it was held that on proof of good faith the appellant would be entitled to a community interest in the property acquired during the marriage.

Dicta to the Contrary. — Expressions of opinion are to be found in the decisions of the courts of Texas adverse to the doctrine of *Morgan v. Morgan*, 1 Tex. Civ. App. 315; but such opinions are *obiter*. As, for instance, in a case involving the right to administer the estate of the deceased husband, and not involving the right of the putative wife to a community interest, the court said: "The earlier decisions as to the effect of putative marriages on property rights under the Spanish law are not applicable to attempted marriages entered into in this state since the adoption of the common law and our statutes regulating the subject." In this case the court approves the opinion of Walker, J., in *Routh v. Routh*, 57 Tex. 589, and said: "The community estate is created by law as an incident of marriage, and does not arise from contract between the par-

ties. It is created by law only as between those who occupy toward each other the relation of husband and wife. Whatever may be the interests of parties related to each other as were appellant and Thomas Chapman, in property acquired during their connection, such interests do not constitute the community estate recognized by law to exist between the parties to a lawful marriage." *Chapman v. Chapman*, 11 Tex. Civ. App. 392.

In the opinion in this case no reference was made to the previous case of *Morgan v. Morgan*, 1 Tex. Civ. App. 315.

On an application of the putative wife to the Supreme Court of the state for a writ of error to review the judgment, the Supreme Court dismissed her application on the ground that her right to a community interest was not involved. *Chapman v. Chapman*, 88 Tex. 641.

And in *Routh v. Routh*, 57 Tex. 589, where the question was whether the legal wife, the first wife, is barred of her community rights in property acquired by the husband after his marriage with another woman whom he had married pending the existence of the first marriage, and the property in question having been acquired by the joint labor of the partners in the last marriage, in its opinion upholding the right of the first wife to a community interest, the court makes use of some expressions seeming to indicate that the law does not recognize the community right of the second wife who contracted the marriage in good faith in ignorance of the former undissolved marriage of the husband; but it will be noticed that the claims of the second wife to a community interest were not involved in the case, but only the rights of the first wife — the legal wife. Even under the civil law, where putative marriages are expressly recognized, the legal wife takes one-half the gains made by her husband during his putative marriage with another woman. See note 3, p. 296.

1. Adultery. — *Babb v. Carroll*, 21 Tex. 768; *Lewis v. Ames*, 44 Tex. 345; *Boone v. Hulsey*, 71 Tex. 176.

2. Yates v. Houston, 3 Tex. 433; *Carroll v. Carroll*, 20 Tex. 731.

the separate property of the wife; and community property, in which both spouses have certain defined rights. Separate property is the counterpart of community property; into one or the other of these classes will fall all the property of married persons.¹ The codes and statutes of the community property states and territories provide that each spouse may have a separate estate—an estate separate and distinct from the community estate. To this separate estate belong the following:

2. Property Owned Before Marriage or Afterwards Acquired by Gift, Devise, or Descent.—All property and pecuniary rights possessed by either spouse before marriage, or afterwards obtained by gift, devise, or descent, belong to the separate estate.²

3. Rents, Issues, and Profits of Separate Property.—In *California*, *Nevada*, *Washington*, and *Arizona*, the rents, issues, and profits of separate estate are a part of such estate; in *Texas*, the increase of separate real estate; in *Louisiana*, the fruits and revenues of the wife's separate estate if she retains its separate administration.³

4. Property Acquired in Exchange for Separate Property.—Property procured by either spouse in exchange for or by purchase with his separate property belongs to the separate estate.⁴

The right to exchange and reinvest the separate estate was recognized by the Spanish law⁵ and is now firmly established as an essential part of the community property system, except in *Louisiana*.

How Such Property Regarded.—Property so acquired is not regarded as an original acquisition, but merely as a change in the form of the original separate ownership.⁶

1. Separate Estate.—“The property of married persons is divided into separate property and community property. Separate property is that which either party brings into the marriage or acquires during the marriage by inheritance or by donation made to him or her particularly. Common property is that which is acquired by the husband and wife during the marriage, in any manner different from that above declared.” *Louisiana Civil Code*, art. 2334.

2. Texas.—Sayles' Civil Statutes, art. 2851. *Idaho*.—Revised Statutes (1887), § 2495.

The statutes defining separate property in the other states and territories will be found within the next note following.

3. Arizona.—Revised Statutes (1887), § 2100. *California*.—Civil Code, §§ 162–163.

Nevada.—General Statutes (1885), § 499.

Washington.—Code (1896), § 2152–2153; *Hill's Code*, § 1697–1398.

4. See notes 2, 3, 4, p. 303.

5. “Property acquired by either after marriage by a gratuitous title, such as inheritance, donation, or bequest, does not belong to the community.” “Nor does property acquired in exchange for other property belonging to one of them, nor that acquired by the produce of the sale of property belonging exclusively to one of the spouses.” Schmidt's Civil Law of Spain and Mexico, arts. 46, 47; *Tanner v. Robert*, 5 Martin N. S. (La.) 255.

6. Property Acquired in Exchange for Separate Property.—*Texas*.—*McIntyre v. Chappell*, 4 Tex. 187; *Hall v. Hall*, 52 Tex. 294, 36 Am. Rep. 725; *Parker v. Coop*, 60 Tex. 114; *Epperson v. Jones*, 65 Tex. 425; *Chapman v. Allen*, 15 Tex. 278; *Mitchell v. Mitchell*, 84 Tex. 303.

In the first case in Texas, where the question was considered at length, the facts were as follows: At the time of the husband's marriage there was owing to him from the sale of his patrimony one thousand and thirty dollars, which he collected after the marriage. The marriage took place in Texas in 1837. With part of this money, in 1841, he purchased a negro slave. The court, after reviewing some of the earlier cases in Texas, and citing several cases from the Supreme Court of Louisiana, proceeds as follows: “From these cases it seems clear that property purchased with the separate or individual money of either husband or wife does not necessarily belong to the community. From the language of the court in the case last cited (*Smalley v. Lawrence*, 9 Rob. (La.) 214), it is to be inferred that if the wife can prove that the purchases were made with her own money or the property given in payment of a debt owing to her in her own right the property if an immovable would not belong to the community. Accordingly, in *McIntyre v. Chappell*, 4 Tex. 187, we held that negroes received by the husband during the marriage in discharge of a debt due him for property which he had sold previous to the marriage were his separate property. It is difficult to perceive any real distinction between this case and that. In the case of a purchase made during the marriage it will in general be more difficult to prove the individual ownership of the money, from what source it was derived, and whose money was really employed in making the acquisition, than in the case of the mere exchange of one article for another. A greater burden of proof will devolve on the claimant. * * * But when it is established, as in this case, clearly

If Separate Funds Are Used to make up in part the purchase price, the community furnishing the remainder, the property so acquired will be held in a sort of tenancy in common between the spouse furnishing the separate fund and the community, in proportion to the amount of the consideration furnished by each.¹

and conclusively, that the property was purchased with the separate money of one of the parties, no reason is perceived why it should have a destination different from that of property received in payment of a debt due the party, or why it should not remain in the one case as well as in the other the separate property of the party with whose money it was purchased. Why should not the property purchased with the proceeds of the patrimony receive the same direction as property received in lieu of those proceeds? Whatever difficulties the question may present, owing to the general dispositions of the law applicable to such cases, in principle and reason there can be no difference in the cases and no difficulty in the question. Equity and justice require that the property in each case should have the same destination." *Love v. Robertson*, 7 Tex. 9, 56 Am. Dec. 41.

The doctrine of this case has never been departed from, and purchases made with separate property remain separate property. See note 4, p. 303.

California. — *Ewald v. Corbett*, 32 Cal. 498; *Schuyler v. Broughton*, 70 Cal. 282; *In re Bauer's Estate*, 79 Cal. 304. See note 4, p. 303.

Washington. — *Webster v. Thorndyke*, 11 Wash. 395.

1. Separate Funds Used as Part of Purchase Price — *Texas*. — *Love v. Robertson*, 7 Tex. 6, 56 Am. Dec. 41; *Claiborne v. Tanner*, 18 Tex. 68; *Goddard v. Reagan*, 8 Tex. Civ. App. 272; *Parker v. Coop*, 60 Tex. 114; *John v. Battle*, 58 Tex. 591.

In *Claiborne v. Tanner*, 18 Tex. 68, real property was purchased during the marriage, and the deed taken in the wife's name, and the down payment made out of her separate estate, the balance being secured by the sole note of the husband. The court held that the wife and the community held the land as tenants in common in proportion to the amount of the consideration furnished by each, the husband's note being treated as the share contributed by the community.

In *Goddard v. Reagan*, 8 Tex. Civ. App. 272, the facts were as follows: One thousand dollars was paid for lands, seven hundred of it out of the separate estate of the wife and three hundred out of community funds. The court held that the wife, by such a purchase, became a tenant in common with the community, her interest being an undivided seven-tenths and the community's an undivided three-tenths of the whole.

In the case of *Parker v. Coop*, 60 Tex. 114, the doctrine of the text was upheld under the following circumstances: A creditor of the husband levied an attachment on one thousand six hundred and forty-five acres of land standing in the name of the defendant's wife. She intervened and set up her equitable title and resulting trust in the land levied on, and alleged that the land was bought for her and that

three-fourths of the money with which the same was paid for was her separate property, and that her husband had already sold five hundred and twenty-one acres of the entire tract of one thousand six hundred and forty-five acres and had converted the proceeds of such sale to his own use, and that the land sold by him was worth as much as the unsold portion of the tract. The deed to the entire tract was made to the wife during the marriage and recited that the purchase money was paid by her, but did not recite that it was her separate money. The court below found the allegations of the wife's plea in intervention to be true, but refused to set aside the attachment because the attaching creditor had no notice of her rights at the time of making the levy. (The reader will remember that in *Texas* a creditor levying an attachment or execution will generally hold real estate levied upon as against any unrecorded title or interest, but resulting trusts are held not to be within the requirement of the recording laws and will prevail as against an execution or attachment.) The court held that the interest of the wife in the property in question was in the nature of a resulting trust, and that her interest would prevail as against an attaching creditor of the husband; and in reversing the judgment of the court below remanded the cause with instructions: "To have the interest of Mrs. Parker [the wife] set apart and vested in her by decree, from the residue of the land unsold at the time the attachment was levied, she to have such proportion as the land which was her separate property bore in value to the entire land which was given in exchange for the land in controversy."

And in the case of *John v. Battle*, 58 Tex. 591, the court upheld the right of the wife as against the husband's assignee in bankruptcy and the purchaser from the latter with notice of her rights. The property in question was purchased in the husband's name, but a determinate portion of the consideration paid for the property was furnished by the wife out of her separate estate, and she was held to have a separate undivided interest in the property; her interest being equal to the proportion of the consideration money furnished by her.

California. — The doctrine of the text finds support in the decisions of this state. *Ewald v. Corbett*, 32 Cal. 499; *Schuyler v. Broughton*, 70 Cal. 282; *In re Bauer's Estate*, 79 Cal. 304.

In *Ewald v. Corbett*, 32 Cal. 499, the court recognized, but was not called upon to pass judgment upon a state of facts necessarily involving, the doctrine stated in the text. But in *Schuyler v. Broughton*, 70 Cal. 282, the precise point was involved, and was passed upon by the court. The facts were as follows: Real estate was purchased in the name of the wife for which nine hundred dollars was paid; two

Rule in Louisiana — Such Property Is Part of the Community. — In Louisiana, owing to the textual provisions of its code, property acquired "by purchase or in other similar way" belongs to the community.¹

The Spouse Whose Separate Funds Are Used in making the acquisition is recompensed by being recognized as a creditor of the community to the extent of his separate funds used; but the property itself acquired by purchase falls into the community.²

Difference Explained. — The reader will notice that the only difference between the rule prevailing in Louisiana and the other states is this: — In the other states, the property itself, acquired in exchange for or by purchase with separate property, remains separate property, and the loss if any in the transaction falls upon, or the gains if any belong to, the separate estate; but in Louisiana the property itself, acquired by purchase or in any similar way, falls into community, and the loss if any in the transaction is borne by, or the gain if any belongs to, the community; but the spouse whose separate property made the acquisition holds as his or her separate property an obligation against the community for reimbursement, and if the wife's separate estate is used in making the acquisition, she has as her separate property a tacit mortgage on the community property to secure her right to reimbursement.³

In This State a Qualified Right to Reinvest Separate Property, and acquire separate property in exchange for or by purchase with separate property, is recognized. The wife, if she retains in her own hands the administration of her separate estate, and purchases property with it in her own name, may hold the property purchased as her separate estate.⁴

Husband Purchasing on His Separate Account. — A negative recognition has been given to the right of the husband to purchase on his separate account, "if he explains his intentions" at the time of making the purchase; and if the property purchased is real estate, it is said he should declare in the "act of sale" his intention to purchase on his separate account, so that the loss, if any, will fall on his separate estate and not on the community. He cannot keep silent and speculate on the chances, and, if profitable so to do, claim the property, and if not, throw the loss on the community. But an examination of the adjudged cases will disclose that in every instance considered by the courts,

hundred dollars of this sum was the separate property of the wife, the remainder belonged to the community. The property was levied upon by a judgment creditor of the husband and sold by the sheriff, and his certificate issued, and no redemption was made within the statutory period. An injunction was sued out by the wife to prevent the delivery by the sheriff of a deed in completion of his sale. The court, after remarking that the conveyance to the wife reciting the payment of a valuable consideration *prima facie* vested the title in the community and made the property subject to the execution, proceeded to say: "We have, then, a case arising out of a transaction by a married woman, in which she purchased a tract of land, in part with money belonging to her separate funds, and in part with money belonging to the community funds, so that the land became in part separate property of the wife, and in part common property of the husband and wife. Under the law a husband and wife may acquire and hold real property in joint tenancy, tenancy in common, or as common property. (Civil Code, § 161.) By the purchase the wife therefore became a tenant in common of the land with her husband [the community?] in proportion of the separate estate to the whole purchase price."

In Louisiana the law is otherwise. See the two notes following.

1. Rule in Louisiana. — See *infra*, div. V., subd. 1.

2. Merrick's Succession, 35 La. Ann. 296; Dominguez v. Lee, 17 La. 300; Rouse v. Wheeler, 4 Rob. (La.) 114; Reid v. Rochereau, 2 Woods (U. S.) 151; Brown v. Cobb, 10 La. 181; Planchet's Succession, 29 La. Ann. 522; Foreman's Succession, 38 La. Ann. 700; Breaux's Succession, 38 La. Ann. 728; Rhodes's Succession, 39 La. Ann. 473.

3. Difference between Louisiana Rule and That of Other States Explained. — Rouse v. Wheeler, 4 Rob. (La.) 114; Dees v. Seale, 5 La. Ann. 688.

But to preserve this mortgage or privilege against third persons the wife is now required to record in the mortgage book of the parish where the husband may own mortgageable property the evidence of her mortgage or privilege. Voorheis Rev. Laws of Louisiana, § 2831.

4. Stauffer v. Morgan, 39 La. Ann. 632; Rouyer v. Carroll, 47 La. Ann. 768; Reinach v. Levy, 47 La. Ann. 963; Bachino v. Coste, 35 La. Ann. 570; Cockburn v. Wilson, 20 La. Ann. 40; Ellis v. Rush, 5 La. Ann. 116; Dominguez v. Lee, 17 La. 296; McCay v. Boatner, 22 La. Ann. 437.

the acquisition was held to belong to the community, and the remarks of the court, as to the necessity of the husband's "explaining his intention," were made in cases where there had been no such explanation, and the acquisition was held to belong to the community.¹

5. Gifts Between the Spouses — Husband's Conveyance of Community Interest in Property in Esse. — When the laws of the state permit transfers between the spouses,² fraud upon creditors aside, the husband may convey to the wife, as a gift, the community interest in the property *in esse* so as to vest in her the entire title as her separate property.³

1. Husband Purchasing on His Separate Account — Explanation of Intention. — In *Young v. Young*, 5 La. Ann. 611, the court, after referring to the doctrine that the wife may purchase separate property if the purchase is made in her own name with her separate funds under her separate administration, stated, *arguendo*, that upon the principles of equality and reciprocity the husband should have the right to purchase on his separate account if he explains his intentions so to do; but decided that a purchase of real estate made by the husband in his own name and paid for with his own funds fell into community because there was no recital in the act of sale showing his intention to purchase on his own account.

And in *Breaux v. Carmouche*, 15 La. Ann. 588, the court decides that if the husband wishes to acquire property for his separate estate by purchase "he should declare his intention in the act by which his acquisitions are evidenced." In the absence of this declaration the property falls into community.

And in *Durham v. Williams*, 32 La. Ann. 162, the absence of such a declaration in the deed was held to be decisive in favor of a community purchase.

In *Moore v. Stancel*, 36 La. Ann. 819, in speaking of an acquisition made by the husband in his own name and paid for with his separate fund, the court uses this language: "He should have clearly established his intention at the time [of making the acquisition] by declaration in the act, and mentioned the fact of the payment out of his individual assets, and been ready eventually to establish that last fact contradictorily with the heirs of his wife;" and that in the absence of such a declaration the acquisition falls into community.

And in *Bass v. Larche*, 7 La. Ann. 104, the court says: "The evidence of his (the husband's) intention to purchase for his separate account should be sufficient to throw the loss upon him in case the property purchased had diminished in value or totally perished."

2. Gifts Between the Spouses — Spanish Law. — The general rule of the Spanish law, and in this particular it is identical with the Roman law, is that donations between the husband and wife are prohibited. *Ferris v. Parker*, 13 Tex. 386.

Louisiana. — "One of the married couple may, either by marriage contract or during the marriage, give to the other, in full property, all that he or she might give to a stranger." C. C., art. 1746 (1739).

"Married persons cannot, during marriage, make to each other by an act *inter vivos* or *mortis causa* any reciprocal or mutual donation by one and the same act." C. C., art. 1751 (1744).

"All donations made between married persons, though termed *inter vivos*, shall always be revocable. The revocation may be made by the wife without her being authorized to that effect by her husband or by a court of justice." C. C., art. 1749 (1742).

3. Husband's Conveyance of Community Interest in Property in Esse — Texas. — *Parker v. Chance*, 11 Tex. 513; *Ferris v. Parker*, 13 Tex. 386; *Fitts v. Fitts*, 14 Tex. 443; *Smith v. Strahan*, 16 Tex. 314, 67 Am. Dec. 622; *Higgins v. Johnson*, 20 Tex. 389, 70 Am. Dec. 394; *Story v. Marshall*, 24 Tex. 306; *Barziza v. Graves*, 25 Tex. 322; *Smith v. Boquet*, 27 Tex. 507; *Petty v. Barrett*, 37 Tex. 84; *Johnson v. Burford*, 39 Tex. 243; *Tucker v. Carr*, 39 Tex. 98; *Stafford v. Stafford*, 41 Tex. 111; *French v. Strumberg*, 52 Tex. 92; *Hall v. Hall*, 52 Tex. 294, 36 Am. Rep. 725; *Rose v. Houston*, 11 Tex. 326, 62 Am. Dec. 478; *Green v. Ferguson*, 62 Tex. 525; *Wallace v. Finberg*, 46 Tex. 44; *Cox v. Miller*, 54 Tex. 16; *Richardson v. Hutchins*, 68 Tex. 81; *Presidio Min. Co. v. Bullis*, 68 Tex. 581; *Dixon v. Sandersen*, 72 Tex. 359, 13 Am. St. Rep. 801; *Lewis v. Simon*, 72 Tex. 470; *Fox v. Brady*, 1 Tex. Civ. App. 590; *Hanover F. Ins. Co. v. Shrader*, 11 Tex. Civ. App. 255.

California. — *Peck v. Brummagim*, 31 Cal. 441, 89 Am. Dec. 195; *Woods v. Whitney*, 42 Cal. 358; *Read v. Rahm*, 65 Cal. 343; *Von Glahn v. Brennan*, 81 Cal. 261; *Oaks v. Oaks*, 94 Cal. 66; *Wickersham v. Comerford*, 96 Cal. 433; *Wren v. Wren*, 100 Cal. 276, 38 Am. St. Rep. 287; *Wright v. Wright*, (Cal. 1895) 41 Pac. Rep. 695; *Taylor v. Opperman*, 79 Cal. 468.

Washington. — *Yesler v. Hochstetler*, 4 Wash. 353; *Klosterman v. Harrington*, 11 Wash. 138; *Yake v. Pugh*, 13 Wash. 78.

In *Story v. Marshall*, 24 Tex. 306, the court had under consideration the effect of a deed of community property made by the husband directly to the wife. After upholding the right of the husband to make such a conveyance the court uses this language: "In the absence of any evidence of intention outside of the deed it must be taken as evidencing the intention which upon its face it imports; that is, to convey to the wife the estate of the husband in the property. It must have been intended to have some operation upon the estate of the grantor; and that must be taken to have been, to change the estate from community into separate property of the wife, in the absence of evidence of any other or different purpose in the making of the conveyance. To deny it that effect would be to render the deed wholly inoperative and void. The grantor could have made an effectual conveyance to a stranger, of the whole estate; and it is not perceived that there is any legal impediment to his conveying

Past and Future Earnings of Wife.—The husband may also agree with the wife to give her as her separate property not only her past¹ but also her future earnings.² As to her past earnings the right is clear; as to her future earnings the gift takes effect as soon as the wife, from time to time, reduces the earnings to her possession, if the husband's permission so to do continues, the continuing consent of the husband giving effect to and completing the gift.³

The Method of Making a Gift to the Wife may take this form: The husband makes a purchase with funds belonging to the community, and directs the conveyance to be made to the wife. Will such direction of itself, in the absence of other evidence, be sufficient to overcome the presumption in favor of the community, and establish the property as the separate property of the wife; or must further proof be produced, explaining his intention to make a gift to the wife, in directing the conveyance to be made to her? The authorities are not entirely clear as to the amount and character of the additional evidence required; but it may be safely stated, as a general rule, that some further proof will be required to overcome the presumption in favor of the community.⁴

to his wife his interest, thereby investing her with the whole estate. * * * There can be in this case no presumption, as in the case of a purchase from a stranger in the name of the wife, that funds of the community were employed in making the purchase and therefore it is community property. But the conveyance being of community property of the parties between whom the conveyance is made, *prima facie* the presumption must be that it was intended to change its character from community to separate property of the wife."

1. Past Earnings of Wife.—Johnson v. Burford, 39 Tex. 243; Green v. Ferguson, 62 Tex. 525; Wallace v. Finberg, 46 Tex. 44; Cox v. Miller, 54 Tex. 16.

2. Future Earnings of Wife.—Von Glahn v. Brennan, 81 Cal. 261; Wren v. Wren, 100 Cal. 276, 38 Am. St. Rep. 287; Yake v. Pugh, 13 Wash. 78.

3. When Gift Takes Effect in Case of Future Earnings.—In Yake v. Pugh, 13 Wash. 78, the right of the husband to make a gift to the wife of her future earnings was placed upon the doctrine stated in the text, viz.: the continuing consent of the husband giving effect to and completing the gift at the time the wife appropriates her earnings. The court used this language: "The consent on his part that she should render these services and receive pay therefor as her own, was a continuing arrangement and was in force at the time she received the money; hence, when she received each sum she received it as her own by express direction of her husband, and the effect was the same as though the money had first been in his hands and had been then delivered to her as a gift."

Wren v. Wren, 100 Cal. 276, 38 Am. St. Rep. 287, was an action brought by a married woman against the defendant to recover for the value of her services in nursing the defendant. The complaint alleged an agreement between the husband and the wife that she should have and receive as her separate property all moneys earned by her in nursing the defendant. The Supreme Court sustained the wife's right to recover for the services, but not upon the power of the husband to make a gift of property not then *in esse*, but upheld the

arrangement between the husband and the wife as the exercise of powers expressly conferred by §§ 158 and 159 of the Civil Code. The case of Read v. Rahm, 65 Cal. 343, is cited and distinguished by the court.

The case of Wren v. Wren, 100 Cal. 276, 38 Am. St. Rep. 287, is the only case that has been found where the courts have upheld the right of the wife living with her husband to sue in her own name for her services.

The cases of Yake v. Pugh, 13 Wash. 78, and Von Glahn v. Brennan, 81 Cal. 261, do not go the length of sustaining the wife's right to sue in her own name while living with her husband, for her services, but the gift of future earnings rests upon the husband's consent to their appropriation by the wife to her own separate use, and do not go the length of supporting the wife's authority to sue for her wages, and so reduce them to her possession, where she has no other right to her earnings than the husband's unexecuted gift made before the wages were earned.

4. Evidence Necessary to Establish the Property as Separate Property.—Texas. — Smith v. Strahan, 16 Tex. 324, 67 Am. Dec. 622; Higgins v. Johnson, 20 Tex. 389, 70 Am. Dec. 394; Johnson v. Burford, 39 Tex. 243; Tucker v. Carr, 39 Tex. 98; French v. Strumberg, 52 Tex. 92; Hall v. Hall, 52 Tex. 204, 36 Am. Rep. 725; Presidio Min. Co. v. Bullis, 68 Tex. 581; Gaston v. Wright, 83 Tex. 282; Fox v. Brady, 1 Tex. Civ. App. 590; Hanover F. Ins. Co. v. Shrader, 11 Tex. Civ. App. 255; Smith v. Boquet, 27 Tex. 507; Peters v. Clements, 46 Tex. 125.

California. — Peck v. Brummagim, 31 Cal. 445, 89 Am. Dec. 195; Woods v. Whitney, 42 Cal. 358; Read v. Rahm, 65 Cal. 343; Wright v. Wright, (Cal. 1895) 41 Pac. Rep. 695; Higgins v. Higgins, 46 Cal. 259.

Illustrations.—In the case of Smith v. Strahan, 16 Tex. 323, 67 Am. Dec. 622, the effect of a deed to the wife during marriage, the court said: "There is a material distinction between the inferences to be drawn as to the effect of the act of the husband, in his purchase of property in the name of the wife with community funds and in his purchase in her name with his own property. The law regulating ganan-

Transfer to Wife by Husband.—Subject, of course, to the rigorous scrutiny which courts give such transactions, it is not perceived why the wife may not transfer to the husband, as a gift, her interest in the community property. The rights of community creditors would not be affected, and as between

cial property prescribes the effect of purchase in the name of the wife, and makes it precisely the same as if purchased in the name of the husband. The definition of community property includes all effects which husband and wife during marriage acquire by a common title, either lucrative or onerous, or which they or either of them acquire by purchase or through their labor or industry. The intention of the husband in taking the conveyance of community property in the name of his wife has no effect upon either his own or the rights of the wife. The law prescribes the operation of such deed irrespective of the motives in taking it in either the name of the husband or of the wife, or of both jointly; for, whether taken in the one form or the other, the community character of the property is not changed."

This language of the court, in so far as it applies to purchases made with community property by the husband, but in the name of the wife, was used by the court by way of argument and illustration. The court was considering the effect of a purchase by the husband with his separate funds, the deed being taken in the wife's name.

In the subsequent case of *Higgins v. Johnson*, 20 Tex. 389, 70 Am. Dec. 394, the same court in discussing the effect of a purchase made by the husband in the wife's name with community funds, uses this language: "A deed to the wife is ordinarily but a deed to the community; yet, as she may possess separate property, a conveyance of such property must be to her and in her own name. We have seen that a mere direction by the husband, when purchasing with common funds, to convey to the wife, would not vest in her any separate interest. But in this case there was more than a mere order to convey to the wife. The evidence showed to the satisfaction of the jury, and we think pretty clearly, that the husband intended to make to her a gift of the certificate. He was apprehensive of trouble from old debts in New York, and, as he said, he wanted his wife to have something for the benefit of the family, and therefore the assignment to her of the certificate and not to himself. If the purchase had been with his own money the conveyance to the wife would of itself have been presumptive evidence of a gift. If made with community funds, will not the deed, under the direction of the husband and with the avowed intention of a gift, operate in the same way to convey the property to her in her separate right? Is not, in both cases, the only question that of the intention of the husband? In the former the law *prima facie* presumes the intent to favor the wife. In the latter the *prima facie* presumption is for the community; but this is rebutted by the express declarations of intention by the husband to make provision for the wife, and it is manifest that to secure this object he took the deed in her separate name."

In *Peck v. Brummagim*, 31 Cal. 447, 89 Am. Dec. 195, the court had under consideration

the effect of a purchase made by the husband with community funds and the conveyance made by his direction to the wife with his declaration that he intended to make her a gift of the property. In reference to this transaction the court said: "The deed that George Peck [the husband] caused the vendor of the lands to execute and deliver to the plaintiff [the wife], when taken in connection with the fact that he purchased the lands and directed them to be conveyed to her as a gift, was sufficient to invest the title in her."

The doctrine of the last case has been reaffirmed in *Dow v. Gould*, etc., Silver Min. Co., 31 Cal. 653; *Ingersoll v. Truebody*, 40 Cal. 603; *Woods v. Whitney*, 42 Cal. 358; *Higgins v. Higgins*, 46 Cal. 259.

In the case of *Presidio Min. Co. v. Bullis*, 68 Tex. 581, the first issue before the jury was as to whether the one-fourth interest claimed by Mrs. Bullis was her separate property or the community estate of herself and husband. After reviewing the circumstances attending the purchase, the court said: "The land in dispute was therefore presumably bought with community funds, and the title taken in the name of the wife. This made it *prima facie* community estate, and the burden of showing to the contrary rested upon the plaintiff. If it was a fact that the husband did actually intend at the time of making the application that the land should belong to his wife, it doubtless became her property as to him and his heirs, and those claiming under him with notice. The intention of the husband, whether to give the land to his wife or that it shall become part of the community estate, is the subject matter of proof, like any other fact. Surrounding circumstances and contemporaneous statements of the husband may be taken into consideration, and must have more or less weight in determining his intention. It has been held by this court that a declaration of the husband made at the time the title is taken in the wife's name, that he intends it for her separate benefit, will make it her property as to him and his heirs. *Higgins v. Johnson*, 20 Tex. 389, 70 Am. Dec. 394. It must be also true that if the declarations are such as show that it was intended to be community estate it would assume that character. It results that much force is given to declarations made at the time as evidence of the real intention of the husband, and they are entitled to great weight in corroborating or disproving any evidence as to a secret intent, different from that which was contemporaneously expressed. So, too, as to facts and circumstances occurring at the time which tend to show the true intent of the husband in having the deed made to his wife. A declaration at the time, however, is not necessary to establish his intention, one way or the other, and it may be proved by accompanying circumstances." And the court held that the fact that the husband had exhausted his right to purchase school lands, and for that reason ap-

the spouses themselves, subject, however, to the condition mentioned above, there is no reason for denying this power to the wife.

V. OF WHAT COMMUNITY PROPERTY CONSISTS 1. **In General** — Line of Demarkation Between Separate and Community Property. — The codes and statutes of the community property states and territories, after defining what property shall belong to the separate estates of each spouse,¹ then provide in general terms that "all other property" acquired during the marriage shall belong to the community. The separate estate is defined and limited; all the remainder of the great field of acquisition belongs to the community. Does the property in question square with the statutory definition of separate estate? If not, it is "other property," and belongs to the community. This is the line of demarkation fixed by the codes and statutes.²

plied for these lands in the name of the wife, would not of itself make the lands her separate property.

In *Gaston v. Wright*, 83 Tex. 282, the plaintiffs claimed as heirs of the deceased wife and alleged that the property in controversy was her separate estate. In the agreed statement of facts upon which the trial was had it appeared that the land in controversy was purchased during the marriage and paid for with community funds, and the conveyance made to the wife by direction of the husband; that at the time of the purchase the husband was hard pressed by his creditors; that he owned no other property except the money paid for the land in controversy, and that the land was conveyed to the wife by his direction with intent to defraud his creditors. The deed was in the usual form and contained no recitals showing the community character of the property conveyed. The court below instructed the jury that the land was presumed to be community property, and that in order to overcome such presumption it was necessary to prove that in taking the deed in the name of the wife it was the intention of the husband to make the property the wife's separate estate. The appellate court said: "Under the facts as presented here we think the charge of the court correct in virtually construing the title of the property as lodged in the community. * * *

No evidence was offered showing that Coleman [the husband] intended, in having the conveyance made to his wife, to create a separate right in her. The deed that conveys the land does not by any recital negative the presumption that the property belongs to the community. * * *

The fraudulent purpose of Coleman in having the conveyance made to his wife with the intent to shield the property from claims of his creditors would not have the effect to vest the title in her in her separate right unless the deed contained recitals sufficient to create in her a separate right in the property, or unless the purpose of Coleman was clearly shown to create in her a separate title."

In the case of *Fox v. Brady*, 1 Tex. Civ. App. 590, in reference to the effect of a deed made to the wife by the husband's direction and the additional proof necessary to establish the separate character of the land conveyed, the court uses this language: "The fact that Peter W. Wynne [the husband] requested the deed made in that way, and the further fact that only a few months thereafter his wife, without his joinder, and apparently with his

consent, made a deed of gift of the property to her son-in-law; were proper matters for the consideration of the jury, under a proper instruction, in arriving at the intention of Peter W. Wynne in having the deed taken in the name of his wife."

1. For a definition of separate estate, see *supra*, this title, *Separate Estate*.

2. **Division Between Separate and Community Property.** — As an illustration of this line of division between separate and community property, the Civil Code of *California* may be cited. In sections 162 and 163 separate property is defined. Then follows section 164 with the following definition of community property: "All other property acquired after marriage by either husband or wife, or both, is community property." The term "other property" is used in this section in contradistinction to separate property, which is defined in the two previous sections. This line of distinction between separate and community property runs through the codes and statutes of the other states.

Arizona. — Revised Statutes 1887, § 2102.

Idaho. — Revised Statutes 1887, § 2497.

Louisiana. — Civil Code, art. 2334.

Nevada. — General Statutes of 1885, § 500.

Texas. — Sayles' Civil Statutes, art. 2852.

Washington. — Code 1896, § 2154; 1 Hill's Code, § 1399.

This line of distinction, in doubtful cases, will often solve the difficulty, and determine whether the property in question is separate or community.

The Following Cases will Illustrate the Application of the Rule:

In *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Am. St. Rep. 72, in deciding that a right of action for negligent injury to the wife was community property the court said: "But inasmuch as the right to sue for a tort which one has suffered is a chose in action, and therefore property, in those states where, as here, all property acquired by either spouse otherwise than by gift, bequest, devise, or descent is common or community property, this chose in action is suable by that member of the community who has the disposition of the community personalty."

And in *Schuyler v. Broughton*, 70 Cal. 282, the court, in deciding that money borrowed by the wife was community property, did so upon the basis of this distinction. The court said: "There is no doubt that property acquired after marriage by either husband or wife by

Positive Definition. — In addition to the foregoing negative definition of community property, a positive definition approximately correct may also be framed. Constructing this positive definition out of the materials of the typical community of the Spanish law, community property may be defined as all property and pecuniary rights obtained by or in the name of either spouse after the marriage, by toil, talent, thrift, energy, industry, or other productive faculty, and all the rents, issues, profits, fruits, and revenues of separate property.¹

This Definition Necessarily Implies that to the community, during its existence, belong a usufruct in all the separate property and the product of every faculty of both the spouses.

In Louisiana Community Property Consists Of:² First: "The fruits of the property of which the husband has the administration and enjoyment in right or in fact. This includes the revenues of the husband's separate property, and of the wife's paraphernal property, if she allows him to administer it."³ Second: The produce of the labor and industry of the husband or wife. This includes every species of profit the result of toil or talent.⁴ Third: All property pur-

gift, bequest, devise, or descent, with its rents, issues, and profits, is the separate property of the spouse who acquires it, * * * and that all other property acquired after marriage by either husband or wife, or both, is community property. * * * The sum of two hundred dollars which the plaintiff * * * acquired by gift was therefore her separate property. * * * But the sum of seven hundred dollars which she borrowed was not acquired by gift, bequest, devise, or descent, nor was it rents, issues, or profits of property so acquired."

1. "To This Community Belong:

"1. All the property, of whatever nature, which the spouses acquire by their own labor and industry.

"2. The fruits and income of the individual property of the husband and wife.

"3. Whatever the husband does gain by the exercise of a profession or office, *e. g.*, as judge, lawyer, physician, etc.

"4. The gains from the money of spouses, although the capital is the separate property of one of them." Schmidt's Civil Laws of Spain and Mexico, art. 44, pp. 12, 13.

The Full Measure of the Definition Given in the Text Has Not Been Realized in any of the states or territories of the American Union except in *New Mexico*.

The Following Subtractions from the Definition should be made to fix the exact measure of community property in the different states and territories:

In *Texas*: The "increase" of separate real estate.

In *Louisiana*: The fruits of the wife's paraphernal property, if she retains in her own hands its administration.

In *Idaho*: The rents and profits of the wife's separate property, if it is so provided in the instrument by which she acquired the property.

In *Arizona, California, Nevada, and Washington*: The rents, issues, and profits of all the separate property, whether belonging to the husband or wife.

The Following Additions Should Be Made to the Definition:

In *Louisiana* and *New Mexico*: Donations made to the husband and wife jointly.

By the Spanish-Mexican law, which prevails in *New Mexico*, donations made to husband and wife jointly fall into community. *Noe v. Card*, 14 Cal. 577.

For the rule in *Louisiana*, see the note following.

In the Common-Law Community Property States and Territories, the statutes regulating the marital partnership make no exception of joint gifts to both spouses, but provide that all gifts shall belong to the separate estate of the donee. In these states and territories, whatever may be the effect of a deed of gift to husband and wife jointly — whether creating an estate in common or joint tenancy — the interest which each holds is separate estate, and the entire property is not subject to the husband's power of disposition, as is generally true of community property, nor is it subject to the peculiar restraint on alienation which prevails in *Washington*, as to community real estate. *Stockstill v. Bart*, 47 Fed. Rep. 231.

2. This definition of community property is taken from a paper read by Thomas J. Semmes, of the Louisiana Bar, before the American Bar Association, at its meeting in the year 1882, and is found on pages 275 and 276 of the Report for that year.

The Civil Code of Louisiana, art. 2402 (2371), provides: "This partnership or community consists of the profits of all the effects of which the husband had the administration and enjoyment either of right or in fact of the produce of the reciprocal industry and labor of both husband and wife, and of the estates they may acquire during marriage either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two, and not of both, because in that case the period of time when the purchase is made is alone tended to, and not the person who made the purchase."

3. See *infra*, this section, *Rents, Issues, Profits, Increase, Fruits, and Revenues of Separate Property*.

4. See *infra*, this section, *Earnings of the Spouses*.

chased by either husband or wife, unless it be an investment of paraphernal funds.¹ Fourth: All donations *inter vivos* or *causa mortis* made jointly to both husband and wife.² Fifth: The value of the improvements put on the separate property of either spouse with the funds of the community.³

2. Damages for Injuries — *a.* IN GENERAL. — A cause of action for injuries to the person, reputation, credit, or commercial or individual standing of either spouse belongs to the community. Such a cause of action is property acquired through sources other than those prescribed by the codes and statutes for the acquisition of separate estate, and necessarily falls into community.⁴ All the damages growing out of the injury belong to the community

1. Investment of Paraphernal Funds — **How Prevented from Falling into Community.** — The wife, to prevent property obtained by an investment of her paraphernal funds falling into community, must purchase in her own name, with her paraphernal funds, under her separate administration.

Illustrations. — Accordingly it is held that property purchased by the husband in the joint names of himself and wife, and paid for with her separate funds, falls into community. *Tally v. Heffner*, 29 La. Ann. 583.

So, also, does a purchase made in the wife's name and paid for with separate and community funds. *Reid v. Rochereau*, 2 Woods (U. S.) 151.

Property purchased in the husband's name with the separate funds of the wife belongs to the community. *Le Blanc v. Le Blanc*, 20 La. Ann. 206; *Stokes v. Shackelford*, 12 La. 170.

So, also, does the property purchased in the wife's name under the authority and direction of the husband. *New Orleans Exch., etc., Co. v. Bein*, 12 Rob. (La.) 578.

And to the community also belongs property purchased by a third party on account of the wife and in her name, the request to purchase being made by the husband and the business managed by him. *Andrew v. Bradley*, 10 La. Ann. 606.

As a general principle of the Spanish law, as well as of the law of *Louisiana*, all property acquired by either spouse by purchase falls into community. The following cases, while not all turning upon this doctrine, recognize it as correct: *Savenat v. Le Breton*, 1 La. 520; *Lawson v. Ripley*, 17 La. 238; *Comeau v. Fontenot*, 19 La. 406; *Broussard v. Broussard*, 11 Rob. (La.) 445; *Stroud v. Humble*, 2 La. Ann. 930; *Davidson v. Stuart*, 10 La. 146; *Bertie v. Walker*, 1 Rob. (La.) 431; *Smalley v. Lawrence*, 9 Rob. (La.) 210; *Forbes v. Forbes*, 11 La. Ann. 326; *Provost v. Delahoussaye*, 5 La. Ann. 610; *Young v. Young*, 5 La. Ann. 611; *Webb v. Peet*, 7 La. Ann. 92; *Stauffer v. Morgan*, 39 La. Ann. 632.

Property purchased by the husband at a sheriff's sale in execution of a judgment belonging to his separate estate belongs to the community. *German v. Nicholls*, 18 La. 361.

All property purchased by the husband during the marriage and paid for with his separate funds, when the act of sale contains no recital of his intention to acquire the property on his separate account, falls into community. *Moore v. Stancel*, 36 La. Ann. 819; *Durham v. Williams*, 32 La. Ann. 162. Approving this doctrine and stating the exception, see *Tanner*

v. Robert, 5 Martin N. S. (La.) 257; *Young v. Young*, 5 La. Ann. 611.

For the exceptions to the above rule, and for the instances when, and the circumstances under which, the spouses may purchase separate with separate property, see *supra*, this title, *Separate Estate*.

2. Civil Code La., art. 2402 (2371), quoted *supra*. See also *supra*, this title, *Separate Estate*.

3. See *infra*, this section, *Improvements Made by Community on Separate Property*.

4. Damages for Injuries — **General Rule** — *Louisiana*. — *Fournet v. Morgan's Louisiana, etc., R., etc., Co.*, 43 La. Ann. 1202, 11 So. Rep. 541; *White v. Vicksburg, etc., R. Co.*, 42 La. Ann. 990; *Ford v. Brooks*, 35 La. Ann. 157; *Holzab v. New Orleans, etc., R. Co.*, 38 La. Ann. 185; *Cooper v. Cappel*, 29 La. Ann. 213; *Barton v. Kavanaugh*, 12 La. Ann. 332; *Holmes v. Holmes*, 9 La. 350.

Texas. — *Ezell v. Dodson*, 60 Tex. 331; *Texas Cent. R. Co. v. Burnett*, 61 Tex. 639; *Gallagher v. Bowie*, 66 Tex. 265; *Loper v. Western Union Tel. Co.*, 70 Tex. 689; *Campbell v. Harris*, 4 Tex. Civ. App. 636; *Western Union Tel. Co. v. Kerr*, 4 Tex. Civ. App. 280; *Pacific Express Co. v. Black*, 8 Tex. Civ. App. 363; *Rice v. Mexican Nat. R. Co.*, 8 Tex. Civ. App. 130; *Western Union Tel. Co. v. Kelly*, (Tex. Civ. App. 1894) 29 S. W. Rep. 408.

Washington. — *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Am. St. Rep. 72.

In *Ezell v. Dodson*, 60 Tex. 331, an action brought to recover damages for an assault and battery upon the wife, the court said: "The right to sue for damages for a tort is a chose in action, and property within the legal sense of that term. * * * But of the property which a wife may acquire during marriage none becomes her separate estate except such as is derived by gift, devise, or descent; all acquired in any other manner is community property. Of course such property as is derived by reason of a personal trespass committed upon her falls under neither of these heads of gift, devise, or descent, and necessarily forms part of the acquets and gains of the marital partnership." And the court held that the suit should be brought in the name of the husband as head and master of the community.

In *Texas Cent. R. Co. v. Burnett*, 61 Tex. 638, the court says: "In *Ezell v. Dodson*, 60 Tex. 331, this court, after a very careful consideration of the question, held that such property as is derived during marriage by reason of a personal trespass committed upon the wife belongs to the community. In a suit to recover damages for a personal injury done

and may be recovered at the suit of the husband.¹

b. TO WIFE BY HUSBAND AND ANOTHER. — But a cause of action for damages inflicted upon the wife by the husband and another is the separate property of the wife. To hold otherwise would leave the wrong without any means of legal redress. The husband could not sue on such a cause of action, for he is a party to the commission of the wrong, and to give him the dominion over the money when recovered and reduced to possession, at the suit of

to the wife during marriage, the husband is the proper person to maintain the action. The wife is ordinarily neither a proper nor a necessary party to such a suit."

In *Gallagher v. Bowie*, 66 Tex. 265, the court reaffirms the doctrine of the text and holds that the damages recoverable by the community will include the mental suffering of the wife for whose injuries the suit was brought.

The damages given by statute on a liquor dealer's bond for liquors sold to a minor belong to the community, and the suit for the recovery should be brought in the name of the husband as sole plaintiff. *Wartelsky v. McGee*, 10 Tex. Civ. App. 220; *Matthew v. Central Pac. R. Co.*, 63 Cal. 450; *Baldwin v. Second St. Cable R. Co.*, 77 Cal. 390; *McFadden v. Santa Ana, etc.*, St. R. Co., 87 Cal. 464; *Neale v. Depot R. Co.*, 94 Cal. 425.

The Rule in California upon this subject is out of line with the authorities in the other community property states. Here it is held that the wife is a necessary party to an action to recover for her own personal injury, and the necessity for joining her is placed upon common-law grounds, and in an action to recover for her injuries it was held that she must join as party plaintiff, and that no recovery could be had on account of disbursements or expenditures by the husband. Evidently, if the entire cause of action belonged to the community a recovery might be had in the husband's name alone, and the damages recovered would include the injury to the wife as well as the expenditures of the husband. *Sheldon v. Steamship Uncle Sam*, 18 Cal. 526, 79 Am. Dec. 193.

In *Matthew v. Central Pac. R. Co.*, 63 Cal. 450, an action to recover for the wife's personal injuries, the court said: "The ground of the action is the wife's personal injuries. The cause of action is hers. The husband was joined as a plaintiff because the common-law rule requiring that he do so is yet in force. But the husband could not himself recover for the personal injuries sustained by the wife. He might, however, recover such damages as he has suffered in consequence of such injuries. Under this head fall the loss of the wife's services to the husband, and such expenses as he may have been put to by reason of the injuries. Such consequential damage constitutes the husband's cause of action, and in a suit to recover it the wife could not join."

The doctrine of the previous cases is approved in *Baldwin v. Second St. Cable R. Co.*, 77 Cal. 390.

McFadden v. Santa Ana, etc., St. R. Co., 87 Cal. 464, was, like the former cases, an action to recover for personal injuries to the wife. In reference to such a right of action, the court says: "The right to recover damages for a

personal injury, as well as the money recovered as damages, is property, and may be regarded as a chose in action, * * * and if this right to damages is acquired by the wife during marriage, it, like the damages when recovered in money, is, in this state, community property of the husband and wife (Civil Code, §§ 162-164, 169), of which the husband has the management, control, and absolute power of disposition other than testamentary. (Civil Code, § 172.) Consequently, the wife cannot sue alone for damages on account of an injury to her person, as she is permitted to do 'when the action concerns her separate property.'

* * * In these respects our codes differ from the laws of those states in which the cases cited by appellants were decided, wherein the right to recover for a personal injury to the wife, and the money recovered, are deemed her separate property." And in this case the negligence of the husband contributing to the injury was held to be a bar to a recovery.

And in the subsequent case of *Neale v. Depot R. Co.*, 94 Cal. 425, the doctrine of this case was approved, and a right of action for injuries to the wife was held to belong to the community. It may be said, then, upon the authority of the two later cases, that the doctrine in California is different from that prevailing in the other community property states in the one particular, requiring the wife to join as party plaintiff in a suit to recover for her own injury.

And perhaps in this state all damages growing out of the injury cannot be recovered in a single action in the name of the husband as head and master of the community, but an action in the name of the husband and wife must be brought to recover for the direct injuries to the wife, and another by the husband in his own name for the consequential damage to himself. This would seem to be the rule of practice established by *Sheldon v. Steamship Uncle Sam*, 18 Cal. 526, 79 Am. Dec. 193; *Matthew v. Central Pac. R. Co.*, 63 Cal. 450.

But the cases of *Neale v. Depot R. Co.*, 94 Cal. 425, and *McFadden v. Santa Ana, etc.*, St. R. Co., 87 Cal. 464, would seem to establish the rule in this state, as in the other community property states, that a cause of action for injuries to either spouse is community property.

1. The Damages Recoverable by the community in a suit by the husband as plaintiff are: First. Damages for the direct injury to the wife and its subsequent consequences, whether permanent or temporary, and her pain, suffering, wounded feelings, etc. Second. The cost of her nursing, medical attendance, and medicines. Third. The loss of the wife's services in her household. *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Am. St. Rep. 72; *Gallagher v. Bowie*, 66 Tex. 265.

the wife, would enable him to gain indirectly by his own wrong. Such a cause of action is not covered by the statutes providing for community of property between the spouses, and the wife cannot be protected against such a wrong, except by giving her, as her separate property, such a cause of action. The marital relation prevents a recovery against the husband, but the other is liable.¹

3. Earnings of the Spouses — a. IN GENERAL. — It is one of the fundamental postulates of the community property system, that whatever is gained by the toil or talent of either spouse belongs to the community.²

1. Damages Inflicted upon Wife by the Husband and Another. — *Nickerson v. Nickerson*, 65 Tex. 281. This was an action brought by the wife against her husband and another for a tort committed upon her by the defendants during coverture. At the time the wrong was committed the husband and wife were living apart. By an amendment to the complaint the wife alleged that at the time the suit was instituted she was in destitute circumstances, and that after the institution of the suit she was divorced from her husband. The court below overruled a demurrer to the complaint; the husband made no further answer, and the trial resulted in a judgment against both defendants, from which an appeal was prosecuted. The court's opinion may be reduced to the following propositions: First. "The tort inflicted upon the wife by the husband and another gave no right of action to the wife against the husband." *Citing* *Cooley on Torts*, 223, 227; *Peters v. Peters*, 42 Iowa 182; *Longendyke v. Longendyke*, 44 Barb. (N. Y.) 366. "Whatever cause of action the wife had accrued when the acts of which she complains were committed; and the fact of divorce subsequently granted cannot make that a cause of action which was not so at the time the facts transpired." *Citing* 2 *Bishop on Div.* 438; *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27. Second. "The cause of action sought to be enforced in this case cannot be a community right, for it springs from the joint tort of one then a member of the community and another. Its foundation is a tort for which, but for the relation existing between the person injured and one of the tort feorsors, a cause of action would exist against both. The case before us is one evidently not within the contemplation of the statute declaring what shall be separate and what shall be community property." Third. The right of the wife to recover from the defendant other than her husband was upheld by the court, and the judgment recovered was held to be her separate property. The action was dismissed as to the husband. Fourth. The court seems to approve the doctrine that when the wife has withdrawn from the society of the husband for justifiable reason it is necessary for her protection that she should have the right to sue in her own name for injuries inflicted upon her by others. The general doctrine that injuries to either spouse are community property and suable in the name of the husband only is approved, but the facts of the present case take it out of the general rule.

2. General Rule as to Earnings — Louisiana. — To the community belongs "the produce of the reciprocal industry and labor of both hus-

band and wife." Civil Code, art. 2402. The produce of the labor, skill, and industry of the wife falls into community. *Ford v. Brooks*, 35 La. Ann. 159.

Spanish-Mexican Law. — "To this community belong: all the property, of whatever nature, which the spouses acquire by their own labor and industry; * * * whatever the husband gains by the exercise of a profession of office, *e. g.*, as a judge, lawyer, physician, etc." Art. 44, *Schmidt's Civil Laws of Spain and Mexico*.

Texas. — *Higgins v. Johnson*, 20 Tex. 389, 70 Am. Dec. 394; *Cooke v. Bremond*, 27 Tex. 457, 86 Am. Dec. 626; *Green v. Ferguson*, 62 Tex. 525; *Epperson v. Jones*, 65 Tex. 425; *McKay v. Overton*, 65 Tex. 82; *Marlin v. Kosmyroski*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1042.

"Our whole system of marital rights is based upon the fact that acquisitions, either of the joint or separate labor or industry of the husband or wife, become common property." *Cooke v. Bremond*, 27 Tex. 457, 86 Am. Dec. 626.

California. — *Washburn v. Washburn*, 9 Cal. 476; *Fuller v. Ferguson*, 26 Cal. 547; *Moseley v. Heney*, 66 Cal. 478; *Wren v. Wren*, 100 Cal. 276, 38 Am. St. Rep. 287.

In *Washburn v. Washburn*, 9 Cal. 476, a novel application of the doctrine of the text was made by the court. The suit was for divorce by the wife against the husband, alleging as ground for a decree the wilful neglect of the husband for the period of three years to provide for her the common necessities of life, he having the ability to provide the same. It appeared in the proof that she had supported herself by her own earnings. The court held that to justify a decree the neglect must be such as leaves the wife destitute of the common necessities of life, and "if those common necessities are provided by the earnings of either husband or wife, there is no such wilful neglect as is contemplated by the statute. The earnings of both go into a common fund and become common property, the control and disposition of which belong to the husband, and when applied by him or with his assent for her support, and are sufficient for that purpose, there is no basis for a decree and the application must fail. In the present case the earnings of the plaintiff were sufficient for her support and were applied to that purpose, and it does not appear that the defendant ever exercised control over them or interfered with their use."

Washington. — *Abbott v. Wetherby*, 6 Wash. 507, 36 Am. St. Rep. 176; *Yake v. Pugh*, 13 Wash. 78.

b. **EXEMPTION OF WIFE'S EARNINGS.**—In some of the community property states it is provided that the earnings of the wife shall not be liable for the husband's debts.¹ Such statutes create an exemption and do not make the earnings of the wife her separate property.²

c. **WIFE LIVING SEPARATE AND APART FROM HUSBAND.**—In some of the states still another provision is found, giving to the wife as her separate property the earnings of herself and her minor children living with her while she is living separate and apart from her husband, even though there may be no actual dissolution of the marriage or the community.³

4. **Purchases on Credit**—a. **PERSONAL CREDIT OF PURCHASER.**—Purchases made by either spouse purely on the personal credit of the purchaser fall into community. Such property is not acquired by gift, devise, or descent, nor in exchange for separate property, and by force of the written law belongs to the community.⁴

b. **PROPERTY PROCURED BY PLEDGE OR MORTGAGE OF SEPARATE PROPERTY.**—But property procured by a pledge or mortgage of separate property is separate property, even though the mortgagor or pledgor become personally liable on the obligation secured. The separate property pledged or mortgaged is regarded as the efficient cause, the source, of the acquisition.⁵

1. **Exemption from Husband's Debts**—*California*.—Civil Code, § 168. *Finnegan v. Hibernian, etc., Soc.*, 63 Cal. 390.

Nevada.—General Statutes of 1885, § 511.

Washington.—Code of 1896, § 4538; 2 Hill's Code, § 480.

2. **Wife's Earnings Not Constituted Separate Property.**—The statutes of *Washington* provide that "a wife may receive the wages of her personal labor, and maintain an action therefor in her own name, and hold the same in her own right." Code of *Washington*, 1896, § 2157; 1 Hill's Code 1402, and that "all her personal earnings" shall be exempt from execution for the husband's debts, Code *Washington*, 1896, § 4538; 2 Hill's Code, § 480, and that the earnings of the wife and her minor children living with her "while she is living separate from her husband" shall be her separate property. Code of *Washington*, 1896, § 2158; 1 Hill's Code 1403.

It was held that these different provisions must be construed together, and that the wife's earnings do not become her separate property, except those earned while she is living separate and apart from her husband. In this case there is a dictum by the court to the effect that her earnings are exempt from execution for her husband's debts. *Abbott v. Wetherby*, 6 Wash. 507, 36 Am. St. Rep. 176. See also an article by Professor Pomeroy, in vol. 4, *West Coast Reporter*, pp. 305-310.

3. **Where Wife Lives Separate and Apart from Husband**—*California*.—Civil Code, § 169.

Nevada.—General Statutes of 1885, § 512.

Washington.—Code of 1896, § 2158; 1 Hill's Code, § 1403.

Where the Husband Abandoned His Family and left the wife in charge of the children and the home, the wife supporting herself and the children by her own efforts, it was held to be such "a separate living" as made the earnings of the wife her separate property. *Loring v. Stuart*, 79 Cal. 200.

4. **Personal Credit of Purchaser**—*California*.—*Schuyler v. Broughton*, 70 Cal. 282; *Martin v. Martin*, 52 Cal. 235; *Heney v. Pesoli*, 109 Cal. 53.

Texas.—*White v. Harris*, 85 Tex. 42; *Parker v. Fogarty*, 4 Tex. Civ. App. 615; *Krohn v. Krohn*, 5 Tex. Civ. App. 125; *Sinsheimer v. Kahn*, 6 Tex. Civ. App. 143; *Cavil v. Walker*, 7 Tex. Civ. App. 305; *Ullmann v. Jasper*, 70 Tex. 446; *Hamilton-Brown Shoe Co. v. Lastinger*, (Tex. Civ. App. 1894) 26 S. W. Rep. 924; *Goddard v. Reagan*, 8 Tex. Civ. App. 272; *Carter v. Bolin*, (Tex. Civ. App. 1895) 30 S. W. Rep. 1084; *Heidenheimer v. McKeen*, 63 Tex. 229; *Herschell v. Blum*, 2 Tex. Unrep. Cas. 265; *Epperson v. Jones*, 65 Tex. 425; *Smith v. Bailey*, 66 Tex. 553.

Washington.—*Yesler v. Hochstetler*, 4 Wash. 353.

5. **Property Procured by Pledge or Mortgage of Separate Property.**—*Heney v. Pesoli*, 109 Cal. 53. In this case the wife purchased property in her own name, and for her separate estate, the down payment being made out of her separate funds. To make up the balance of the purchase money she borrowed eleven hundred dollars by mortgage on the property purchased and other separate property belonging to her; the husband joined with her in the note accompanying the mortgage, but the entire mortgage debt was paid out of the separate property of the wife. In considering the question as to whether that part of the property purchased with the eleven hundred dollars obtained upon the credit of the mortgage fell into community, or was the wife's separate property, the court said: "In that case [*Schuyler v. Broughton*, 70 Cal. 282], so far as appears, there was no showing by extrinsic evidence that it was the intention of the spouses that the wife should purchase and take the title and enjoyment as her separate estate, and hence the court held that as to the purchase money borrowed by the wife, but not secured by any lien or mortgage upon the property, the money so borrowed and the estate so far as paid for therewith became the community property of the spouses. In the present case the extrinsic evidence tended to show the intent to purchase the property by the plaintiff as her separate estate, which intent was acquiesced in by her

c. CREDIT GIVEN TO WIFE ON HER SEPARATE PROPERTY.—The wife may make purchases for her separate estate based in part on her personal credit, where the credit is clearly given to her separately, and is based upon, and the sum credited intended to be paid out of, her separate estate.¹

5. Grants of Public Lands—*a. GENERAL RULE*—*Principle Governing Private Grants Prevails.*—In determining whether lands granted by the state to either spouse are separate or community property, generally the same rules prevail that are applied to grants made by private persons.²

Character of Grant Fixed by Law of Grant.—But the character of the grant may be so fixed, by the law under which it is made, that it is either separate or community property, without regard to the source of the consideration.³

b. DONATIONS.—Donations to either spouse are separate property.⁴

The Several Classes.—“Under all systems donations are of three classes—pure, remuneratory, and conditional.

“*They Are Pure When Made Without Condition*, in the exercise of a spirit of liberality, as charities.

“*They Are Remuneratory* when required by no legal obligation, but are made from a regard for services rendered. Such are pensions; such was the character of the grants of land made in many instances to officers of the Revolution.

“*They Are Conditional* when accompanied with provisions intended to secure the

husband. That being so, the money borrowed and secured by a mortgage upon her separate property became also her separate property, and when it went to pay the residue of the purchase price of the land the whole estate vested in the plaintiff as her separate property. It is rational to conclude that money borrowed upon the separate real estate of one of the spouses will, in the absence of any showing to the contrary, be treated as the separate property of the party owning such real estate. A like rule is applicable to funds raised upon the security of community property.”

Rule in Louisiana.—In this state the rule as to purchases made by the wife upon credit has been carefully formulated by the court, and is stated in the following language: “It is difficult to lay down precise rules as to the limits within which the wife’s liberty to purchase on credit should be restricted, but we think the following general propositions are reasonable, viz.: (1) It should be regarded as essential that the wife should have some paraphernal funds to invest, because such investment is the foundation of her right to purchase. (2) The cash so invested should bear such fair proportion to the total price of the purchase as to render it reasonably certain that the property purchased would furnish sufficient security for the credit portion of the price. (3) The wife’s paraphernal property and revenues should be ample to enable her to make the acquisition with the reasonable expectation of being able to meet the deferred payments.” This rule was first formulated by the court in *Miller v. Handy*, 33 La. Ann. 160, and was subsequently quoted with approval in *Lewis’s Succession*, 45 La. Ann. 833.

In the first case the court said: “The wife has the right to invest her paraphernal funds and to acquire property as the result of such investment.” The court says it is able to find no case where “a wife having sufficient paraphernal means to make a purchase is debarred from availing herself of the usual terms of credit, or forfeits her right by accepting such

terms. On the other hand, we find several cases in which the wife’s title was protected where she had purchased partly for cash and partly on credit, on showing that the cash paid was paraphernal, and that she had paraphernal means to meet the credits.” *Citing Metcalf v. Clark*, 8 La. Ann. 286; *Cockburn v. Wilson*, 20 La. Ann. 40; *Vanrenselaer’s Succession*, 6 La. Ann. 803; *Squier v. Stockton*, 5 La. Ann. 742; *Stroud v. Humble*, 2 La. Ann. 930. The court quotes with approval the doctrine of *Bouligny v. Fortier*, 16 La. Ann. 214, that “the wife is required not only to prove that she had paraphernal effects at her disposal, but also that they were ample to enable her, reasonably at least, to make the new acquisition.” And the court then proceeds to formulate the rule stated above.

But when the amount of the credit is out of proportion to the wife’s paraphernal funds invested by her, the acquisition will fall into community. In this case the purchase price was eighty thousand dollars, and the down payment made by the wife only five thousand one hundred and ninety-three dollars and sixty-two cents. Adequate paraphernal means to make the deferred payments were not shown. *Bouligny v. Fortier*, 16 La. Ann. 209.

1. Credit Given on Wife’s Separate Property.—*Evans v. Purinton*, (Tex. Civ. App. 1866) 34 S. W. Rep. 350. Here the court said: “Money borrowed by M. M. Purinton [the wife] for the benefit of her separate estate, to be repaid out of her separate funds, would not be community property; nor would property purchased on a credit by the wife for her separate use and benefit be necessarily community property.” See also *Ullmann v. Jasper*, 70 Tex. 452.

2. Presidio Min. Co. v. Bullis, 68 Tex. 581.

3. Gardner v. Port Blakely Mill Co., 8 Wash. 1.

4. Donations Separate Property.—*Scott v. Ward*, 13 Cal. 459; *Fuller v. Ferguson*, 26 Cal. 547; *Wilson v. Castro*, 31 Cal. 420; *Noe v. Card*, 14 Cal. 576; *Hood v. Hamilton*, 33 Cal. 698; *Edwards v. James*, 7 Tex. 372.

purposes for which they are made. These provisions may often impose the discharge of burdensome and expensive duties without changing the character of the transactions. Grants of land for institutions of benevolence or instruction, hospitals, schools, asylums, and the like, are generally of this class. Conditions annexed to such grants that the institution shall be established only operate as a requirement that the lands shall be appropriated to the purposes for which they are granted. The performance of the conditions does not constitute a consideration in the nature of a price, thereby converting the transactions into sales. This is so obviously true as to require no argument for its support."¹

c. GRANTS ON CONSIDERATION FROM SEPARATE PROPERTY.—Grants resting upon a consideration moving from the separate estate of the patentee are generally separate property;² otherwise, if the community furnishes the consideration.³ This follows logically from the nature of community property, and from the doctrine that the same rules are applied to grants of public lands as to grants made by a private individual, unless the law of the grant necessarily fixes its character.

d. LIMITATIONS UPON QUANTITY OF PURCHASE.—It may be stated as an almost universal rule that grants made by the state are hedged about with statutory regulations enacted to carry out some policy of the government in the disposal of its lands. These regulations may take the form of a limitation on the amount an individual may purchase.

Husband's Right Exhausted — Purchase in Name of Wife.—Under such a limitation it has been held that a purchase by the husband in the name of the wife (he

1. *Noe v. Card*, 14 Cal. 611, by Field, C. J.

2. **Consideration Moving from Separate Property of Patentee.**—*Yates v. Houston*, 3 Tex. 453; *Gardner v. Port Blakely Mill Co.*, 8 Wash. 1.

Act of Congress.—The grant considered by the court in the latter case was made to the husband under the provisions of an Act of Congress entitled "An Act for the sale of timber lands in the states of California, Oregon, Nevada, and in Washington Territory," approved June 3, 1878 (20 U. S. Stat. at Large, p. 89), commonly known as "The Stone and Timber Act."

The applicant to purchase under this Act is required to file a sworn application stating, among other things, "that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit;" and that he has not directly or indirectly made any contract or agreement whereby the grant will inure to the benefit of any person except himself. This affidavit is required by the terms of the Act and must be made by every applicant to purchase. In pursuance of authority believed to have been conferred upon him by law, the commissioner of the General Land Office has prescribed certain regulations in regard to purchases made by married women under the Act. According to these regulations a married woman may purchase under the Act when she is permitted by the laws of the state to hold real estate as a *feme sole*, and she is required to make the further affidavit "that she proposes to purchase said land with her separate money in which her husband has no interest or claim;" that said entry is made for her sole and separate use and benefit, and that she has "made no contract or agreement whereby any interest whatever therein will inure to the

benefit of her husband or any other person." The court held the purchase by the husband to be his separate property, and said that "the situation would not be altered as to the ownership of the legal title to the land," even though the community should furnish the purchase money.

As to purchases made by the wife under this Act, if the affidavit required to be made by her is authorized, and is to have any legal or controlling force whatever, her purchase, at least, would certainly be separate property. It would be a strange result, if her purchase under the Act is separate property, that she should have a community interest in the purchase of her husband.

3. **Where the Community Furnishes the Consideration**—*California*.—*Scott v. Ward*, 13 Cal. 472; *Noe v. Card*, 14 Cal. 598.

Idaho.—*Jacobson v. Bunker Hill, etc., Min., etc., Co.*, 2 Idaho 863.

Texas.—*Yates v. Houston*, 3 Tex. 433; *Burris v. Wideman*, 6 Tex. 231; *Edwards v. James*, 7 Tex. 377; *Parker v. Chance*, 11 Tex. 513; *Webb v. Webb*, 15 Tex. 274; *Wilkinson v. Wilkinson*, 20 Tex. 237; *Babb v. Carroll*, 21 Tex. 765; *Good v. Coombs*, 28 Tex. 35; *Cannon v. Murphy*, 31 Tex. 405; *Wright v. McGinty*, 37 Tex. 733; *Carter v. Wise*, 39 Tex. 273; *Hodge v. Donald*, 55 Tex. 344; *Caruth v. Grigsby*, 57 Tex. 259; *Porter v. Chronister*, 58 Tex. 53; *Belcher v. Fox*, 60 Tex. 527; *Manchaca v. Field*, 62 Tex. 135; *Nixon v. Wichita Land, etc., Co.*, 84 Tex. 408; *Gardner v. Burkhardt*, 4 Tex. Civ. App. 590; *Clifton v. Thompson*, (Tex. Civ. App. 1895) 29 S. W. Rep. 197.

Washington.—*Philbrick v. Andrews*, 8 Wash. 7; *Kromer v. Friday*, 10 Wash. 621; *Bolton v. La Camas Water Power Co.*, 10 Wash. 246.

having exhausted his right to purchase) fell into community, the latter having furnished the purchase price.¹

But under an Act of Congress not only limiting the amount which an individual might purchase but also requiring the applicant to make oath that he intended to purchase for his own exclusive use and benefit, it was held that the grant made in pursuance of this law and such an application vested the property in the patentee as his separate property.²

c. GRANTS UPON CONDITION.—Again, these regulations may take the form of conditions either precedent or subsequent.

For Example, under the homestead and pre-emption laws, settlement, residence, and improvement; and under the mining laws, a stated amount of annual labor, are required as conditions precedent to the grant. No title vests as against the state until these conditions are complied with.

The Great Conflict of Judicial Opinion between the courts of *Louisiana* and *California* on the one side, and *Texas* on the other, has been over the effect of conditions annexed to the grant, and in the proper application of the law of community to the conditions.³

Conditions Subsequent.—The true rule is this: If the grant vests at once as a donation, but is liable to be defeated for a failure to perform onerous conditions subsequent, it is separate property, and the subsequent performance of the conditions by the community will not convert the donation into a sale resting upon a consideration paid. Such a grant is a conditional donation.⁴

1. Presidio Min. Co. v. Bullis, 68 Tex. 581.

2. Gardner v. Port Blakely Mill Co., 8 Wash. 1.

3. See the following note, where an abstract of the opinions is given.

4. Grants upon Condition.—*California*.—Scott v. Ward, 13 Cal. 459; Fuller v. Ferguson, 26 Cal. 547; Wilson v. Castro, 31 Cal. 420; Noe v. Card, 14 Cal. 576; Hood v. Hamilton, 33 Cal. 698.

Louisiana.—Gayoso De Lemos v. Garcia, 1 Martin N. S. (La.) 333; Frique v. Hopkins, 4 Martin N. S. (La.) 214; Pontalba v. Copland, 3 La. Ann. 86; Morris v. Covington, 2 La. Ann. 259.

Texas.—Yates v. Houston, 3 Tex. 433; Edwards v. James, 7 Tex. 372.

The Conflict of Opinion.—*California*.—In the grant considered by the court in Scott v. Ward, 13 Cal. 459, the so-called conditions annexed to the grant were as follows:

"1. Neither the grantee nor his heirs can divide nor alienate the premises granted to them, nor place upon said premises any mortgage or other charge, even though such mortgage or charge be for pious purposes; nor shall they convey said premises in mortmain.

"2. He may enclose the premises without prejudice to the roads and easements; he shall enjoy the premises freely and exclusively, devoting them to such cultivation and use as he may see proper.

"3. When the property shall be confirmed to him he shall ask the proper judge that he give him juridical possession in virtue of this title, for which purpose the boundary shall be marked, and some landmarks shall be placed about said premises.

"4. The land which is embraced in this grant is only that which is named in the petition of the grantee and which is delineated in the sketch attached hereto, and the judge who shall give him possession thereof shall make

to this government a report of the quantity of land comprised in the grant."

After referring to the conditions at length, the court said: "It is evident from this statement that the clauses of the instrument which are termed conditions are not properly such. The first is a restriction; the second is the expression of the power of the grantee with a reservation of easements; the third is a provision for giving bounds and precision to the grant; and the fourth is a specification of the land intended to be conveyed, with a requisition upon the judicial officer to report to the government. There is nothing in any of these provisions which is onerous or burdensome to the grantee, or which can be regarded as a valuable consideration, moving the government to make the grant. Donations may be absolute, or accompanied with conditions the performance of which may be essential to the enjoyment of the property donated. Thus a gift of fruits would not lose its character as a gift because accompanied with the condition that the donee should gather them, nor would a gift of land be less a donation because the beneficiary was required to measure off the specific quantity given and designate it by metes and bounds. And it would seem that under the Spanish-Mexican law a more comprehensive meaning was attached to the term 'donation' than that usually given to it in our jurisprudence. Conditions are sometimes attached to donations which would be regarded at common law as changing the character of the transaction from one of gift to one of purchase."

In the grant considered by the court in the subsequent case of Noe v. Card, 14 Cal. 576, the conditions were as follows:

"1st. That within the term of one year from this date the said lot shall be fenced in and a house constructed thereon.

"2d. That the petitioner shall hold the lot

But on the other hand, if the law of the grant requires, as a condition precedent to the vesting of title, a stated amount of labor, or settlement, residence,

subject to the municipal laws and regulations now existing and those which may be hereafter established.

"3d. That in case of the nonfulfilment of the first condition above expressed the petitioner shall lose his right to the said lot; and his nonconformity to the second condition above expressed will expose him to the penalty of infraction.

"4th, and last. That the municipal fees established by law and corresponding to the said lot shall be duly paid."

The court, after approving the decision in the case of *Scott v. Ward*, 13 Cal. 459, proceeded to say: "When the donation is solicited for specific purposes it may be accompanied with conditions limiting the property to such purposes without changing the character of the act, even when the conditions impose the discharge of expensive and burdensome duties. Thus if one should solicit a gift of land in order that he might construct church or college thereon, and the land should be granted on condition that such a church or college be erected, the gift would be none the less a donation for the presence of the condition. The reason is obvious, and founded on the distinction existing between the inducement or motive for an act and the consideration or price for it."

And as to the condition imposing the payment of municipal fees the court held that they were imposed as a tax for the purpose of raising municipal funds and not as a consideration in the nature of a price for the lot. The reference by the court to the soliciting of the grant refers to the grantee's petition, the material parts of which were expressed in the following words: "That having to establish myself in the place called Yerba Buena, to effect which object I require a fifty-vara lot to build a house, for which I apply to you," etc., describing the location which he desired. The grant considered by the court in this case, as well as in *Scott v. Ward*, 13 Cal. 459, was made to a married man, and claimed to be community property, that contention being based on the character of the conditions, which, it was claimed, rendered the grant a sale, not a donation.

Texas.—In *Yates v. Houston*, 3 Tex. 433, it was urged that the land had been acquired by onerous, not lucrative, title, and therefore belonged to the community, and this principally on the following grounds:

"1st. That the commissioner's fees, office fees, stamp paper, surveying fees, etc., amounting to a considerable sum, were required by law to be paid before the colonist could be put into possession of the land. [The authorities had fixed the sum of one hundred and sixty-five dollars as the fees for or price of the land.]

"2d. An onerous condition, of cultivating the land within two years, was attached to the grant, and it should therefore be deemed a recompense for services rendered by the matrimonial community, and as their reward for settling upon the wild and uncultivated wastes of a new country."

In reference to these conditions the court said: "It would seem that where the government requires, by public order, a sum of money so considerable in amount to be paid before the issue of the title and as an indispensable condition to its delivery, that the grant could not be justly regarded as a pure donation. * * *

But on the second ground [the condition annexed to the grant requiring cultivation within two years] we are of opinion that the grant was in consideration of services to be rendered, and should, therefore, be regarded as a portion of the ganancial property of the marriage. The object of the government in the law of colonization was to settle the vast wilderness of a remote frontier with a reputable, hardy, and industrious population. 'Agriculture, industry, and the arts' were to be promoted, and to accomplish this, grants of a large amount of land were offered to emigrant families, but not gratuitously; not simply on the ground that they would introduce themselves into the country; but that they should cultivate the lands, and that within two years from the date of the concession. The inquiry then arises, by whom is this to be accomplished? Are we to suppose that the husband is the sole cultivator? that fields are to be opened and lands stocked with cattle without the assistance of his partner and the expenditure of their joint funds? * * * The position is fallacious which assumes that the land is already granted, and that the labors of the wife are repaid by her community interest in the value of the improvements made or cattle pastured on the land. If the land can be retained only by services to be rendered, or labors performed by both of the partners, or by one, and the profits by law accrue to both, it would be inequitable that the labors of the one should be rewarded by the land and half of the improvements, and that of the other by only half of the latter. To this she would be entitled on property brought by the husband into the marriage as his separate estate, and of which the title was fully vested in him, and to procure or preserve which no expenditure of money or labor is necessary; but where these expenditures and services can alone procure and secure the title, she should certainly be entitled to an equal share of the reward bestowed." See *Noe v. Card*, 14 Cal. 576, for criticism of the reasoning of this case.

The subsequent cases in Texas follow *Yates v. Houston*, 3 Tex. 433, and grants made under the settlement and colonization laws of that state have uniformly been held to belong to the community. *Burris v. Wideman*, 6 Tex. 232; *Parker v. Chance*, 11 Tex. 513.

Louisiana.—In speaking of the conditions annexed to the grants in Louisiana, Judge Field, in the case of *Noe v. Card*, 14 Cal. 606, says: "It is true there is no direct mention in the decisions cited of any conditions to the Louisiana grants, and for the reason, it is probable, that little importance was attached to their existence. But, in point of fact, such grants were accompanied by conditions necessarily attached to them by force of the laws

or improvement, on the property to be granted, the grant rests upon a consideration — is not a donation; and when the community, that is, either spouse, fulfils these conditions precedent, it thereby earns the grant and becomes the owner.¹

Explanation — The Conflict of Opinion. — The grants considered by the courts of *Louisiana* and *California* were conditional donations, and the cases in those states clearly uphold the rule stated as to that class of grants; the observations by the courts that the requirement of improvement, etc., did not change the character of the grant and make it community property must be read in the light of the facts before the court. The Supreme Court of *Texas* recognizes the soundness of the rule, and urges, as reasons why the grant considered in that court should fall into community, first, that payment of a considerable sum of money was required as a condition precedent to the vesting of title; second, that the grant rested upon a consideration of labor to be performed — treating the condition merely as security for the performance of the labor. The second reason may seem more like an evasion than an application of the rule, but it is at least a recognition of its soundness.²

6. Inchoate Titles — a. TITLES INITIATED BEFORE AND PERFECTED DURING MARRIAGE. — **The Doctrine of Relation**, whereby a title takes effect as of the time of the first act initiating it, is often invoked to determine, as between the

and regulations on the subject existing at the time. All Spanish grants in Louisiana were governed by the code of the Indies, or the regulations of O'Reilly, the instructions of Gayoso de Lemos, or the regulations of the Intendente Morales. The law of the Indies required settlement and improvement within a specified time, under penalty of forfeiture.

* * * The regulations of O'Reilly required the grantee to clear and enclose, within three years, the entire front of his land, unless the same were situated on the borders of the Mississippi, in which case he was required within the like period to erect mounds sufficient for the preservation of the land, and ditches necessary to carry off the water, and to keep roads in good repair, with bridges over the ditches crossing the same, and also to clear the entire front of his land to the depth of two arpens; and a failure to comply with these conditions caused the lands to revert to the sovereign.

* * * The instructions of Gayoso required the grantee to commence an establishment upon his land within one year, and to put under labor ten arpens in every hundred within the third year, under the pain of absolute loss of the land. * * * By the regulations of the Intendentes Morales the grantees were obliged, under the like penalty, to clear and put in cultivation, within three years, the entire front of their lands to the depth of two arpens, and those who obtained concessions on the bank of the Mississippi were also required, in the first year of their possession, to construct levees sufficient to prevent the inundation of the waters, and canals sufficient to carry off the water when the river was high, to make and keep in order a public highway thirty feet in width, and to construct bridges of fifteen feet over the canals at the crossings of the roads."

In *Pontalba v. Copland*, 3 La. Ann. 86, the court says: "It is an historical fact that during the colonial existence of Louisiana grants of lands were frequently relinquished by the grantees for the purpose of avoiding the charges which they imposed and that

the lands thus granted were reunited to the national domain."

And yet these grants were held, when made to a married person, to be his separate property. *Gayoso De Lemos v. Garcia*, 1 Martin N. S. (La.) 333; *Frique v. Hopkins*, 4 Martin N. S. (La.) 214.

But the reader will not fail to notice that the so-called conditions considered in the California grants were at most conditions subsequent; the same is true of those referred to by Judge Field in Louisiana; and while the grant considered by the Supreme Court of Texas, in *Yates v. Houston*, 3 Tex. 433, may seem to be on conditions subsequent, one at least, the payment of money, one hundred and sixty-five dollars, was treated as a condition precedent; and while the condition relating to improvement and cultivation within two years, is really a condition subsequent, the court treats the improvement to be made as the consideration for the grant — as the means of earning the grant.

1. *Philbrick v. Andrews*, 8 Wash. 7; *Kromer v. Friday*, 10 Wash. 621; *Bolton v. La Camas Water Power Co.*, 10 Wash. 246; *Jacobson v. Bunker Hill, etc., Min., etc., Co.*, 2 Idaho 863.

2. *Yates v. Houston*, 3 Tex. 433.

Lands acquired by married persons under the following laws are community property:

United States Homestead and Exemption Laws.

— *Kromer v. Friday*, 10 Wash. 621; *Philbrick v. Andrews*, 8 Wash. 7; *Bolton v. La Camas Water Power Co.*, 10 Wash. 246.

Mining Laws of the United States. — *Jacobson v. Bunker Hill, etc., Min., etc., Co.*, 2 Idaho 863.

Lands Granted under the United States Town Site Act. — *Morgan v. Lones*, 78 Cal. 58.

The following are separate property:

Lands Acquired under the "Stone and Timber" Act. — *Gardner v. Port Blakeley Mill Co.*, 8 Wash. 1.

Lands Granted the Husband as a Bounty for Services Rendered Before Marriage. — *Nixon v. Wichita Land, etc., Co.*, 84 Tex. 406.

community and one of the spouses, whether the property is separate or falls into the community.¹

Equitable Title Before Marriage. — If either spouse, before the marriage, has acquired an equitable right to property which is perfected after the marriage, the property is separate, and the community has a right to reimbursement out of the separate estate of the spouse benefited for all expenditures of money, time, and effort made in performing the conditions and perfecting and completing the title.²

b. TITLES INITIATED DURING AND PERFECTED AFTER DISSOLUTION OF MARRIAGE. — The same rule will prevail in favor of the community as to a title initiated during the community and perfected after the dissolution of the marriage. In the first case the title takes effect as of a time before the community, and the property is therefore separate; and in the other, as of a time during the community, and is therefore community property.³

1. Doctrine of Relation — California. — *Harris v. Harris*, 71 Cal. 314; *Labish v. Hardy*, 77 Cal. 327; *Morgan v. Lones*, 80 Cal. 317.

Louisiana. — *Lawson v. Ripley*, 17 La. 238; *Sexton v. McGill*, 2 La. Ann. 190; *Barbet v. Langlois*, 5 La. Ann. 213; *Morgan's Succession*, 12 La. Ann. 153; *Morris v. Covington*, 2 La. Ann. 259; *Fulton v. Fulton*, 7 Rob. (La.) 73; *Simien v. Perrodin*, 35 La. Ann. 931; *Lallande v. Terrell*, 7 Rob. (La.) 67.

Texas. — *Yates v. Houston*, 3 Tex. 433; *Wilkinson v. Wilkinson*, 20 Tex. 237; *Cannon v. Murphy*, 31 Tex. 405; *Wright v. McGinty*, 37 Tex. 733; *Carter v. Wise*, 39 Tex. 273; *Hodge v. Donald*, 55 Tex. 344; *Caruth v. Grigsby*, 57 Tex. 259; *Porter v. Chronister*, 58 Tex. 53; *Mills v. Brown*, 69 Tex. 244; *Gardner v. Burkhardt*, 4 Tex. Civ. App. 590.

Washington. — *Kromer v. Friday*, 10 Wash. 621; *Bolton v. La Camas Water Power Co.*, 10 Wash. 246.

2. The Following Are Cases Where the Right Was Initiated Before the Marriage and perfected afterwards, and the property was held to be separate: *Gardner v. Burkhardt*, 4 Tex. Civ. App. 590; *Lake v. Bender*, 18 Nev. 361; *Morgan v. Lones*, 80 Cal. 317; *Barbet v. Langlois*, 5 La. Ann. 213; *Morgan's Succession*, 12 La. Ann. 153; *Lawson v. Ripley*, 17 La. 238.

Life Insurance. — The right to recover the amount due on a life insurance policy taken by a single man and made payable to himself relates back to the origin of the contract, and does not belong to the community between himself and the wife of a subsequent marriage; the premiums paid out by the community create a charge against the husband's separate estate. *Moseman's Estate*, 38 La. Ann. 219.

Under an Act of Texas providing that all white persons being heads of families or twenty-one years of age, who may hereafter settle upon and improve a portion of the vacant public domain, shall have the privilege of locating and appropriating a tract of such vacant land not exceeding one hundred and sixty acres, an unmarried man being twenty-one years of age entered upon a tract of the lands described in the Act, made the settlements and improvements required by the Act, and became thereby entitled to appropriate the tract. After his marriage the patent was issued, and the land was held to be his separate estate. The title was initiated and an inchoate right obtained

before his marriage. *Gardner v. Burkhardt*, 4 Tex. Civ. App. 590.

A single man was in possession of a tract of land as grantee from the patentee of a Mexican grant. He claimed title under his purchase. The United States government, on his subsequent application, refused to confirm his title. Subsequent to his marriage, the United States, by an Act of Congress, provided that persons situated as he was should have the right to purchase the land of which they were in possession. He took advantage of the Act, and purchased the property after his marriage. The court held the property to be his separate estate. *Lake v. Bender*, 18 Nev. 361.

In *Harris v. Harris*, 71 Cal. 314, the husband claimed a community interest in lands patented to the wife after marriage, under the pre-emption laws of the United States. The wife had filed her declaratory statement and had entered upon and begun improvement of the land before the marriage. Her right was initiated before the marriage, and the patent, when issued, took effect as of a date preceding the marriage, and the property was held to be the separate property of the wife.

The wife, before her marriage, was in possession of certain public lands constituting a town site. After her marriage, these lands were conveyed by the government to a trustee in trust for the benefit of the occupants thereof, and the trustee subsequently conveyed to the wife. The property was held to belong to the wife separately. *Morgan v. Lones*, 80 Cal. 317.

The grant considered in the latter case was clearly a donation, and for that reason separate property; but the court recognizes the doctrine of relation as constituting, in part at least, the basis of its judgment.

3. The Following Are Cases Where the Right Was Initiated During the Marriage and perfected after its dissolution, and the property was held to be community: *Yates v. Houston*, 3 Tex. 433; *Wilkinson v. Wilkinson*, 20 Tex. 237; *Cannon v. Murphy*, 31 Tex. 405; *Wright v. McGinty*, 37 Tex. 733; *Carter v. Wise*, 39 Tex. 273; *Hodge v. Donald*, 55 Tex. 344; *Caruth v. Grigsby*, 57 Tex. 259; *Bolton v. La Camas Water Power Co.*, 10 Wash. 246.

In *Wilkinson v. Wilkinson*, 20 Tex. 237, two questions arose: 1st. Was the grant of such character that it would fall into community? 2d. Had the wife in the present case acquired such an interest in the land in controversy as

Property Acquired from "Cause" or "Title" Antedating Marriage. — By some authorities the same result is arrived at by excluding from the community of acquets and gains all property acquired by a "cause" or "title" antedating the marriage; but this is only the doctrine of relation under another name; and presumably if the "cause" or "title" had its origin during the marriage the property would belong to the community, even though the title was not perfected until after the dissolution of the marriage.¹ The difficulty in the application of

that at her death an estate therein descended to her heirs? After answering the first question in the affirmative, the court proceeded to say: "The second inquiry, whether any such right had vested in the wife in the land as would descend to her heirs must be answered in the affirmative. The conditional certificate was issued and surveyed in the lifetime of the wife. She lived for three years after the issue of this certificate; and before her death the husband was clearly entitled to the grant of the unconditional certificate. He had the control of the community; and her rights and those of her heirs cannot be affected by his laches in applying for the certificate. The case is clearly distinguishable from that of *Webb v. Webb*, 15 Tex. 274. In that case nothing had been done before the death of the wife which would attach an equity in favor of the heirs of the wife upon the grant issued after her death to the husband. It was not shown that any legal step had been taken before her death to secure the land or a title."

Conveyance to Husband — Omission — Second Conveyance After Wife's Death. — Where the conveyance to the husband during marriage by mistake omitted a parcel of land intended to be conveyed, a conveyance for the original consideration, made after the death of the wife, to correct this error, will inure to the benefit of the community. *Morris v. Covington*, 2 La. Ann. 259.

Lands Devised to a Single Man upon Conditions which are not performed till after the marriage of the devisee are his separate property. His title is derived from the will and antedates the marriage. So also when the husband owned before his marriage a tract of land fronting on a river. His ownership of this land under the law gave him the right to purchase from the United States a tract in the rear of that owned by him. The land so purchased, though after the marriage, became his separate property. He acquired the right to purchase the latter tract before his marriage. His ownership of the front tract was the cause of the latter acquisition — gave him the right to purchase; and having this right before marriage, the back land, when purchased, became separate property. "The 'cause' of the acquisitions may be fairly considered as having preceded the marriage." *Barbet v. Langlois*, 5 La. Ann. 213.

A Written Agreement Entered Into by the Husband for the Purchase of Land creates such an inchoate title that the plantation will remain the separate property of the husband, even though the deed is not made and delivered till after, the contract having been made before, the marriage. *Lawson v. Ripley*, 17 La. 238.

During the Marriage the Wife Entered Public Lands of the United States and received from

the register and receiver a receipt. The patent was issued to her after the dissolution of the community by a judgment of separation of property. The court held that the patent took effect by relation, as of the date of the entry and the land was therefore an acquisition of the community. *Simien v. Perrodin*, 35 La. Ann. 931.

Purchase of Husband's Property for Benefit of Wife — Payment and Conveyance After Separation. — A wife, during the community, requested a third party to purchase, at a sheriff's sale of her husband's property, certain real estate, which was done, and to hold it for her, with the understanding that she would purchase the property and pay the purchase price within a year. Within that time the community was dissolved and she became separated in property, and afterwards paid the purchase price and acquired the property. Inasmuch as the community was dissolved, and she was capable of purchasing at the time the conveyance was made to her, and the purchase money was not community property, the acquisition belonged to her as her separate estate. *Lalonde v. Terrell*, 7 Rob. (La.) 67.

1. The Community of Acquets and Gains "excludes everything in which the husband or wife had a right, present or future, vested or contingent, at the time of their marriage.

"It follows, therefore, that the property which the husband or wife acquires *stante matrimonio*, by a title which had its existence at the time of the marriage, is excluded from the community. * * *

"Property repurchased by the husband, *stante matrimonio*, under a right of repurchase, reserved on a sale made by him before the marriage, is not deemed a new acquisition. The title has relation, not to the repurchase, but to the ownership which existed previous to the sale. It is therefore excluded from this community. It is also considered that when the husband purchases from the vendor a right of repurchase, which he had reserved to himself, on a sale made before the marriage, the estate remains his separate property, and the wife is indemnified by receiving a moiety of the price which had been paid. * * *

"A purchase by the husband, before the marriage, which, by a decree, *stante matrimonio*, is set aside on account of inadequacy of price, unless he pays a further sum, and he adopts that alternative, is still deemed to have been complete before the marriage, and therefore forms no part of this community. * * *

"When the husband, *stante matrimonio*, sets aside a sale of his property made by him before the marriage, and obtains a restitution of it, he will be deemed to enjoy it under his former title, and not under the sentence of restitution. It will therefore be excluded from the community. * * *

either rule is to fix upon the act or the point of time when it can be said the "title" or "cause" had a beginning.

7. Rents, Issues, Profits, Increase, Fruits, and Revenues of Separate Property —

a. SPANISH LAW. — Under the Spanish law the fruits and revenues of the separate estate of both the spouses fell into community.¹

b. TEXAS DOCTRINE — (1) *Fruits of Separate Property.* — In this state the rents, issues, and profits of separate property belong to the community.²

"Property which he has regained *jure retractus propter proximitatem sanguinis*, is not deemed an acquisition *stante matrimonio*. The title by which it was acquired being a right in the husband before the marriage, the property itself is also considered to have been vested in him before the marriage. * * *

"In these and similar cases, the question is whether the estate returns to its owner by virtue of some cause or title which had its existence before the marriage, or from a new cause or title arising *stante matrimonio*." 1 Burge's Col. and For. Laws, pp. 283-288.

1. Spanish Law. — Art. 44, Schmidt's Civil Laws of Spain and Mexico.

2. In Texas, Rents, Issues, and Profits of Separate Property Belong to the Community. — Howard v. York, 20 Tex. 670; Cartwright v. Cartwright, 18 Tex. 626; De Blane v. Lynch, 23 Tex. 25; Bateman v. Bateman, 25 Tex. 271; White v. Lynch, 26 Tex. 195; Forbes v. Dunham, 24 Tex. 611; Carr v. Tucker, 42 Tex. 330; Hall v. Hall, 52 Tex. 294, 36 Am. Rep. 725; Braden v. Gose, 57 Tex. 37; Carlisle v. Sommer, 61 Tex. 124; Cleveland v. Cole, 65 Tex. 402; Smith v. Bailey, 66 Tex. 553; Green v. Ferguson, 62 Tex. 529; Epperson v. Jones, 65 Tex. 425; Connor v. Hawkins, 64 Tex. 545, 66 Tex. 639; Rhine v. Blake, 59 Tex. 240; Smith v. Bailey, 66 Tex. 553; Jones v. Epperson, 69 Tex. 586; Dixon v. Sanderson, 72 Tex. 359, 13 Am. St. Rep. 801; Schmidt v. Huppmann, 73 Tex. 112; Claflin v. Pfeiffer, 76 Tex. 469; Mitchell v. Mitchell, 80 Tex. 101; Stringfellow v. Sorrells, 82 Tex. 277; Hamilton-Brown Shoe Co. v. Whittaker, 4 Tex. Civ. App. 380; Hayden v. McMillan, 4 Tex. Civ. App. 479; Schepflin v. Small, 4 Tex. Civ. App. 493; Hamilton-Brown Shoe Co. v. Lastinger, (Tex. Civ. App. 1894) 26 S. W. Rep. 924.

The "Increase" of Cattle owned by the wife as her separate property is an acquisition of property from other sources than "by gift, devise, or descent," and is therefore community property. The same rule prevailed under the Spanish civil law prior to the adoption of the common law. Howard v. York, 20 Tex. 670.

Under the Statute of Texas of 1848 giving to the wife as her separate property "all property, both real and personal, * * * owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands or slaves thus acquired," and providing that all other property should fall into community, crops grown upon the land of the wife, by the labor of her slaves, belonged to the community. While the ordinary etymological sense of the word "increase" would include the crops grown upon land, this meaning cannot prevail against the manifest intent of the community property laws. "The husband has, by the statute, the

control and management of the separate property of the wife; and if the husband owned land as separate property, and the wife owned slaves as separate property, the husband could always employ the wife's slaves in the cultivation of his own land and thus add to his separate property by the use of her separate property. The principle which lies at the foundation of the whole system of community property is that whatever is acquired by the joint efforts of the husband and wife shall be their common property." De Blane v. Lynch, 23 Tex. 25.

Lumber. — The doctrine of the last case was reaffirmed in Forbes v. Dunham, 24 Tex. 611, and upon its authority it was held that lumber cut by the wife's slaves, in the wife's sawmill, from logs taken from her land, was community property. White v. Lynch, 26 Tex. 195.

Crops. — "It is now firmly settled by the decisions of this court that crops grown upon the land of the wife, although the labor and other means used in their production are of her separate estate, become the community property of the husband and wife. * * * The language of our revised statutes on this subject is substantially the same as that used in the acts under which these decisions were made, and they are applicable and of binding force in the present case." Cleveland v. Cole, 65 Tex. 402. To the same effect is Connor v. Hawkins, 66 Tex. 639.

Gross Gains from Sales of Stock of Merchandise. — The profits arising from an investment of a married woman's property become the community estate of herself and husband, hence the gross gains arising from sales made of a stock of merchandise belonging to the separate estate of the wife are community property. Smith v. Bailey, 66 Tex. 553; Epperson v. Jones, 65 Tex. 425; Hamilton-Brown Shoe Co. v. Lastinger, (Tex. Civ. App. 1894) 26 S. W. Rep. 924.

The Rents derived from the wife's separate property are community property. Rhine v. Blake, 59 Tex. 240.

Execution Against Husband. — It has been frequently decided and firmly established in Texas that the profits derived from the wife's separate estate are community property. Jones v. Epperson, 69 Tex. 586. And these profits are liable to an execution running against the husband. Smith v. Bailey, 66 Tex. 553.

"It seems to be settled by the previous decisions of this court that profits on investments of the wife's separate estate are community property, and liable for the husband's debts." Claflin v. Pfeiffer, 76 Tex. 469.

Lottery Prize. — A prize received on a lottery ticket purchased with the separate funds of the wife is community property. "The statute declares that 'all property acquired by either

The courts have confined separate estate to the very words of the statute defining it, have construed the statute strictly, and have, on the other hand, given to the statute defining community property a broad and liberal construction. This course is nowhere more clearly exhibited than in the classification as separate or community property of the fruits and revenues of separate estate.

Crops — Rents — Interest — Lumber. — Crops grown on the wife's land,¹ the rents of her real estate,² the interest on her money,³ and even lumber sawed in her mill, by her slaves, from logs cut from her lands,⁴ are community property.

The Reasons Assigned for this course of decision may be classified as follows:

1. Crops, rent, interest, etc., are not produced spontaneously, but by cultivation, care, labor, and attention.

2. The husband (in *Texas*) has the management and control of the wife's separate property, and if the fruits of separate property went to the owner of that property as separate estate, the husband might employ the wife's capital in the enrichment of himself at her expense and at the expense of the community, in which, with him, she is equally interested.⁵

(2) *Increase of Separate Real Estate.* — By statute the "increase" of separate real estate remains separate property.⁶ The term "increase" has, by construction, been confined to limits narrower than its commonly accepted meaning. It has been held not to include crops⁷ or rents,⁸ but it was finally

husband or wife during marriage, except that which is acquired by gift, devise, or descent, shall be deemed the common property of the husband and wife." Rev. Stat., art. 2852. That the prize came not by gift, devise, or descent, is too clear. It came as the fortuitous result of a contract based on valuable consideration paid, and is but the profit on a return which, like other profit not resulting from the increased value of a thing bought with the separate means of one party to the marital union, becomes the common property of the husband and wife." *Dixon v. Sander-son*, 72 Tex. 359, 13 Am. St. Rep. 801.

Husband's Creditors — Garnishment of Rents Due. — In *Hayden v. McMillan*, 4 Tex. Civ. App. 479, creditors of the husband sought to garnish rents due on a lease of the separate lands of the wife. The court reviews at length the different decisions in that state, refuses to follow the lead of the *California* Supreme Court, and adheres to the well established doctrine in *Texas* that such rents are community property, and as such subject to garnishment by a creditor of the husband. The court said: "It is therefore a legitimate inference that crops, though grown on the separate land of the wife, have been produced through the combined efforts of the husband and wife, and that rent arising from the lease of her property is the result of the joint care and management of him and his wife, and therefore community property. Rents are not the natural outgrowth of lands. Land has never yet brought rents without some intelligence behind it to prepare for it, to contract for, and collect it. Certainly if crops grown upon the separate property of the wife, and lumber sawed from the trees cut from her land, are not the increase of the lands, rents cannot be held to be the increase, for if the one be the outgrowth of the joint labor of husband and wife the other must be too. The first two

would on a liberal construction be looked upon as the increase of the land, because they have grown out of and been sustained by it. The latter is but a right to a certain profit issuing periodically out of the land. 2 *Minor's Inst.*, p. 32. The moment the rents become due they are disconnected from the land and become personal property, and being acquired by the joint labors of the married couple, put forth during the marital relation, they must necessarily become community. The rent of land is merely incident to it, a right connected with it, and is not a part of the land."

In a subsequent case the court approved the doctrine of the case last cited, and held an attempt to transfer the rents derived from a lease of the wife's separate lands to be void as against the existing creditors of the husband. *Schepflin v. Small*, 4 Tex. Civ. App. 493.

Profits of Husband's Separate Estate. — As to the profits arising from the husband's separate estate, it has never been denied that they fell into community. See the cases *supra*, this note. And see *Cabell v. Menczer*, (Tex. Civ. App. 1896) 35 S. W. Rep. 206.

1. *De Blane v. Lynch*, 23 Tex. 25; *Forbes v. Dunham*, 24 Tex. 611; *Cleveland v. Cole*, 65 Tex. 402; *Conner v. Hawkins*, 66 Tex. 639.

2. *Hayden v. McMillan*, 4 Tex. Civ. App. 479; *Schepflin v. Small*, 4 Tex. Civ. App. 493; *Rhine v. Blake*, 59 Tex. 240.

3. *Braden v. Gose*, 57 Tex. 37; *Cabell v. Menczer*, (Tex. Civ. App. 1896) 35 S. W. Rep. 206.

4. *White v. Lynch*, 26 Tex. 195.

5. **Reasons for the Rule.** — *De Blane v. Lynch*, 23 Tex. 25; *Forbes v. Dunham*, 24 Tex. 611; *White v. Lynch*, 26 Tex. 195.

6. *Sayles' Texas Civil Statutes*, art. 2851.

7. **Construction of Statutory Term "Increase."** — *De Blane v. Lynch*, 23 Tex. 25, and note 3, *supra*.

8. See note 8, *supra*.

held to include the profits made in the exchange and sale of separate real estate.¹

(3) *Interest on Wife's Money Agreed to Be Paid by Husband.* — The husband, by his contract to pay interest to the wife on a loan of her funds, makes the interest her separate property.²

(4) *Increase in Value of Young Animals Belonging to Separate Estate.* — The increase in size, weight, and value of young animals, the wife's separate property, belongs to her separate estate.³

c. **LOUISIANA DOCTRINE.** — In Louisiana the fruits and revenues of the husband's separate property fall into community,⁴ as do also those of the wife's separate property if she permits the husband to administer it, or if it is administered by the husband and wife indifferently.⁵

When Wife Retains Separate Administration. — But the wife may retain the separate administration of her separate property, and then its fruits and revenues belong to her separately.⁶

1. *Evans v. Purinton*, (Tex. Civ. App. 1896) 34 S. W. Rep. 350; *Cabell v. Menczer*, (Tex. Civ. App. 1896) 35 S. W. Rep. 206.

2. **Interest To Be Paid by Husband on Wife's Loan.** — To the wife was devised certain property to be secured to her for life, with power to give it to her children, if any; if none, to give it to any of the testator's descendants she might choose. As part of the property devised consisted of certain bonds which were turned over to the husband as the wife's trustee, which he converted into money, and loaned to a firm of which he was a member, taking as security a firm note payable to himself as trustee, agreeing to pay interest. The court, while agreeing that it is settled law in *Texas* that interest derived from a loan of the wife's separate money belongs to the community, also agreed that the rule does not apply to the facts in this case, the court not agreeing as to the grounds of the latter conclusion. "One opinion is that it is the income and not the *corpus* of the fund that was bequeathed, * * * and that, therefore, the interest on the money comes literally within the definition of 'separate property' as given in the statute; that is to say, that the income of the fund is acquired directly 'by devise.' Rev. Stat., art. 2851. The other opinion is that when the husband borrows the money of the wife and agrees to pay her interest the effect of the contract is to make the interest her separate property." The right of the creditor who insisted upon the community character of the interest had not accrued when the note was given. *Martin Brown Co. v. Perrill*, 77 Tex. 199.

Interest agreed to be paid to the wife by the husband on her separate funds borrowed by him is her separate property. This is so by force of the very agreement between the husband and the wife. *Hamilton-Brown Shoe Co. v. Whitaker*, 4 Tex. Civ. App. 380.

3. **The Increase in Size, Weight, and Value of Young Animals** owned by the wife at the time of marriage is in no sense an asset of the community. "It would tend to entirely destroy the *corpus* of the wife's estate, consisting of live personal property, to declare that an augmentation in weight or value should be deemed an increase of the property itself so as to constitute a part of the community to that extent." *Stringfellow v. Sorrells*, 82 Tex. 277.

4. **Rule in Louisiana.** — According to the textual provisions of the Louisiana Code "the profits of all the effects of which the husband has the administration and enjoyment either of right or in fact" belong to the community. Civil Code, art. 2402. This would, of course, include all the profits and revenues derived from the husband's separate estate. And such has been the uniform construction placed upon the code by the courts of that state. It is one of the few questions about which there has been no dispute and no contrariety of opinion. It will be noticed that the terms of the code would also include the profits of the wife's separate estate when the husband has in his hands the administration and enjoyment of it.

5. **"When the Paraphernal Property Is Administered by the Husband,** or by him and the wife indifferently, the fruits of this property, whether natural; civil, or the result of labor, belong to the conjugal partnership if there exists a community of gains." Art. 2386, Civil Code of Louisiana.

6. **Separate Administration by Wife — Louisiana.** — Civil Code, art. 2384, provides: "The wife has the right to administer personally her paraphernal property without the assistance of her husband."

Art. 2385: "The paraphernal property which is not administered by the wife separately and alone is considered to be under the management of the husband. And the wife's separate property is presumed to be under the administration of the husband."

Art. 2387: "The wife who has left to the husband the administration of her paraphernal property may afterwards withdraw it from him."

The revenues of the wife's separate estate, unless she permits the husband to administer it, do not fall into community. This is strictly within the letter of the code. *Lambert v. Franchebois*, 16 La. 1. Or unless the administration is by the husband and the wife indifferently. *Rowley v. Rowley*, 19 La. 574.

But the Wife May Employ the Husband as Her Agent to assist her in the administration where his acts as her agent are in her name, in strict pursuance of her instructions, and according to powers of attorney given him by her to act for her, and where the accounts are kept separate

d. DOCTRINE IN CALIFORNIA, NEVADA, WASHINGTON, AND ARIZONA.

In these states an innovation from a common-law source¹ has been introduced, and the rents, issues, and profits of separate property retain the separate character.²

Classification. — Where this innovation prevails the following are clearly separate property: the spontaneous fruits or growth of separate property;³ products of the soil wrung from it by industry;⁴ profits on the investment of

from his. *Miller v. Handy*, 33 La. Ann. 160; *Davis v. Williams*, 28 La. Ann. 298.

Young of Slaves. — Children born of slaves which are separate property do not belong to the community. The argument in favor of giving to the community the young born of slaves which are separate property, and that provision of the code (art. 537) designating slaves as fruits, are in conflict with other provisions of the code. They conflict with the rule laid down in article 183, that the children of slaves follow the condition of the mother and belong to her owner, and with the same general rule reiterated in article 491. There is further conflict with the exception stated in article 536, upon the subject of usufruct, and repeated in article 539. They conflict with the principles of the Roman law, which is the basis of our jurisprudence. They conflict with article 2351, which binds the husband to return the young of dotal slaves. Cases to the contrary are overruled. *Childers v. Johnson*, 6 La. Ann. 634. To the same effect see *Cartwright v. Cartwright*, 18 Tex. 626.

1. California, Nevada, Washington, and Arizona. — The history of the innovation which prevails in these states clearly shows its common-law origin.

Article 11, § 14, of the former Constitution of California provided: "All property both real and personal of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property."

The Act of April 17, 1850, provided: "The husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate; and the rents and profits of the separate estate of either husband or wife shall be deemed common property."

In *George v. Ransom*, 15 Cal. 322, 76 Am. Dec. 490, the court said: "We think the legislature has not the constitutional power to say that the fruits of the property of the wife shall be taken from her and given to the husband or his creditors. If the constitutional provision be not a protection to the wife against the exercise of this authority, the anomaly would seem to exist of a right of property in one divested of all beneficial use — the barren right to hold in the wife and the beneficial right to enjoy in the husband. One object of the provision was to protect the wife against the improvidence of the husband; but this object would wholly fail, in many instances, if the estate of the wife were reduced to a mere reversionary interest, to be

of no avail to her except in the contingency of her surviving her husband. It has been seen that the provision of the constitution is that the property acquired by the wife by devise, bequest, etc., shall be her separate property. This term 'separate property' has a fixed meaning in the common law, and had in the minds of those who framed the constitution, a large majority of whom were familiar with and had lived under that system. By the common law the idea attached to separate property in the wife, and which forms a portion of its definition, is that it is an estate, held as well in its use as in its title for the exclusive benefit and advantage of the wife. The common law recognized no such solecism as a right in the wife to the estate, and a right in some one else to use it as he pleased and to enjoy all the advantages of its use. It is not perceived that property can be in one, in full and separate ownership, with a right in another to control it and enjoy all of its benefits. The sole value of property is in its use; to dissociate the right of property from the use in this class of cases would be to preserve the name, the mere shadow, and destroy the thing itself, the substance. It would be to make the wife the trustee for the husband, holding the legal title while he held the fruits of that title."

In this case it was sought to subject, by supplementary proceedings, the dividends on the wife's separate stock to the debts of the husband.

Profits of Husband's Business. — Subsequently the Supreme Court of *California* held that the profits made by the husband in a business carried on by him with his separate capital belonged to the community. The facts out of which this case arose occurred before the amendment of the code giving to the husband as his separate estate the rents, issues, and profits of his separate property. *Lewis v. Lewis*, 18 Cal. 654.

The Present Code of *California* places both the spouses upon an equality as to the rents, issues, and profits of separate property, and gives them to the owner of the separate estate, producing them as his separate property.

As to rents, issues, and profits, the codes and statutes of *Nevada*, *Washington*, and *Arizona* have followed and been modelled after the present *California* code.

² See *supra*, this title, *Separate Estate*, where the statutes defining separate property in the states of *California*, *Nevada*, and *Washington*, and the territory of *Arizona*, are given at length, and the rents, issues, and profits of the separate property, it will be seen, remain separate property.

³ *Lake v. Bender*, 18 Nev. 361.

⁴ *Lewis v. Johns*, 24 Cal. 98, 85 Am. Dec. 49.

separate estate;¹ revenues derived by loaning, hiring out, or letting either real or personal separate estate;² animals whose dams are separate property;³ gains resulting from the ordinary use of separate property;⁴ the increase in value of separate property by growth, accretion, or other like means.⁵

Where Either Spouse Devotes His or Her Time to Care of Separate Estate. — Either spouse may devote his or her time to the care and administration of the separate estate without subjecting the resulting product to a claim in favor of the community.⁶

The Profits of a Business, the result mainly of the toil, talent, energy, or business capacity of either spouse, belong to the community, even though separate capital may have been used in the business.⁷ Such profits are the result of two factors — the toil, talent, and energy of the spouses which belong to the community, and the separate capital. If the community makes the larger contribution to the result it takes as its property the fruits of the enterprise.

This Rule Furnishes No Certain Test, and leaves each case to be decided upon its own peculiar facts, but no other can now be extracted from the cases.⁸

8. Improvements Made by Community on Separate Property — Belong to Separate Estate. — Improvements made by the community on the separate estate of either spouse become the property of the owner of the separate estate.⁹

Property Improved, Debtor to Community. — But the spouse owning as separate estate the property improved becomes the debtor of the community to the extent of the value added to such property by such improvements.¹⁰

The Measure of Compensation to the community is not the expense or the cost of making the improvements, but the increased value of such separate property on account of the improvement.¹¹

Time at Which Value to Be Taken. — The increased value is to be taken as of the time when the community is dissolved.¹²

1. *George v. Ransom*, 15 Cal. 322, 76 Am. Dec. 490.

2. *Lewis v. Johns*, 24 Cal. 98, 85 Am. Dec. 49.

3. *Lewis v. Johns*, 24 Cal. 98, 85 Am. Dec. 49.

4. *Matter of Higgins's Estate*, 65 Cal. 407.

5. *Stringfellow v. Sorrells*, 82 Tex. 277. This case arose under the statutes of *Texas*. For a better reason, the rule stated in the text would apply in the states where rents, issues, and profits of separate property remain separate property.

6. *Lake v. Bender*, 18 Nev. 361.

7. *Lake v. Bender*, 18 Nev. 361.

8. *Lake v. Bender*, 18 Nev. 361.

9. **Improvements to the Property of Owner of Separate Estate.** — *Patton's Estate*, Myr. Prob. (Cal.) 241; *Hughey v. Barrow*, 4 La. Ann. 248; *Boyer's Succession*, 36 La. Ann. 506; *Dillon v. Dillon*, 35 La. Ann. 92; *McClelland's Succession*, 14 La. Ann. 776; *Depas v. Riez*, 2 La. Ann. 30; *Childers v. Johnson*, 6 La. Ann. 634; *Moore v. Stancel*, 36 La. Ann. 819; *Rice v. Rice*, 21 Tex. 58; *Conner v. Hawkins*, 66 Tex. 639.

10. See the preceding note.

11. **Measure of Compensation.** — *Roth's Succession*, 33 La. Ann. 540; *Boyer's Succession*, 36 La. Ann. 506.

12. **Time of Valuation.** — *Roth's Succession*, 33 La. Ann. 540; *Kelly v. Robertson*, 10 La. Ann. 303. In this latter case the creditors of the husband sought to hold the wife as garnishee for the amount expended by the community in the improvement of her separate property,

and for which the law recognized a liability from the wife to the community. The court said: "The attempt to garnishee the wife and render her liable for an alleged indebtedness to the community finds no support in any of the principles of our law applicable to the rights and obligations of married persons, or to the nature and character of the conjugal partnership. * * * The husband, who is the judgment debtor in this case, has no right of action against his wife, during the existence of the community, for any sums of money which he may have expended for her benefit either from his own separate funds or from the funds of the community, and his wife cannot, therefore, be garnisheed by either the individual creditors of the husband or by the creditors of the community. It is equally clear that this suit cannot be maintained for an account of the community transactions, with a view to its liquidation, in order to establish an indebtedness on the part of the wife to the community and thereby render her liable for the debt due to the plaintiffs by the community. * * * Whatever right one of the spouses may have to claim a recompense from the other for funds of the community employed for the separate benefit and advantage of such spouse, either in the payment of his or her debts contracted anterior to the marriage, or in the increase and improvement of the hereditary property of such spouse, this right can only be exercised at the dissolution of the community. The community, under our laws, consists only of acquets and gains made during the marriage."

The Other Spouse Is Entitled to One Half the value of such improvements.¹

9. Property Acquired by Prescription. — Property acquired by prescription during the marriage forms part of the community of acquets and gains.

Where Prescription Begins and Ends During Marriage. — There can be no doubt of this when the prescription begins and ends during the marriage.²

Where Prescription Begins Before and Ends During Marriage. — But when the prescription begins before, and ends during, the marriage, the title takes effect as of the time when the prescription began, and is therefore separate property.³

10. Property Acquired by Compromise During Marriage. — Property acquired by compromise during marriage belongs to the community if the right compromised belonged to the community;⁴ otherwise if the right is separate.⁵ The right compromised is the consideration for the property obtained by the compromise.⁶

VI. PRESUMPTIONS — 1. The General Rule. — All property acquired after marriage by either spouse is *prima facie* community property.⁷ This rule is

The creditors of the husband have a right to seize upon any community property in the possession of the wife to satisfy their demands; but the improvements made upon the wife's separate property are only acquets of the community to the extent to which her property, at the time of the dissolution of the community, has been benefited, but on the dissolution it may be shown that the wife has demands against the husband equal in amount, as a set-off for similar improvements on his separate estate.

1. *Noe v. Card*, 14 Cal. 604.

2. *Hurley v. Lockett*, 72 Tex. 262.

3. "Property which is acquired *stante matrimonio* by *usucapio* * * * becomes part of the community only when these titles have had their commencement and completion *stante matrimonio*. If the party's *bona fide* possession had commenced * * * before the marriage, although * * * the time during which such possession must continue had not elapsed, * * * the property so acquired will retain its former character, and will not be part of the community." 1 Burge's Col. and For. Laws, pp. 289, 290.

4. **When Right Compromised Belongs to Community.** — *Pancoast v. Pancoast*, 57 Cal. 320. This was a case of property obtained by the compromise of a tortious possession of real estate begun by the husband before the marriage; but the court assumed that such possession was tortious, was not property in any sense of the term, and that there was, therefore, no ante-nuptial right, and held that the property obtained by the compromise was an acquet of the community. If the court's assumption that the ante-nuptial possession created no right was correct, then the result arrived at necessarily followed.

5. **Where Right Compromised Belongs to Separate Estate.** — "Property may also have been acquired by compromise (*transactio*). It is urged that if the party against whom the suit was instituted were in possession of the property in dispute, and put an end to such suit by paying a certain sum of money to his adversary, he ought, from the presumption of the law in favor of possession, to be deemed to have a good title when he instituted it, and the property ought not to be considered as an acquisition; but that, on the other hand, if he

had not been in possession, and had, by compromise, procured its delivery to his adversary, it ought to be deemed an *acquæstus* and included in the community. Other jurists consider that this question depends on the proportion which the sum given as a compromise bears to the value of the property in dispute. If the sum be large, they treat the compromise as a purchase." 1 Burge on Colonial and Foreign Laws, p. 290.

6. See the preceding note.

7. **Presumption as to Property Acquired After Marriage** — *California*. — *Alverson v. Jones*, 10 Cal. 12, 70 Am. Dec. 689; *Thompkins' Estate*, 12 Cal. 114; *Meyer v. Kinzer*, 12 Cal. 248, 73 Am. Dec. 538; *Noe v. Card*, 14 Cal. 576; *Mott v. Smith*, 16 Cal. 558; *Burton v. Lies*, 21 Cal. 91; *Ramsdell v. Fuller*, 28 Cal. 43, 87 Am. Dec. 103; *Peck v. Brummagim*, 31 Cal. 445, 89 Am. Dec. 195; *Althof v. Conheim*, 38 Cal. 230, 99 Am. Dec. 363; *Woods v. Whitney*, 42 Cal. 358; *Wedel v. Herman*, 59 Cal. 507; *Moore v. Jones*, 63 Cal. 12; *Schuler v. Savings, etc., Soc.*, 64 Cal. 397; *Schuyler v. Broughton*, 70 Cal. 282; *McComb v. Spangler*, 71 Cal. 418; *In re Bauer's Estate*, 79 Cal. 304; *Jackson v. Torrence*, 83 Cal. 521; *Tolman v. Smith*, 85 Cal. 280; *Dimmick v. Dimmick*, 95 Cal. 323; *Jordan v. Fay*, 98 Cal. 264; *Gwynn v. Diersen*, 101 Cal. 563; *Wright v. Wright*, (Cal. 1895) 41 Pac. Rep. 695.

Louisiana. — *Montegut v. Trouart*, 7 Martin (La.) 361; *Babin v. Nolan*, 6 Rob. (La.) 508; *Baum's Succession*, 11 Rob. (La.) 314; *Grayson v. Sanford*, 12 La. Ann. 646; *Thibodeaux v. Thibodeaux*, 16 La. 40; *Nores v. Carraby*, 5 Rob. (La.) 292; *Packwood's Succession*, 12 Rob. (La.) 334, 43 Am. Dec. 230; *McClelland's Succession*, 14 La. Ann. 776; *Foreman's Succession*, 38 La. Ann. 700; *Breaux's Succession*, 38 La. Ann. 728; *Davidson v. Stuart*, 10 La. 146; *Dominguez v. Lee*, 17 La. 296; *Bertie v. Walker*, 1 Rob. (La.) 431; *Smalley v. Lawrence*, 9 Rob. (La.) 210; *Provost v. Delahoussaye*, 5 La. Ann. 610; *Hanna v. Pritchard*, 6 La. Ann. 730; *Webb v. Peet*, 7 La. Ann. 92; *Block v. Melville*, 10 La. Ann. 784; *Forbes v. Forbes*, 11 La. Ann. 326; *Ellis v. Rush*, 5 La. Ann. 116; *Bass v. Larche*, 7 La. Ann. 104; *Metcalfe v. Clark*, 8 La. Ann. 286; *Andrew v. Bradley*, 10 La. Ann. 606; *Campbell v. Bell*, 12 La. Ann. 193; *Joffrion v.*

a part of the written law in some states;¹ but in the absence of statute to that effect, it is recognized as an essential part of the jurisprudence of the community-property system.²

Applicable to Both Husband and Wife.—It applies to acquisitions made by or in the name of the wife, as well as to those made by or in the name of the husband;³ though the fact that the conveyance is made to the wife weakens

Bordelon, 14 La. Ann. 628; *Bachino v. Coste*, 35 La. Ann. 570; *Shaw v. Hill*, 20 La. Ann. 531, 96 Am. Dec. 420; *Pope v. Foster*, 24 La. Ann. 521; *Sulstrang v. Betz*, 24 La. Ann. 295; *Gogreve v. Dehon*, 41 La. Ann. 244; *Bellande's Succession*, 41 La. Ann. 491; *Duruty v. Musacchia*, 42 La. Ann. 357; *Coste's Succession*, 43 La. Ann. 144; *Reinach v. Levy*, 47 La. Ann. 963; *Rouyer v. Carroll*, 47 La. Ann. 768; *Bartels v. Souchon*, 48 La. Ann. 783; *Monroe v. His Creditors*, 48 La. Ann. 801.

Texas.—*Scott v. Maynard*, Dall. (Tex.) 551; *Edrington v. Mayfield*, 5 Tex. 364; *Lott v. Keach*, 5 Tex. 395; *Love v. Robertson*, 7 Tex. 6, 56 Am. Dec. 41; *Hustön v. Curl*, 8 Tex. 239, 58 Am. Dec. 110; *Wells v. Cockrum*, 13 Tex. 128; *Gilliard v. Chessney*, 13 Tex. 337; *Chapman v. Allen*, 15 Tex. 278; *Higgins v. Johnson*, 20 Tex. 389, 70 Am. Dec. 394; *Dunham v. Chatham*, 21 Tex. 231, 73 Am. Dec. 228; *Mitchell v. Marr*, 26 Tex. 330; *Cooke v. Bremond*, 27 Tex. 457, 86 Am. Dec. 626; *Smith v. Boquet*, 27 Tex. 507; *Holloway v. Holloway*, 30 Tex. 164; *Johnson v. Burford*, 39 Tex. 242; *Tucker v. Carr*, 39 Tex. 98; *Zorn v. Tarver*, 45 Tex. 519; *Stanley v. Epperson*, 45 Tex. 645; *Schmeltz v. Garey*, 49 Tex. 49; *Cox v. Miller*, 54 Tex. 16; *Medlenka v. Downing*, 59 Tex. 32; *King v. Gilleland*, 60 Tex. 271; *Ross v. Kornrumpf*, 64 Tex. 390; *Epperson v. Jones*, 65 Tex. 425; *Smith v. Bailey*, 66 Tex. 553; *Jones v. Epperson*, 69 Tex. 586; *Morris v. Hastings*, 70 Tex. 26, 8 Am. St. Rep. 570; *Peet v. Commerce, etc.*, St. R. Co., 70 Tex. 522; *Kimberlin v. Westerman*, 75 Tex. 127; *Mitchell v. Mitchell*, 80 Tex. 101; *King v. Holden*, (Tex. 1891) 16 S. W. Rep. 898; *McDougal v. Bradford*, 80 Tex. 558; *Hawley v. Geer*, (Tex. 1891) 17 S. W. Rep. 914; *McKinney v. Nunn*, 82 Tex. 44; *McCutchen v. Purinton*, 84 Tex. 603; *Sanburn v. Schuler*, 3 Tex. Civ. App. 629; *Augustine v. State*, (Tex. Crim. App. 1893) 23 S. W. Rep. 794; *Sinsheimer v. Kahn*, 6 Tex. Civ. App. 143; *Swink v. League*, 6 Tex. Civ. App. 309; *Heidenheimer v. Loring*, 6 Tex. Civ. App. 560; *Byars v. Byars*, 11 Tex. Civ. App. 565.

Washington.—*Lemon v. Waterman*, 2 Wash. Ter. 492; *Castor v. Peterson*, 2 Wash. 204, 26 Am. St. Rep. 854; *Yesler v. Hochstettler*, 4 Wash. 353; *Curry v. Catlin*, 9 Wash. 495.

The Rule Stated.—"The community of acquets and gains commences at the moment of marriage with nothing, and includes at its dissolution presumptively everything found in the succession of the deceased spouse and in the possession of the survivor, unless it be satisfactorily proved which of such effects either of the spouses brought into the marriage, or which have been given them separately, or been inherited by them separately." *Denegre v. Denegre*, 30 La. Ann. 276.

1. Statutes.—*Louisiana* Civil Code, art. 2405; *Sayles' Civil Statutes (Texas)*, art. 2832.

California.—Civil Code, § 164. By an amendment to this section of the California Code, passed March 3, 1893, the presumption is changed as to property conveyed to the wife, providing that such a conveyance vest the title *prima facie* in the wife as her separate property, and the presumption is conclusive in favor of a *bona fide* purchaser from the wife.

Spanish Law.—"All property possessed by husband and wife is presumed to belong to the community, and is to be divided equally unless it be proved that a portion of the same is the individual property of one of them." Art. 63, Schmidt's Civil Law of Spain and Mexico.

2. Yesler v. Hochstettler, 4 Wash. 354; *Ramsdell v. Fuller*, 28 Cal. 43, 87 Am. Dec. 103.

Reasons for the Rule.—Where the rule rests upon legal principle unaided by statute, various reasons are assigned for its existence. In the first case above, the rule is said to rest upon this reason: "The community * * * is the superior and controlling entity," the acquisition of property by either of the spouses as separate estate is exceptional—made so by the terms of the statute defining community property. Whoever asserts the exceptional (the existence of separate estate) must prove it, or the general rule will prevail.

In the second case the court said: "It is much easier for the party purchasing * * * to show affirmatively that the funds used are separate property of the party purchasing than for others interested to show negatively that they were not."

3. Applicable to Both Spouses—*California.*—*Meyer v. Kinzer*, 12 Cal. 248, 73 Am. Dec. 538; *Pixley v. Huggins*, 15 Cal. 128; *Tolman v. Smith*, 85 Cal. 280; *Tryon v. Sutton*, 13 Cal. 493; *Kohner v. Ashenauer*, 17 Cal. 581; *Landers v. Bolton*, 26 Cal. 394; *Althof v. Conheim*, 38 Cal. 233, 99 Am. Dec. 363; *Gwynn v. Dierssen*, 101 Cal. 563.

Louisiana.—*Pearson v. Ricker*, 15 La. Ann. 119; *Shaw v. Hill*, 20 La. Ann. 531, 96 Am. Dec. 420; *Pope v. Foster*, 24 La. Ann. 521; *Sulstrang v. Betz*, 24 La. Ann. 295; *Gogreve v. Dehon*, 41 La. Ann. 244.

Nevada.—*Crow v. Van Sickle*, 6 Nev. 146. While the last case did not turn upon the presumption, yet the court held that a mortgage taken in the wife's name during the marriage was community property; this included the lesser proposition that it is presumed that the mortgage is community property. No proof was introduced to show to whom the mortgage belonged.

Texas.—*Scott v. Maynard*, Dall. (Tex.) 551; *Love v. Robertson*, 7 Tex. 6, 56 Am. Dec. 41; *Lott v. Keach*, 5 Tex. 394; *Pearce v. Jackson*, 61 Tex. 642; *Kimberlin v. Westerman*, 75 Tex. 127; *Sinsheimer v. Kahn*, 6 Tex. Civ. App. 143.

Washington.—*Curry v. Catlin*, 9 Wash. 495; *Yesler v. Hochstettler*, 4 Wash. 353.

somewhat the force of the presumption, for conveyances of community property are not ordinarily made to the wife.¹

The Courts Differ Only as to the Force of the Presumption, and the amount and character of the evidence required to overcome it.

Presumption Overcome by "Satisfactory Proof." — Generally the presumption will be overcome by "satisfactory proof" that the property in question is separate. What constitutes "satisfactory proof" cannot be reduced to a formula; the probative force of the different items of evidence will vary according to the peculiar facts and circumstances of each case.²

2. Mutations of Separate Property — Identity Must Be Traced. — In the exchange of separate property for other separate property, and in the purchase of separate property with separate funds, the mutations must be traced by clear proof. If the proofs fail in any essential particular, the presumption in favor of the community will prevail, and the acquisition will fall into community.³

In Case of a Purchase Made with Separate Money or other funds, there will be greater difficulty in the tracing and identification than when definite articles of separate property are exchanged for others. The former case will require a wider range of proof; not that a given fact must be proven by more, or more conclusive, evidence, but money has no earmarks, and in its handling is apt to be mingled with other funds; and to trace and identify it as separate property, and exclude the presumption, the proofs must meet a wider range of circumstances, all favoring the community.⁴

3. Blending of Separate and Community Property. — The blending in a common mass of separate and community property, each losing its identity, will render the entire mass community property. The impossibility of tracing, identifying, and separating the separate property in the mass will leave the spouse claiming it without the means of establishing his separate title, and the presumption will turn the scale in favor of the community.⁵

When Separation Possible. — But the mere intermixture of money, funds, or other property capable of separation by count, measure, or weight, will not

1. Presumption Weaker When Conveyance Made to Wife. — *Higgins v. Johnson*, 20 Tex. 389, 70 Am. Dec. 394.

"The presumption that the deed to the husband is a conveyance to the community is, under ordinary circumstances, much more strong than when the deed is to the wife." *Higgins v. Johnson*, 20 Tex. 395, 70 Am. Dec. 394.

2. How Presumption Overcome. — *Moore v. Jones*, 63 Cal. 12; *Yesler v. Hochstettler*, 4 Wash. 353; *McCutchen v. Purinton*, 84 Tex. 603.

In the Earlier Cases forms of expression were used seeming to give to the presumption a force requiring more than satisfactory proof to overcome it. Thus, in *Love v. Robertson*, 7 Tex. 6, 56 Am. Dec. 41, the presumption is said to be strong. In *Huston v. Curl*, 8 Tex. 239, 58 Am. Dec. 110, clear and satisfactory proof is said to be required. In *Gilliard v. Chessney*, 13 Tex. 337, abundant proof is said to be required. In *King v. Gilliland*, 60 Tex. 271, it was held that the proof need not overcome all doubt to remove the presumption. In *Morris v. Hastings*, 70 Tex. 26, 8 Am. St. Rep. 570, it was held necessary to show by clear proof of a conclusive tendency the fact of separate property to overcome the presumption. In *Meyer v. Kinzer*, 12 Cal. 248, 73 Am. Dec. 538, clear and satisfactory proof was held

to be required. But in the later cases the rule of the text is upheld.

Property Acquired in Common-Law State. — For the rule as to the presumption, when the property is acquired by the husband in a common-law state and brought by him to a community property state, see *infra*, this title, *Conflict of Laws*.

3. Mutations of Separate Property — Identity Must Be Traced. — *McDougal v. Bradford*, 80 Tex. 558; *Hall v. Hall*, 52 Tex. 294, 36 Am. Rep. 725; *Stoker v. Bailey*, 62 Tex. 299; *Parker v. Coop*, 60 Tex. 114; *Epperson v. Jones*, 65 Tex. 425. See *supra*, *Separate Property*.

4. Purchase Made with Separate Money or Other Funds. — *Love v. Robertson*, 7 Tex. 6, 56 Am. Dec. 41. In this case it was said: "In the case of a purchase made during the marriage it will, in general, be more difficult to prove the individual ownership of the money, from what source it was derived, and whose money was really employed in making the acquisition, than in the case of the mere exchange of one article for another. A greater burden of proof will devolve on the claimant."

5. Blending of Separate and Community Property. — *Yesler v. Hochstettler*, 4 Wash. 353; *Parker v. Portis*, 14 Tex. 170; *Moore v. Jones*, 63 Cal. 15; *In re Bauer's Estate*, 79 Cal. 304; *Smith v. Bailey*, 66 Tex. 554.

work such confusion as to render the mass community property.¹

4. Recitals in Deeds—*a. IN GENERAL*—**Evidence Aliunde.**—Property conveyed to either spouse by a deed containing no recitals showing it to be separate property may nevertheless be proven to be such by evidence *aliunde*, subject, of course, to the rule as to weight of evidence, and the force of the presumption in favor of the community.²

Conveyances to Husband.—In *Louisiana* this rule would not apply to conveyances to the husband.³

Recitals Showing Property to Be Separate—**Not Conclusive.**—Recitals in a conveyance showing the property acquired to be separate may be disputed by proof to the contrary, and the property shown to belong to the community.⁴

As to the Probative Force of Recitals Showing the Source of the Consideration the courts of the different states are not agreed.⁵

b. RULE IN LOUISIANA—**Recitals in Conveyance to Wife**—**Effect on Husband.**—In *Louisiana* the rule is clear that recitals in conveyance to the wife, showing the acquisition to be her separate estate, in the absence of fraud or mistake⁶ are binding on the husband and those standing strictly in the husband's place.⁷

Effect on Husband's Forced Heirs.—But they are not even evidence against the husband's forced heirs, to the extent, at least, of their legitime,⁸ nor against

1. See the titles *ACCESSION*, vol. I, p. 247; *CONFUSION OF GOODS*, *post*.

2. **Recitals in Deeds—May Be Explained.**—Property Conveyed to the Wife may be shown by her to be paraphernal, by evidence *dehors* the act of sale, even though the act be barren of any recitals showing the paraphernality of the purchase. *Pinard v. Holten*, 30 La. Ann. 167; *Terrell v. Cutrer*, 1 Rob. (La.) 367; *Stroud v. Humble*, 2 La. Ann. 930; *Metcalf v. Clark*, 8 La. Ann. 286; *Edwards v. Edwards*, 29 La. Ann. 600.

Oral Proof.—And the proof may consist of oral as well as written evidence. *Pinard v. Holten*, 30 La. Ann. 167.

Property Conveyed to the Husband may be shown by evidence to be his separate property. *Oliver v. Robertson*, 41 Tex. 422; *Kraemer v. Kraemer*, 52 Cal. 302; *Turner v. Roberts*, 5 Martin N. S. (La.) 255.

In Further Support of the Text see the cases cited *supra*, this title, *Separate Estate; Property Acquired in Exchange for Separate Property*.

3. See *supra*, this title, *Separate Estate*.

4. See the notes following. See also *Peck v. Vandenberg*, 30 Cal. 11.

5. The recitals prove little or nothing. *Bachino v. Coste*, 35 La. Ann. 571. See opinion of Sawyer, J., in *Peck v. Vandenberg*, 30 Cal. 11.

6. **Recitals in Conveyance to Wife—Fraud—Mistake.**—The husband may show that the recitals in a deed to the wife, stating the consideration to have been paid out of her separate estate under her separate administration, were inserted by fraud, etc., even though he participated in the purchase. The recitals are *prima facie* true in favor of the wife or her heirs, and against the husband, but on proof of fraud, etc., the force of the recitals is overthrown. *Bellande's Succession*, 41 La. Ann. 491.

7. **Binding upon Husband.**—*Drumm v. Kleinman*, 31 La. Ann. 124; *Moore v. Stancel*, 36 La. Ann. 819; *Brown v. Stroud*, 34 La. Ann. 374; *Compton v. Maxwell*, 33 La. Ann. 688;

Stewart v. Mix, 30 La. Ann. 1036; *Kerwin v. Hibernia Ins. Co.*, 35 La. Ann. 33.

Claimant of Mere Bounty from Husband.—One neither a creditor nor a forced heir, but the claimant of a mere bounty from the husband, cannot question the recitals in the deed to the wife showing it to be her separate property. "They cannot claim as his that which he declared or admitted was another's." *Drumm v. Kleinman*, 31 La. Ann. 126; *Hebert v. Lege*, 29 La. Ann. 511; *Stewart v. Mix*, 30 La. Ann. 1036.

"It may now be considered as settled that where a husband has been a party to an act of purchase of property in the name of his wife, reciting that the purchase has been made with her paraphernal funds, and establishing and constituting it as her paraphernal property, he will not be permitted in his own interest to contradict his own solemn assertions and attack the title of his wife, established with his own consent, and by his own act; and so his legatees or simple heirs, claiming through him, standing in his shoes, and bound like himself by his acts and words, are equally debarred. * * * Only creditors and forced heirs are excepted from this rule, and the latter only to the extent of their legitime and for the purpose of protecting the same." *Kerwin v. Hibernia Ins. Co.*, 35 La. Ann. 33; *Bachino v. Coste*, 35 La. Ann. 570.

8. **Husband's Forced Heirs.**—*Bachino v. Coste*, 35 La. Ann. 570; *Brown v. Stroud*, 34 La. Ann. 374; *Drum v. Kleinman*, 31 La. Ann. 124; *Compton v. Maxwell*, 33 La. Ann. 688; *Stewart v. Mix*, 30 La. Ann. 1036; *Kerwin v. Hibernia Ins. Co.*, 35 La. Ann. 33.

By Forced Heirs Are Meant the descendants of the ancestor, of whatever degree they may be. *Louisiana Civil Code*, art. 1493. They are called "forced heirs" because the donor, the ancestor, cannot deprive them of the portion of his estate reserved for them by law except in cases where he has a just cause to disinherit them. *Civil Code*, art. 1621.

The just causes for which parents may dis-

the husband's creditors,¹ nor against third persons generally.²

And the Wife, to Maintain Her Separate Right, must be able, by proof *aliunde*, to establish it contradictorily with those interested in disputing it.³ To maintain her right the wife must purchase in her own name, and she carries the burden of establishing the paraphernal character of the consideration paid, and her separate administration of it.⁴

Reasons for Holding Husband Bound. — The husband, in the absence of fraud or mistake, is held to be bound by such recitals, because he is a party to the "act of sale" (the deed) to the wife, consents to it, and is presumed to know the provisions of its recitals, and ought to be bound accordingly, as by an admission against interest.⁵

Recitals in a Deed to the Husband, showing the acquisition to be his separate property, are not evidence against the wife or her heirs; the husband must establish the separate character of the property by proof outside the deed.⁶

c. RULE IN OTHER STATES. — In the Common-Law Community Property States (except *Texas*), recitals contained in a deed to the wife, showing the acquisition to have been made with her separate property, have but little, if any, probative force. The reasons which underlie the rule in *Louisiana* are wanting in those states where the wife may accept a conveyance without the consent of her husband. Such recitals are useful as notice, but whether they are evidence of the source of the consideration is very doubtful.⁷

In *Texas*, where the husband has the management of the wife's separate estate, such recitals are perhaps to be taken as *prima facie* true, though this is not entirely clear. The husband's legal right to manage the wife's separate property would seem to make the rule in *Louisiana* applicable here, although the cases leave the matter somewhat doubtful.⁸

inherit their children are ten in number, and are enumerated in the Civil Code, art. 1493.

The legitimate, or legitimate portion, consists of one-third if the deceased leaves one legitimate child; one-half if he leaves two children; and one-third if he leaves three or a greater number. Civil Code, art. 1493.

1. **Husband's Creditors.** — *Metcalf v. Clark*, 8 La. Ann. 286; *Pearson v. Ricker*, 15 La. Ann. 119; *Clark v. Norwood*, 12 La. Ann. 598; *Fisher v. Gordy*, 2 La. Ann. 762; *Pinard v. Holten*, 30 La. Ann. 170; *Shaw v. Hill*, 20 La. Ann. 532, 96 Am. Dec. 420.

In the following cases the courts say that such recitals do not conclude creditors: *Forbes v. Forbes*, 11 La. Ann. 326; *Bachino v. Coste*, 35 La. Ann. 570; *Pinard v. Holten*, 30 La. Ann. 167; *Buisson v. Thompson*, 7 Martin N. S. (La.) 461; *Lambert v. His Creditors*, 2 Rob. (La.) 476; *Stauffer v. Morgan*, 39 La. Ann. 632. But the rule is believed to be accurately stated in the text.

2. **Third Persons Generally.** — *Block v. Melville*, 10 La. Ann. 784; *Dimitry v. Pollock*, 12 La. 304; *Lambert v. His Creditors*, 2 Rob. (La.) 476.

Such recitals are not evidence in the wife's favor in a suit by her against her husband for separation of property. This ruling was made, however, in a suit for separation where the husband's creditors intervened. *Angele de Sentmanat v. Soule*, 33 La. Ann. 612.

Such recitals are not binding on the administrator of the husband's estate, if the estate is insolvent and the property needed to pay community debts. *Bachino v. Coste*, 35 La. Ann. 570.

3. *Metcalf v. Clark*, 8 La. Ann. 286; *Pinard v. Holten*, 30 La. Ann. 167.

4. *Stauffer v. Morgan*, 39 La. Ann. 632.

5. See cases cited in note 4, *supra*.

6. See *supra*, this title, *Separate Estate*.

7. **Recitals — Rule in Common-Law Community States.** — As late as September 16, 1896, the Supreme Court of *California*, in considering a deed to the wife reciting a consideration of one dollar paid with the grantee's "separate funds and for her separate use," passed it over with the remark that it need not be considered whether such a recital had the force of a conveyance to the wife as her separate estate, which the court held *prima facie* vested a separate estate in the wife, as, on other grounds, it appeared that the wife's separate right was fully established. *Sanchez v. Grace M. E. Church*, 114 Cal. 295.

8. **Rule in Texas.** — *McCutcheon v. Purinton*, 84 Tex. 603; *Purinton v. Gunter*, 3 Tex. Civ. App. 525; *Evans v. Purinton*, (Tex. Civ. App. 1896) 34 S. W. Rep. 350.

In all of these cases, the conveyances to the wife not only by their recitals showed the source of the consideration to be the wife's separate property, but the deeds conveyed the property to the wife as her separate estate. In the case of *McCutchen v. Purinton*, 84 Tex. 603, the court's discussion of the legal effect of the recitals showing the source of the consideration is necessarily not so conclusive as if the case had rested upon the effect of the recitals alone. But the reasoning of the court, fairly construed, would lead to the conclusion that in *Texas*, where the husband has the management of the wife's separate property, a

d. THE OPERATIVE WORDS OF THE CONVEYANCE.—In *Texas* and *California* it is now settled that a deed to the wife conveying property to her as her separate estate vests in her, at least *prima facie* true, and would overcome the presumption in favor of the community. The husband, having the management of her estate, might fairly be presumed to know the contents of deeds running to her, and ought to be bound by such recitals, in the absence of fraud or mistake, for the same reason that he is bound in *Louisiana*. But in *Texas*, differing in this respect from *Louisiana*, the courts have held that recitals showing the source of the consideration to be the wife's separate estate, in a deed conveying the property to her as her separate property, overcome the presumption even as against creditors.

A Deed of Gift.—A deed which upon its face is clearly a deed of gift will transfer the property to the grantee as his separate estate.³

recital in a deed to her, showing the source of the consideration to be her separate estate, should be taken as *prima facie* true, and would overcome the presumption in favor of the community. The husband, having the management of her estate, might fairly be presumed to know the contents of deeds running to her, and ought to be bound by such recitals, in the absence of fraud or mistake, for the same reason that he is bound in *Louisiana*. But in *Texas*, differing in this respect from *Louisiana*, the courts have held that recitals showing the source of the consideration to be the wife's separate estate, in a deed conveying the property to her as her separate property, overcome the presumption even as against creditors.

1. The Term "Operative Words of the Conveyance," used in the text, is perhaps not strictly accurate. It is here used simply in reference to those words which fix the source of the title, and in contradistinction to the words "acknowledging receipt," and "recitals showing the source of the consideration."

California.—*Swain v. Duane*, 48 Cal. 358; *Sanchez v. Grace M. E. Church*, 114 Cal. 295.

Texas.—*Morrison v. Clark*, 55 Tex. 437; *McCutchen v. Purinton*, 84 Tex. 603; *Evans v. Purinton*, (Tex. Civ. App. 1896) 34 S. W. Rep. 350; *Purinton v. Gunter*, 3 Tex. Civ. App. 525.

Illustrations.—In *McCutchen v. Purinton*, 84 Tex. 603, the heirs of the wife claimed the property as against the purchaser at an execution sale made in pursuance of a judgment against the husband. The deed to the wife contained recitals showing the consideration to have been paid out of her separate estate and conveyed the property to her as her separate estate. The court said: "If he [the husband] causes a deed for property paid for with community funds to be made to the wife, for her separate use, and causes the deed to so recite, it would vest the title in the wife as her separate estate." The court then observed that, inasmuch as the husband has the management of both the community property and the wife's separate estate, such a deed overcomes the presumption in favor of the community.

And in *Evans v. Purinton*, (Tex. Civ. App. 1896) 34 S. W. Rep. 350, it was held that the force of such a deed was not overcome by a showing that part of the funds were community property, but that the community creditors could only reach such a portion of the lands as the funds of the community proven to have been invested bore to the entire consideration paid. In all of the cases from *Texas* cited *supra*, the deeds to the wife recited the consideration to have been paid from her separate estate, and the operative words of the deeds,

as appears from the opinions, conveyed the property to the wife as her separate property, and the business was transacted by the husband.

In *Swain v. Duane*, 48 Cal. 358, the deed was made to the wife for a valuable consideration recited in the deed, but contained no recital showing the source of the consideration; at least the opinion does not mention such a recital; but the operative words of the deed conveyed the property to the wife "as her separate property, and to and for her sole and separate use, benefit, and behoof." The court said of the deed that, "though made for a valuable consideration paid to the grantor, running to her as it did 'as her separate property, and to and for her sole and separate use, benefit, and behoof,' [it] constituted the premises her separate estate. This is apparent upon the face of the instrument by which Reis [the grantor] parted with his estate. It was the intent of the grantor that the grantee should be seised of the premises conveyed, not as of property belonging to the marital community of which she was a member, but as of her separate estate." The operative words of the deed were not permitted in this action (an action of ejectment) to be controlled by parol proof showing that the husband paid the consideration. The court held that such proof would be admissible in a proper action.

The doctrine of the last case was followed in *Sanchez v. Grace M. E. Church*, 114 Cal. 295.

In the case of *Higgins v. Higgins*, 46 Cal. 264, the court makes a distinction between proof aimed at explaining the source of the consideration and proof intended to alter the operative words of a conveyance. In speaking of proof offered to show that a deed to the wife vested a separate estate in her on the grounds that the consideration was a gift to her from her husband, the court said: "But the parol proof was directed wholly to the consideration, and not to the operative words of the conveyance." In this action (an action of ejectment), proof explaining the source of the consideration was held to be admissible, although in the same form of action it was held in *Swain v. Duane*, 48 Cal. 358, that parol proof was not admissible to control the operative words of a deed, although in a proper action, with proper parties, it was said, such a deed, even as to the operative words, might be explained, at least in favor of community creditors.

2. Conveyances Directly from Husband to Wife.

—The presumption in favor of the community is overthrown by a conveyance from the husband directly to the wife. See *supra*, this title, *Separate Estate*.

3. Deed of Gift.—*Peck v. Vandenberg*, 30 Cal. 11. In this case the deed contained a re-

VII. CHARACTER OF INTEREST AND RIGHT OF EACH SPOUSE DURING THE COMMUNITY — 1. **General Rule** — Husband's Dominion and Power of Disposition. — As a rule, applicable alike to all the community property states and territories (except *Washington* as to community real property), the husband's dominion and power of disposition extend to all community property, that standing in his own as well as in his wife's name; and her joinder, even in the conveyance of lands standing of record in her name, is not required to transfer the entire community right.¹

The Sole Limitation on the Husband's Dominion is that he shall not convey with intent to defraud the wife.²

Rights to Be Enforced in Husband's Name. — And all community, rights, whether acquired in his own or his wife's name, must be enforced in his name as plaintiff, and he is the sole proper party defendant in an action to enforce an obligation against the community.³

2. Rule in Louisiana — *a.* **THE HUSBAND.** — The husband is head and master of the community; ⁴ he may dispose of its effects as he chooses, subject only to the condition that he must not do so with intent to defraud the wife.⁵

cital showing that the grantor, the mother of the grantees, had received a conveyance of the tract of land in question to her and to her family, and that her children (eight in number, naming them) "have each an interest of one undivided ninth part * * * and are entitled * * * to the enjoyment of the same in common with me [the grantor]." The deed then proceeded as follows: "And this indenture further witnesseth that, in order to secure fully to my said children the aforesaid interest, * * * I, the said Martina Castro, for and in consideration of the natural love and affection which I have and bear to my said children, and for the further sum of five dollars, * * * have granted," etc., to the children, naming them, an undivided one-ninth interest, to each, in the property in question. One of the children appeared upon the face of the deed to be a married woman. The interest of this married daughter was claimed by Vandenberg through a deed executed by the daughter and her husband, but not so acknowledged as to be a valid conveyance of the wife's separate property; but it was claimed by Vandenberg that the interest was community property, and therefore that it passed by the husband's act in joining in the wife's deed. The same interest was claimed by another through a subsequent deed of the wife so executed as to pass her separate estate. On the trial the latter claimant offered to prove "that no money was paid or agreed to be paid to Mrs. Castro in consideration of the conveyance to her children, but, to the contrary, that the conveyance was in consideration of love and affection alone." The testimony was admitted over Vandenberg's objection, and its admission was assigned as error. Sawyer, J. contended in a long and able opinion that the evidence was properly admitted. The other members of the court agreed with Sawyer, J., in affirming the judgment, and rendered the following opinion: "As to the admissibility of parol evidence to explain the effect of the deed from Martina Castro to her children, we deem it unnecessary to express an opinion, for the reason that it is, in our judgment, a deed of gift upon its face, and therefore

stands in no need of explanation. On this and the remaining grounds discussed in the opinion we concur in the judgment."

1. Husband's Dominion over Community Property — *General Rule* — *California*. — *Tustin v. Faught*, 23 Cal. 238; *Meyer v. Kinzer*, 12 Cal. 252, 73 Am. Dec. 538; *Ramsdell v. Fuller*, 28 Cal. 44, 87 Am. Dec. 103; *Tolman v. Smith*, 85 Cal. 280; *Althof v. Conheim*, 38 Cal. 230, 99 Am. Dec. 363; *Pixley v. Huggins*, 15 Cal. 127; *Van Maren v. Johnson*, 15 Cal. 308; *Tryon v. Sutton*, 13 Cal. 493; *Köhner v. Ashenauer*, 17 Cal. 581; *Landers v. Bolton*, 26 Cal. 394; *Gwynn v. Dierssen*, 101 Cal. 563.

Louisiana. — *Wolf v. Wolf*, 12 La. Ann. 529; *Glenn v. Elam*, 3 La. Ann. 611; *Guice v. Lawrence*, 2 La. Ann. 226; *Trahan v. Trahan*, 8 La. Ann. 455.

Texas. — *Scott v. Maynard*, Dall. (Tex.) 548; *Huston v. Curl*, 8 Tex. 240, 58 Am. Dec. 110; *Wright v. Hays*, 10 Tex. 130, 60 Am. Dec. 200; *Walters v. Jewett*, 28 Tex. 192; *Brewer v. Wall*, 23 Tex. 585, 76 Am. Dec. 76; *Berry v. Wright*, 14 Tex. 270.

Washington. — See *infra*, this section, *Rule in Washington*.

2. Limitation — Fraud on Wife — *California*. — *Mott v. Smith*, 16 Cal. 558; *Moseley v. Heney*, 66 Cal. 478; *Spreckels v. Spreckels*, 116 Cal. 339.

Louisiana. — *Beigel v. Lange*, 19 La. Ann. 112; *Sulstrang v. Betz*, 24 La. Ann. 295.

Nevada. — *Crow v. Van Sickle*, 6 Nev. 146.

Texas. — *Scott v. Maynard*, Dall. (Tex.) 548; *Murphy v. Coffey*, 33 Tex. 508; *Jackson v. Cross*, 36 Tex. 193.

Washington. — *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Am. St. Rep. 72.

3. See the cases in note preceding. The husband is the sole proper party defendant. *Surls v. Hienn*, 20 La. Ann. 229; *Shelby v. Perrin*, 18 Tex. 517; *Black v. Bryan*, 18 Tex. 453; *Jacobs v. Scott*, 53 Cal. 74; *Heney v. Sargent*, 54 Cal. 396.

4. *Boyer's Succession*, 36 La. Ann. 506; *Tourne v. His Creditors*, 6 La. 459; *Tourne v. Tourne*, 9 La. 452; *Guice v. Lawrence*, 2 La. Ann. 226.

5. See the note preceding.

He may give in charity, or waste its effects in luxury or extravagance.¹ He has a present vested proprietary interest, with the absolute power of disposition, subject only to the one condition mentioned.²

b. THE WIFE.—The wife has no present vested proprietary interest in community property, but only an expectancy.³ She cannot dispose of its property even to pay a community debt.⁴ Her rights are in abeyance, and at the dissolution of the community she may renounce it and stand toward it as a third party having no interest in it and subject to none of its obligations.⁵

3. Rule in Texas—**a. THE HUSBAND.**—The Code of This State provides that community property "during the coverture may be disposed of by the husband only."⁶

Exception in Favor of Wife Abandoned by Husband.—But the jurisprudence of the state has engrafted upon the code an exception giving to a wife abandoned by her husband certain defined powers to convey community property.⁷

Aside from This Exception the power of the husband over community property is absolute, and he alone may convey or encumber it, subject, of course, to the right of the wife to attack his conveyances made with intent to defraud her.⁸

b. THE WIFE.—The wife during the community has no active power over

1. See the second note *supra*.

2. See the third note *supra*.

In Boyer's Succession, 36 La. Ann. 506, the court said: "Under our law the husband is head and master of the community. During its existence he may dispose of its effects as he pleases, subject only to the right of the surviving wife upon its dissolution to proceed against his heirs for one-half of the same, provided that she can prove that the transfer or other disposition was made with a fraudulent intent to injure her. C. C. 2404. * * * The wife has, during the marriage, no vested proprietary interest in any property composing the community, but only an [expectancy]. The surviving wife must take the community * * * as she finds it, without any right or power to call the succession of her husband or his heirs to an account for any act done or even waste committed during its existence, unless in the exceptional case mentioned above by which its value is diminished or its property is despoiled or encumbered. * * * Had he chosen even to squander the community funds or property on unworthy objects or in the gratification of extravagant tastes or luxurious indulgences, neither his estate nor his heirs could have been called to an account for it by the community or its representatives."

The rule was the same in *Missouri* during the regime of the community in that state. *Moreau v. Detchemendy*, 18 Mo. 522.

Larceny of Community Property.—In an indictment or information charging larceny of community personal property, the husband should be alleged to be the owner. *State v. Gaffery*, 12 La. Ann. 265.

3. Wife Has Only an Expectancy.—"The wife has during the marriage no vested proprietary interest in any property composing the community, but only an inchoate right which entitles her to the hope or expectation that if she survives her husband she can receive or own one-half of the property that may be left after payment of the community debts." *Boyer's Succession*, 36 La. Ann. 506.

The *Louisiana Civil Code*, art. 2373, forbidding alienations in fraud of the wife, does not

recognize her title during the marriage. "As well might it be said that children have a title in the property of their father because he is prohibited from disposing of it on fraud of their legitime." *Guice v. Lawrence*, 2 La. Ann. 228. In this case the court disapproves of the reasoning in *Dixon v. Dixon*, 4 La. 188, 23 Am. Dec. 478, seeming to hold that, during marriage, the wife has more than an expectancy.

For Property Conveyed by the Husband in Fraud of the Wife she has no remedy before the institution of a suit for separation. *Code of Louisiana*, 148, 2373; *Tourne v. His Creditors*, 6 La. 462.

And in an Action for Separation from Bed and Board, and to set aside a sale of community property alleged to have been made in fraud of the wife, if she fails to establish grounds for a separation she is without remedy as to the alleged fraudulent sale. *Tourne v. Tourne*, 9 La. 458.

4. Payment of Community Debts.—*Hart v. Gottwald*, 15 La. Ann. 13. In this case it was held that one who purchased from the wife a community movable in payment of a community debt might be held as garnishee of the husband for the property; the attempted sale of the wife was a nullity, and this rule was applied even when the husband had absconded.

5. See the notes preceding.

6. Rule in Texas.—Article 2852 *Sayles' Texas Civil Statutes*; *Thomas v. Chance*, 11 Tex. 634; *Berry v. Wright*, 14 Tex. 274.

A Deed by the Wife Alone of Community Property standing of record in her name does not transfer the title, but the husband may ratify such a transfer, and he is estopped to question the validity of a transfer if he receives the proceeds of it. *Thomas v. Chance*, 11 Tex. 634.

But in the Absence of Facts Creating an Estoppel her deed will not convey the title to community real estate even when standing of record in her name. *Berry v. Wright*, 14 Tex. 274.

7. See notes 1, 2, and 3, p. 333.

8. See the three notes immediately following.

community property, and cannot convey or encumber it except when she is abandoned by the husband; then her passive dominion becomes active, and to relieve the necessities of herself and children she may convey even the community real estate standing of record in the husband's name;¹ but her necessities are not only the origin but the measure of this power.² When abandoned, her rights of management and preservation are more extensive. Then she may sue in her own name on a community cause of action.³

c. **BENEFICIAL INTERESTS EQUAL.**—The beneficial interests of the spouses in community property are equal.⁴

1. **Wife's Rights**—*Texas*.—*Cheek v. Bellows*, 17 Tex. 613, 67 Am. Dec. 686; *Fullerton v. Doyle*, 18 Tex. 3; *Zimpelman v. Robb*, 53 Tex. 274.

Abandonment of Wife.—As a general rule the husband has the control and management of community property; but as the result of necessity there are exceptions. In the absence of the husband, leaving no one to manage community property, and the wife and family being in need, she may make contracts binding on the community. Under such circumstances a lease made by her of a hotel belonging to the community, for a period of one year, reserving a rent of five hundred and fifty dollars, together with a residence therein for herself and family, was upheld. In this case she did not, and she should not, go farther than the emergency of her condition required. *Cheek v. Bellows*, 17 Tex. 613, 67 Am. Dec. 686.

If the husband abandons the wife, who has no separate property, and leaves her and the family no means of support, except a tract of unproductive community land worth about two hundred dollars, the fact of abandonment, not its length, gives the wife the power of making conveyances of community real estate, and her deed of this tract of land was upheld. The formalities required in the execution of a deed of a *feme sole* are sufficient. The marital prerogatives of the husband are exalted, but when he abjures and virtually renounces his authority, and by abandonment disables himself to perform his duties as husband, it would be the extreme of cruelty to deprive the wife of the miserable privilege of providing for the wants of herself and family out of property designed by the law for the benefit of the community. *Fullerton v. Doyle*, 18 Tex. 3.

It has long been the settled law of *Texas*, that if the husband deserts the wife, ceasing to discharge his duties as husband, and to contribute to the support of his wife and family, the powers and rights of the wife, which during the dominion of the husband were passive, spring into activity, and she may transfer the community property. She is not a stranger to the title within the meaning of the registry laws, and her deed of community real estate, when she is authorized to make it by reason of the husband's abandonment, is a valid conveyance, and the record thereof is notice to a subsequent purchaser from the husband himself. *Zimpelman v. Robb*, 53 Tex. 274.

2. *Cheek v. Bellows*, 17 Tex. 613, 67 Am. Dec. 686.

3. **A Wife Abandoned by Her Husband May Sue**

in Her Own Name on a community cause of action. The abandonment must be alleged and proved. *Houston, etc., R. Co. v. Lackey*, (Tex. Civ. App. 1896) 33 S. W. Rep. 768.

May Convey Community Title.—When the wife is abandoned by the husband, and the condition of the title to the community property is such that the wife, to save anything from the property, must sell or otherwise dispose of it, she may convey the community title. *Woodson v. Massenberg*, 3 Tex. Civ. App. 146.

Succeeds to Husband's Right of Management.—When abandoned the wife occupies much the same relation to community property as the husband ordinarily does, and she succeeds to his right of management. *Queen Ins. Co. v. May*, (Tex. Civ. App. 1896) 35 S. W. Rep. 829.

May Sue for Injury to Herself.—She may sue in her own name for an injury to herself. *St. Louis, etc., R. Co. v. Griffith*, (Tex. Civ. App. 1896) 35 S. W. Rep. 741.

Insanity of Husband.—But the insanity of the husband will not authorize the wife to convey community property. The law makes express provision for the management of his estate in such an emergency. *Cason v. Laney*, (Tex. Civ. App. 1894) 27 S. W. Rep. 420; *Heidenheimer v. Thomas*, 63 Tex. 291.

4. **Beneficial Interests Equal**—*Texas*.—The doctrine of the text has been often stated and applied to a great variety of circumstances and conditions. Its chief qualification is that the equitable or beneficial interests are equal; the legal title being in the spouse to whom the title is conveyed. *Fullerton v. Doyle*, 18 Tex. 4; *Zimpelman v. Robb*, 53 Tex. 274; *Cullers v. James*, 66 Tex. 494; *Johnson v. Harrison*, 48 Tex. 268; *Garner v. Thompson*, 1 Tex. Law Rev. 286; *Edwards v. Brown*, 68 Tex. 329.

Statement of Rule.—"It is settled law in this state that the interests of the husband and wife in the community property are equal whether the deed be taken in the name of either or in the name of both. * * * And there are decisions of our courts in which the title of the wife or of her heirs in the common estate held in the name of the husband is denominated a legal title. *Johnson v. Harrison*, 48 Tex. 268; *Garner v. Thompson*, 1 Tex. Law Rev. 286. But, as we take it, by this must be meant the wife or her heirs have beneficial title in fee simple which, save as to the husband's power of management and disposition during her life and power to sell for the payment of community debts after her death, is in no degree subordinate or inferior to his right." *Edwards v. Brown*, 68 Tex. 329.

4. Rule in California — *a*. THE HUSBAND. — In this state the only limitation on the husband's absolute dominion over community property, both real and personal, is that he shall not make gifts or convey without consideration except with the wife's consent,¹ nor convey the community property with

1. Husband's Rights — California. — *Panaud v. Jones*, 1 Cal. 490; *Tryon v. Sutton*, 13 Cal. 490; *Van Maren v. Johnson*, 15 Cal. 312; *De Godey v. Godey*, 39 Cal. 157; *Packard v. Arellanes*, 17 Cal. 525; *Fuller v. Ferguson*, 26 Cal. 547; *Greiner v. Greiner*, 58 Cal. 115; *Gwynn v. Dierssen*, 101 Cal. 563; *Washburn v. Washburn*, 9 Cal. 476; *Lord v. Hough*, 43 Cal. 581.

Statement of Rule. — "During the marriage the husband is the head of the community, and the law invests him with discretionary power in all matters pertaining to its business or property. In fact its business is conducted * * * in his name, and his authority in the administration of its affairs is exclusive and absolute. The wife has no voice in the management of these affairs, nor has she any vested or tangible interest in the community property. The title to such property rests in the husband, and for all practical purposes he is regarded by the law as the sole owner. It is true the wife is a member of the community, and entitled to an equal share of the acquets and gains; but so long as the community exists her interest is a mere expectancy and possesses none of the attributes of an estate either at law or in equity. This was held in *Van Maren v. Johnson*, 15 Cal. 312, where the interest of the wife was compared to that which an heir may possess in the property of his ancestor." The question considered by the court in this case was whether, upon a dissolution of the community by the death of the wife, one-half of the community property was subject to the control of the administrator of the wife's estate. The court held it was not, and in the course of its opinion used the language above quoted in defining the nature of the husband's interest during marriage. *Packard v. Arellanes*, 17 Cal. 538.

"It is true that the interest of the wife therein [in the community property] pending the marriage has been termed a mere expectancy; * * * but while perhaps no other technical designation would so nearly define its character, it is at the same time an interest so vested in her as that [the] husband cannot deprive her of it by his will, * * * nor voluntarily alienate it for the mere purpose of divesting her of her claims to it. * * * Her * * * right in the community property is as well defined and ascertained in contemplation of law, even during the marriage, as is that of the husband." The husband is held to have the power of management and control, and may convey the community property; but these powers are intended to be exercised for the benefit of the community, not to defraud it. This case was begun by the plaintiff against the defendant for a partition of the community property acquired by them during their marriage. In a previous action, begun by the husband against the wife, a divorce from the bonds of matrimony had been granted, but in granting the divorce there was no division of the community property, and no action of the court in relation

thereto. The wife's present right to one-half the property was upheld by the court. *De Godey v. Godey*, 39 Cal. 164.

The reader will notice the difference between the right of the wife to her community interest when the marriage is annulled by a decree of divorce and she is still living, and the rights of the wife's heirs when the marriage is dissolved by the wife's death and the husband survives her. See *Packard v. Arellanes*, 17 Cal. 538.

In California Prior to March 31, 1891, the husband's power of disposition over community property was defined in the following terms: "The husband has the management and control of community property, with the like power of disposition (other than testamentary) as he has of his separate estate." Civil Code, § 172.

Amendment to Code. — On the date above mentioned an amendment was added to this section, reading as follows: "Provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto."

Gift of Community Property by Husband. — In an action involving the husband's right to make a gift of community property acquired prior to the amendment, the court reviewed at length the California cases, and entered into an exhaustive consideration of the nature of community property, and of the husband's as well as the wife's right therein during the community. The court used this language: "Now, then, we have this state of the case: The statute provides that the husband and wife may hold property as community property. § 161. It defines what shall constitute community property. It defines ownership (§ 654), and then gives to the husband complete legal ownership of the community property (§ 172), and confers upon the wife no element of ownership whatever. Courts and counsel have occasionally endeavored to find some property right in the wife, or some respect in which the husband's interest falls short of full property. I think it will be universally admitted that so far there has been a complete failure in this respect. The first attempt shown by our reports of that kind is in *De Godey v. Godey*, 39 Cal. 157. In that case it is said that while no other technical term so well defines the wife's interest as the phrase 'a mere expectancy,' * * * it is at the same time * * * so vested in her that [the] husband cannot deprive her of it by his will nor voluntarily alienate it for the mere purpose of divesting her of her claim to it." The testamentary power is not an essential incident to property, and depriving the husband of such power with reference to the community estate did not take from him any right of property. It was competent for the legislature to deny to the husband the right to dispose of his separate estate by will, and to provide that upon his death all should go to

intent to defraud her.¹

b. THE WIFE. — The wife has no recognized power over community property during the existence of the community.²

c. HUSBAND'S PROPRIETARY INTEREST. — The husband's proprietary interest is little short of absolute ownership.³

d. WIFE'S PROPRIETARY INTEREST. — The wife's interest has been reduced to the minimum. It is said to be a mere expectancy.⁴

5. **Rule in Nevada and Idaho.** — In these states the husband has the same absolute dominion over community property, both real and personal, as in *California*. And the rights of the wife are believed to be substantially as defined by the codes and jurisprudence of the latter state.⁵

6. **Rule in Washington** — a. A DUAL SYSTEM. — In this state, in the management of community property as well as in its liability for debts, a dual system has been created.⁶ While "the husband has the management and control of the community real property" he cannot convey or encumber it unless the wife join with him in executing the deed or other instrument of conveyance or incumbrance. The community real estate is liable, however, for community debts and mechanic's and material men's liens, and the husband has, of course, full power to contract these debts.⁷

his widow subject to the payment of his debts. Should the legislature now so provide it would not deprive the husband of any vested right to property, or give the wife an interest in his estate during his life. If the property did not belong to the husband there would be no occasion for a law limiting his testamentary power with reference thereto. The original statute, which practically adopted the Mexican system as to gananciales, was held to constitute such a limitation. *Beard v. Knox*, 5 Cal. 256, 63 Am. Dec. 125. That gave the wife a nominal estate during the marriage, which became an actual estate upon its termination. If the husband cannot make a valid transfer of the property for the purpose of depriving the wife of it, that does not show a vested right in her. This is explained in the very case quoted as authority, in *De Godey v. Godey*, 39 Cal. 157. In *Smith v. Smith*, 12 Cal. 217, 73 Am. Dec. 533, Justice Field said: "Voluntary conveyances given on the eve of marriage for the purpose of depriving the intended wife of her right of dower where that common-law right exists are fraudulent as against her claim. * * * And, upon the same principle, a voluntary disposition by the husband of the common property or a portion thereof, for the like purpose of depriving the wife of her interest in the same, must be held ineffectual against the assertion of her claim." Nor can he put his separate property out of his hands for the purpose of defeating his wife in an anticipated application for alimony. *Murray v. Murray*, 115 Cal. 266. So we see a mere expectancy, without any vested property right at the time the fraud was committed, is sufficient to enable the person who has the expectancy to maintain the action after his right has become vested. The husband's ownership of one-half of the community estate is in a sense conditional. It may terminate upon the happening of a possible event. Until then he is, however, absolute owner as defined in the code. Civ. Code, §§ 678-680." The court held that the amendment of March 31, 1891, denying the husband's right to make gifts of community

property, could not apply to property acquired before its passage, for the reason that the husband is the owner of community property, and "a statute which makes the exercise of the right to dispose of it subject to the will of another is unconstitutional." *Spreckels v. Spreckels*, 116 Cal. 339.

1. See second note to subd. *General Rule*, *supra*, this section.

2. See second note, *supra*.

3. See third note, *supra*.

4. See fourth note, *supra*.

5. *Nevada* General Statutes of 1885, § 504; *Crow v. Van Sickle*, 6 Nev. 146; *Idaho* Revised Statutes of 1887, § 2498.

6. See the two notes immediately following.

7. **Rule in Washington.** — "The husband has the management and control of the community real property, but he shall not sell, convey, or encumber the community real estate unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife, provided, however, that all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon, as provided by law in other cases to liens of judgments recovered for community debts and to sale on execution issued thereon." Code of Washington, 1896; 1 Hill's Code, § 1400.

In reference to this act the court uses this significant language: "In somebody must be vested a power in behalf of the community to deal with and dispose of it [the community property]. * * * Management and disposition may be vested in either one or both of the members [of the community]. If in one, then that one is not thereby made the holder of larger proprietary rights than the other, but is clothed, in addition to his or her proprietary rights, with a bare power in trust for the community. This power the statute of 1873 chose to lay upon the husband, while

6. PERSONAL PROPERTY. — As to personal property the husband has the

the statute of 1879 thought proper to take it from the husband and lay it upon husband and wife together." The court further held that, as the power conferred upon the husband by the Act of 1873 was a mere power in trust, it was competent for the legislature of 1879 to take this power from him as to community property previously acquired and assign it to the husband and wife conjointly. The husband alone, therefore, had no power after the passage of the Act of 1879 to enter into a contract to sell the community real estate acquired before the passage of the latter act. Such an agreement is in conflict with the law, and void. The court seems to treat the contract as in violation of the law, and not merely as one executed without sufficient authority. *Holyoke v. Jackson*, 3 Wash. Ter. 239. Compare the reasoning of the court in this case with *Spreckels v. Spreckels*, 116 Cal. 339.

Specific Performance of Husband's Contract for Lease. — And on the authority of *Holyoke v. Jackson*, 3 Wash. Ter. 239, the court refused to compel a specific performance of a contract made by the husband alone to execute a lease of community real estate. *Hoover v. Chambers*, 3 Wash. Ter. 26.

Want of Authority in Husband No Defense Against Claim for Rent. — But where tenants had entered into possession of community real estate under a lease executed by the husband alone, his want of authority to execute the lease was no defense to the tenants' neglect or refusal to pay the stipulated rent. *Isaacs v. Holland*, 4 Wash. 54.

And in an Action by the Vendees in a Land Contract to recover the money paid, alleging that the land was community property and the contract signed by the husband alone, the court held the plaintiffs were not entitled to recover. If the purchasers knew of the community character of the land, and entered into the contract to purchase with the husband alone, they were "wrongdoers or wilful violators of the law," and the contract was absolutely void. But if they had no such knowledge, the contract was not so far void that the purchasers could not maintain an action for damages, but they could not maintain a suit for specific performance. In any event the purchasers should not be permitted to avoid the contract without first giving the husband an opportunity to perform the same or to execute a valid contract wherein all persons interested would be bound. *Colcord v. Leddy*, 4 Wash. 791.

A Man Living in the State, Holding Himself Out as a Single Man, buying and selling land as a single man, his wife living in a distant state, her very existence unknown to those with whom the husband is dealing, she asserting none of the rights of a wife, may make a valid deed of real estate acquired by him after coming to the state. The five judges composing the court agreed to the judgment upholding the deed, but disagreed as to the grounds upon which the judgment shall rest. *Stiles, J.*, with whom *Anders, C. J.*, concurred, held that the legal title to community real estate standing of record in the husband's name is in him, the wife's interest being a mere equity, inferior to the equity of a *bona fide* purchaser for value

from the husband. *Scott, J.*, concurred in the judgment on the ground that the wife was estopped as against a *bona fide* purchaser from the husband; he also doubted whether the statute "should be held to apply where the wife did not become a resident of this state prior to the conveyance." *Dunbar, J.*, concurred on the ground of estoppel, and added that the testimony plainly shows "that there was no actual community existing such as is contemplated by the law," and that the wife by her acts and silence had aided her husband in perpetrating a fraud; but he dissented from the opinion of *Stiles* and *Anders, JJ.*, who held that the wife's interest is a mere equity. *Hoyt, J.*, agreed that the wife was estopped as against a *bona fide* purchaser, and added that, "so far as the public is concerned, such a relation cannot be held to exist without the concurrence of two facts: first, the marriage relation between the members of the community; and, second, some assertion of the rights incident to such marriage relation." The reader will notice that three of the judges concur in upholding the husband's conveyance on the ground of estoppel, each, however, adding other reasons for his opinion, while *Stiles* and *Anders, JJ.*, agree in upholding the deed on the ground that where the title stands of record in the husband's name the wife's interest is a mere equity and must yield to the superior equity of a *bona fide* purchaser from her husband. *Sadler v. Niesz*, 5 Wash. 182.

In a subsequent case, where the facts were substantially the same as in *Sadler v. Niesz*, 5 Wash. 182, the court arrived at the same conclusion as in the latter case. *Scott, J.*, wrote the opinion and placed the judgment upon the grounds, first, of an estoppel against the wife; and, second, that the community relationship did not exist as to those dealing in good faith with the husband in ignorance of the marriage. *Anders, C. J.*, and *Hoyt, J.*, concurred; *Dunbar, J.*, concurred on the ground of estoppel, and *Stiles, J.*, for the reasons stated by him in *Sadler v. Niesz*, 5 Wash. 182. *Nuhn v. Miller*, 5 Wash. 405.

But When the Spouses Live Openly Together as Husband and Wife in this state, no other assertion or notice of her rights is required to be made by the wife; and while the husband and wife are living together the husband's sole deed conveys no interest in community real estate, even though the husband represents himself to be, and the deed describes himself as, a single man. *Adams v. Black*, 6 Wash. 528. In this case the court repudiates the doctrine that when the record title stands in the husband the wife's interest is a mere equity, and seems to hold that the legal title itself is in the community.

Mortgage Executed by Husband. — Upon the authority of *Sadler v. Niesz*, 5 Wash. 182, and *Nuhn v. Miller*, 5 Wash. 405, the court upheld a mortgage executed by the husband alone. From the report of the case it does not appear whether the husband and wife were living together or not. There was some proof that the husband claimed to be a married man, and had so sworn in making his final proof to obtain patent for the land upon which the

same absolute dominion that he has over his own separate property.¹

mortgage was given, but the court held that the preponderance of proof showed no notice to the mortgagee. *Schwabacher v. Van Reyepen*, 6 Wash. 154.

Assignment for Creditors.—But a conveyance by the husband alone of the community real estate in an assignment for the benefit of creditors under the insolvent laws of the state is valid. Such a conveyance places the community real estate in the custody of the court for distribution among those who might by judgment subject the same property to their claims. The deed of assignment "should therefore be considered not as a conveyance, but as one of the methods by which the property may be subjected to the community debts, and that it being in the power of the husband to contract such debts in the prosecution of the business of the community, it is within his power to set on foot the machinery of the law by which its property may be applied to their payment." The husband has the conceded power to confess judgments on community obligations which constitute a lien on community real estate, subject, of course, to the condition that he shall exercise the power in good faith. *Thygesen v. Neufelder*, 9 Wash. 455.

Husband's Interest in Community—Liability for Separate Debt.—The husband has no interest in community real estate separate and apart from the community. His interest is not of such a character that it can be levied upon and sold for his separate debt. *Stockand v. Bartlett*, 4 Wash. 730.

The Wife as a Party to Suits Affecting Community Real Estate.—As a logical result of the rule in this state that the husband, by his sole act, cannot convey community real estate, and that the interest of each spouse is a legal interest, it is held that the wife is not only a proper but a necessary party to all actions involving the title to the community real estate.

Foreclosure of Mechanic's Lien.—Thus, in *Littell, etc., Mfg. Co. v. Miller*, 3 Wash. 480, the wife was held to be a necessary party defendant in an action to foreclose a mechanic's lien upon community real estate. The question was not raised collaterally, but on appeal.

In *Sagmeister v. Foss*, 4 Wash. 320, the same doctrine as to the necessity of joining the wife as a party defendant in an action to foreclose a mechanic's lien was announced, and, in addition, it was held that where the lienor knew of the marriage relation at the time of filing his lien notice he should name the wife with the husband as the owners of the property.

Turner v. Bellingham Bay Lumber, etc., Co., 9 Wash. 484, was an action prosecuted by husband and wife to enjoin the sale of community real estate under a judgment rendered against the husband alone in an action to foreclose a mechanic's lien. The court held the wife to be a necessary party defendant, "and unless she was made a defendant no judgment could be entered by the court upon which a sale could be made that would bind a purchaser to take the property." But the court refused to enjoin the sale and the enforcement of the judgment, and suggested a method of making the judg-

ment effective by proceedings to bring in the wife or by her voluntary intervention. The court seems to assume that the judgment was void, and Hoyt, J., in his dissenting opinion, says: "As it is conceded that no title would pass by a sale under the decree, I can see no good reason why such sale should not be enjoined."

Injuries to Community Realty.—In *Parke v. Seattle*, 5 Wash. 134 Am. St. Rep. 839, it was held that the husband alone could not maintain an action as plaintiff for injuries to community real estate. The wife was a necessary party. The objection for nonjoinder of the wife as party plaintiff was timely made on the trial, and the ruling was made on appeal.

Collateral Attack.—A judgment either for or against the husband as a party without the wife being joined, in a suit involving community real estate, is not necessarily void on a collateral attack. *Lichty v. Lewis*, 63 Fed. Rep. 535, 77 Fed. Rep. 111; *Johnson v. Richmond Beach Imp. Co.*, 63 Fed. Rep. 493; *Leggett v. Ross*, 14 Wash. 41.

The case of *Lichty v. Lewis*, 63 Fed. Rep. 535, was affirmed by the United States Circuit Court of Appeals of the Ninth Circuit, expressly upon the authority of *Leggett v. Ross*, 14 Wash. 41. See *Lichty v. Lewis*, 77 Fed. Rep. 111, for a strong dissenting opinion by Judge McKenna, in which he ably reviews the Washington cases.

A safer rule than that laid down in *Leggett v. Ross*, 14 Wash. 41, would have been to treat the husband as the statutory representative of the interest of both himself and his wife, to community property, and make the judgment against him binding in all cases, subject to be overthrown only on proof of fraud or collusion. Either this, or require her to be joined in all cases, and leave the judgment of no force against her when she is not a party. Either of these rules produces certainty. The rule adopted introduces uncertainty where the utmost certainty obtainable should be sought.

The Wife as a Party to Suits on Community Obligations.—As the logical result of the wife's equal interest in community property, she is a proper party to actions on community obligations. She has a right to controvert the community character of the obligation sued upon, and while the obligation is presumptively a community obligation, the plaintiff may join her, in order to make the presumption a finality, and conclude the community as to the character of the obligation. *McDonough v. Craig*, 10 Wash. 239, *distinguishing* and, as to the propriety of joining the wife as a party, *overruling*, *Commercial Bank v. Scott*, 6 Wash. 499.

And if the wife be not joined, she may, on her own motion, intervene in an action against the husband alone, to contest the character of the obligation, and have it adjudged to be his separate obligation, and the judgment lien limited to the separate real estate of the husband. *Gund v. Parke*, 15 Wash. 393. See *infra*, this title, *Rights and Remedies of Creditors During Community*, for the remedies of creditors against separate and community property.

1. See *supra*, this title, *Separate Estate*; and *infra*, *Proprietary Interests Equal*.

c. PROPRIETORY INTERESTS EQUAL. — As to Real Estate it is clear that the proprietary interests of the spouses are equal, and the right of each is a legal and not merely an equitable estate.¹

As to Personalty. — While the husband has, during the community, the same dominion over its personalty that he has over his own separate estate, it is not clear that these added powers increase his proprietary interest.² Prior to 1879 he had the same complete dominion over community real estate, but his dominion was held to be merely a power in trust, and not to be an increase of his rights as proprietor.³ If this rule be sound, and be applied to personalty, his complete dominion would not subtract from the wife's, nor increase his rights as proprietor, but his increased dominion would be merely a power in trust.⁴

VIII. RIGHTS AND REMEDIES OF CREDITORS DURING THE COMMUNITY —

1. Community Property Liable for Community Debts. — It is universally true that community property is liable for community debts.⁵ The husband being the head and master of the community and alone personally liable for its obligations, and its property being under his dominion and subject to his disposition, he alone need be joined in a suit on a community obligation, and on a judgment against him alone the community property may be taken in execution and sold and a valid title made.⁶

2. Ante-nuptial and Other Separate Debts of the Husband. — Community property is also liable for the ante-nuptial and other separate debts of the husband. This rule prevails in all the community property states and territories (except in *Washington* as to community real estate). This liability is predicated upon the husband's liability for these debts, and his interest in, coupled with his

1. Realty. — *Holyoke v. Jackson*, 3 Wash. Ter. 235; *Sadler v. Niesz*, 5 Wash. 182; *Adams v. Black*, 6 Wash. 528.

2. Code of Washington (1896), § 2154; 1 Hill's Code, § 1399.

3. *Holyoke v. Jackson*, 3 Wash. Ter. 235.

4. *Holyoke v. Jackson*, 3 Wash. Ter. 235. The reasoning of this case is hardly satisfactory. Prior to 1879, the husband held the complete dominion over, and the right by his sole deed to convey or encumber, community real as well as personal property. By the Act of that year it was provided that he should not convey community real estate without the joinder of his wife. This Act was held to be operative as to real estate acquired before its passage, on the ground that the husband had no vested right by his sole deed to convey community real estate, that his right to convey was a mere statutory power held by him in trust for the legal entity known as the community, and that he suffered no loss of vested right by the law which took from him and gave to himself and another the right to convey. The reasoning of this case is opposed to the recent case of *Spreckels v. Spreckels*, 116 Cal. 339, in which it was held that the husband's right to make a gift of community property could not, constitutionally, be taken away from him. Again, the theory that the husband's dominion is a mere power in trust can scarcely be reconciled with the admitted right of his separate creditors to take the community personalty in satisfaction of their demands. With an execution against the trustee, the property of the *cestui que trust* should not be taken.

5. Rights and Remedies of Creditors — *Louisiana*. — In the same manner the debts con-

tracted during marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, while the debts of both husband and wife anterior to the marriage must be acquitted out of their own personal and individual effects. Civil Code, art. 2403 (2372).

Arizona. — Revised Statutes, § 2106.

Texas. — Sayles' Civil Statutes, art. 2164.

Washington. — Code of 1896, § 2155; 1 Hill's Code, § 1400.

6. Judgment Against Husband Alone — *California*. — *Mott v. Smith*, 16 Cal. 553; *Althof v. Conheim*, 38 Cal. Ann. 310; 99 Am. Dec. 363.

Louisiana. — *Prudhomme v. Edens*, 6 Rob. (La.) 64; *Kelly v. Robertson*, 10 La. Ann. 303; *Beigel v. Lange*, 19 La. Ann. 112; *Chauviere v. Fliege*, 6 La. Ann. 56.

In Louisiana not only is the husband alone liable for community debts, but the wife cannot bind herself for their payment. *Draughon v. Ryan*, 16 La. Ann. 309; *Bartington v. Bradley*, 16 La. Ann. 310; *Carroll v. Manning*, 24 La. Ann. 142; *Surls v. Hienn*, 20 La. Ann. 229; *Trudeau v. Row*, 23 La. Ann. 198.

Nevada. — *Crow v. Van Sickle*, 6 Nev. 149.

Texas. — *Scott v. Maynard*, Dall. (Tex.) 548; *Wells v. Cockrum*, 13 Tex. 127; *Shelby v. Perin*, 18 Tex. 517; *Murphy v. Coffey*, 33 Tex. 508; *Jackson v. Cross*, 36 Tex. 193.

Washington. — A debt contracted during the community is presumed to be a community debt, and the judgment recovered against the husband alone is *prima facie* a lien on community real estate, and the sale on such a judgment *prima facie* passes the community title. *Calhoun v. Leary*, 6 Wash. 17; *Curry v. Cattlin*, 9 Wash. 495.

power of disposition over, community property.¹

3. Ante-nuptial and Other Separate Debts of the Wife.—In the common-law community property states it is now established that community property is liable for the satisfaction of the ante-nuptial debts of the wife. The ground of this liability is the husband's common-law obligation to pay the wife's ante-nuptial debts, which has only been displaced to the extent of relieving the husband's separate property, leaving the common property still liable.²

In Louisiana, community property cannot be seized to satisfy an ante-nuptial or separate debt of the wife. Her separate property alone can be taken.³

4. What Are Community Debts.—In none of the codes or statutes has any attempt been made to define, exactly, community obligations. Generally speaking all obligations contracted during marriage are community obligations.¹

1. Ante-nuptial and Other Separate Debts of Husband.—*Van Maren v. Johnson*, 15 Cal. 312; *Vlautin v. Bumpus*, 35 Cal. 214; *Portis v. Parker*, 22 Tex. 699; *Guice v. Lawrence*, 2 La. Ann. 226; *Davis v. Compton*, 13 La. Ann. 396; *Hawley v. Crescent City Bank*, 26 La. Ann. 230.

"As the husband has the right to alienate the effects of the community without the consent of his wife, creditors of the husband before marriage ought also to have the right to seize the effects of the community to satisfy their claims." *Davis v. Compton*, 13 La. Ann. 396.

2. Ante-nuptial and Other Separate Debts of Wife.—*Van Maren v. Johnson*, 15 Cal. 312; *Vlautin v. Bumpus*, 35 Cal. 214; *Taylor v. Murphy*, 50 Tex. 291; *Lee v. Henderson*, 75 Tex. 190.

Taylor v. Murphy, 50 Tex. 291, was a case involving the liability of community property for the ante-nuptial debts of the wife. The court, after reviewing at length the cases of *Roundtree v. Thomas*, 32 Tex. 286; *Nash v. George*, 6 Tex. 234; *Callahan v. Patterson*, 4 Tex. 64, 51 Am. Dec. 712; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769; *Booth v. Cotton*, 13 Tex. 364, supposed to announce doctrines or contain *dicta* contrary to the contention that community property is liable for the ante-nuptial debts of the wife, proceeds to say: "The examination of these cases shows, as we think beyond all question, that the court did not, as before said, authoritatively decide in either of them that the husband is not liable for the debts of the wife contracted before marriage; at least, in the broad and unqualified sense in which the proposition has been stated. That it did not intend in announcing this general proposition to deny the liability of the community property for the payment of such debts, is certainly beyond all question, when we look at what is said by Judge Hemphill in *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769, and especially in *Nash v. George*, 6 Tex. 234. The court evidently intended, as we think, merely to deny the personal and unqualified liability of the husband for the ante-nuptial debts of the wife. The chief ground of the common-law liability of the husband for such debts seems to be supposed by the court, in the cases referred to, to be that by marriage the husband acquires all of the wife's personal property and a freehold estate in her lands as well as the absolute-right to all that she may earn during the marriage. That the difference between the common law and our

statutes defining marital rights may and should be held to operate a corresponding change in the husband's responsibilities, we have no hesitancy in admitting. But we may ask, should the common law be held to be repealed by this mere implication to any greater extent than the husband has been deprived by the statutes of the property of the wife and proceeds of her labor, to which he would otherwise have had to meet the liabilities and burdens imposed upon him by the common law? * * * At common law, though the wife has no property, the husband becomes immediately liable for her debts because he is entitled to all she may earn during the marriage. Now, with us the wife is supposed to be an equal contributor to the community estate. At least, the revenues and profits derived from her separate estate, as well as whatever she may acquire by her industry and labor during coverture, become a part of it and are subject to the uncontrolled possession and disposal of the husband. Is it unreasonable, then, to hold that he is liable for the ante-nuptial debts of the wife to the extent of the community estate in his hands?"

3. Rule in Louisiana.—*Flogny v. Hatch*, 12 Martin (La.) 84; *Waters v. Wilson*, 3 Martin N. S. (La.) 139; *Greenlee v. Penny*, 1 La. 243; *State Bank v. Wilcox*, 2 La. Ann. 344.

In an action against both the husband and wife, on a note given by the wife before marriage, it was contended that a demand should have been made on the husband, as well as on the wife, under a law of Louisiana requiring an amicable demand to be made before suit. The court said: "The only inquiry, then, in the case before us is, who was debtor—husband or wife? The law has furnished the answer: husbands are not responsible for the debts of their wives contracted before marriage, nor wives for those of their husbands; each must be acquitted out of their own personal and individual effects. * * * The husband is cited merely to aid the wife in her defense, and no judgment should be rendered against him. We have already seen it [the judgment] must be satisfied out of the wife's effects." *Flogny v. Hatch*, 12 Martin (La.) 84.

In the absence of some act of his, binding himself to pay his wife's ante-nuptial debts, the husband "is certainly not bound to pay the debts contracted by his wife before coverture." The judgment was rendered against the wife alone. *Waters v. Wilson*, 3 Martin N. S. (La.) 139.

4. See Civil Code (La.) art. 2403; *McDonough v. Craig*, 10 Wash. 239; *Calhoun v. Leary*,

In Washington, due to the exemption of community real estate from liability for other than community debts,¹ considerable litigation has arisen over what is a community debt. The term has not been exactly defined, but the following have been held not to be community obligations, for which community real estate may be sold: A judgment for the husband's tort;² ante-nuptial debts of the spouses;³ a suretyship obligation contracted by the husband in reference to his separate property;⁴ a debt contracted by the husband in another state, before his removal to this state, in the prosecution of a business which under the laws of the former state was his separate business;⁵ an indebtedness contracted by the husband to a real-estate broker, whom he employed, without authority of the wife, to procure a purchaser for com-

6 Wash. 17; Oregon Imp. Co. v. Sagmeister, 4 Wash. 710.

In none of the community property states except *Washington* will the question of what is a community debt be of much practical importance to creditors. A community obligation, so called, is also the separate debt of the husband, and the creditor may resort to either the community property or the husband's separate property for satisfaction; but not to the separate property of the wife.

And the creditor whose debt is the separate debt, so called, of the husband, may take community property in execution for its satisfaction. (Except in *Washington*, where community real estate is not liable except for community debts; see *supra*, this title, *Character of Interest and Right of Each Spouse During the Community — Rule in Washington*.)

The question may become important when the marshaling of separate and community debts and property is decreed, with a view of applying community property to the payment first of community debts; but the courts have not attempted a definition of separate debts.

1. See *supra*, *Rule in Washington*, where the statute is given at length.

2. **Judgment for Husband's Tort.**—Brotton v. Langert, 1 Wash. 73. In this case the husband, as constable, levied upon and sold certain chattels subject to a mortgage, in disregard of the rights of the mortgagee, and thereby subjected himself to a liability in favor of the latter. The court held that the judgment recovered for this wrong was not a community debt, and that under the statute (Code of *Washington*, 1896, § 2155; Hill's Code, § 1400) community real estate could not be sold for its satisfaction. There was a dissenting opinion by Stiles, J., which presents in a strong light the objections to the doctrine of this case. The fees earned by the husband as constable certainly belonged to the community, and if the fees earned in making this tortious sale had been invested in real estate, it would be a strange perversion of justice to permit the community to hold this property against one who had suffered a wrong committed in the service of the community in earning the fees which purchased the real estate. If the doctrine of this case be limited to those torts committed by the husband, which do not and cannot enrich the community, such as slander, libel, assault and battery, etc., no great amount of injustice would be done; but where the wrong is committed by the husband in procuring or attempting to procure property,

the community ought to be liable, and all its property, real and personal, subject to the judgment.

In the subsequent case of *Oudin v. Crossman*, 15 Wash. 519, in an action against both husband and wife to recover the money paid for a worthless mine, community property, the title to which stood in the wife's name, the false representations on the sale having been made by the husband, it was held that a judgment against both husband and wife was proper. *Brotton v. Langert*, 1 Wash. 73, was not referred to, nor did the court discuss the liability of community real estate to the judgment, but the form of the judgment was such that community real property might certainly be levied upon in satisfaction.

3. See *supra*, this section, the two subdivisions immediately preceding.

4. **Suretyship Obligation by Husband.**—*Spinning v. Allen*, 10 Wash. 570; *Horton v. Donohoe Kelly Banking Co.*, 15 Wash. 399.

In the case first cited the court decided that a suretyship debt contracted by the husband, not in the prosecution of a community business, and without benefit to the community, was his separate debt, and the judgment recovered thereon not a lien on community real estate. The debt contracted was as surety for a corporation, in which the husband held stock as his separate property. This latter fact does not appear in the opinion, but is referred to in the case of *Horton v. Donohoe Kelly Banking Co.*, 15 Wash. 399, where a suretyship debt contracted by the husband, as surety for a corporation, in which he held stock as community property, was held to be a community debt, and the judgment a lien on community real estate.

5. **Debt Contracted by Husband in Another State in Separate Business.**—*La Selle v. Woolery*, 14 Wash. 70, 11 Wash. 337.

The debt referred to in this case was contracted by the husband while doing business in Wisconsin. By the laws of that state the business and the property acquired in its prosecution were his separately, and the debt, therefore, his separate debt. The real estate which the court held was not subject to this debt was procured in Washington after removal to the latter state. The opinion does not show how the real estate was acquired, but the record discloses that it was not obtained by purchase with funds obtained by the husband under the laws of Wisconsin, for in that event the real estate would have been his separate property, and liable for his debts.

munity real estate.¹

IX. DISSOLUTION OF THE COMMUNITY. — The community is dissolved by a judgment dissolving a putative marriage;² in *Louisiana*, by a judgment for separation of property,³ or a judgment giving to the heirs of an absentee provisional possession of his estate;⁴ by divorce, either from bed and board or from the bonds of matrimony;⁵ by the death of either spouse.⁶

Parties Cannot Dissolve. — The spouses cannot by their own act or agreement dissolve the community. Nor will mere desertion by either spouse, not followed by a judgment of divorce or separation, produce that result.⁷ But the wife by abandoning her husband and living in adultery with another will forfeit her interest in the community.⁸

Disposition of Property on Divorce. — On a dissolution of the community by divorce, generally the property belonging to the marital partnership will be divided equally between the former partners.⁹ But in some of the states the courts in granting the divorce and dividing the common property may take into account the abilities and the necessities of each spouse and make such partition as the peculiar facts and equities of the case may warrant.¹⁰

X. RIGHTS AND POWERS OF THE SURVIVOR — 1. **Rule in Louisiana** — *a. THE HUSBAND AS SURVIVOR* — **Liquidation and Settlement.** — For the purposes of liquidation and settlement only, the community is said to have a fictitious

1. *McGlauffin v. Merriam*, 7 Wash. 112. The court said: "The husband, having no authority to sell community real estate, cannot bind the same for any indebtedness incurred by him in employing a broker to find a purchaser therefor, and consequently the judgment obtained by respondent Merriam was not a charge upon the community lands." This quotation shows the grounds of the court's judgment, but it would seem that the employment of a broker to find a purchaser for community real estate came within the range of the husband's power of management which is given him, rather than within the range of the power to sell which is forbidden him.

2. **Dissolution of the Community.** — *McCaffrey v. Benson*, 40 La. Ann. 10.

3. *Bransford v. Bransford*, 46 La. Ann. 1214; *Spencer v. Scott*, 46 La. Ann. 1209; Civil Code La., arts. 2425 to 2437, both inclusive; *Rogge's Succession*, (La. 1897) 21 So. Rep. 170.

4. Civil Code La., arts. 57, 75.

5. *McLeran v. Benton*, 31 Cal. 33; *Rogge's Succession*, (La. 1897) 21 So. Rep. 170.

6. *Ryan v. Fergusson*, 3 Wash. 356; *Johnston v. San Francisco Sav. Union*, 75 Cal. 134, 7 Am. St. Rep. 129; *Newman v. Cooper*, 46 La. Ann. 1485.

Spanish Mexican Law. — "Art. 56. — The community is dissolved:

"1. By the death of one of the spouses.

"2. By the confiscation of the property of one of them.

"3. By the separation from bed and board.

"Art. 57. — The dissolution by death takes effect from the moment of its occurrence, although the heirs of the deceased spouse continue to live with the survivor. * * *

"Art. 59. — Confiscation dissolves the community from the moment the decree becomes executory, but such decree does in no manner affect the share belonging to the other partner. * * *

"Art. 68. — The wife loses her matrimonial gains in the following cases:

"1. When she has been guilty of adultery.

"2. When she has abandoned her husband without his consent.

"3. When she has joined some religious sect and therein married or committed adultery.

"Art. 69. — The widow likewise forfeits her portion of the matrimonial gains by leading a dissolute life." Schmidt's Civil Laws of Spain and Mexico.

7. **A Mere Voluntary Separation** will not dissolve the community. "The law wisely refuses any legal effect to a voluntary separation of those who are bound by the most solemn of obligations to live together." *Cole v. His Executors*, 7 Martin N. S. (La.) 41, 18 Am. Dec. 241.

8. *Wheat v. Owens*, 15 Tex. 241, 65 Am. Dec. 164. In this case was involved the right in community property of a wife who had, without any wrong on the part of the husband, abandoned him and lived in open adultery with another. Because of her adultery the court held that she had forfeited all her interest in the community property. The court's opinion may be reduced to the following proposition:

1. While "continued absence would defeat a claim in an ordinary partnership to a share of the profits, the absence merely of the wife will not forfeit her share of the matrimonial gains."

2. The separation of husband and wife by mutual consent will not dissolve the community nor deprive the wife of her share of the matrimonial gains.

3. But the wilful abandonment by the wife of her husband "in violation of her conjugal duties and relations" will work a forfeiture of all her rights in the subsequent gains.

9. *Bovo v. Bovo*, 63 Cal. 77; *De Godey v. Godey*, 39 Cal. 164; *Gratton v. Weber*, 47 Fed. Rep. 852.

10. *Arizona*. — Revised Statutes of 1887, § 2114.

California. — Civil Code, §§ 146, 147.

Nevada. — General Statutes of 1885, § 510.

Washington. — Code of 1896, § 5124; 2 Hill's Code, § 771.

continuance after its actual dissolution by the death of the wife.¹ To the husband as survivor the creditors of the community apply for the settlement and payment of their claims.²

Custody and Control.—For the purpose of liquidating the community and settling its affairs, the husband, as survivor, retains the custody and control of the community property. In his capacity as survivor he may waive prescriptions on community obligations, and extend the payment thereof by giving new notes or obligations, without discharging the community.³

Creditors May Proceed Against Husband Alone.—Without the joinder of the wife's heirs or personal representatives he may stand in judgment as the representative of the community, and community creditors may proceed against him alone as defendant and recover judgment, on which community property may be validly sold and good title made as against the wife's heirs.⁴

1. Louisiana — Fictitious Continuance for Purposes of Settlement. — Hooke's Succession, 46 La. Ann. 353; Dumestre's Succession, 42 La. Ann. 411; Factors, etc., Ins. Co. v. Levi, 42 La. Ann. 434; Landreaux v. Louque, 43 La. Ann. 234 (see cases cited); Cason's Succession, 32 La. Ann. 792.

2. Verrier v. Loris, 48 La. Ann. 717.

3. Husband's Custody and Control. — Lawson v. Ripley, 17 La. 242; Depas v. Riez, 2 La. Ann. 30; McLean's Succession, 12 La. Ann. 222; Hart v. Foley, 1 Rob. (La.) 378; Fortier v. Slidell, 7 Rob. (La.) 398; Baird v. Lemee, 23 La. Ann. 424; Rusk v. Warren, 25 La. Ann. 314; Vinson v. Vives, 24 La. Ann. 336; Ricker v. Pearson, 26 La. Ann. 391; Brown v. Jacobs, 24 La. Ann. 526.

4. Creditors May Proceed Against Husband Alone as Defendant. — Verrier v. Loris, 48 La. Ann. 717; Smith's Succession, 9 La. Ann. 107; Richard v. Deuel, 11 Rob. (La.) 508; Davidson v. Davidson, 28 La. Ann. 270; Hood's Succession, 33 La. Ann. 467; Vinson v. Vives, 24 La. Ann. 336; Hawley v. Crescent City Bank, 26 La. Ann. 230; Ricker v. Pearson, 26 La. Ann. 391; Riley v. Condran, 26 La. Ann. 294; Randolph v. Chapman, 21 La. Ann. 486.

Review of Louisiana Cases.—In the case of Verrier v. Loris, 48 La. Ann. 717, the controversy arose between the administrator of the deceased wife's succession and the surviving husband. The controversy involved the right of the deceased wife's administrator as well as the rights of the surviving husband over community property. The court enters into an extensive review of the Louisiana cases, omitting none of the important ones, and as to the rights of the surviving husband may be taken as settling definitely the law of Louisiana. The writer can do no better than to present the review of the Louisiana cases in the language of the court: "The most recent and most pertinent expression of this court on the subject is to be found in Hewes v. Baxter, 46 La. Ann. 1281, in which the chief justice, in speaking for the court, said: 'Defendant's theory that when the community of acquets and gains is dissolved by the death of the wife, and her succession has been opened and a testamentary executor appointed thereto, that the community property passes into the possession and under the control of this executor and the community has to be settled and liquidated in the wife's succession by and through an administration of the executor is not correct.'

* * * The opinion expressed in Hewes v. Baxter * * * is not only well stated, * * * but it is in keeping with the uniform jurisprudence of this court. In Hooke's Succession, 46 La. Ann. 353, it was held that a creditor of a community cannot compel an administration of the wife's succession, but his remedy is to proceed against the surviving husband and against the community property for the satisfaction of the claim. * * * In Cason's Succession, 32 La. Ann. 790, it was said that 'community creditors are under no necessity to provoke its liquidation through the medium of the wife's succession, because it is settled they may disregard the wife's interest and proceed directly against the community property in the possession of the husband, contradictorily with him alone.' In Landreaux v. Louque, 43 La. Ann. 234, this court recognized the right of a community creditor to foreclose a mortgage by executory proceedings conducted against the surviving husband alone, without citation or notice to the heirs of the deceased wife. To the same effect are Poutz v. Bistes, 15 La. Ann. 636, and Killelea v. Barrett, 37 La. Ann. 865. In Lawson v. Ripley, 17 La. 238, it was held that when the community is dissolved by the death of the wife the surviving husband is usually applied to for the satisfaction of community debts. In Rusk v. Warren, 25 La. Ann. 314, it was held that the death of the wife does not deprive the surviving husband of the right to make *bona fide* settlements for the payment of the debts of the community. In Hawley v. Crescent City Bank, 26 La. Ann. 230, the court said: 'Upon the dissolution of the community by the death of the wife the responsibility of the husband in regard to the community debts is not changed. He is absolutely and personally bound for their payment, and his separate property may be seized and sold for their acquittal. This being his position, he has under his control the community property which by law is expressly subjected to the payment of the community debts; and he has, so far as the final settlement and liquidation of the community after its dissolution is concerned, the same rights he had during its existence, because he is, after dissolution, under the same responsibilities for the community debts that he was before the dissolution. It is but just that he should have these powers (because) the community property continues under his control until the debts are paid.' In Vinson v.

As to Conveyances. — But the husband, as survivor, has no authority, by his own act, to convey community property; he can convey no more than his own moiety.¹

b. THE WIFE AS SURVIVOR. — The wife as survivor may renounce the community and escape all liability for its obligations. Her acceptance makes her liable for one-half the community obligations.²

2. Rule in Texas — *a. THE HUSBAND AS SURVIVOR* — **Trustee.** — The husband as survivor becomes a trustee for the community with much the same powers as the surviving partner in a mercantile partnership.

Completion of Contracts to Convey Community Lands. — He may complete by deed the performance of contracts to convey community lands entered into before the wife's death, even when the contract has not been strictly performed by the vendee.³

Discharging Community Obligations. — For the purpose of discharging community obligations he may convey and make good title to community property, either real or personal.⁴

Vives, 24 La. Ann. 336, it was held that the surviving husband had the legal right to collect community debts because he was owner of one half of the community property and usufructuary of the other; and the court recognized and maintained as legal and binding a compromise which he had made with a debtor of the community, subsequent to the death of his wife, of a large mortgage debt. * * * It was decided in *Baird v. Lemee*, 23 La. Ann. 424, that a community creditor may seize and sell, under execution conducted against the surviving husband alone, property of the community in satisfaction of a judgment, and that the heirs of the deceased wife had no interest or right to enjoin the sale. In *Ricker v. Pearson*, 26 La. Ann. 391, it was held that community property having been sold under execution against the surviving husband in the collection of a community debt, the heirs of the deceased wife had no standing in court to annul the sale or to claim an interest therein. To the same effect is *Riley v. Condran*, 26 La. Ann. 294. And finally it was decided in *McLean's Succession*, 12 La. Ann. 222, that an administration of the deceased wife's estate was unnecessary for the purpose of divesting that of the community and vesting a complete title in a purchaser in the property sold. This principle was again announced in *Brown v. Jacobs*, 24 La. Ann. 526."

1. As to Conveyances of Community Property. — *German v. Gay*, 9 La. 584; *Griffin v. Waters*, 1 Rob. (La.) 149; *Stewart v. Pickard*, 10 Rob. (La.) 18; *Petrie v. Wofford*, 3 La. Ann. 562; *Calvit v. Mulhollan*, 12 Rob. (La.) 266; *Hart v. Foley*, 1 Rob. (La.) 378; *Walker v. Kimbrough*, 23 La. Ann. 637; *Glasscock v. Clark*, 33 La. Ann. 584; *Smith v. Dorsey*, 5 La. Ann. 381; *Biossat v. Sullivan*, 21 La. Ann. 565; *Bennett v. Fuller*, 29 La. Ann. 666.

The last case overrules a previous case (*Williams v. Fuller*, 27 La. Ann. 634) which seemed to decide that the husband as survivor had the power by his own act to convey community property.

2. Louisiana — The Wife as Survivor. — Both the wife and her heirs or assigns have the privilege of being able to exonerate themselves from the debts contracted during the marriage by renouncing the partnership or

community of gains. Civil Code, arts. 2410, 2414 (2379).

The wife who renounces loses every sort of right to the effects of the partnership or community of gains. But she takes back all her effects, whether dotal or extra-dotal. Civil Code, art. 2411 (2380).

The wife who has taken an active concern in the effects of the community cannot renounce the same. Acts which are simply administrative or conservatory do not come in this article under the denomination of active concern. Civil Code, art. 2412 (2381).

The surviving wife who wishes to preserve the power of renouncing the community of gains must make an inventory within the delays and with the formalities prescribed for the beneficiary heir. Civil Code, art. 2413 (2382).

She ought also to make her renunciation within the same delays which are allowed for the beneficiary heir to explain his intentions. After the expiration of these delays she may be in the same manner forced to make her decision, and judgment may be rendered against her as a partner unless she renounces. Civil Code, art. 2414 (2383).

3. Texas — Husband May Complete Contracts to Convey Realty. — *Stramler v. Coe*, 15 Tex. 211; *Brewer v. Wall*, 23 Tex. 585, 76 Am. Dec. 76; *Primm v. Barton*, 18 Tex. 206.

The husband as survivor of the marital partnership has the right to complete a transaction begun by him before the death of the wife. When during the community he has entered into a contract to convey community land, he may, after the death of the wife, make a deed in pursuance of the contract conveying the entire community interest. *Stramler v. Coe*, 15 Tex. 211, approved in *Brewer v. Wall*, 23 Tex. 585, 76 Am. Dec. 76.

And this power of the husband as survivor was upheld even to the extent of making a deed to a vendee who had defaulted in the payment according to the terms of the contract, but under such circumstances that a court of equity would have been justified in decreeing a specific performance. *Primm v. Barton*, 18 Tex. 206.

4. Discharging Community Obligations. — *Wenar v. Stenzel*, 48 Tex. 484; *Wilson v. Helms*, 59 Tex. 680; *Good v. Coombs*, 28 Tex.

Application of Purchase Money. — The purchaser from him is not bound to see to the application of the purchase money.¹

When There Are No Community Obligations. — But the existence of community obligations constitutes his power of attorney to sell, and in the absence of such obligations he has no power to convey.²

Payment of Husband's Separate Debt. — Whether there are community debts or not, a person who takes a conveyance from a surviving husband, in payment of the husband's separate debt contracted by him after the wife's death, will not get the community title, but only the husband's interest. Such a conveyance is not made in the *bona fide* exercise of the survivor's power to sell.³

Claimant Must Prove Existence of Community Obligations. — Whoever claims through a conveyance of community property made by the survivor must prove the existence of community obligations — must prove the facts which constitute the power to sell.⁴

Lapse of Time — Presumption. — But after the lapse of a long time, the deed having passed unquestioned, a presumption of community obligations will be indulged to uphold the survivor's deed.⁵

b. THE WIFE AS SURVIVOR. — The wife as survivor has the same powers as the surviving husband. But her remarriage revokes her authority.⁶

35; *Randolph v. Junker*, 1 Tex. Civ. App. 517; *Allen v. Bright*, (Tex. Civ. App. 1893) 23 S. W. Rep. 712; *Eastham v. Sims*, 11 Tex. Civ. App. 133.

A Sale of Community Real Estate fairly made by the surviving husband for the purpose of discharging community obligations cannot be questioned by the heirs of the wife. *Wenar v. Stenzel*, 48 Tex. 484. And the survivor may exercise this power and sell community property to reimburse himself for debts due to him by the community. *Wilson v. Helms*, 59 Tex. 680. And in *Good v. Coombs*, 28 Tex. 35, the court, *arguendo*, says: "The right to make sales of the community property would seem to be a necessary consequence of his obligation as survivor to discharge the debts against the partnership, because usually it is only by that means that these debts can be paid."

"Without administration the survivor may sell the real estate belonging to the community estate for the purpose of discharging the debts against the community." *Randolph v. Junker*, 1 Tex. Civ. App. 517.

And where real estate belonging to the community was involved in litigation, and the husband as survivor compromised the suit, and in settlement conveyed part of the real estate involved, retaining the residue, his conveyance as survivor was upheld as a lawful exercise of his powers and his deed conveyed the community interest. *Allen v. Bright*, (Tex. Civ. App. 1893) 23 S. W. Rep. 712.

1. *Eastham v. Sims*, 11 Tex. Civ. App. 133.

2. See the notes preceding.

3. See the notes preceding.

4. **Existence of Debts Not Presumed.** — *Wright v. McGinty*, 37 Tex. 733; *Eastham v. Sims*, 11 Tex. Civ. App. 133; *Brown v. Elmendorf*, (Tex. Civ. App. 1894) 25 S. W. Rep. 145; *Stone v. Ellis*, 69 Tex. 325; *Good v. Coombs*, 28 Tex. 35.

5. **Lapse of Time — Presumption.** — *Johnson v. Harrison*, 48 Tex. 257; *Duncan v. Rawls*, 16 Tex. 478; *Hill v. Parker*, 36 Tex. 650; *Walker v. Howard*, 34 Tex. 478; *Hensel v. Kegans*, 79 Tex. 347; *Moody v. Butler*, 63 Tex. 210; *Simp-*

son v. Brotherton, 62 Tex. 170; *Corzine v. Williams*, 85 Tex. 499, (Tex. Civ. App. 1892) 21 S. W. Rep. 267; *Brown v. Elmendorf*, (Tex. Civ. App. 1894) 25 S. W. Rep. 145; *Veramendi v. Hutchins*, 56 Tex. 421.

6. **Texas — Wife as Survivor.** — *Stone v. Ellis*, 69 Tex. 325; *Ladd v. Farrar*, (Tex. 1891) 17 S. W. Rep. 55; *Corzine v. Williams*, 85 Tex. 499, *reversing* (Tex. Civ. App. 1892) 21 S. W. Rep. 267; *Western Union Tel. Co. v. Kerr*, 4 Tex. Civ. App. 280; *Chambers v. Ker*, 6 Tex. Civ. App. 373; *White v. Waco Bldg. Assoc.*, (Tex. Civ. App. 1895) 31 S. W. Rep. 58; *Brown v. Elmendorf*, (Tex. Civ. App. 1894) 25 S. W. Rep. 145.

The Wife, as Survivor, Before Her Remarriage has the right to pay and discharge community debts and obligations, and to relieve community property from encumbrances; but she has no power to make future contracts binding on the community. *Stone v. Ellis*, 69 Tex. 325.

But a Quitclaim Deed of Community Real Estate executed by the surviving wife, describing herself in the deed as the "surviving widow and heir," in discharge of a mortgage on the property conveyed and in cancellation of the community debts secured by the mortgage is valid and conveys the community interest — not her interest merely. "Her power to sell community property to pay the debt cannot be denied; the property conveyed was not of greater value than the debt; there was nothing unfair or improper in the transaction; in such case her deed conveyed the community title to the lot." *Ladd v. Farrar*, (Tex. 1891) 17 S. W. Rep. 55.

Where Sale Not Made to Pay Community Debts. — But where the evidence shows that the sale was not made to pay community debts, but to relieve the pressing needs of the widow or to purchase implements, etc., the sale of the community interest will not be upheld. The sale is valid only to the extent of the wife's moiety. *Brown v. Elmendorf*, (Tex. Civ. App. 1894) 25 S. W. Rep. 145.

Remarriage. — The surviving wife's remarriage revokes her powers as survivor. *Auer-*

3. Rule in California — *a*. THE HUSBAND AS SURVIVOR. — The husband as survivor, under the present code of California, takes the entire community estate as his own absolutely.¹

***b*. THE WIFE AS SURVIVOR.** — The wife as survivor seems to have no other or greater authority over the community property than has the heir.²

4. Rule in Nevada and Idaho. — These two states have followed the code of *California* very closely. The differences are not sufficient to warrant a difference of decision.³

5. Rule in Washington. — In this state the rights of the survivor as such over community property, except as to his moiety, are neither defined by statute nor recognized by judicial opinion. His right over more than his own moiety has been denied.⁴

bach v. Wylie, 84 Tex. 615; *Llano Imp., etc., Co. v. Cross*, 5 Tex. Civ. App. 175.

The Surviving Wife as Party to Actions. — The wife as survivor may represent the community either as plaintiff or defendant in an action involving community rights. *Western Union Tel. Co. v. Kerr*, 4 Tex. Civ. App. 280; *Chambers v. Ker*, 6 Tex. Civ. App. 373; *White v. Waco Bldg. Assoc.*, (Tex. Civ. App. 1895) 31 S. W. Rep. 58.

Statement of Rule. — *Western Union Tel. Co. v. Kerr*, 4 Tex. Civ. App. 280, was an action brought by the surviving wife on a community cause of action. In its opinion upholding the wife's right to sue, the court said: "The husband, while living, is the manager and representative of the community estate, and suits for the enforcement of rights which belong to it must be brought by him. After his death the wife who survives him is placed by the law in most respects in the attitude of a surviving partner. As such she may retain possession of the common estate and may pay debts with which it is chargeable, and for this purpose may dispose of assets of which it is constituted. She may be sued by creditors holding debts against the community estate, and judgments against her will establish charges against it, and may be satisfied out of it. *Carter v. Conner*, 60 Tex. 53; *Hollingsworth v. Davis*, 62 Tex. 438; *Leatherwood v. Arnold*, 66 Tex. 414. She may exercise this control over the community estate until the appointment of an administrator upon the estate of her husband. Having these powers and being subject to these liabilities, it would seem to follow necessarily that she should be allowed to bring suits to collect and preserve the community estate."

Judgments Rendered For or Against the Survivor are as binding upon those claiming through the deceased as though they were themselves parties to the record. *Western Union Tel. Co. v. Kerr*, 4 Tex. Civ. App. 280; *Woodley v. Adams*, 55 Tex. 531; *Carter v. Conner*, 60 Tex. 60.

Foreclosure of Lien — Husband Dead at Time of Suit. — In an action against husband and wife to foreclose a lien on community real estate service was made by publication. At the time the suit was instituted the husband was dead. The pleadings did not disclose the fact of the husband's death, nor was the action against the wife as survivor. The judgment rendered in the action was nevertheless held binding upon the community, and the sale of the com-

munity real estate made in pursuance of the judgment transferred the community title and bound all parties interested in the community. *White v. Waco Bldg. Assoc.*, (Tex. Civ. App. 1895) 31 S. W. Rep. 58.

1. California — Husband as Survivor. — "Upon the death of the wife the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition goes to her descendants or heirs exclusive of her husband." Civil Code Cal., § 1401.

2. Spreckels v. Spreckels, 116 Cal. 337.

3. Rule in Nevada and Idaho. — "Upon the death of the wife the entire community property belongs, without administration, to the surviving husband, except that in case the husband shall have abandoned his wife and lived separate and apart from her without such cause as would have entitled him to a divorce, the half of the community property, subject to the payment of its equal share of the debts chargeable to the estate owned in community by the husband and wife, is at her testamentary disposition in the same manner as her separate property; and in the absence of such disposition goes to her descendants equally, if such descendants are in the same degree of kindred to the decedent, otherwise according to the right of representation; and in the absence of both such disposition and such descendants, goes to her other heirs at law, exclusive of her husband." Nevada Gen. Stat. 1885, § 508. Idaho Rev. Stat. 1887, § 5712, is identical with Civil Code Cal., § 1401, quoted *supra*.

4. In Washington the right of the surviving spouse by his own act to dispose of more than his moiety of the community property has been uniformly denied. *Ryan v. Fergusson*, 3 Wash. 356; *Lawrence v. Bellingham Bay, etc., R. Co.*, 4 Wash. 664; *In re Hill's Estate*, 6 Wash. 285; *Hill v. Young*, 7 Wash. 33.

The courts of this state have given no judicial recognition to the peculiar doctrine recognized in *Texas* as to the right of either spouse as survivor; nor do the courts recognize the doctrine that prevails in *Louisiana* as to the husband's right as survivor; nor is there any statute similar in character to the provisions quoted from the codes and statutes of *California*, *Nevada*, and *Idaho*.

XI. DISPOSITION OF COMMUNITY PROPERTY BY WILL.—The law of community limits the testamentary power to the testator's moiety.¹ The disposition by will of all the testator's property will not devise or bequeath all the community property, but only his half.² The power of the testator to vest in another than the survivor as executor powers over the survivor's moiety has been denied.³

XII. ADMINISTRATION OF COMMUNITY PROPERTY.—In Louisiana, on the death of the husband, the administration of his succession, if any is granted, draws to it the settlement and liquidation of the community.⁴ On the death of the wife the administrator of her succession has no authority or control over the community property; it remains under the control of the husband for the purpose of settling the affairs of the community.⁵

In Texas a special statutory form of administration for community property is provided, and either spouse as survivor may comply with the statute and administer the community property under it.⁶

In Washington, on the death of either spouse, the administration of his or her estate draws to it the settlement and liquidation of the community.⁷

The case of *Ryan v. Fergusson*, 3 Wash. 356, arose out of a conveyance executed in pursuance of a decree of the Probate Court. The decree was rendered in the probate proceedings on the husband's death. The surviving wife challenged the validity of the deed on the ground that the Probate Court, in the administration of the husband's estate, acquired no jurisdiction over her half of the community property. This contention of the wife the court held to be wrong, and decided that the administration of the husband's estate necessarily involved the administration of the entire community property; and in rendering its opinion the court decided generally that the community is dissolved by the death of either spouse, and that upon the death of either husband or wife the administration of his or her estate necessarily draws to it the administration of the entire community property.

In *Lawrence v. Bellingham Bay, etc.*, R. Co., 4 Wash. 664, this doctrine was announced and approved, though perhaps not necessarily before the court; and in *In re Hill's Estate*, 6 Wash. 285, this doctrine was again approved by the court, and the further doctrine was announced that "a husband or wife cannot appoint an executor to take charge of the community estate to the exclusion of the surviving spouse."

And in the case of *Hill v. Young*, 7 Wash. 33, the court announced the following doctrine: First. The community is dissolved by the death of either spouse. Second. The community property on the death of either spouse vests by moieties in the survivor and the children. Third. Upon the death of the wife the husband's right to dispose of the entire estate terminates.

1. Testamentary Power Limited to Testator's Moiety — California. — *Beard v. Knox*, 5 Cal. 256, 63 Am. Dec. 125; *Buchanan's Estate*, 8 Cal. 507; *Scott v. Ward*, 13 Cal. 459; *Smith v. Smith*, 12 Cal. 216, 73 Am. Dec. 533; *Payne v. Payne*, 18 Cal. 291.

Texas. — *Carroll v. Carroll*, 20 Tex. 731; *Conn v. Davis*, 33 Tex. 203; *Walker v. Howard*, 34 Tex. 510; *Wells v. Petree*, 39 Tex. 420; *Moss v. Helsley*, 60 Tex. 426; *Box v. Word*, 65 Tex. 159; *Weir v. Smith*, 62 Tex. 1; *Mayo v.*

Tudor, 74 Tex. 471; *Haley v. Gatewood*, 74 Tex. 281.

Washington. — *In re Hill's Estate*, 6 Wash. 285.

2. See the note preceding.

3. *In re Hill's Estate*, 6 Wash. 285.

Wife's Election to Take under the Will. — Where the testator devised all his property to his wife and children on equal shares, the wife could claim her half of the community property and her equal share with the children in the testator's half. By such a will the wife is not put to an election. *Carroll v. Carroll*, 20 Tex. 732.

But where the husband had, by his will, assumed to dispose of all the community property, giving to his children special devises, and making other special provisions for them, and giving to the surviving wife during her life a considerable amount of community real estate, appointing her executrix, which office she accepted, and for a long time acted under the terms of the will, it was held to be a case for an election by the widow, and having accepted the special benefit conferred upon her by the will, she was bound by the disposition made thereby. *Wells v. Petree*, 39 Tex. 420. See generally the title ELECTION.

4. Administration — Louisiana. — *Lawson v. Ripley*, 17 La. 239; *McLean's Succession*, 12 La. Ann. 222; *Durham v. Williams*, 32 La. Ann. 162. See *supra*, this title, *Rights and Powers of the Survivor*.

5. See the preceding notes.

6. Texas. — Rev. Stat. Texas (1879), c. 28, arts. 2164, 2183, pp. 318, 319, 320.

The rights conferred upon the survivor by this statute do not restrict but enlarge his powers. If the survivor does not qualify under the statute he will be held strictly as a trustee. *Johnson v. Burford*, 39 Tex. 243; *Lumpkin v. Merrell*, 46 Tex. 51; *Wenar v. Stenzel*, 48 Tex. 484.

7. Washington. — *Ryan v. Fergusson*, 3 Wash. 356; *Lawrence v. Bellingham Bay, etc.*, R. Co., 4 Wash. 664; *In re Hill's Estate*, 6 Wash. 285.

In this last case the court, while adhering to the rule stated in the text, and first announced in *Ryan v. Fergusson*, 3 Wash. 356, held that

In California, Nevada, and Idaho, the husband as survivor takes the entire community estate as absolute owner, and, as a necessary consequence, the heirs or personal representatives of the deceased wife cannot interfere with the community property.¹ On the death of the husband the administration of his estate includes the administration, settlement, and liquidation of the community.²

XIII. RIGHTS OF HEIRS — Subject to Payment of Debts. — Community property descends to the heirs, subject, of course, to the payment of such debts as are legally chargeable against it, including the debts due each spouse.³

An Usufruct in Favor of the Survivor of the community, or a homestead right, or other right peculiar to the local law, may intervene to prevent the immediate enjoyment of the property by the heir; but his right vests on the death of the ancestor.⁴

Gifts Made from Community Property to a prospective heir or devisee will be treated as advancements and charged to the heir as part of his share.⁵

when the wife died first, and her estate was in course of administration at the time of the death of her surviving husband, the executors of the husband, who had assumed to administer the community property, could not be held to the rule of liability of administrators *de son tort*, and that such an administration, while irregular, was not entirely void, and if creditors and heirs and others interested acquiesced in the administration of the community property by the executors of the husband, it might be made a valid administration; and inasmuch as the administrator *de bonis non* of the wife's estate had for one year and a half acquiesced in the irregular administration, he was estopped to assert his personal right to administer the community property. His personal right was held to be lost by his laches. But the court in its opinion leaves open the question of the validity of this irregular administration so far as others interested were concerned, as they were not before the court as parties, nor represented. See *supra*, this title, *Rights and Powers of the Survivor*.

1. See the statutes, and see also the note following.

2. California. — *Thompkins's Estate*, 12 Cal. 114; *Packard v. Arellanes*, 17 Cal. 525; *Ord v. De La Guerra*, 18 Cal. 73.

In *Packard v. Arellanes*, 17 Cal. 525, it was held that the wife's interest in community property is not such an interest as on her death would pass into the hands of her administrator to be dealt with in the administration of her estate, but that it remains in the hands of the surviving husband for the purpose of settling and liquidating the community. Her interest "constitutes neither a legal nor an equitable estate, and there is therefore nothing in it for a court of probate to act upon." The general powers of the courts were held sufficient to afford relief to community creditors and to others interested in the preservation of the property.

But in *Ord v. De La Guerra*, 18 Cal. 73, it was held that the surviving husband administers the property not as owner but as trustee, and that a court of equity has jurisdiction at the suit of an heir of the wife to call upon the husband for an accounting of his management of the community property after the wife's death.

These decisions were made before the enactment of the present code, giving to the husband as survivor the community property absolutely. See the statute.

3. Community Descends Subject to Debts — *California*. — *Panaud v. Jones*, 1 Cal. 490; *Cummings v. Chevrier*, 10 Cal. 519; *Packard v. Arellanes*, 17 Cal. 525; *Ord v. De La Guerra*, 18 Cal. 73; *Payne v. Payne*, 18 Cal. 292; *Burton v. Lies*, 21 Cal. 91; *Jewell v. Jewell*, 28 Cal. 236; *Broad v. Murray*, 44 Cal. 228; *Cook v. Norman*, 50 Cal. 633; *Johnston v. San Francisco Sav. Union*, 75 Cal. 134, 7 Am. St. Rep. 129.

Idaho. — *Jacobson v. Bunker Hill, etc., Min., etc., Co.*, 2 Idaho 863.

Louisiana. — *Gee v. Thompson*, 41 La. Ann. 348; *Dumestre's Succession*, 42 La. Ann. 411; *Tugwell v. Tugwell*, 32 La. Ann. 848; *Glasscock v. Clark*, 33 La. Ann. 584; *Myers v. Brigham*, 34 La. Ann. 1026; *Murphy v. Jurey*, 39 La. Ann. 785; *Bartoli v. Huguenard*, 39 La. Ann. 411; *Dickson v. Dickson*, 36 La. Ann. 453; *Bennett v. Fuller*, 29 La. Ann. 663.

The two following cases, which seem to intimate a contrary doctrine, have been overruled: *Phelan v. Ax*, 25 La. Ann. 379; *Daniel v. Ivy*, 26 La. Ann. 639. See *Bennett v. Fuller*, 29 La. Ann. 663.

Texas. — *Robinson v. McDonald*, 11 Tex. 385, 62 Am. Dec. 480; *Jones v. Jones*, 15 Tex. 143; *Morrill v. Hopkins*, 36 Tex. 686; *Carter v. Wise*, 39 Tex. 273; *Yancy v. Batte*, 48 Tex. 46; *Duncan v. Rawls*, 16 Tex. 501; *Parker v. Parker*, 10 Tex. 96; *Magee v. Rice*, 37 Tex. 501; *Johnson v. Harrison*, 48 Tex. 257; *Porter v. Chronister*, 58 Tex. 53; *Wilson v. Helms*, 59 Tex. 680; *Hill v. Osborne*, 60 Tex. 390; *Rowland v. Murphy*, 66 Tex. 534; *Gilder v. Brenham*, 67 Tex. 345; *Stone v. Ellis*, 69 Tex. 325; *McKenzie v. Ross*, 74 Tex. 600; *Pegues v. Haden*, 76 Tex. 94; *Hoffman v. Hoffman*, 79 Tex. 189; *Brown v. Elmendorf*, 87 Tex. 56; *Cochran v. Sonnen*, (Tex. Civ. App. 1894) 26 S. W. Rep. 521.

Washington. — *Hill v. Young*, 7 Wash. 33.

4. *Dumestre's Succession*, 42 La. Ann. 411.

5. Advancements. — *Maxwell v. Morgan*, 20 Tex. 202; *Sparks v. Spence*, 40 Tex. 693; *Yancy v. Batte*, 48 Tex. 46; *French v. Strumberg*, 52 Tex. 92; *Belcher v. Fox*, 60 Tex. 527.

When the survivor of the marital partner-

XIV. REGISTRY LAWS. — In Texas it is held that the record of a deed to the wife reciting the payment of a valuable consideration and containing no recitals showing her separate right is not of itself notice of title in the wife, to a prospective purchaser from the husband.¹

In Louisiana and California the opposite rule prevails, and inasmuch as real estate standing of record in the wife's name, and presumptively community property, may be shown by parol to be the wife's separate property, the record of such a deed is notice of the wife's rights, and a purchaser from the husband will take the property subject thereto.²

ship conveys community property, the heir who receives his heritable share cannot question the conveyance. *Maxwell v. Morgan*, 20 Tex. 202; *Monroe v. Leigh*, 15 Tex. 519; *Burleson v. Burleson*, 28 Tex. 383; *Conner v. Huff*, 48 Tex. 364; *French v. Strumberg*, 52 Tex. 92.

Gifts made by way of advancement out of community property to a prospective heir or devisee will be collated as between the donee and the other heirs or devisees, but not as between the donor and the heirs of the survivor. *Wilson v. Helms*, 59 Tex. 680. See the title **ADVANCEMENTS**, vol. 1, p. 760.

1. Registry Laws — Texas. — *Oppenheimer v. Robinson*, 87 Tex. 174; *Sinsheimer v. Kahn*, 6 Tex. Civ. App. 143; *Cooke v. Bremond*, 27 Tex. 457, 86 Am. Dec. 626. See the title **RECORDING ACTS**.

Illustrations. — This last case is a leading and oft-quoted case. The plaintiffs were the heirs at law of Catharine N. Cooke; the defendant was a grantee of the husband of Catharine. The plaintiffs alleged that the land in controversy was conveyed to Catharine N. Cooke by her brother, in consideration of natural love and affection, by a deed of gift. The deed expressed a consideration of two hundred dollars and was duly recorded. The defendant claimed as a *bona fide* purchaser from the husband. The court said: "It is true that it is now a well-established and long-recognized rule of procedure in our judicial system, as between the parties to such deeds, their privies in blood, purchasers without value or with notice, to affect the legal import of such deeds by parol evidence. *Smith v. Strahan*, 16 Tex. 314, 67 Am. Dec. 622; *Higgins v. Johnson*, 20 Tex. 389, 70 Am. Dec. 394; *Dunham v. Chatham*, 21 Tex. 231, 73 Am. Dec. 228. But we know of no principle upon which such evidence can be received for the purpose of explaining or modifying such deeds after the property has passed into the hands of innocent purchasers, and thereby engrafting upon it a trust to their detriment. Such a doctrine would go far to destroy the utility of written evidences of title to land and the registration of conveyances for the purpose of notice. The alleged fact that the defendant in error examined the deed to Mrs. Cooke before he purchased the lots is immaterial. The inspection of a deed only charges a party with notice of the facts which its contents import. An inspection of this deed authorized the defendant in error to infer that the property was a part of the community estate of Cooke and wife, and justified him in dealing with it as such. The statute authorizes the husband during its continuance to dispose of all community property. That the title of it, when acquired by the community, was

taken in the name of the wife, imposes no additional burthen upon the purchaser of inquiring as to the equities of the husband and wife in respect to it."

In the case of *Oppenheimer v. Robinson*, 87 Tex. 174, the court, in speaking of a conveyance to the wife during the community, and of the presumption that such property is community property, said: "As to the plaintiff, who purchased without notice of other facts, and paid a valuable consideration, this presumption becomes conclusive. *Cooke v. Bremond*, 27 Tex. 457, 86 Am. Dec. 626. This court has followed the case cited until it has become too well settled to be questioned, no matter what might be the decision if it were an original question in this case."

In *Sinsheimer v. Kahn*, 6 Tex. Civ. App. 143, the court said: "It has also been settled by a long line of decisions of this state that as against a purchaser for value from the husband, or through an execution against him, without notice of the right of the wife, she will not be permitted to hold land upon proof that it was bought with her separate means, or was a gift to her from some other person, unless there be recitals in the conveyance to her that will put such person upon inquiry as to her separate interest in the property; and this rule is enforced although the land be conveyed to her during coverture. Or, in other words, the fact that she is married and the deed is made to her alone without a recital that it is intended for her separate use and benefit does not destroy the presumption that all property acquired during the coverture is community estate." *Citing Cooke v. Bremond*, 27 Tex. 459, 86 Am. Dec. 626; *French v. Strumberg*, 52 Tex. 109; *Parker v. Coop*, 60 Tex. 112.

2. Louisiana and California. — *McComb v. Spangler*, 71 Cal. 418; *Peck v. Brummagim*, 31 Cal. 448, 89 Am. Dec. 195; *Ramsdell v. Fuller*, 28 Cal. 38, 87 Am. Dec. 103; *Morrison v. Wilson*, 13 Cal. 500, 73 Am. Dec. 593, 30 Cal. 344; *Jackson v. Torrence*, 83 Cal. 521; *Gwynn v. Dierssen*, 101 Cal. 563; *Hero v. Bloch*, 44 La. Ann. 1032; *Metcalf v. Clark*, 8 La. Ann. 286.

In *McComb v. Spangler*, 71 Cal. 418, the court said: "In *Ramsdell v. Fuller*, 28 Cal. 38, 87 Am. Dec. 103, it was decided that parties purchasing of the husband real estate deeded to the wife, for a money consideration, during coverture, do so at their peril. The record of the deed to the wife is notice to all the world that the land may be the separate property of the wife, and is sufficient to put purchasers on inquiry; and this notwithstanding the presumption that the land is community property. By parity of reason,

XV. ORDINARY COMMERCIAL PARTNERSHIP BETWEEN THE SPOUSES. — An ordinary commercial or business partnership between husband and wife comes in conflict with the marital partnership at so many points that the two cannot exist together. The ordinary partnership cannot supersede, but is superseded by, the marital partnership.¹

XVI. SPECIFIC PERFORMANCE — Marketable Title. — The law of community may render doubtful, litigious, or unmarketable a title standing of record in the wife's name. This may happen when a conveyance, or an undertaking to convey, assumes either (1) that the property belongs to the separate estate of the wife, or (2) to the community. In the first case the separate claim of the wife will be met with the presumption in favor of the community,² and in the second case, while the property belongs, *prima facie*, to the community,³ the claim of the latter may be overthrown and the wife's separate ownership established by proof;⁴ and the record of her deed (except in *Texas*) is notice of her right.⁵

Presumption in Favor of Community Overcome. — In the first case the title of the wife is not marketable till the presumption in favor of the community has been overthrown and her separate right established by proof.⁶

parties purchasing from the wife real estate deeded to her for a money consideration do so at their peril, notwithstanding the presumption arising from a clause like that in the deed from Brumagim, that the land is her separate property — if, indeed, the clause creates any such presumption — since they take with notice that the land may be community property."

1. Ordinary Partnership Superseded by Marital Partnership. — *Smith v. Bailey*, 66 Tex. 553; *Miller v. Marx*, 65 Tex. 131; *Green v. Ferguson*, 62 Tex. 529; *McKay v. Overton*, 65 Tex. 82; *Cox v. Miller*, 54 Tex. 16; *Wallace v. Finberg*, 46 Tex. 35; *Bradford v. Johnson*, 44 Tex. 381; *Board of Trade v. Hayden*, 4 Wash. 263, 31 Am. St. Rep. 919; *Squire v. Belden*, 2 La. 268; *City Ins. Co. v. Steamboat Lizzie Simmons*, 19 La. Ann. 250; *Pickereil v. Fisk*, 11 La. Ann. 277.

Statement of Rule. — In a suit against the husband and wife, between whom a community existed, and another, as members of a commercial partnership, on a bill of exchange accepted by them, the court said: "This community or legal partnership is so inconsistent with the ordinary commercial partnership that both cannot exist together, and the legal supersedes the commercial. The husband is the head and member of the former. He administers its effects, and may dispose of all the personal property by gratuitous and particular title; * * * the wife and her heirs may exonerate themselves of the partnership debts, * * * and can never be bound but for one-half of them. In the commercial partnership each member may bind or alienate the property of the partnership. * * * Every partner is liable for all the damage which the partnership may sustain by his fault. * * * The partners are bound *in solido* for the debts of the partnership. Although the legal supersedes the commercial partnership, it cannot be superseded by it; for the legal results from the tacit or express agreement of the parties, at the time of the marriage, and they cannot alter their matrimonial agreements after the celebration of the marriage." *Squire v. Belden*, 2 La. 268.

It is only fair to the reader to add that the court in this case supplements its reasons for holding that a commercial partnership cannot exist between husband and wife with the further reason that the wife in Louisiana cannot be bound jointly with her husband for any debt of his, whether a community exists between them or not. Civil Code § 2411.

In the case of the *Board of Trade v. Hayden*, 4 Wash. 263, 31 Am. St. Rep. 919, while the majority opinion of the court does not place the denial of the right of the husband and wife to enter into a commercial partnership on the ground that such a partnership is in conflict with the marital partnership superinduced by the law, the concurring opinion of Scott, J., clearly points out the incompatibility of the commercial with the marital partnership.

In *Texas* "it is now fully established that the wife cannot form a partnership with either her husband or any one else to carry on a mercantile business. * * * In case her separate property is invested in such a partnership, she becomes a creditor of the concern to the extent of her means thus invested, and not a partner." *Smith v. Bailey*, 66 Tex. 553. See generally the title PARTNERSHIP.

2. See *supra*, this title, *Presumptions*.

3. See *supra*, this title, *Presumptions*.

4. See *supra*, this title, *Registry Laws*.

5. See *supra*, this title, *Registry Laws*.

6. Where Presumption in Favor of Community Overcome. — *Bachino v. Coste*, 35 La. Ann. 570; *Coste's Succession*, 43 La. Ann. 144; *Duruty v. Musacchia*, 42 La. Ann. 357; *Rouyer v. Carroll*, 47 La. Ann. 768; *Hero v. Bloch*, 44 La. Ann. 1032; *Rogge's Succession*, (La. 1897) 21 So. Rep. 170.

Bachino v. Coste, 35 La. Ann. 570, was an action to compel a purchaser to accept the property and pay the price. The defendant objected to the title, and defended on the ground that the title was unmarketable. The property in question was purchased by the plaintiff, a married woman, during her marriage. The deed to her recited the source of the consideration and her separate administration, and the husband joined with her in the purchase. The court held that the defendant

Proof of Wife's Ownership. — In the second case the deed of the husband alone (except in *Washington*) is sufficient, *prima facie*, to transfer the title; but his attempted transfer may be overthrown by proof of the wife's separate ownership¹ (except in *Texas*, where the presumption of community ownership is conclusive in favor of a *bona fide* purchaser from the husband.)² Is the community title marketable which, though *prima facie* good, may be overthrown by proof of the wife's separate right, and when the record of her deed is notice (except in *Texas*) of her right? The authorities give no direct answer to the question.

Record Title in Husband's Name — Wife's Death. — Again, the record title of community real estate may stand of record in the husband's name and be apparently good, but by reason of the wife's death one-half has passed to her heirs, and his power to convey is gone except as to his own moiety.³

could not be compelled to accept the title, for the reasons:

1st. He was entitled to "a complete, valid, unclouded title."

2d. The property was *prima facie* community property, and recitals in the deed to the wife did not overcome the presumption as against the defendant. They do not bind creditors, nor force heirs to the extent of their legitimacy.

3d. It was not proven that the husband left no creditors.

"A judgment rendered in plaintiff's favor in this case could conclude neither the creditors of her husband nor his forced heirs," and would not protect the defendant against their claims. (They were not parties to the action.)

In the dissenting opinion of Manning, J., it is stated that the sole controversy was "not that the recitals [in the deed to the plaintiff] were untrue, but that whether true or not, the purchaser could not be forced to accept a title which required a lawsuit to establish that it was good." In *Duruty v. Musacchia*, 42 La. Ann. 357, the plaintiff, a married woman, authorized by her husband, contracted to convey to the defendant certain real property standing in her name. The recitals in the deed to her showed it to be her separate property. A judicial mortgagee (judgment creditor) of the husband was joined as defendant, and the principal controversy was over the validity of constructive service on him, so as to bind him to the judgment rendered. The court said: "Our decision in *Bachino v. Coste*, 35 La. Ann. 570, certainly imposes upon the married woman in such case the duty, and upon the purchaser from her the right, to require her to rebut this presumption [the presumption that the property belongs to the community], and to rebut it contradictorily with those having a right to dispute her title, such as the forced heirs of the husband, if he be dead, and his judicial mortgage creditors."

Prof. Pomeroy relates the following as an actual case arising in California: The wife, with her own separate property, derived by inheritance from her father's estate, purchased land, taking the deed in her own name, but omitting in the deed any recitals showing the source of the consideration, and the deed did not convey the property to her as her separate estate. She held the lands during her own life. The husband's heirs, after his death, claimed an interest in the property as community property, and were likely to succeed

until by accident the wife's heirs discovered proof of the facts that the wife had paid for the land with her separate property. Without right, the heirs of the husband might have succeeded on the strength of the presumption, and the wife's title was saved by the accidental discovery of the necessary proof to show her separate purchase. *West Coast Reporter*, vol. 4, pp. 360-362.

In *Washington*, owing to the provisions of the statute forbidding the husband to convey or encumber community real property without the joinder of the wife, a contract to convey community real estate, signed by the husband alone, will not be decreed to be specifically performed. *Holyoke v. Jackson*, 3 Wash. Ter. 235; *Colcord v. Leddy*, 4 Wash. 791.

But Where the Wife Was a Party to the Negotiations and the bargain to convey or lease community real estate, but not a party to the formally executed contract or lease, and the vendees or lessees have gone into possession and done acts in performance of the contract, specific performance may be decreed against both husband and wife. *Payne v. Still*, 10 Wash. 433; *Konnerup v. Frandsen*, 8 Wash. 551.

1. Proof of Wife's Separate Ownership. — A deed to a married woman reciting the payment of a valuable consideration without recitals showing it to be her separate estate is equivocal in its character. Such a deed, "so far as shown on its face, might have conveyed a title absolute to a *feme sole*, a separate estate to a *feme covert*, or an estate in common to husband and wife." But parties purchasing from the husband do so at their peril, and if the proofs show the purchase money to have been paid from the wife's separate estate the grantee from the husband will get no title. *Ramsdell v. Fuller*, 28 Cal. 38, 87 Am. Dec. 103.

2. See *supra*, this title, *Registry Laws*.

3. Record Title in Husband's Name — Death of Wife. — *Hero v. Bloch*, 44 La. Ann. 1032. This was an action by the surviving husband to compel a purchaser from him, under a contract made after the wife's death, to accept the title and pay the purchase price. The court held that the husband's title only extended to his own half. The other half had vested in the heirs of the wife. The court refused to compel the vendee to accept the title.

Action to Determine Character of Property — Necessity of Joining Parties Claiming Adversely. — If a purchaser mediately or immediately

XVII. CONFLICT OF LAWS — 1. Application of the Law of Community to Nonresidents — a. LOUISIANA. — In the application of the law of community to nonresidents, the legal history of Louisiana may be divided into three periods.

The Three Periods into Which Divisible — First: The Period Ending with the Repeal of the Spanish Laws in 1828. — According to Spanish jurisprudence, the law of community is a real statute, which is interpreted to mean a law applying to and regulating all acquisitions made in the state by married persons, whether resident or nonresident. This provision of the Spanish law was held not to be repealed by, but to remain in force after, the enactment of articles 2399 (2369) and 2401 (2370) of the Civil Code. The Spanish laws were repealed by Act No. 83, Laws of 1828.¹

Second: The Period from 1828 to 1852. — During this period (after the repeal of the Spanish laws) there was no provision of the code supplying the place of the repealed Spanish law which extended the laws of community to acquisitions made in the state by nonresident married persons, and their acquisitions during this period were not placed under the régime of the community.²

from the wife be compelled to accept the title, even after proof that her funds made the purchase, yet the presumption remains, and has not been destroyed, unless those interested in maintaining the community claim are made parties to some action or proceeding in which the character of the property has been fixed by a judgment or decree. A hasty reading of *Bachino v. Coste*, 35 La. Ann. 570, might lead to the conclusion that in such a case the wife should establish her right adversely with those interested in maintaining the community character of the property in question; and *Duruty v. Musacchia*, 42 La. Ann. 357, gives color to the same idea. But these cases, when considered in the light of other cases, will scarcely warrant so sweeping a conclusion. In the case of *Bachino v. Coste*, 35 La. Ann. 570, the opinion discloses that the truth of the recitals showing the wife's separate purchase were not proven (see dissenting opinion), and there was no proof offered that the husband had no creditors. In *Duruty v. Musacchia*, 42 La. Ann. 357, a judicial mortgagee (a judgment creditor) of the husband was, in fact, made a party, and one of the principal controverted questions related to the validity of constructive service on him. The case of *Rouyer v. Carroll*, 47 La. Ann. 768, seems to make important the proof of the wife's separate ownership, but not the joinder of those who claim or might claim adversely. And in *Rogge's Succession*, (La. 1897) 21 So. Rep. 170, the court uses this language: "The principal question presented for determination is whether the adjudicatee can be made to take title, although it is not established contradictorily with the husband that the property was the property of the wife. The adjudicatee is a third person, who cannot be compelled to comply with the terms of adjudication unless the presumption which makes the property a community asset has been effectually destroyed. *Bachino v. Coste*, 35 La. Ann. 570. The vendor should tender to the adjudicatee a title free from risks, and not one subject to attack." It then proceeds to a discussion of the evidence bearing on the character of the property, and after finding the proof of the wife's separate right to be not sufficiently clear to warrant a judgment compelling the purchaser to

accept, says: "We do not decide that the title is in the community. We only conclude, in the present condition of the case, chiefly caused by contradictory testimony, and the fact, in addition, that the husband is not a party, and that he is actually suing to have the property decreed property of the community, that the title is not one that the purchaser is bound to accept." If in no case the purchaser could be compelled to accept the title till those who might claim it as community property were bound by a judgment, that alone would have disposed of the case and the further consideration of the evidence would have been unnecessary.

The Result of These Cases would seem to be that the judgment creditors of the husband and others who actually claim the property as community property should be parties to an action or proceeding where the respective claims can be determined and the wife's separate right adjudicated in a binding form, before the vendee should be compelled to accept the title as one free from reasonable doubt.

See the title SPECIFIC PERFORMANCE; and see *supra*, this title, *Character of Interest and Right of Each Spouse During the Community; Registry Laws*.

1. Louisiana — The Period Ending 1828. — The provisions of the Civil Code of Louisiana which, it was contended, so limited the law of community that it did not extend to nonresidents, were contained in two articles.

Art. 2399 (2369): Every marriage contracted in this state superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

Art. 2401 (2370): A marriage contracted out of this state, between persons who afterwards come here to live, is also subjected to community of acquets with respect to such property as is acquired after their arrival. See *Saul v. His Creditors*, 5 Martin N. S. (La.) 569; 16 Am. Dec. 212; *Cole v. His Executors*, 7 Martin N. S. (La.) 41, 18 Am. Dec. 241; *Dixon v. Dixon*, 4 La. 188, 23 Am. Dec. 478.

2. The Period from 1828 to 1852. — *Packwood's Succession*, 9 Rob. (La.) 438, 41 Am. Dec. 341, 12 Rob. (La.) 334, 43 Am. Dec. 230; *Cooper v. Cotton*, 6 La. Ann. 256; *Armorer v. Case*, 9 La. Ann. 288, 61 Am. Dec. 209; *McGill's Suc-*

Third: The Period Since 1852.—During this period the law of community, by express provision, is made applicable to the acquisitions made in the state by nonresident married persons.¹

b. CALIFORNIA AND WASHINGTON.—In the Early Statutes of these states provisions were found to the effect that the law of community should apply to and control the marital rights of persons thereafter married in the state, and the property thereafter acquired by persons formerly married in these states, and also the future acquisitions of persons married out of the state "who shall reside and acquire property" therein.²

These Provisions Were Omitted in the Subsequent Revision of the statutes, and now form no part of the written law. In Washington it has been held that such provisions limited the law of community to the acquisitions of resident married persons.³

c. TEXAS AND ARIZONA.—In each of these jurisdictions there is a statute that provides that the marital right of persons married in other states or countries who may remove to the state shall, in regard to property acquired in the state during the marriage, be repealed by the laws of the state.⁴

cession, 6 La. Ann. 327; *Connor v. Connor*, 10 La. Ann. 440; *Leech v. Guild*, 15 La. Ann. 349; *Wolfe v. Gilmer*, 7 La. Ann. 583; *Waterer's Succession*, 25 La. Ann. 211; *Huff v. Bolland*, 6 La. Ann. 436.

Illustrations.—In *Packwood's Succession*, 9 Rob. (La.) 438, 41 Am. Dec. 341, the spouses were domiciled in Louisiana until 1836, when they removed to the state of New York. Acquisitions made in Louisiana after the removal were not governed by the law of community. This decision was made in 1845, so it is clear that the acquisitions in question were made between 1828 and 1852.

"Until parties married abroad come here to live, the property acquired by the husband in this state does not fall into the community." *Cooper v. Cotton*, 6 La. Ann. 256.

The property in controversy was purchased in Louisiana in 1834 by the husband, who was then a resident of Kentucky. Afterwards he removed to Louisiana. The property was held to be the husband's separate property. *Wolfe v. Gilmer*, 7 La. Ann. 583.

Property purchased in Louisiana in 1833 by a person then domiciled in Mississippi is not community property. *Armorer v. Case*, 9 La. Ann. 288, 61 Am. Dec. 209.

The spouses were married in Mississippi previous to 1825, and neither ever resided in the state of Louisiana. The court held that the law as it was previous to 1828 "would be utterly inoperative upon the parties unless they resided in the state or had property within it." And inasmuch as it did not appear from the evidence that the property left by the husband in Louisiana at the time of his death was acquired previous to the passage of the Act of 1828; and the code, articles 2399 (2369) and 2401 (2370), not being applicable to parties situated as these were, there was no community in the property left by the deceased husband. Referring again to the above mentioned articles, the court said: "That no community existed by virtue of the laws of this state in property acquired by either of the married persons within this state whose marriage was not contracted within the state, nor who ever resided in it, we have always understood as resulting from the evident sense of

these articles." The court is here speaking of acquisitions made between 1828 and 1852. *McGill's Succession*, 6 La. Ann. 327.

The marriage was contracted in Mississippi, where the parties continued to reside. The property in question in which the surviving wife claimed a community interest was purchased in Louisiana in 1841 by the husband. The court said: "The present marriage was not contracted in this state, nor in contemplation of a matrimonial domicile in this state, nor did the parties or either of them come here to live before the acquisition of the Louisiana property." This property was held to be the separate property of the husband. *Connor v. Connor*, 10 La. Ann. 440.

On appeal the last case was affirmed by the Supreme Court of the United States. *Connor v. Elliott*, 18 How. (U. S.) 591.

1. The Period Since 1852.—By the Act of March 18, 1852, the law of community was extended to all property acquired in Louisiana by nonresident married persons. The substance of this act is contained in the Civil Code (1870), in art. 2400: All property acquired in this state by nonresident married persons, whether the title thereto be in the name of either husband or wife, or in their joint names, shall be subject to the same provisions of law which regulate the community of acquets and gains between citizens of this state.

2. California and Washington.—California Act of 1850, §§ 14 and 15; Washington Act of 1869, §§ 11 and 12; Act of 1871, § 25.

3. Hershberger v. Blewett, 46 Fed. Rep. 704; *Gratton v. Weber*, 47 Fed. Rep. 852.

4. Texas and Arizona.—Revised Statutes of Arizona 1887, § 2109; Revised Statutes of Texas 1879, art. 2859; *Heidenheimer v. Loring*, 6 Tex. Civ. App. 560. In this case the court seemed to assume that the law of community extended to nonresidents, but the Court of Civil Appeals seemed to place its concurrence on the ground that the statutes of the domicile were not proven, and the case must, therefore, be decided by the laws of Texas. Extending the law of community to all property acquired in a community property state by married persons, whether resident or nonresident, must be carefully distinguished

2. Acquisitions Before Removal to Community Property State — Rule Stated. —

Vested rights of property acquired in a foreign state or country by married persons there domiciled will not be divested by a change of domicile to a community property state; but the latter state will recognize and protect the rights of property of married persons acquired under foreign laws.¹

from an attempt to extend the law of community to, and to classify as community property, the acquisitions made in other states, under the régime of other laws, by married persons there domiciled. Such an attempt can only be made where the property is taken to a community property state on a change of domicile, or sent there for investment. Such an attempt, if successful, would result in the divestiture of rights acquired under other laws by the mere process of crossing a state line. See *infra*, this section, *Acquisitions Before Removal to a Community Property State*.

The case of *Graton v. Weber*, 47 Fed. Rep. 852, has sometimes been supposed to give color of authority to such an attempt; but an examination of the record in the case will disclose the fact that the point was not before the court. The action was to partition lands acquired during the marriage, and claimed to belong to the community. The only allegation to overcome the presumption in favor of a common acquisition was an allegation in the answer (the suit was in equity and heard on bill and answer) that the spouses were nonresidents, and were domiciled in Oregon, where the law of community did not prevail. The court simply decided that this allegation, though taken as true, was not sufficient to overcome the presumption. If it had been alleged that the property in controversy had been purchased with funds acquired in a state where the spouses were domiciled, by whose laws the funds were separate in character, the conclusion would doubtless have been different.

1. Property Acquired Before Removal to Community Property State — California. — *Dye v. Dye*, 11 Cal. 163; *Kraemer v. Kraemer*, 52 Cal. 302.

Louisiana. — *Gale v. Davis*, 4 Martin (La.) 645; *Tanner v. Robert*, 5 Martin N. S. (La.) 255; *Young v. Templeton*, 4 La. Ann. 254, 50 Am. Dec. 563; *Sherrod v. Callegan*, 9 La. Ann. 510; *Spears v. Shropshire*, 10 La. Ann. 218, 11 La. Ann. 559, 66 Am. Dec. 206; *Eager v. Brown*, 14 La. Ann. 695. The separate property of the wife obtained by her in a common-law state may be made the basis of a money judgment against the husband or a separation of property. *Eager v. Brown*, 14 La. Ann. 695.

Texas. — *Hill v. M'Dermott*, Dall. (Tex.) 419; *State v. Barrow*, 14 Tex. 180, 65 Am. Dec. 109; *McCulloch v. Renn*, 28 Tex. 794; *Oliver v. Robertson*, 41 Tex. 422; *McIntyre v. Chappell*, 4 Tex. 187; *Chappell v. McIntyre*, 9 Tex. 163; *Duke v. Reed*, 64 Tex. 705.

Washington. — *Freeburger v. Gazzam*, 5 Wash. 772; *La Selle v. Woolery*, 11 Wash. 337.

Cases in the Common-law States Recognizing the Same Doctrine. — In *Doss v. Campbell*, 19 Ala. 590, 54 Am. Dec. 200, the chattels in controversy belonged to the wife before her marriage, which occurred in Texas, which was then the domicile of the spouses. Under the laws of that state the property in question re-

mained the separate property of the wife. On removal of the spouses to Alabama, taking the property with them, the husband obtained no title to it, though if the marriage had been celebrated in Alabama, and the spouses there domiciled, the husband would have become by virtue of the marriage the owner of the property in question. "The *lex loci contractus* must govern, not only as to the validity of the marriage itself, but also in ascertaining the rights which each party takes in the property of the other, and which either owned at the time of the marriage;" but the rights acquired in another state or country will be governed by the laws of the latter. If the spouses are married in a common-law state, where the marriage operates as an assignment to the husband of the wife's personal property in possession, a subsequent removal to a civil-law state or country will not reinvest her with the property, and if married in a civil-law state or country, a subsequent removal will not divest rights acquired under the civil law.

In *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 88, property acquired in Louisiana by husband and wife, and community property under the laws of that state, was taken with them on a change of domicile to Missouri and there invested in the real estate in question, the legal title being taken in the name of the husband. Subsequently the parties returned to Louisiana, where the wife procured a divorce. Subsequent to the divorce, by proceedings in equity taken by her in Missouri, she sought to reach the property in question and have a resulting trust declared therein in her favor for one-half the property. The court said: "This question * * * must be determined by our law and not by the law of Louisiana." In this state in lands purchased in the name of one with the money of another a trust will result in favor of the one whose money was used in the purchase. "Had *Depas* [the husband], whilst residing in Louisiana, remitted a sum of money belonging to the community and procured its investment in Missouri lands, would the rights of the parties in Louisiana have been changed? What difference can it make that previous to the investment the parties had changed their domicile?" The purchase of the real estate was not an acquisition of property in Missouri, "but a mere investment of money previously acquired in Louisiana. It was a change of the character of the property from personality to realty." The court, by its decree, enforced a trust in the wife's favor for one-half of the property.

The spouses were domiciled and married in South Carolina, where the common law prevailed, and by force of that law the marriage operated as an assignment to the husband of the wife's chattels. These chattels were after the marriage taken to Louisiana on a change of domicile to that state, and were there claimed to be the wife's separate property.

Principle of Rule. — This does not admit the controlling force of foreign laws within the state, but merely recognizes rights vested under such laws, treating the foreign laws as evidentiary facts necessary to be proved and making part of the chain of title to the right asserted or claimed.

Limitation. — This recognition and protection are, of course, subject to these limitations: the forum must be provided with the necessary remedies and processes to protect and enforce the right, and its assertion must not be contrary to the laws or policy of the forum, nor create unknown or prohibited tenures of property.¹

Presumption. — Property brought by the husband from a common-law state or country to a community property state is *prima facie* his separate property.²

3. Acquisitions Before Adoption of or Changes in Law of Community. — Property acquired by either spouse before the adoption by the state of the law of community will be governed by the former law.³ And when changes are made in the law of community the law in force when the acquisition is made will determine its character.⁴

4. Acquisitions While Removing or Intending to Remove to a Community Property State. — When the marriage is celebrated in another state or country, but with an actual intent to move to a community property state, which intent is followed by an actual removal within a reasonable time, the latter state rather than the place of the marriage will be regarded as the matrimonial domicil, and its laws will regulate the property rights of the married pair acquired after or by the fact of marriage. For a better reason property acquired while actually in transit to a community property state with the intention of taking up a residence there will be governed by its laws.⁵

5. Classification by the Law of Community of Property Acquired in Other States

This claim the court denied, and upheld the title of the husband, vested under the laws of South Carolina, the matrimonial domicil. *Gale v. Davis*, 4 Martin (La.) 654.

The judgment in the case of *Tanner v. Robert*, 5 Martin N. S. (La.) 255, rests on the same doctrine.

1. *Hill v. M'Dermot*, Dall. (Tex.) 419; *Hall v. Harris*, 11 Tex. 300; *Castro v. Illies*, 22 Tex. 479, 73 Am. Dec. 277.

2. *Penny v. Weston*, 4 Rob. (La.) 165; *Martin v. Boler*, 13 La. Ann. 369; *Henderson v. Trousdale*, 10 La. Ann. 548; *Hayden v. Nutt*, 4 La. Ann. 65.

3. **Acquisitions Before Adoption of or Changes in Law of Community** — *Washington*. — *Spurlock v. Port Townsend Southern R. Co.*, 13 Wash. 29.

The first community property statute passed in Washington (which took effect December 2, 1869), limited the application of the act to the future acquisitions of the spouses. Act of 1869, § 12; *Abbott's Real Property Statutes*, p. 473. But the present act contains no such express limitation, and in view of the present act this case was decided. The property acquired by the husband when the modified common law regulated the rights of the spouses was classified, under the subsequent law of community, as his separate property.

Nevada. — By the terms of the statute adopting the law of community, it was made prospective; the common law governed the previous acquisitions of the spouses. *Lake v. Bender*, 18 Nev. 361; *Darrenberger v. Haupt*, 10 Nev. 46.

4. By the *Texas* Act of January 20, 1840, all

property except land and slaves owned by the spouses before marriage became community property.

Personal property belonging to the wife before marriage, and community property by this Act, continued to belong to the community after the change in the law by the Act of 1848, making such property separate property. *Portis v. Parker*, 22 Tex. 699.

5. Acquisitions While Removing or Intending to Remove to Community Property State. — *Ford v. Ford*, 2 Martin N. S. (La.) 574, 14 Am. Dec. 201; *Le Breton v. Nouchet*, 3 Martin (La.) 60, 5 Am. Dec. 736; *Allen v. Allen*, 6 Rob. (La.) 104, 39 Am. Dec. 553; *Routh v. Routh*, 9 Rob. (La.) 224, 41 Am. Dec. 326; *Fisher v. Fisher*, 2 La. Ann. 774; *Walker v. Duverger*, 4 La. Ann. 569; *Hayden v. Nutt*, 4 La. Ann. 65; *Percy v. Percy*, 9 La. Ann. 185; *Arendell v. Arendell*, 10 La. Ann. 566; *Connor v. Connor*, 10 La. Ann. 440; *State v. Barrow*, 14 Tex. 179, 65 Am. Dec. 109.

The spouses had been domiciled in Mississippi, but left the latter state with the intention of removing to Texas; on their way to the latter state they made a visit to the wife's father, who lived in Tennessee, and who made her a gift of a chattel, which by the laws of the latter state became the husband's property, but according to the laws of Texas became the wife's separate property. The laws of Texas were held to control the rights of the parties for the reason that they regarded that state as their future home, to which they were then *en route*, and to whose laws they looked for the regulation of their marital rights. *State v. Barrow*, 14 Tex. 179, 65 Am. Dec. 109.

—*a.* IN GENERAL. — In the community property states the property of married persons is divided into: the separate property of the wife;¹ the separate property of the husband;² and the community property, in which both spouses have certain defined rights.³

Force and Effect of the Classification. — The laws of these states not only assign to one or the other of these classifications all the property of married persons, but provide the remedies and processes for the maintenance of the rights incident to these estates and tenures. And these classifications are not mere mechanical divisions, but the classification when made by the law of the forum necessarily implies that the property so classified becomes subject to the legal incidents attached to it by that law, and not by the foreign law; but in making the classification the law of the forum must regard the rights vested under the foreign law, and make the classification accordingly, doing as little violence as possible to those rights. But when the classification is once made, the property thenceforth is treated by the law of the forum as any other property belonging to that classification, and is subject to the same legal incidents. The only difficulty that can arise is this: To which one of the foregoing classifications does property brought by married persons from other states or countries belong?

b. SEPARATE PROPERTY OF MARRIED WOMEN ACQUIRED IN A COMMON-LAW STATE. — The property belonging to the statutory as well as the equitable separate estate of a married woman in a common-law state or country is, by the law of community, classified as her separate property, and protected as such, and becomes subject to the legal incidents attaching to that class of property.⁴

c. PROPERTY ACQUIRED BY HUSBAND IN A COMMON-LAW STATE. — Property acquired by the husband in a common-law state or country, and there known and classified simply as his property, and in which the wife has no vested interest corresponding to her interest in community property, is, by the law of community, classified as his separate property with all the rights incident to that class of property under the law of community.⁵

Reinvestment and Exchange of Separate Property. — One of the rights which attaches to the separate property of both the husband and wife, under the law of community (except in *Louisiana*), is to reinvest and exchange it, and with it purchase other separate property. And property acquired by either husband or wife in a foreign state or country, which under the law of community is classified as the separate property of either, may be reinvested and exchanged, and other separate property acquired by reinvestment, exchange, or purchase, in a community property state. For a better reason funds acquired in a foreign state or country by either spouse, the vested rights in which are such, under the foreign law, that by the law of community the funds would be classified as

1. See *supra*, this title, *Separate Estate*.

2. See *supra*, this title, *Separate Estate*.

3. See *supra*, this title, *Separate Estate*.

4. **Separate Property of Married Women Acquired in Common-law State.** — *Young v. Templeton*, 4 La. Ann. 254, 50 Am. Dec. 563; *Sherrod v. Callegan*, 9 La. Ann. 510; *Spears v. Shropshire*, 10 La. Ann. 218, 11 La. Ann. 559, 66 Am. Dec. 206; *Eager v. Brown*, 14 La. Ann. 695; *Freeburger v. Gazzam*, 5 Wash. 772.

A separate estate secured to the use of the wife through the medium of a trustee in a state where the parties were then domiciled, and valid by the laws of the domicile, will control the rights of the parties as to all property covered by the settlement afterwards brought to Louisiana, and the property belonging to

this separate estate secured to the wife through the medium of a trustee was classified in Louisiana as the wife's separate property. *Young v. Templeton*, 4 La. Ann. 254, 50 Am. Dec. 563.

Property secured to the separate use of the wife by a valid deed of trust was subsequently brought to Louisiana on a change of domicile to that state. In the latter state this property was classified as the wife's separate property, and her separate right thereto upheld. *Eager v. Brown*, 14 La. Ann. 695.

5. **Property Acquired by Husband in Common-law State.** — *Gale v. Davis*, 4 Martin (La.) 645; *Tanner v. Robert*, 5 Martin N. S. (La.) 255; *Oliver v. Robertson*, 41 Tex. 422; *Duke v. Reed*, 64 Tex. 705; *Kraemer v. Kraemer*, 52 Cal. 302.

the separate property of either spouse, and sent without a change of domicile to a community property state for reinvestment, remain separate property, and the property procured by reinvestment of these funds retains the separate character and classification.¹

In Louisiana, while the property acquired in this way (by reinvestment) would fall into community, the separate property would be converted into a charge against the community, which charge would be the separate property of the spouse whose funds make the acquisition by purchase or exchange.²

6. Acquisitions After Removal to a Community Property State.—After a change of domicile to a community property state by persons married elsewhere, their acquisitions will be governed by the law of community.³

The Only Admitted Exception to This Rule is where a marriage contract "speaks to the very point," and was made in view of, and to control after, a removal; but such contract must not be in violation of the laws or policy of the state where it is sought to be enforced.⁴

COMMUTATION. (See also the title PARDON.)—"Commutation" is the change of a punishment to which a person has been condemned, to a less severe one. This can be granted only by the authority in which the pardoning power resides.⁵

1. Separate Property Reinvestment and Exchange.—In *Tanner v. Robert*, 5 Martin N. S. (La.) 255, real estate purchased in Louisiana with funds brought by the husband from South Carolina was held to belong to the husband as his separate property because the funds were of that character, and this character was one fixed by the laws of South Carolina and recognized and upheld in Louisiana. The funds brought to Louisiana by the husband had belonged to the wife before marriage, but by the laws of South Carolina, where the marriage was celebrated, the property became the property of the husband by the fact of marriage. The reader will notice that the facts out of which this controversy arose occurred before the enactment of the present Code of Louisiana, and were governed by the Spanish law which recognized the husband's right to purchase separate property with his separate funds.

Oliver v. Robertson, 41 Tex. 422, rests upon exactly the same principle, as does also *Kraemer v. Kraemer*, 52 Cal. 302.

2. See the two preceding notes.

3. Acquisitions After Removal to Community Property State.—The following cases either expressly decide or recognize the doctrine stated in the text: *Saul v. His Creditors*, 25 Martin N. S. (La.) 571, 16 Am. Dec. 212; *Deshautels v. Fontenot*, 6 La. Ann. 689; *Young v. Young*, 5 La. Ann. 611; *Arnold v. McBride*, 6 La. Ann. 703; *Tourne v. Tourne*, 9 La. 457; *Pritchard v. Citizens' Bank*, 8 La. 130, 28 Am. Dec. 132; *Connor v. Connor*, 10 La. Ann. 440; *Armorer v. Case*, 9 La. Ann. 288, 61 Am. Dec. 209; *McGill's Succession*, 6 La. Ann. 327; *Cooper v. Cotton*, 6 La. Ann. 256; *Wolfe v. Gilmer*, 7 La. Ann. 583; *Packwood's Succession*, 9 Rob. (La.) 438, 41 Am. Dec. 341, 12 Rob. (La.) 334, 43 Am. Dec. 230; *Morales v. Marigny*, 14 La. Ann. 867.

4. *Castro v. Illies*, 22 Tex. 479, 73 Am. Dec. 277; *Dacey's Conflict of Law* (notes by J. S. Moore), p. 651; *Young v. Templeton*, 4 La. Ann. 254, 50 Am. Dec. 563; *Sherrod v. Calle-*

ghan, 9 La. Ann. 510; *Spears v. Shropshire*, 11 La. Ann. 559, 66 Am. Dec. 206.

5. Commutation.—*Bouv. Law Dict.*; *Ex p. Parker*, 106 Mo. 551; *Ex p. Collins*, 94 Mo. 22; *State v. Peters*, 43 Ohio St. 629; *Rich v. Chamberlain*, (Mich. 1895) 65 N. W. Rep. 235, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 365. The last case was upon the construction of the *Michigan* statute providing that whenever the sentence of any female, confined in the state prison, should be commuted by the governor to confinement for any period in the Detroit house of correction, it should be the duty of the prison agent to transfer such convict. It was held that this authorized the governor to transfer a person sentenced to life imprisonment.

"A commutation," says Beatty, J., in *Ex p. Janes*, 1 Nev. 321, "is the change of one punishment known to the law for another and different punishment also known to the law."

In *Ogletree v. Dozier*, 59 Ga. 802, it is said: "In its legal sense, to commute would mean to change from a higher to a lower punishment—to change a penalty from the hard work of a chain-gang to work on a farm, for instance; and we hold that this power belongs, if to be exercised at all, to the governor."

Change of Punishment.—By a *Missouri* statute, a justice of the peace was empowered to change a fine to imprisonment, if the defendant was unable to pay the fine. It was held that this provision was not in conflict with the constitution which conferred the power of commutation upon the governor. *Ex p. Parker*, 106 Mo. 551.

Pardon Distinguished from Commutation.—A commutation of punishment does not relieve the convict of disabilities attached to a conviction as a pardon does. *Young v. Young*, 61 Tex. 193, where it is said: "A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." *Bouvier's Law Dict.*

COMMUTATIVE CONTRACTS. — “Commutative contracts” are contracts in which what is done, given, or promised by one party is considered as equivalent to, or a consideration for, what is done, given, or promised by the other.¹

COMPACT. (As to compacts as used in the Constitution of the United States see the titles CONSTITUTIONAL LAW; STATES; TREATIES.)— An agreement; a contract; generally applied as between states or governments.²

COMPANY. (See also ASSOCIATION, vol. 3, p. 162; and the titles CORPORATIONS; JOINT STOCK COMPANIES; PARTNERSHIP; SOCIETIES AND CLUBS. For various kinds of companies, such as express companies, railroad companies, etc., see such specific titles as EXPRESS COMPANIES; RAILROADS, etc.)— A “company” is a number of persons united for the same purpose,

(word Pardon). ‘Pardon—forgiveness of a crime, remission of punishment. * * * The effect of a pardon is to make the offender a new man (*novus homo*), to acquit him of all corporal penalties and forfeitures annexed to the offense for which he obtains pardon, and not so much to restore him former, as to give him new credit and capacity.’ Wharton’s Law Dict. (word ‘Pardon’). ‘As human actions are necessarily imperfect, the pardoning power must be vested somewhere in order to prevent injustice when it is ascertained that an error has been committed.’ Bouvier’s Law Dict., see ‘Pardon.’ **Commutation** of punishment is thus defined by Bouvier— word ‘*commutation*’: ‘The change of a punishment to which a person has been condemned into a less severe one. This can be granted only by the executive authority in which the pardoning power resides.’ Wharton’s definition is, in substance, the same. It is clear from the definitions thus given of a pardon and of the *commutation* of punishment that they essentially differ in their nature from each other, and that they differ no less in their moral constituents than in their immediate material and physical consequences.”

A *commutation* is not a conditional pardon, but the substitution of a lower for a higher grade of punishment, and is presumed to be for the culprit’s benefit. Matter of Victor, 31 Ohio St. 206; State v. Peters, 43 Ohio St. 629.

In *Ex p. Janes*, 1 Nev. 321, it was held that although the governor of the territory had the right to pardon absolutely or conditionally, he had no right to *commute* one punishment for another.

But, in *Lee v. Murphy*, 22 Gratt. (Va.) 799, the court says: “*Commutation* is simply the substitution of a less for a greater penalty or punishment. If followed by the acceptance of the convict, it practically amounts to the same thing as a conditional pardon. I do not mean to assert it has the effect of a full pardon, which, when performed, not only remits the original punishment, but restores the competency of the offender and removes the infamy of the conviction. Certain it is, it has the operation and effect of a partial pardon, which is described in many of the cases as merely remitting or releasing the punishment without removing the guilt of the offender. Perkins v. Stevens, 24 Pick. (Mass.) 277; *Ex p. Garland*, 4 Wall. (U. S.) 333, 380.”

Commutation Ticket. (See also the title TICKETS AND FARES.)— A *commutation* ticket is a ticket issued at a reduced rate by a carrier of passengers, entitling the holder to be car-

ried over a given route a limited number of times, or an unlimited number, during a certain period. Interstate Commerce Commission v. Baltimore, etc., R. Co., 43 Fed. Rep. 56, affirmed 145 U. S. 263. In that case the following distinction is made between party-rate tickets and *commutation* tickets: “The difference between *commutation* and party-rate tickets is, that *commutation* tickets are issued to induce people to travel more frequently, and party-rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them, the object in both cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured.”

1. *Ridings v. Johnson*, 128 U. S. 216.

2. **Compact** and “contract” are convertible terms. Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co., 4 Gill & J. (Md.) 129; *Green v. Biddle*, 8 Wheat. (U. S.) 1.

Distinguished from Treaty.— As used in the prohibition upon the states to “enter into any agreement or compact with another state or with a foreign power,” in Const. U. S., Art. I., § 10, cl. 3, something more is meant by *compact* than by the word “treaty” in the preceding clause. The prohibition is designed to be more comprehensive, and to forbid every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties. *Holmes v. Jenison*, 14 Pet. (U. S.) 572.

Compacts or Agreements. (See also AGREEMENT, vol. 2, p. 16.)— In *Virginia v. Tennessee*, 148 U. S. 520, it is said: “*Compacts* or agreements—and we do not perceive any difference in the meaning, except that the word *compact* is generally used with reference to more formal and serious engagements than is usually implied in the term ‘agreement’—cover all stipulations affecting the conduct or claims of the parties.”

“The terms ‘agreement’ or *compact*, taken by themselves, are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.” Wharton v. Wise, 153 U. S. 168.

or in a joint concern, as a company of merchants. The word is applicable to private partnerships or incorporated bodies of men; hence it may signify a firm, house, or partnership; or a corporation, as the East India Company.¹

1. Municipal Corporations. (See also the title MUNICIPAL CORPORATIONS.)—Kansas City *v.* Vineyard, 128 Mo. 75, in which case it was held that a municipal corporation was not an incorporated *company*.

Same — Incorporated Company in an embezzlement act was held to mean one composed of individuals associated together for private purposes. *Coats v. People*, 22 N. Y. 245.

Broad Scope of the Term.—A statute imposed a specific tax upon every sewing machine *company*. In *Singer Mfg. Co. v. Wright*, 33 Fed. Rep. 127, the court, in construing this statute, said: "The term 'sewing machine companies' includes necessarily all *companies*, whether corporate, joint stock, or firms; and I am inclined to think it includes individuals engaged in manufacturing sewing machines, and in selling the same in Georgia."

Individual.—A statute providing that "the city council or board of trustees shall have no power to grant the use of, or the right to lay down, any railroad tracks in any street of the city to any steam or horse railroad *company*, except upon a petition of the owners of the land," etc., is to be construed as including both corporations and individuals. The word *company*, in the clause, must be held to embrace natural persons as well as corporations. *Chicago Dock, etc., Co. v. Garrity*, 115 Ill. 155.

Used Synonymously with "Corporation."—The term *company* is frequently used as synonymous with "corporation," as in an affidavit that the "defendant is a corporation or *company* established and doing business under" the laws of Illinois. *Broome v. Galena, etc.*, *Packet Co.*, 9 Minn. 239.

That *company* and "corporation" may be used synonymously, see *Com. v. Reinoehl*, 163 Pa. St. 291; *Taylor v. Coon*, 79 Wis. 83.

But, in *State v. Mead*, 27 Vt. 722, it was held that the expression "railroad *company*" does not necessarily import a corporation, and that a court cannot take judicial notice that a *company* is a corporation unless it be so alleged.

Omission of Word from Corporate Name.—In *Hammond v. Starr*, 79 Cal. 556, it was held that the omission in a complaint and proceedings upon attachment against a corporation, of the word *company* from its corporate name, did not affect the attachment lien. See also the title NAME.

"Association" Used Synonymously with "Company."—The Lee Mutual Fire Insurance Association was indicted for exercising the privilege of a "fire insurance *company* or association," without having first paid for and obtained a license in accordance with section 85, Code of 1880. A motion was made to quash the indictment on the ground that it was "vague and uncertain." It was held that the words "association" and *company*, as used in the indictment, were synonymous, and that though the use of them was surplusage it produced no uncertainty in the indictment. The court said: "The motion to quash the indictment was properly overruled. The words

'association' and *company* are synonymous in the sense here used, both meaning a number of persons banded together for a common business purpose." *Lee Mut. F. Ins. Co. v. State*, 60 Miss. 393. See also *Mills v. State*, 23 Tex. 303.

Company, Association, or Partnership.—Referring to the phrase "*company*, association, or partnership," in section 4, English Companies Act 1862 (25 and 26 Vict., c. 89), James, L. J., said: "I believe that according to the vernacular we use on these subjects, the difference which the Act intended to draw between a *company* or association and an ordinary partnership is this: An ordinary partnership is a partnership composed of definite individuals bound together by contract between themselves to continue combined for some joint object either during pleasure or during a limited time; and is essentially composed of the persons originally entering into the contract with one another. A *company* or association—which I take to be synonymous terms—is the result of an arrangement by which parties intend to form a partnership which is constantly changing, a partnership to-day consisting of certain members, and to-morrow consisting of some only of those members, along with others who have come in; so that there will be a constant shifting of the partnership, a determination of the old and a creation of a new partnership, and with the intention that, so far as the partners can by agreement between themselves bring about such a result, the new partnership shall succeed to the assets and liabilities of the old partnership. This object as regards liabilities could not in point of law be attained by any arrangement between the persons themselves, unless the persons contracting with them authorized the change by a novation, or unless by special provisions in Acts of Parliament sanction was given to such arrangements;" that being the sole distinction between association and partnership. *Smith v. Anderson*, 50 L. J. Ch. Div. 39, 15 Ch. Div. 273. In that case, however, Brett and Cotton, L.JJ., suggest distinctions between *company* and "association."

Partnership. (See also the title PARTNERSHIP; and see FIRM.)—The words *company* and "association" may be applied to an ordinary commercial partnership; but they are, in mercantile or commercial language, most frequently and most properly applied to many persons acting together, through officers or agents, in the prosecution of important enterprises. *Mills v. State*, 23 Tex. 303. The court said: "The word 'association' is used as synonymous with the word *company*. Speaking of joint stock companies, Mr. McCulloch says: 'The business of a great association must be conducted by factors or agents.' Treating of 'open or regulated *companies*,' the same author says: 'The affairs of such companies or associations are managed by directors appointed by the members.' In another place this author says: 'The conduct of the Dutch East India Company in burning spices, that

The state of being a companion ; fellowship ; society.¹

their price might not be lowered by larger importations, is an example of the mode in which such associations uniformly, and indeed almost necessarily, act.' In speaking of the English East India Company, McCulloch defines it, or describes it, as 'a famous association, originally established for prosecuting the trade between England and India.' Numerous other quotations might be made, to show that the word *company*, and the word 'association' are, in mercantile or commercial language, most frequently and most properly applied to many persons acting together, through officers or agents, in the prosecution of important enterprises."

In *Palmer v. Pinkham*, 33 Me. 32, it was said: "The proper signification of the word *company*, when applied to persons engaged in trade, denotes those united for the same purpose or in a joint concern. It is so commonly used in this sense, or as indicating a partnership, that few persons accustomed to purchase goods at shops where they are sold by retail would misapprehend that such was its meaning." In that case it was accordingly held that a representation that one was in *company* in a store with another was equivalent to a representation that they were partners.

"Trading or other public *company*" does not include a private partnership. *In re Griffith*, 12 Ch. Div. 655.

Partnership—Fictitious Use of the Word.—"A partnership resident in another state, whose firm name includes the fictitious use of the word *company*, doing business in this state through a local agent, is not within section 363 of the Penal Code, forbidding the fictitious use of the word *company*." *Cahn v. Gottschalk*, 14 Daly (N. Y.) 542. And for the construction of this and similar statutes see the title PARTNERSHIP.

Clubs. (See also the title SOCIETIES AND CLUBS.)—A club is not a *company* within winding-up acts. *Matter of St. James's Club*, 2 De G. M. & G. 383.

Joint-stock Company and "corporation organized under general laws" are convertible terms in *Massachusetts* legislation. *Atty.-Gen. v. Mercantile Marine Ins. Co.*, 121 Mass. 524. See the title JOINT STOCK COMPANIES.

Manufacturing Company.—See the title MANUFACTURING CORPORATIONS.

Persons Composing the Company, in an act making such liable to the extent of their respective shares of stock for the debts of the *company*, are all persons who own stock. *Rosevelt v. Brown*, 11 N. Y. 148. See the titles CORPORATIONS; STOCK AND STOCK-HOLDERS.

In an act incorporating a dock *company* the phrase, "the dock or wharf now owned by the said *company*," must be construed to mean, by the individuals composing the said *company*. *Keyport, etc., Steamboat Co. v. Farmers' Transp. Co.*, 18 N. J. Eq. 13, 511.

"Said Company."—A bond of indemnity given to the trustees of an incorporated insurance *company*, conditioned for the good conduct of a clerk while in the service of the said *company*, remains in force as long as the clerk serves the *company*, although there are changes among the individuals composing the *company*. It is otherwise in an ordinary partnership. *Metcalf v. Bruin*, 2 Campb. 422. See the title FIDELITY INSURANCE.

The Company. (See also TELEGRAPH AND TELEPHONE COMPANIES.—Where a person delivered a message to a telegraph *company* to be sent to a point beyond its terminus, and the *company* sent the message to its terminus, where it was delivered for transmission to another *company*, and upon the blank upon which the message was written there was a stipulation that "the *company*" would not be responsible for error or delay of any other *company*, and limiting the liability of "the *company*," it was held, in a suit against the second *company*, that "the *company*" meant the first *company*, and the limitation did not extend to the second. *Squire v. Western Union Tel. Co.*, 98 Mass. 232.

"Ship's Company or Crew" does not include a mere passenger. *U. S. v. Libby*, 1 Woodb. & M. (U. S.) 221. See the titles SEAMEN; SHIPS AND SHIPPING.

1. Keep Company.—Where in a deed granting an annuity there was a provision that it should cease if the annuitant "should associate, continue to keep *company* with, or cohabit or criminally correspond with J. F.," the condition was held to be broken by receiving his visits whenever he chose to call. *Dormer v. Knight*, 1 Taunt. 417.

COMPARATIVE NEGLIGENCE.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *CONTRIBUTORY NEGLIGENCE*, *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 5, p. 1.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *CONTRIBUTORY NEGLIGENCE*; *NAVIGATION*; *NEGLIGENCE*.

I. INTRODUCTORY. — Although the doctrine of comparative negligence has been abrogated in the state of *Illinois*,¹ in which jurisdiction alone it prevailed as a common-law doctrine, yet it has seemed best to state the doctrine as it formerly existed there, and to trace the refinements which grew up under this rule, because it obtains in a modified form elsewhere under statutory enactments,² and because in the state of *Illinois* itself the ordinary doctrines of contributory negligence are so interwoven with the decisions under the rule of comparative negligence, that a just understanding of the

1. See *infra*, this title *Status of Doctrine in Various Jurisdictions — Illinois*.

2. See *infra*, this title, *Status of Doctrine in Various Jurisdictions — Georgia*.

limits of the rule is necessary in order to appreciate the value of the cases as precedents in that state.

II. DEFINITION. — Comparative negligence is that doctrine in the law of negligence by which the negligence of the parties is compared in the degrees of "slight," "ordinary," and "gross" negligence, and a recovery permitted notwithstanding the contributory negligence of the plaintiff, when the negligence of the plaintiff is slight and the negligence of the defendant gross, but refused when the plaintiff has been guilty of a want of ordinary care contributing to his injury, or when the negligence of the defendant is not gross but only ordinary or slight when compared, under the circumstances of the case, with the contributory negligence of the plaintiff.¹

III. DEGREES OF NEGLIGENCE — **Comparison, How Made.** — The comparison of the negligence of the plaintiff and defendant must be made by determining whether, under the circumstances, the negligence of each is slight, ordinary, or gross, in the technical and legal sense of these terms, and comparing the degree in which the one has been negligent with the degree of negligence on the part of the other.²

Circumstances Must Be Considered. — The comparison must be made after con-

1. Cases Supporting Definition of Text. — Galena, etc., R. Co. v. Jacobs, 20 Ill. 478; Chicago, etc., R. Co. v. Dewey, 26 Ill. 255, 79 Am. Dec. 374; Chicago, etc., R. Co. v. Hazzard, 26 Ill. 373; St. Louis, etc., R. Co. v. Todd, 36 Ill. 409; Coursen v. Ely, 37 Ill. 339; Chicago, etc., R. Co. v. Hogarth, 38 Ill. 376; Chicago, etc., R. Co. v. Triplett, 38 Ill. 484; Chicago, etc., R. Co. v. Gretzner, 46 Ill. 74; Keokuk Packet Co. v. Henry, 50 Ill. 264; Chicago, etc., R. Co. v. Pondron, 51 Ill. 333, 2 Am. Rep. 306; Chicago, etc., R. Co. v. Sweeney, 52 Ill. 325; Chicago, etc., R. Co. v. Dunn, 52 Ill. 451; Illinois Cent. R. Co. v. Baches, 55 Ill. 379; Chicago, etc., R. Co. v. Gregory, 58 Ill. 272; St. Louis, etc., R. Co. v. Manly, 58 Ill. 300; Chicago, etc., R. Co. v. Payne, 59 Ill. 534, 11 Am. Ry. Rep. 157; Indianapolis, etc., R. Co. v. Stables, 62 Ill. 319; Chicago, etc., R. Co. v. Van Patten, 64 Ill. 510; Toledo, etc., R. Co. v. Spencer, 66 Ill. 528; Illinois Cent. R. Co. v. Maffit, 67 Ill. 431; Chicago, etc., R. Co. v. Lee, 68 Ill. 576; Illinois Cent. R. Co. v. Benton, 69 Ill. 174; Chicago West. Div. R. Co. v. Bert, 69 Ill. 388; Chicago, etc., R. Co. v. Clark, 70 Ill. 276; Toledo, etc., R. Co. v. McGinnis, 71 Ill. 346; Chicago, etc., R. Co. v. Mock, 72 Ill. 141; Illinois Cent. R. Co. v. Hall, 72 Ill. 222; Rockford, etc., R. Co. v. Hillmer, 72 Ill. 235; Illinois Cent. R. Co. v. Hammer, 72 Ill. 347; Grand Tower Mfg., etc., Co. v. Hawkins, 72 Ill. 386; Illinois Cent. R. Co. v. Goddard, 72 Ill. 567; Fairbank v. Haentzsche, 73 Ill. 236; Chicago, etc., R. Co. v. Coss, 73 Ill. 394; Chicago, etc., R. Co. v. Donahue, 75 Ill. 106; Chicago, etc., R. Co. v. Becker, 76 Ill. 32; Toledo, etc., R. Co. v. O'Connor, 77 Ill. 391; Indianapolis, etc., R. Co. v. Flanagan, 77 Ill. 365; Rockford, etc., R. Co. v. Delaney, 82 Ill. 198, 25 Am. Rep. 308; Illinois Cent. R. Co. v. Hetherington, 83 Ill. 510; Schmidt v. Chicago, etc., R. Co., 83 Ill. 405; Quinn v. Donovan, 85 Ill. 194; Indianapolis, etc., R. Co. v. Evans, 88 Ill. 63; Toledo, etc., R. Co. v. Grable, 88 Ill. 443; Chicago, etc., R. Co. v. Harwood, 90 Ill. 425, 80 Ill. 88; East St. Louis Packing, etc., Co. v. Hightower, 92 Ill. 139; Chicago, etc., R. Co. v. Dimick, 96 Ill. 42; Chicago, etc.,

R. Co. v. Johnson, 103 Ill. 512, 8 Am. & Eng. R. Cas. 225; Chicago v. Stearns, 105 Ill. 554, 2 Am. & Eng. Corp. Cas. 594; Wabash, etc., R. Co. v. Wallace, 110 Ill. 114, 19 Am. & Eng. R. Cas. 359; Calumet Iron, etc., Co. v. Martin, 115 Ill. 358; Chicago, etc., R. Co. v. Johnson, 116 Ill. 206; Chicago, etc., R. Co. v. Warner, 123 Ill. 38; Chicago, etc., R. Co. v. Dunleavy, 129 Ill. 132; Earlville v. Carter, 2 Ill. App. 34; Chicago City R. Co. v. Lewis, 5 Ill. App. 242; Winchester v. Case, 5 Ill. App. 486; Glover v. Gray, 9 Ill. App. 329; Chicago West. Div. R. Co. v. Klauber, 9 Ill. App. 613; Moody v. Peterson, 11 Ill. App. 185; Pittsburgh, etc., R. Co. v. Shannon, 11 Ill. App. 222; Peoria, etc., R. Co. v. Miller, 11 Ill. App. 375; Chicago, etc., R. Co. v. Thorson, 11 Ill. App. 634; Chicago, etc., R. Co. v. Dougherty, 12 Ill. App. 199; Lanark First Nat. Bank v. Eitemiller, 14 Ill. App. 22; St. Louis, etc., R. Co. v. Andres, 16 Ill. App. 292; Chicago, etc., R. Co. v. Dillon, 17 Ill. App. 355; Gardner v. Chicago, etc., R. Co., 17 Ill. App. 265; Garfield Mfg. Co. v. McLean, 18 Ill. App. 449; Chicago, etc., R. Co. v. Boggess, 21 Ill. App. 336; Chicago, etc., R. Co. v. Krueger, 23 Ill. App. 639; Chicago, etc., R. Co. v. Mason, 27 Ill. App. 450; Mt. Carmel v. Guthridge, 52 Ill. App. 632; Chicago, etc., R. Co. v. Fietsam, 123 Ill. 518; Chicago, etc., R. Co. v. Goebel, 119 Ill. 515.

These cases, upon examination, will be found to support all the parts of the statement of the rule in the text.

2. Slight, Ordinary, and Gross Negligence Defined. — Central Military Tract. R. Co. v. Rockafellow, 17 Ill. 541; Galena, etc., R. Co. v. Jacobs, 20 Ill. 478; Chicago, etc., R. Co. v. Lee, 68 Ill. 576; Illinois Cent. R. Co. v. Hammer, 72 Ill. 351; Rockford, etc., R. Co. v. Delaney, 82 Ill. 198, 25 Am. Rep. 308; Chicago, etc., R. Co. v. Harwood, 90 Ill. 427; East St. Louis Packing, etc., Co. v. Hightower, 92 Ill. 141; Chicago, etc., R. Co. v. Johnson, 103 Ill. 512, 8 Am. & Eng. R. Cas. 232; Chicago v. Stearns, 105 Ill. 557; Calumet Iron, etc., Co. v. Martin, 115 Ill. 358.

sidering the circumstances of the case and with regard to the circumstances.¹ But when both parties have been negligent as to a particular act or omission, the relative degrees of negligence cannot be changed by comparison.²

IV. WHEN PLAINTIFF CAN RECOVER — 1. Difference in Degrees of Negligence of Plaintiff and Defendant.—The plaintiff can recover when it appears, upon comparison, that the negligence of the plaintiff is "slight" and the negligence of the defendant "gross," as above defined; that is, where a degree of negligence in the legal sense intervenes between the "slight" contributory negligence of the plaintiff and the "gross" negligence of the defendant.³ This doctrine was an attempt to mitigate the common-law rule of contributory negligence, which was conceived by the *Illinois* courts to prevent a recovery in any case where the plaintiff was negligent in any degree, however slight, if such negligence contributed proximately to his injury.⁴

2. Proximate Cause — Plaintiff's Negligence Not the Proximate Cause.—When the plaintiff's negligence is not the proximate cause of injury he can recover, no matter what the degree of his negligence. The rule of comparative negligence does not apply in such cases, and the ordinary rules of proximate and remote negligence are applied.⁵

Plaintiff's Negligence the Proximate Cause.—Though the negligence of the plaintiff is the proximate cause, still the plaintiff may recover when a full degree of negligence intervenes between the negligence of the plaintiff and that of the defendant, the rule of comparative negligence being applicable.⁶ And in all

1. Circumstances of Case to Be Considered in Making Comparison.—*Chicago, etc., R. Co. v. Triplett*, 38 Ill. 484; *Chicago, etc., R. Co. v. Pondrom*, 51 Ill. 333, 2 Am. Rep. 306; *St. Louis, etc., R. Co. v. Manly*, 58 Ill. 300; *Chicago, etc., R. Co. v. Van Patten*, 64 Ill. 510; *Toledo, etc., R. Co. v. Spencer*, 66 Ill. 528; *Illinois Cent. R. Co. v. Hall*, 72 Ill. 225; *Illinois Cent. R. Co. v. Goddard*, 72 Ill. 568; *Rockford, etc., R. Co. v. Delaney*, 82 Ill. 198, 25 Am. Rep. 308; *Chicago, etc., R. Co. v. Dimick*, 96 Ill. 42; *Chicago, etc., R. Co. v. Johnson*, 103 Ill. 512, 8 Am. & Eng. R. Cas. 232; *Chicago v. Stearns*, 105 Ill. 554, 2 Am. & Eng. Corp. Cas. 594; *Chicago, etc., R. Co. v. Warner*, 123 Ill. 38; *Chicago, etc., R. Co. v. Dillon*, 17 Ill. App. 355.

2. Chicago, etc., R. Co. v. Johnson, 103 Ill. 512, 8 Am. & Eng. R. Cas. 232.

3. Recovery Where Plaintiff's Negligence Slight and Defendant's Gross.—The rule, as has been often announced, is, "that although the plaintiff may have been guilty of some negligence, still, if it is slight as compared with that of defendant, which is gross, a recovery may be had." *Chicago, etc., R. Co. v. Dimick*, 96 Ill. 47, 2 Am. & Eng. R. Cas. 205; *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 478; *Coursen v. Ely*, 37 Ill. 339; *Chicago, etc., R. Co. v. Triplett*, 38 Ill. 484; *Chicago, etc., R. Co. v. Sweeney*, 52 Ill. 325; *Chicago, etc., R. Co. v. Pondrom*, 51 Ill. 333, 2 Am. Rep. 306; *Chicago, etc., R. Co. v. Mock*, 72 Ill. 141; *Rockford, etc., R. Co. v. Hillmer*, 72 Ill. 235; *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 347; *Illinois Cent. R. Co. v. Goddard*, 72 Ill. 568; *Rockford, etc., R. Co. v. Delaney*, 82 Ill. 198, 25 Am. Rep. 308; *Indianapolis, etc., R. Co. v. Evans*, 88 Ill. 63; *Chicago, etc., R. Co. v. Harwood*, 90 Ill. 427; *East St. Louis Packing, etc., Co. v. Hightower*, 92 Ill. 141; *Stratton v. Central City Horse R. Co.*, 95 Ill. 25; *Chicago, etc., R. Co. v. Johnson*, 103 Ill. 512; *Chicago*

v. Stearns, 105 Ill. 554; *Calumet Iron, etc., Co. v. Martin*, 115 Ill. 358; *Chicago, etc., R. Co. v. Langley*, 2 Ill. App. 505; *Lake Shore, etc., R. Co. v. Berlink*, 2 Ill. App. 427; *Illinois Cent. R. Co. v. Brookshire*, 3 Ill. App. 225.

4. Rule of Contributory Negligence Relaxed.—*Chicago, etc., R. Co. v. Gretzner*, 46 Ill. 83; *Illinois Cent. R. Co. v. Baches*, 55 Ill. 389; *St. Louis, etc., R. Co. v. Manly*, 58 Ill. 306; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 319; *Chicago, etc., R. Co. v. Lee*, 68 Ill. 580; *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 351; *Indianapolis, etc., R. Co. v. Evans*, 88 Ill. 65; *Chicago, etc., R. Co. v. Harwood*, 90 Ill. 427.

5. Not Proximate Cause.—The plaintiff may recover in all cases where his negligence, whatever its degree, was not a proximate cause of the injury.

Connecticut.—*Isbell v. New York, etc., R. Co.*, 27 Conn. 393, 71 Am. Dec. 78.

Illinois.—*Illinois Cent. R. Co. v. Middlesworth*, 46 Ill. 497; *Chicago, etc., R. Co. v. Pondrom*, 51 Ill. 333, 2 Am. Rep. 306; *Chicago, etc., R. Co. v. Becker*, 76 Ill. 25; *Chicago, etc., R. Co. v. Johnson*, 103 Ill. 512; *Chicago v. Stearns*, 105 Ill. 554; *Calumet Iron, etc., Co. v. Martin*, 115 Ill. 358; *Earlville v. Carter*, 2 Ill. App. 34; *Chicago, etc., R. Co. v. Dougherty*, 12 Ill. App. 199.

Massachusetts.—*Murphy v. Deane*, 101 Mass. 455, 3 Am. Rep. 390.

New York.—*Johnson v. Hudson River R. Co.*, 20 N. Y. 65, 75 Am. Dec. 375.

Vermont.—*Trow v. Vermont Cent. R. Co.*, 24 Vt. 487, 58 Am. Dec. 191.

England.—*Tuff v. Warner*, 5 C. B. N. S. 573, 94 E. C. L. 573; *Greenland v. Chaplin*, 5 Exch. 248.

6. Proximate Cause.—*Galena, etc., R. Co. v. Jacobs*, 20 Ill. 478; *Rockford, etc., R. Co. v. Delaney*, 82 Ill. 198, 25 Am. Rep. 308; *Indianapolis, etc., R. Co. v. Evans*, 88 Ill. 65; *Chicago, etc., R. Co. v. Harwood*, 90 Ill. 427.

cases where less than a full degree of negligence intervenes the ordinary rules of proximate cause and contributory negligence govern.¹

3. Wilful Injury — Recovery in All Cases of Wilful Injury. — The plaintiff, though negligent in the highest degree, can recover if injured wilfully by the defendant.² In such case contributory negligence is not a defense.³

Distinction Between Wilfulness, and "Gross," "Reckless," and "Wanton" Negligence. — Wilfulness and negligence are the opposite of each other, and therefore no one of the terms "gross," "reckless," or "wanton" negligence has the meaning of wilfulness.⁴

V. WHEN PLAINTIFF CANNOT RECOVER — 1. Degrees of Negligence of Plaintiff and Defendant — When Defendant's Negligence Is Slight or Ordinary. — In cases to which the doctrine of comparative negligence is applicable the plaintiff cannot recover if the negligence of the defendant was "slight" or "ordinary" and not "gross," although the plaintiff's negligence contributing to the injury may have been only slight, when compared with the negligence of the plaintiff, under the circumstances of the case.⁵

Plaintiff's Negligence Gross. — Nor can the plaintiff recover when his own negligence was gross, whatever the degree of the negligence of the defendant.⁶

Negligence Equal. — Nor can there be a recovery where the negligence of the plaintiff and that of the defendant are equal in degree.⁷

2. Preponderance of Negligence — No Recovery Because of a Mere Preponderance. — It follows from these doctrines, and has been expressly held, that a mere preponderance of negligence upon the part of the defendant will not entitle the plaintiff to recover.⁸

1. Where Degree of Negligence Intervenes Between Plaintiff's and Defendant's. — *Aurora Branch R. Co. v. Grimes*, 13 Ill. 585; *Chicago, etc., R. Co. v. Patchin*, 16 Ill. 198, 61 Am. Dec. 65; *Dyer v. Talcott*, 16 Ill. 300; *Galena, etc., R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323; *Galena, etc., R. Co. v. Yarwood*, 17 Ill. 509, 65 Am. Dec. 682; *Chicago, etc., R. Co. v. George*, 19 Ill. 510, 71 Am. Dec. 239; *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 497; *Chicago, etc., R. Co. v. Dewey*, 26 Ill. 255, 79 Am. Dec. 374; *Chicago, etc., R. Co. v. Johnson*, 103 Ill. 512, 8 Am. & Eng. R. Cas. 225; *Abend v. Terre Haute, etc., R. Co.*, 111 Ill. 203, 53 Am. Rep. 616, 17 Am. & Eng. R. Cas. 614; *Calumet Iron, etc., Co. v. Martin*, 115 Ill. 358; *Chicago, etc., R. Co. v. Thorson*, 11 Ill. App. 631; *Chicago, etc., R. Co. v. Rogers*, 17 Ill. App. 638; *Garfield Mfg. Co. v. McLean*, 18 Ill. App. 449.

2. Wilful Injury. — *St. Louis, etc., R. Co. v. Todd*, 36 Ill. 414; *Indianapolis, etc., R. Co. v. Galbreath*, 63 Ill. 436; *Illinois Cent. R. Co. v. Hetherington*, 83 Ill. 510; *Chicago, etc., R. Co. v. Johnson*, 103 Ill. 512; *Winchester v. Case*, 5 Ill. App. 486; *Earlville v. Carter*, 6 Ill. App. 421, 2 Ill. App. 34; *Carter v. Louisville, etc., R. Co.*, 98 Ind. 552, 49 Am. Rep. 780, 22 Am. & Eng. R. Cas. 360; *Ivens v. Cincinnati, etc., R. Co.*, 103 Ind. 30.

3. *Carter v. Louisville, etc., R. Co.*, 98 Ind. 552, 49 Am. Rep. 780, 22 Am. & Eng. R. Cas. 360; *Lake Shore, etc., R. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218.

4. Wilful Negligence Defined and Distinguished. — *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235, 71 Am. Dec. 265; *Pittsburgh, etc., R. Co. v. McGrath*, 115 Ill. 172; *Chicago West Div. R. Co. v. Klauber*, 9 Ill. App. 613; *Kranz v. Thieben*, 15 Ill. App. 482; *Chicago, etc., R. Co. v. Chapman*, 30 Ill. App. 504; *Jacksonville*

Southeastern R. Co. v. Southworth, 32 Ill. App. 307; *Cincinnati, etc., R. Co. v. Eaton*, 53 Ind. 307; *Terre Haute, etc., R. Co. v. Graham*, 95 Ind. 298, 48 Am. Rep. 719; *Louisville, etc., R. Co. v. Bryan*, 107 Ind. 54.

5. Defendant Guilty of Slight or Ordinary Negligence. — *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 351; *Rockford, etc., R. Co. v. Delaney*, 82 Ill. 198, 25 Am. Rep. 308; *East St. Louis Packing, etc., Co. v. Hightower*, 92 Ill. 141; *Winchester v. Case*, 5 Ill. App. 486; *Moody v. Peterson*, 11 Ill. App. 185.

6. *Chicago, etc., R. Co. v. Lee*, 68 Ill. 576; *Illinois Cent. R. Co. v. Patterson*, 93 Ill. 290.

7. *Toledo, etc., R. Co. v. Riley*, 47 Ill. 514; *Chicago, etc., R. Co. v. Murray*, 62 Ill. 326; *Chicago, etc., R. Co. v. Lee*, 68 Ill. 576.

8. Preponderance of Negligence. — *Chicago, etc., R. Co. v. Dunn*, 61 Ill. 385; *Chicago, etc., R. Co. v. Van Patten*, 64 Ill. 510; *Illinois Cent. R. Co. v. Maffit*, 67 Ill. 431; *Illinois Cent. R. Co. v. Benton*, 69 Ill. 174; *Chicago, etc., R. Co. v. Clark*, 70 Ill. 278; *Chicago, etc., R. Co. v. Mock*, 72 Ill. 141; *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 351; *Illinois Cent. R. Co. v. Goddard*, 72 Ill. 568; *Chicago, etc., R. Co. v. Donahue*, 75 Ill. 106; *Rockford, etc., R. Co. v. Delaney*, 82 Ill. 198, 25 Am. Rep. 308; *Schmidt v. Chicago, etc., R. Co.*, 83 Ill. 405; *Joliet v. Seward*, 86 Ill. 402, 29 Am. Rep. 35; *Indianapolis, etc., R. Co. v. Evans*, 88 Ill. 63; *Toledo, etc., R. Co. v. Grable*, 88 Ill. 443; *Chicago, etc., R. Co. v. Dimick*, 96 Ill. 42; *Earlville v. Carter*, 2 Ill. App. 34; *Parmelee v. Farro*, 22 Ill. App. 467.

These cases and other similar ones seem to be in harmony with *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 478, but modify, and, in some instances, overrule intervening cases which appeared to have recognized the doctrine that

3. Failure to Use Ordinary Care. — When the failure of the plaintiff to exercise ordinary care under the circumstances contributes to the injury, there can be no recovery. The doctrine of comparative negligence does not apply when the plaintiff does not exercise ordinary care.¹

VI. COMPARATIVE NEGLIGENCE AS APPLICABLE TO CHILDREN — **Child Too Young to Exercise Ordinary Care.** — In the case of children too young to be capable of exercising ordinary care for personal safety, the doctrine of comparative negligence is not applicable.²

Child Old Enough to Exercise Some Degree of Care. — Ordinary care must be exercised by children who are of sufficient discretion to be deemed capable of negligence, but the care required is not that of an adult, but that of a careful child of the same age and capacity,³ and in such cases the question of negligence, whether contributory or comparative, is for the jury.⁴

VII. EVIDENCE — **Comparative Negligence a Question of Fact.** — The question of comparative negligence is for the jury.⁵

Custom. — Evidence of a custom prevailing where the plaintiff was employed is admissible to enable the jury to determine the degree of care exercised by the plaintiff in comparison with that of the defendant.⁶

VIII. ORIGIN AND HISTORY OF DOCTRINE — **1. Degrees of Negligence in Law of Bailments.** — The law of bailments has long recognized the distinction between "slight," "ordinary," and "gross" negligence.⁷ But the division of negligence into degrees has been frequently discussed and criticised adversely.⁸

a mere preponderance of negligence upon the part of the defendant would render him liable. *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 251, 71 Am. Dec. 263; *Great Western R. Co. v. Haworth*, 39 Ill. 346; *Chicago, etc., R. Co. v. Payne*, 49 Ill. 503.

1. Plaintiff Must Use Ordinary Care. — *Chicago, etc., R. Co. v. Dewey*, 26 Ill. 255, 79 Am. Dec. 374; *Chicago, etc., R. Co. v. Hazzard*, 26 Ill. 373; *Chicago, etc., R. Co. v. Gretzner*, 46 Ill. 74; *Keokuk Packet Co. v. Henry*, 50 Ill. 264; *Chicago, etc., R. Co. v. Sweeney*, 52 Ill. 325; *Chicago, etc., R. Co. v. Dunn*, 52 Ill. 451; *St. Louis, etc., R. Co. v. Manly*, 58 Ill. 300; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313; *Chicago, etc., R. Co. v. Van Patten*, 64 Ill. 510; *Chicago, etc., R. Co. v. Lee*, 68 Ill. 576; *Illinois Cent. R. Co. v. Green*, 81 Ill. 20, 25 Am. Rep. 255; *Illinois Cent. R. Co. v. Hetherington*, 83 Ill. 510; *Chicago, etc. R. Co. v. Harwood*, 90 Ill. 425; *Wabash R. Co. v. Elliott*, 98 Ill. 481; *Bloomington v. Perdue*, 99 Ill. 329; *Chicago, etc. R. Co. v. Johnson*, 103 Ill. 512, 8 Am. & Eng. R. Cas. 225; *Wabash, etc., R. Co. v. Wallace*, 110 Ill. 114, 19 Am. & Eng. R. Cas. 359; *Abend v. Terre Haute, etc., R. Co.*, 111 Ill. 202, 53 Am. Rep. 616; *Calumet Iron, etc., Co. v. Martin*, 115 Ill. 358; *Willard v. Swansen*, 126 Ill. 381; *Toledo, etc., R. Co. v. Cline*, 135 Ill. 41, 45 Am. & Eng. R. Cas. 150; *Atchison, etc., R. Co. v. Feehan*, 149 Ill. 202; *Beardstown v. Smith*, 150 Ill. 169; *Chicago, etc., R. Co. v. Matthews*, 153 Ill. 268; *Chicago, etc., R. Co. v. Colwell*, 3 Ill. App. 545; *Chicago, etc., R. Co. v. Thorson*, 11 Ill. App. 631; *Chicago, etc., R. Co. v. Dougherty*, 12 Ill. App. 199; *Union R., etc., Co. v. Kallaher*, 12 Ill. App. 400; *Wabash, etc., R. Co. v. Moran*, 13 Ill. App. 72; *Gardner v. Chicago, etc., R. Co.*, 17 Ill. App. 265; *Chicago, etc., R. Co. v. Rogers*, 17 Ill. App. 638; *Garfield Mfg. Co. v. McLean*, 18 Ill. App. 447; *Chicago, etc., R. Co. v. Krueger*, 23 Ill. App. 639; *Illinois Cent.*

R. Co. v. Neer, 26 Ill. App. 356; *Illinois Cent. R. Co. v. Trowbridge*, 31 Ill. App. 190; *Louisville, etc., R. Co. v. Johnson*, 44 Ill. App. 56; *Springfield City R. Co. v. Clark*, 51 Ill. App. 626; *East St. Louis Connecting R. Co. v. Craven*, 52 Ill. App. 415; *Grogan v. Big Muddy Coal, etc., Co.*, 58 Ill. App. 154; *Chicago, etc., R. Co. v. Goebel*, 119 Ill. 515.

2. Very Young Children. — *Chicago, etc., R. Co. v. Welsh*, 118 Ill. 572.

3. Children Old Enough to Exercise Some Care. — *Chicago, etc., R. Co. v. Dewey*, 26 Ill. 255, 79 Am. Dec. 374; *Kerr v. Forgue*, 54 Ill. 482, 5 Am. Rep. 146; *Chicago, etc., R. Co. v. Murray*, 71 Ill. 601, 62 Ill. 326; *Hund v. Geier*, 72 Ill. 393; *Weick v. Lander*, 75 Ill. 93; *Chicago v. Keefe*, 114 Ill. 222, 55 Am. Rep. 860; *Illinois Cent. R. Co. v. Slater*, 129 Ill. 91, 16 Am. St. Rep. 242; *Glover v. Gray*, 9 Ill. App. 329; *Chicago, etc., R. Co. v. Lammert*, 12 Ill. App. 408; *Linck v. Scheffel*, 32 Ill. App. 17.

4. *Chicago, etc., R. Co. v. Becker*, 76 Ill. 32; *Rockford, etc., R. Co. v. Delaney*, 82 Ill. 198, 25 Am. Rep. 310.

5. *Chicago, etc., R. Co. v. Bonifield*, 104 Ill. 223; *Chicago, etc., R. Co. v. Wilson*, 35 Ill. App. 346; *Illinois Cent. R. Co. v. Haskins*, 115 Ill. 300, 22 Am. & Eng. R. Cas. 345.

6. *Pennsylvania Co. v. Stoelke*, 104 Ill. 201; *Chicago, etc., R. Co. v. Clark*, 108 Ill. 113.

7. *Coggs v. Bernard*, 2 Ld. Raym. 909. See the title *BAILMENTS*, vol. 3, p. 742; *Smith's L. Cas.** 82, note.

8. Criticisms of Division into Degrees. — 6 Alb. L. J. 313; *Chicago, etc., R. Co. v. Johnson*, 22 Am. L. Reg. N. S. 126, note; *Wilson v. Brett*, 11 M. & W. 113; *Hinton v. Dibbin*, 6 Jur. 603; *Austin v. Manchester, etc., R. Co.*, 10 C. B. 474, 70 E. C. L. 474; *Grill v. General Iron Screw Collier Co., L. R. 1 C. P. 612*; *Beal v. South Devon R. Co.*, 3 H. & C. 337; *The Steamboat New World v. King*, 16 How. (U. S.) 469; *Milwaukee, etc., R. Co. v. Arms*, 91

2. Admiralty — Collision Cases — Loss Equally Divided. — In cases of collision between two vessels, caused by the negligence of both parties, it was formerly held that the loss should be apportioned between the owners of the vessels according to the relative amount of negligence of each, provided one party was much more in fault than the other, but the rule now is to divide the loss equally between the parties in all cases of loss occasioned by mutual negligence.¹

Other than Collision Cases — Rule Not Settled. — The decisions as to the rule of damages in other than collision cases conflict, but the better opinion seems to be that in this class of cases the doctrine of comparative negligence does not obtain.²

3. Illinois Rule. — The doctrine of comparative negligence was first developed as a common-law doctrine by the courts of Illinois, and was followed in that state in numerous cases though in a modified form, always tending toward the ordinarily accepted doctrine of contributory negligence. The doctrine has recently been held to be abrogated in that state.³

U. S. 494; *Gill v. Middleton*, 105 Mass. 479, 7 Am. Rep. 548; *Lane v. Boston, etc., R. Co.*, 112 Mass. 455; *Wells v. New York Cent. R. Co.*, 24 N. Y. 181; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 206, 82 Am. Dec. 281; *Smith v. New York Cent. R. Co.*, 24 N. Y. 228; *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Dec. 285; *Briggs v. Taylor*, 28 Vt. 185.

1. Collision Cases — United States. — *Reeves v. The Ship Constitution, Gilp.* (U. S.) 579; *The Nautilus, 1 Ware* (U. S.) 529; *The Schooner Catharine v. Dickinson*, 17 How. (U. S.) 177; *Rogers v. Steamer St. Charles*, 19 How. (U. S.) 108; *Cushing v. Ship John Fraser*, 21 How. (U. S.) 184; *Union Steamship Co. v. New York, etc., Steamship Co.*, 24 How. (U. S.) 307; *The Morning Light*, 2 Wall. (U. S.) 550; *The Sapphire*, 18 Wall. (U. S.) 51; *The Steamboat Atlas*, 4 Ben. (U. S.) 27, 93 U. S. 302, 22 Cent. L. J. 166; *The Clara*, 102 U. S. 200; *The Sterling*, 106 U. S. 647; *The Manitoba*, 122 U. S. 97; *McCord v. The Steamboat Tiber*, 6 Biss. (U. S.) 409; *Lucas v. The Steamboat Thomas Swann*, 6 McLean (U. S.) 282; *The Pennsylvania*, 12 Fed. Rep. 914; *The David Dows*, 16 Fed. Rep. 154.

Washington. — *Meigs v. Steamship North-erner*, 1 Wash. Ter. 78; *Puget Sound Commercial Co. v. The Barkentine C. L. Taylor*, 2 Wash. Ter. 93; *Vaux v. Sheffer*, 8 Moo. P. C. 75.

Scotland. — *Hay v. Le Neve*, 2 Shaw's Sc. App. Cas. 395.

England. — *The Montreal*, 24 Eng. L. & Eq. 580.

Contra. — *The Victory*, 68 Fed. Rep. 395. In this case Judge Simonton says: "If the spirit of the rule be adopted, and the liability of each vessel be measured by its degree of fault, exact justice will be done."

2. The Explorer, 20 Fed. Rep. 135; *The Wanderer*, 20 Fed. Rep. 140; *The Marianna Flora*, 11 Wheat. (U. S.) 54; *The Palmyra*, 12 Wheat. (U. S.) 17.

The rule is discussed, but not decided, in *The Max Morris*, 137 U. S. 1. But it does not seem probable that the Supreme Court of the United States will adopt a different rule for different classes of litigants. *Atlee v. Union Packet Co.*, 21 Wall. (U. S.) 389. See also *Peterson v. The Chandos*, 4 Fed. Rep. 645; *Holmes v. Oregon, etc., R. Co.*, 5 Fed. Rep. 533; *The Manhasset*, 19 Fed. Rep. 430.

3. Origin and History in Illinois. — In the first case stating this doctrine, Judge Breese says: "The true doctrine, therefore, we think, is that in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff; that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover. Although these cases do not distinctly avow this doctrine in terms, there is a vein of it very perceptible running through very many of them, as where there are faults on both sides the plaintiff shall recover; his fault being measured by the defendant's negligence, the plaintiff need not be wholly without fault, as in *Raisin v. Mitchell*, 9 C. & P. 613, 38 E. C. L. 252, and *Lynch v. Nurdin*, 1 Q. B. 29, 41 E. C. L. 422. We say, then, that in this, as in all like cases, the degrees of negligence must be measured and considered, and wherever it shall appear that the plaintiff's negligence is comparatively slight and that of the defendant gross, he shall not be deprived of his action." *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 496. The doctrine stated in this case was modified in *Chicago, etc., R. Co. v. Johnson*, 103 Ill. 521; *Chicago v. Stearns*, 105 Ill. 554; *Abend v. Terre Haute, etc., R. Co.*, 111 Ill. 202, 53 Am. Rep. 616; *Calumet Iron, etc., Co. v. Martin*, 115 Ill. 358; *Chicago, etc., R. Co. v. Warner*, 123 Ill. 38; *Mansfield v. Moore*, 124 Ill. 138; *Willard v. Swansen*, 126 Ill. 381; *Chicago, etc., R. Co. v. Fisher*, 141 Ill. 614; *Lake Shore, etc., R. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218; *North Chicago St. R. Co. v. Williams*, 140 Ill. 275.

"It inevitably follows, from the rulings in the numerous cases to which we have referred, that the court has not understood that the rule of comparative negligence changed or modified the general rule requiring that the injured party, in order to recover for the negligence causing his injury, must have observed due or ordinary care for his personal safety, and authorizing him to recover for such injuries where he has observed such care." *Calumet Iron, etc., Co. v. Martin*, 115 Ill. 358.

"We held in the *Martin* case that where one has observed ordinary care, he has, even if slightly negligent, observed all the care the law requires of him, and that 'where, hav-

IX. STATUS OF DOCTRINE IN VARIOUS JURISDICTIONS — 1. Georgia. — The doctrine of comparative negligence prevails in a modified form in Georgia, though it has never been accurately expressed there.

Developed under Statutory Enactment. — The Georgia rule is partly the result of statutory provisions; that the plaintiff may recover though guilty of some negligence, if in the exercise of ordinary care, and that if the plaintiff and the defendant are both at fault the former may recover, but the damages shall be diminished in proportion to the amount of default attributable to the plaintiff.¹

2. Illinois. — As stated above, the doctrine of comparative negligence which seemed at one time firmly established as a characteristic feature of the juris-

ing observed this care, he is injured by the negligence of another, that other has been guilty of the degree of negligence for which the law charges responsibility." *Mansfield v. Moore*, 124 Ill. 138.

Existence of Rule Questioned. — "In respect to the first [instruction], it will only be necessary to say that, whether the doctrine of comparative negligence, as defined in *Galena*, etc., *R. Co. v. Jacobs*, 20 Ill. 478, and subsequent cases, has still a place in the jurisprudence of this state, and whether the later case of *Calumet Iron*, etc., *Co. v. Martin*, 115 Ill. 358, and other cases since decided, have not placed that doctrine upon a basis where it has become simply another form of stating the common-law rule of contributory negligence, need not be here discussed." *Pullman Palace Car Co. v. Laack*, 143 Ill. 257; *Atchison*, etc., *R. Co. v. Feehan*, 149 Ill. 214.

"We have repeatedly held, in effect, in the later decisions, beginning with *Calumet Iron*, etc., *Co. v. Martin*, 115 Ill. 358, that the doctrine of comparative negligence as announced in the earlier cases was no longer the law of this state, and it is to be no longer regarded as a correct rule of law, applicable in cases of this character." *Lake Shore*, etc., *R. Co. v. Heslons*, 150 Ill. 556.

Abrogated. — "The doctrine of comparative negligence is no longer the law of this court." *Lanark v. Dougherty*, 153 Ill. 165; *Wenona Coal Co. v. Holmquist*, 152 Ill. 581; *Chicago*, etc., *R. Co. v. Matthews*, 153 Ill. 268; *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 17; *Cicero*, etc., *St. R. Co. v. Meixner*, 160 Ill. 329.

Rule Compared with the Common-law Doctrine of Contributory Negligence. — And it is probable, that even before the late cases in terms announced the abrogation of the rule of comparative negligence in *Illinois*, the rule as expressed was but a different manner of stating the common-law rule of contributory negligence. 6 Alb. L. J. 313, 314; *Bridge v. Grand Junction R. Co.*, 3 M. & W. 244; *Davies v. Mann*, 10 M. & W. 546; *Butterfield v. Forrester*, 11 East 60; *Baltimore*, etc., *R. Co. v. Jones*, 95 U. S. 439; *Strong v. Sacramento*, etc., *R. Co.*, 61 Cal. 326; *Hughes v. Muscatine*, 44 Iowa 672; *Kennard v. Burton*, 25 Me. 39, 43 Am. Dec. 249; *Baltimore*, etc., *R. Co. v. Fitzpatrick*, 35 Md. 32; *Priest v. Nichols*, 116 Mass. 401; *Kerwhacker v. Cleveland*, etc., *R. Co.*, 3 Ohio St. 172, 62 Am. Dec. 246; *Houston*, etc., *R. Co. v. Gorbett*, 49 Tex. 573; *Dreher v. Fitchburg*, 22 Wis. 675, 99 Am. Dec. 91; *Cremer v. Portland*, 36 Wis. 92; *Hammond v. Mukwa*, 40 Wis. 35; *Griffin v. Willow*, 43 Wis. 509; *Otis v. Janesville*, 47 Wis. 422.

1. Georgia. — Code of Georgia, §§ 2972, 3033, 3034.

In two late cases the Georgia rule is thus stated: "The distinction is clearly drawn [in the instructions] between that negligence which, on the part of plaintiff's husband, would defeat all recovery, and that which would only defeat it in part. In the one case, his negligence must have caused the disaster itself alone; in the other, it did not alone cause it, but the company's default and his negligence together did the work. In the first case the judge instructed the jury that there could be no recovery; in the second, that there might be, but that it was the duty of the jury to diminish damages in proportion to the negligence of the husband." This doctrine is then approved by the court, when considered in connection with the statement in another part of the charge, that "if the deceased could have avoided the consequences to himself by the exercise of ordinary care," there could be no recovery. *Georgia R. Co. v. Pittman*, 73 Ga. 325, 26 Am. & Eng. R. Cas. 478.

Again: "It is well settled that questions of negligence resulting in such injuries as those complained of are for the jury, and that a recovery may be defeated by its being shown that the injury was caused solely from the negligence of the plaintiff, or that he could by the exercise of ordinary care have avoided the consequences to himself, or that the defendant and its employees were in the exercise of all ordinary care and diligence, or in other cases than these, that the defendant will not be relieved, although the plaintiff may in some way have contributed to the injury sustained, but in that event the damages shall be diminished by the jury in proportion to the default attributable to him. Code, §§ 2972, 3033, 3034, and citations." *Branham v. Central R. Co.*, 78 Ga. 35. See also *Augusta*, etc., *R. Co. v. McElmurry*, 24 Ga. 75; *Macon*, etc., *R. Co. v. Davis*, 27 Ga. 113, 18 Ga. 679, 13 Ga. 68; *Macon*, etc., *R. Co. v. Johnson*, 38 Ga. 409; *Central R.*, etc., *Co. v. Dixon*, 42 Ga. 327; *Hendricks v. Western*, etc., *R. Co.*, 52 Ga. 467; *Atlanta*, etc., *R. Co. v. Ayers*, 53 Ga. 12; *Campbell v. Atlanta*, etc., *R. Co.*, 53 Ga. 488; *Thompson v. Central R.*, etc., *Co.*, 54 Ga. 509; *Georgia R.*, etc., *Co. v. Neely*, 56 Ga. 540; *Rome v. Dodd*, 58 Ga. 238; *Southwestern R. Co. v. Johnson*, 60 Ga. 667; *Atlanta*, etc., *R. Co. v. Wyly*, 65 Ga. 120; *Georgia R. Co. v. Thomas*, 68 Ga. 744; *Central R. Co. v. Gleason*, 69 Ga. 200; *Central R. Co. v. Brinson*, 70 Ga. 207; *Savannah*, etc., *R. Co. v. Stewart*, 71 Ga. 427; *Savannah*, etc., *R. Co. v. Smith*, 93 Ga. 742.

prudence of Illinois, has recently been declared not to exist at the present day in that state.¹

3. Kansas.—The doctrine of comparative negligence, though apparently favored in the earlier Kansas cases, has been denied in that state.²

4. Kentucky.—The courts of Kentucky have not adopted the rule of comparative negligence.³

5. Oregon.—The doctrine of comparative negligence has been repudiated in Oregon.⁴

6. Tennessee.—The doctrine of comparative negligence does not prevail in Tennessee, but a peculiar modification of the rule of contributory negligence obtains.⁵

1. See *supra*, this title, *Origin and History of Doctrine—Illinois Rule*.

2. **Kansas.**—The earlier cases, when carefully examined, will be found to state the common-law doctrine of contributory negligence, only in a different form, and the slight neglect which would not bar a recovery was either not the proximate cause of the injury or did not amount to a want of ordinary care. *Union Pac. R. Co. v. Rollins*, 5 Kan. 167; *Sawyer v. Sauer*, 10 Kan. 466; *Pacific R. Co. v. Houts*, 12 Kan. 328; *Kansas Pac. R. Co. v. Pointer*, 14 Kan. 38; *Mason v. Missouri Pac. R. Co.*, 27 Kan. 83, 41 Am. Rep. 405; *Wichita, etc., R. Co. v. Davis*, 37 Kan. 743, 1 Am. St. Rep. 275.

"This court has not adopted what is generally called the rule of comparative negligence." *Kansas Pac. R. Co. v. Peavey*, 29 Kan. 170, 44 Am. Rep. 630, 11 Am. & Eng. R. Cas. 268; *Atchison, etc., R. Co. v. Morgan*, 31 Kan. 77, 13 Am. & Eng. R. Cas. 501; *Howard v. Kansas City, etc., R. Co.*, 41 Kan. 408; *Chicago, etc., R. Co. v. Brown*, 44 Kan. 384; *Atchison, etc., R. Co. v. Hughes*, 55 Kan. 491; *Atchison, etc., R. Co. v. O'Melia*, 1 Kan. App. 385.

3. **Kentucky.**—*Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208, 1 Am. & Eng. R. Cas. 79; *Adams v. Louisville, etc., R. Co.*, 82 Ky. 603, 21 Am. & Eng. R. Cas. 380.

Some confusion has arisen in Kentucky, on account of the use of the terms "gross" and "wilful," in deciding cases arising under the statute as to injuries resulting in death caused by the wilful misconduct of the defendant. In such cases the defendant is liable for injuries resulting in death, notwithstanding the contributory negligence of the plaintiff. *Kentucky Statutes of 1894*, § 6; *Louisville, etc., R. Co. v. Mahony*, 7 Bush (Ky.) 235; *Illinois Cent. R. Co. v. Dick*, 91 Ky. 434.

4. **Oregon.**—Some of the earlier cases in Oregon seem to decide that slight negligence on the part of the plaintiff will not bar a recovery; but in such cases the slight negligence that was held not to bar a recovery was either not a proximate cause of the injury, or the plaintiff was nevertheless in the exercise of ordinary care. *Bequette v. People's Transp. Co.*, 2 Oregon 200; *Holstine v. Oregon, etc., R. Co.*, 8 Oregon 164.

The later cases seem to deny the rule. The doctrine in this state is thus set forth: "Besides, I do not concede that a party can recover in such a case when chargeable with any degree of negligence upon his part, if it directly contributes to the injury. A person

may be negligent in an affair and still recover, on account of the negligence of another party, but not when his negligence is the proximate cause of the injury. The law does not enforce contribution between joint tortfeasors. However slight the negligence upon the part of a plaintiff may be, if it be such that but for that negligence the misfortune could not have happened, he cannot recover. But if the injury would have happened if his want of care had not contributed thereto, there may be a liability." *Hurst v. Burnside*, 12 Oregon 520; *Cassida v. Oregon R., etc., Co.*, 14 Oregon 551; *Ford v. Umatilla County*, 15 Oregon 319.

5. **Tennessee.**—*Whirley v. Whiteman*, 1 Head (Tenn.) 610; *Nashville, etc., R. Co. v. Carroll*, 6 Heisk. (Tenn.) 367; *East Tennessee, etc., R. Co. v. Toppins*, 10 Lea (Tenn.) 65; *East Tennessee, etc., R. Co. v. Gurley*, 12 Lea (Tenn.) 46; *East Tennessee, etc., R. Co. v. Hull*, 88 Tenn. 33, 41 Am. & Eng. R. Cas. 495; *East Tennessee, etc., R. Co. v. Aiken*, 89 Tenn. 245.

The rule in Tennessee is, that negligence on the part of the plaintiff contributing to his injury as the proximate cause thereof will bar a recovery; but that although guilty of some negligence, yet if he could not by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he may recover. But his negligence will be taken into consideration in mitigation of damages, and this rule does not permit a recovery in any case where the parties are equally blamable. *Louisville, etc., R. Co. v. Burke*, 6 Coldw. (Tenn.) 45; *Nashville, etc., R. Co. v. Smith*, 11 Heisk. (Tenn.) 455; *Louisville, etc., R. Co. v. Conner*, 2 Baxt. (Tenn.) 382; *Nashville, etc., R. Co. v. Nowlin*, 1 Lea (Tenn.) 523; *Nashville, etc., R. Co. v. Smith*, 9 Lea (Tenn.) 470; *East Tennessee, etc., R. Co. v. Fain*, 12 Lea (Tenn.) 35, 19 Am. & Eng. R. Cas. 105; *East Tennessee, etc., R. Co. v. Humphreys*, 12 Lea (Tenn.) 200; *East Tennessee, etc., R. Co. v. Stewart*, 13 Lea (Tenn.) 432, 21 Am. & Eng. R. Cas. 618; *Jackson v. Nashville, etc., R. Co.*, 13 Lea (Tenn.) 491, 49 Am. Rep. 663; *Louisville, etc., R. Co. v. Fleming*, 14 Lea (Tenn.) 128, 18 Am. & Eng. R. Cas. 347; *East Tennessee, etc., R. Co. v. Winters*, 85 Tenn. 240; *Nashville, etc., R. Co. v. Seaborn*, 85 Tenn. 396; *East Tennessee, etc., R. Co. v. De Armond*, 86 Tenn. 73, 6 Am. St. Rep. 816.

In this connection the Tennessee statutory provisions regarding the lookout, etc., required to be kept on railroad trains are important. *Code of Tennessee*, §§ 1298, 1299; *East Ten-*

7. **Other States — Doctrine Denied.** — The doctrine of comparative negligence is denied by the courts of most of the states.¹

8. **Federal Courts.** — The Supreme Court of the United States adheres to the rule of contributory negligence.²

9 **England.** — The courts of England have never departed from the rule of contributory negligence.³

COMPARISON OF HANDWRITING. — See the title **HANDWRITING.**

COMPEL. — See note 4.

nessee, etc., R. Co. v. Humphreys, 12 Lea (Tenn.) 200, 15 Am. & Eng. R. Cas. 477, note; Louisville, etc., R. Co. v. Burke, 6 Coldw. (Tenn.) 45; Smith v. Nashville, etc., R. Co., 6 Coldw. (Tenn.) 589, 6 Heisk. (Tenn.) 174; Louisville, etc., R. Co. v. Connor, 9 Heisk. (Tenn.) 19; Hill v. Louisville, etc., R. Co., 9 Heisk. (Tenn.) 823; Memphis, etc., R. Co. v. Smith, 9 Heisk. (Tenn.) 860; Railroad Co. v. Walker, 11 Heisk. (Tenn.) 383.

These and all similar cases must be considered with regard to the statutes above cited.

1. **Doctrine of Comparative Negligence Repudiated — Alabama.** — Gothard v. Alabama G. S. R. Co., 67 Ala. 114; Frazer v. South, etc., Alabama R. Co., 81 Ala. 185, 60 Am. Rep. 145, 28 Am. & Eng. R. Cas. 565.

Arizona. — Prescott, etc., R. Co. v. Rees, (Arizona 1892) 28 Pac. Rep. 1134.

California. — Needham v. San Francisco, etc., R. Co., 37 Cal. 409; Robinson v. Western Pac. R. Co., 48 Cal. 409; Strong v. Sacramento, etc., R. Co., 61 Cal. 326; Holmes v. South Pac. Coast, etc., R. Co., 97 Cal. 161.

Colorado. — Western Union Tel. Co. v. Eysler, 2 Colo. 141.

Connecticut. — Rowen v. New York, etc., R. Co., 59 Conn. 364.

Delaware. — Ogle v. Philadelphia, etc., R. Co., 3 Houst. (Del.) 267; Jefferson v. Brady, 4 Houst. (Del.) 645.

Indiana. — Terre Haute, etc., R. Co. v. Graham, 95 Ind. 293, 12 Am. & Eng. R. Cas. 77, 48 Am. Rep. 719; Louisville, etc., R. Co. v. Falvey, 104 Ind. 434.

Iowa. — O'Keefe v. Chicago, etc., R. Co., 32 Iowa 467, 10 Am. Ry. Rep. 63; Johnson v. Tillson, 36 Iowa 89; Artz v. Chicago, etc., R. Co., 38 Iowa 293; Lang v. Holiday Creek R. Co., 42 Iowa 677.

Maryland. — Fenneman v. Holden, 75 Md. 1.

Massachusetts. — Marble v. Ross, 124 Mass.

44. *Michigan.* — Lake Shore, etc., R. Co. v. Miller, 25 Mich. 277; Mynning v. Detroit, etc., R. Co., 59 Mich. 257; Matta v. Chicago, etc., R. Co., 69 Mich. 109, 32 Am. & Eng. R. Cas. 71.

Missouri. — Welch v. McAllister, 13 Mo. App. 89; Brooks v. Hannibal, etc., R. Co., 35 Mo. App. 571; Hurt v. St. Louis, etc., R. Co., 94 Mo. 255, 4 Am. St. Rep. 374, 34 Am. & Eng. R. Cas. 422.

Nebraska. — Omaha Horse R. Co. v. Doolittle, 7 Neb. 481.

New Hampshire. — State v. Manchester, etc., R. Co., 52 N. H. 528.

New Jersey. — Pennsylvania R. Co. v. Righter, 42 N. J. L. 180, 2 Am. & Eng. R. Cas. 220.

New York. — Wilds v. Hudson River R. Co., 24 N. Y. 432.

Pennsylvania. — Little Schuylkill Nav. R., etc., Co. v. Norton, 24 Pa. St. 465, 64 Am. Dec. 672; Catawissa R. Co. v. Armstrong, 49 Pa. St. 186; O'Donnell v. Allegheny Valley R. Co., 59 Pa. St. 239, 98 Am. Dec. 336; Potter v. Warner, 91 Pa. St. 362, 36 Am. Rep. 668; Monongahela City v. Fischer, 111 Pa. St. 9; Lehigh Valley R. Co. v. Greiner, 113 Pa. St. 600; Long v. Milford Tp., 137 Pa. St. 122.

Texas. — Houston, etc., R. Co. v. Gorbett, 49 Tex. 573; McDonald v. International, etc., R. Co., 86 Tex. 1, 40 Am. St. Rep. 803; Galveston, etc., R. Co. v. Thornsberry, (Tex. 1891) 17 S. W. Rep. 521; Boyd v. Burkett, (Tex. Civ. App. 1894) 27 S. W. Rep. 223; Turner v. Ft. Worth, etc., R. Co., (Tex. Civ. App. 1895) 30 S. W. Rep. 253.

Wisconsin. — Potter v. Chicago, etc., R. Co., 21 Wis. 372, 94 Am. Dec. 548; Otis v. Janesville, 47 Wis. 422; Ditherber v. Chicago, etc., R. Co., 47 Wis. 138; Bloor v. Delafield, 69 Wis. 273.

2. **United States Courts.** — New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.) 357; Sioux City, etc., R. Co. v. Stout, 17 Wall. (U. S.) 660.

3. **England.** — Butterfield v. Forrester, 11 East 60; Bridge v. Grand Junction R. Co., 3 M. & W. 245; Davies v. Mann, 10 M. & W. 546.

4. **Force.** — In its ordinary signification the word *compel* implies force or violence, and has in it the element of irresistibility. It has been held that in an instruction it may be used interchangeably with "force." St. Clair v. Missouri Pac. R. Co., 29 Mo. App. 76.

Compelled to Pay. — A statute provided that a judgment should not be satisfied where a sheriff or other officer is *compelled* to pay it, but should remain in force for the benefit of the officer. It was held that if an officer was liable he was *compelled* to pay though no suit had been brought. The court said: "It is a maxim of the law, that what one may be *compelled* to do by suit, he may do without suit. No good purpose would have been subserved by withholding payment until suit and judgment; but payment without suit saved useless litigation and unnecessary costs. We are of opinion that where the officer is liable to the judgment creditor, and the latter claims payment of him, which is accordingly made, the payment is compulsory within the spirit and intent of the statute. All the analogies of the law, it seems to us, favor this construction. The case is totally unlike those that have been cited by counsel for the appellants, in which it has been held that a party who voluntarily pays an illegal claim against him cannot re-

COMPENSATION. (See the titles DAMAGES; EMINENT DOMAIN; PUBLIC OFFICERS. As to what is just compensation, see JUST, and the title EMINENT DOMAIN. As to the compensation of brokers, executors, servants, etc., see such titles as BROKERS; EXECUTORS AND ADMINISTRATORS; MASTER AND SERVANT, etc.)—A recompense or reward for some loss, injury, or service, especially when it is given by statute.¹

cover it back of the party to whom it is paid, and that such payment will be regarded as voluntary, unless made to release the person or property from process, a threatened action being insufficient to render the payment compulsory. The Town of Ligonier *v.* Ackerman, 46 Ind. 552, and cases there cited. An important difference between those cases and that in judgment is found in the difference between an illegal and a legal claim. The law does not *compel* the payment of the former, while it does of the latter." *Burbank v. Slinkard*, 53 Ind. 495.

By contract made in this state, A engaged "to repay to B, of New Hampshire, any moneys, not exceeding one thousand five hundred dollars, which B should legally be *compelled* to pay to C on account of money received of C on account of and in part pay for money due on D's bond to B." C recovered of B, in an action brought in New Hampshire, a larger sum than one thousand five hundred dollars. It was held that the words "legally *compelled*" meant compulsion by legal process, without reference to the laws of any particular state; that as the particular ground of the recovery in C's action did not, and was not required to appear by the record of the judgment, it might be shown by parol evidence. *Parker v. Thompson*, 3 Pick. (Mass.) 429.

Cause in the Sense of Compel.—A statute directed the sheriff to cause the defendant to enter into a bond. It was held that "cause" in this connection was synonymous with *compel*. *Poole v. Vernon*, 2 Hill L. (S. Car.) 670.

Require in the Sense of Compel.—See *Meagher v. Van Zandt*, 18 Nev. 234.

Compelled to Be a Witness Against Himself.—See the titles CONSTITUTIONAL LAW; CRIMINAL LAW; WITNESSES.

1. *Rapalje & Lawrence Law Dict.*; *Vanhorne v. Dorrance*, 2 Dall. (U. S.) 315; *Searcy v. Grow*, 15 Cal. 117.

Compensation means a recompense given for a thing received. *James River, etc., Co. v. Turner*, 9 Leigh (Va.) 340.

Election.—As to the doctrine of compensation with reference to questions of equitable election, see the title ELECTION.

Income or Profit.—The Constitution of *California* provided that no person holding a lucrative office under the United States should be eligible to any civil office of profit in the state, with a provision that certain offices where the *compensation* did not exceed five hundred dollars should not be deemed lucrative. In construing this provision, the court, in *Searcy v. Grow*, 15 Cal. 123, said: "The counsel construes this word *compensation* to be the clear income of the office resulting after the payment of all the necessary expenses. If the expenses had taken all the income, the office, in this sense of the word, would have been with-

out any *compensation*. * * * The accepted meaning of the term is, that return which is given for something else; in other words, a consideration; and in this sense the word is used in the constitution. The constitution, by the qualification, meant to define, not the profit made by the office-holder, but the income of the office."

Compared with Salary. (See also SALARY.)—The term *compensation* is broader than "salary," and will include allowances for stationery, fare, and clerk hire. *Kilgore v. People*, 76 Ill. 552.

Compensation and Salary Used Synonymously.—See *Crawford County v. Lindsay*, 11 Ill. App. 261.

Compensation in Any Form.—A statute provided for a penalty against any person conducting a game of cards for *compensation*, whereby money might be won or lost. It was held no error that the court in charging the jury in the language of the statute added after the word *compensation* the words "in any form whatever." The court said: "The court's instructions followed the language of the statute in reference to the acts necessary to constitute the crime charged, except after the word *compensation*, the court added the words 'in any form whatever.' It is contended that the addition of these words was not authorized by the statute. But it seems to us that the additional words are not in conflict with the language used in the statute, but the language, '*compensation*, reward, or commission,' means 'in any form whatever.'" *Harper v. Com.*, 93 Ky. 290.

Compensation Not to Be Increased or Diminished. (See also the title PUBLIC OFFICERS.)—The Constitution of *Wisconsin* provided that the *compensation* of public officers should not be increased or diminished during their terms of office. In construing this provision of the constitution, the court, in *Milwaukee County v. Hackett*, 21 Wis. 617, said: "I think the word *compensation*, as used in section 26, article 4 of the constitution, signifies the return for the services of such officers as receive a fixed salary payable out of the public treasury of the state; and that it does not, and was not intended to apply to the remuneration of that large class of officers, such as sheriffs, constables, clerks of courts, and others, who receive specific fees for specific services as they are from time to time required to render them." See also *State v. Kalb*, 50 Wis. 184.

In Full Compensation. (See also the title PUBLIC OFFICERS; STATUTES.)—In *U. S. v. Fisher*, 109 U. S. 143, it was held that when Congress appropriates a sum "in full *compensation*" of the services of a public officer, the incumbent cannot recover an additional sum in the Court of Claims, notwithstanding a prior statute fixes the salary at a larger amount than the sum so appropriated. The court said: "We cannot

In Civil Law. — A reciprocal liberation between two persons who are both creditors and debtors of each other.¹

COMPENSATORY DAMAGES. — See the title DAMAGES.

COMPETENT. (See also CREDIBLE; INCOMPETENT.) — See note 2.

adopt the view of appellee unless we eliminate from the statute the words 'in full *compensation*,' which Congress, abandoning the long-used form of the appropriation acts, has, *ex industria*, inserted. Our duty is to give them effect. When Congress has said that the sum appropriated shall be in full *compensation* of the services of the appellee, we cannot say that it shall not be in full *compensation*, and allow him a greater sum." See also *U. S. v. Fisher*, 109 U. S. 146.

But in the absence of words showing such intention, a statute which fixes the annual salary of a public officer at a designated sum is not abrogated by a subsequent appropriation act appropriating a less sum for his services. *U. S. v. Langston*, 118 U. S. 389.

Taxable Costs. — In an agreement to pay a solicitor just and reasonable *compensation* for services rendered by him as such, the word *compensation* means neither more nor less than taxable costs. *Culley v. Hardenbergh*, 1 Den. (N. Y.) 508.

1. It resembles in many respects the common-law set-off. The principal difference is that common-law set-off must be pleaded to be effectual, whereas *compensation* is effectual without any such plea. 2 Bouvier Inst., n. 1407. See the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM.

Kinds of Compensation. — *Compensation* is of three kinds: legal, or by operation of law; compensation by way of exception; and by reconvention. *Stewart v. Harper*, 16 La. Ann. 181.

Where Compensation Takes Place. — It takes place by mere operation of law, and extinguishes reciprocally the two debts as soon as they exist simultaneously, to the amount of their respective sums. It takes place only between two debts having equally for their object a sum of money, or a certain quantity of consumable things of one and the same kind, and which are equally liquidated and demandable. It takes place whatever be the cause of the debts, except in case, first, of a demand of restitution of a thing of which the owners have been unjustly deprived; second, of a demand of restitution of a deposit and a loan for use; third, of a debt which has for its cause aliments declared not liable to seizure. La. Civ. Code, 2203, 2208; *Dorvin v. Wiltz*, 11 La. Ann. 514.

Same — Bankruptcy. — In *Carr v. Hamilton*, 129 U. S. 252, it is said: "The article apropos of the point now under consideration is 1291 of the Code Napoléon, and 2209 of the Civil Code of Louisiana, and reads as follows: '*Compensation* takes place only between two debts, having equally for their object a sum of money, or a certain quantity of consumable things of one and the same kind, and which are equally liquidated and demandable (*exigibles, i. e., due*).' Now, although upon a bankruptcy declared, all claims against the bankrupt become instantly due (subject, of course, if not matured, to a rebate of interest,

and are equally entitled to dividends of the bankrupt assets, yet, in order that a claim may be the cause of *compensation*, the commentators hold that it must be due (*exigible*) at the time when the bankruptcy is declared. 7 Toullier, art. 381; 28 Demolombe, art. 540. There have also been judicial decisions to the same effect, though not uniformly so. See 3 Merl. Report, p. 262, tit. Compensation."

Same — After Judgment. — In *Caldwell v. Davis*, 2 Martin N. S. (La.) 135, the court said: "There is presented to us, in this case, for decision, the following question: 'whether after a judgment rendered, and execution issued, the defendant in the suit can purchase a promissory note of the plaintiff, oppose it in *compensation* of the amount due, and suspend the operation of the execution until the verity of the claim thus set up is examined.' The novelty of this attempt, and the inconvenience which we apprehend would result from sanctioning it, has induced us to look with considerable attention into the law on the subject. After as close an examination as we are capable of bestowing we feel under the necessity of deciding that the debt in this case was properly offered in *compensation*. *Compensation* is a mode of payment — *compensation es un manera de paga*. It takes place by the mere operation of law, without the knowledge of the debtor, and the two debts are reciprocally extinguished, as soon as they exist simultaneously to the amount of their respective sums. Civil Code 298, art. 190; Toullier, Droit Civil François, vol. liv. 3, tit. 3, c. 5, No. 372; Febrero cinco juicios, p. 2, lib. 3, cap. 2, § 4, No. 185; Pothier, Traité des Obligations, No. 591; Curia Phil., p. 1, Juicio Civil, § 15, No. 8."

2. Competent Evidence. (See the title EVIDENCE.) — **Competent**, when applied to evidence, is equivalent to "admissible." *State v. Johnson*, 12 Minn. 476.

Competent evidence means that which the very nature of the thing to be proven requires, as the production of a writing where its contents are the subject of inquiry. *Chapman v. McAdams*, 1 Lea (Tenn.) 504. See also BEST, and the titles EVIDENCE; SECONDARY EVIDENCE.

Same — Competent in the Sense of Sufficient or Adequate. — In *Niles v. Sprague*, 13 Iowa 204, the trial court instructed the jury that a certain fact must be proved by *competent evidence*. The appellate court said: "All of the testimony submitted to the jury was, for the purposes of the trial, *competent*. They had nothing to do with any other, nor was it any part of their duty to question its *competency*. It was for them to determine its weight or credibility — what facts were or were not established. The word *competent*, as here used, therefore, we understand to mean sufficient or adequate; and not that the jury were to determine whether the testimony was legally fit or suitable, or otherwise, to prove the necessary fact or facts."

Competent Court. (See also the title COURTS.)

COMPETITION.—See note 1.

—In *Clark v. Com.*, 29 Pa. St. 136, the court, by Woodward, J., said: "But to constitute a *competent* court, several things are necessary: the presence of the president judge and jurors, grand and petit, drawn, summoned, and impaneled according to law. Time is another legal requisite. Many president judges are required to hold courts of oyer and terminer in different counties on certain prefixed days; and if the number or duration of trials in one county prevent him from trying all the cases before the law requires his presence elsewhere, the prisoners, whom it has been impossible to try, are not to take advantage of this ineffectual term to claim their release. It is only after two terms, at both of which it was possible to indict and try them according to law, that they become entitled to a discharge."

Same—Foreign Judgments.—In *Williamson's Case*, 26 Pa. St. 30, it is said: "It is usual to say, even of foreign judgments, that, if pronounced by a *competent* tribunal, and carried into effect without our assistance, they are conclusive of the question decided. And here '*competent* tribunal' means one of the regularly established courts of the country, and in it. If its government could, according to the law of nations, have jurisdiction of such a case, we concede to the court itself to decide upon its own jurisdiction, 4 Cranch (U. S.) 276; 1 Rawle (Pa.) 389; for we are not interested in the manner in which other states distribute their civil functions among their different departments." See also the title FOREIGN JUDGMENTS.

Same—Imprisonment for Debt.—*Competent* court, in an act allowing any court to commit to prison one who makes default in payment of a debt due, "in pursuance of any order or judgment of that or any other *competent* court," means "a court acting within the local limits of its existing jurisdiction, and with reference to persons within those limits, against whom, therefore, a warrant of the court for commitment could be enforced." *Washer v. Elliott*, 1 C. P. Div. 176.

Competent Jurisdiction. (See the title JURISDICTION.)—*Competent* jurisdiction, in a statute providing that the validity of a sale shall not be avoided on account of irregularity in the proceedings if it were authorized by a "court of *competent* jurisdiction," does not mean jurisdiction of the subject-matter and not of the parties. The court said: "The terms '*competent* jurisdiction,' in their usual signification, embrace the person as well as the cause." *Babbitt v. Doe*, 4 Ind. 359.

Competent Witnesses.—See the titles WILLS; WITNESSES.

Competent Jurors.—See the titles GRAND JURY; JURY AND JURY TRIAL.

Competent Authorities, in the ratification of a treaty referring to grants made by the king or his "*competent* authorities," were held equivalent to the words "lawful authorities" in the treaty itself, and to mean "those persons who exercised the granting power by the authority of the crown." *U. S. v. Clarke*, 8 Pet. (U. S.) 449; *Mitchell v. U. S.*, 9 Pet. (U. S.) 735.

Competent Clerk.—Where a "committee was authorized to employ a "*competent* clerk,"

and it was contended that this language authorized the employment of something more than a mere clerk, viz., of a "person learned in the law and fully *competent* to grapple with and solve all intricate and perplexing questions of law which might arise in the performance of those duties," it was held that this inference was unwarranted, and that "the use of the adjective in that connection does not change the character of the employment." *Tenney v. State*, 27 Wis. 392, 393.

Competent Party, in a special act, defined, *Bowes v. Haywood*, 35 Mich. 246.

Competent to Dispose by Will.—Where an act imposed a duty in the case of a person "*competent* to dispose by will of a continuing interest," it was held that those words had reference to the interest in the property, and not to the personal capacity. *Pollock, C. B.*, said: "The word *competent* has two meanings, and as in my judgment it must mean one thing or the other, and cannot mean both, we must ascertain in which of the two senses the legislature has used it. Now the very language of the twenty-first section imports that the *competency* relates to the property and not the mind of the party, because he must be *competent* to dispose of a continuing interest; that is, possessing such an interest in the estate as to have the power of disposing by will of a continuing interest." *Atty.-Gen. v. Hallett*, 2 H. & N. 374. See generally the title SUCCESSION TAXES.

Executors and Administrators.—*Competent*, as used in a probate act with reference to an administrator, was held to mean, not addicted to drunkenness, not imprudent, or wanting in integrity or understanding. *Pacheco Estate*, 23 Cal. 476. See the title EXECUTORS AND ADMINISTRATORS.

Arbitration.—One who is a drinking man "and of no account," who has been arrested for vagrancy, and punished for disorderly conduct, is not *competent* within the meaning of that term in a policy of insurance providing for reference in case of dispute to "two disinterested and *competent* men." *Ætna Ins. Co. v. Stevens*, 48 Ill. 33.

1. Agreement Not to Enter into Competition.—An agreement "not directly or indirectly to enter into *competition*" in a business, is not confined to active *competition*; and a physician, having entered into such contract on the sale of his practice, is guilty of a breach if he attend a patient within the prohibited district, even though he was called in without any solicitation on his part, and though he recommended that some one else should be called in, and though it be proved that his vendee would not have been called in. *Rogers v. Drury*, 36 W. R. 496, 57 L. J. Ch. 504, 4 Times Rep. 98. See also the title RESTRAINT OF TRADE.

Voluntary Act.—In *Meredith v. New Jersey Zinc, etc., Co.*, (N. J. 1897) 37 Atl. Rep. 543, the court said: "No doubt the public has reasonable ground to entertain the hope and expectation that its individual members will generally, in their several struggles to acquire the means of comfortable existence, *compete* with each other. But such expectation is

COMPILATION.—See the title COPYRIGHT.

COMPLAIN.—To make a formal assertion of injuries; to bring an accusation; to make a charge.¹

COMPLAINANT.—One who makes a complaint.² The plaintiff in a chancery proceeding.³

COMPLAINT. (See ENCYCLOPÆDIA OF PLEADING AND PRACTICE, titles COMPLAINTS AND PETITIONS, vol. 4, p. 567; INFORMATIONS AND COMPLAINTS, and references there given.)—A complaint is a form of legal process which consists of a formal allegation or charge against a party, made or presented to the appropriate court or officer, as for a wrong done or a crime committed; in the latter case, generally under oath.⁴

based entirely upon the exercise of the free will and choice of the individual, and not upon any legal or moral duty to compete, and can never, from the nature of things, become a matter of right on the part of the public against the individual. In fact, the essential quality of that series of acts or course of conduct which we call *competition*, is that it shall be the result of the free choice of the individual, and not of any legal or moral obligation or duty." See also the title RESTRAINT OF TRADE.

1. Webster's Dict.

Act Complained of.—In an action against a justice of the peace for an act done by him in execution of his office (false imprisonment) the commitment is the act *complained of*, not the quashing of the conviction on the application of the party imprisoned. *Haylock v. Sparke*, 1 El. & Bl. 484, 72 E. C. L. 484.

2. Webster's Dict.

3. Bouvier's Law Dict.

4. Webster's Dict. *Quoted with approval* in *State v. Dodge County*, 20 Neb. 600.

Supplemental Complaint.—See ENCYC. OF PLEADING AND PRACTICE, title SUPPLEMENTAL PLEADINGS.

Proceedings before Magistrates. (See also ENCYC. OF PL. AND PR., title PRELIMINARY EXAMINATION.)—In *Com. v. Davis*, 11 Pick. (Mass.) 436, it is said that the term *complaint* is a technical one, descriptive of proceedings before magistrates. *Compare Com. v. Hayner*, 107 Mass. 197.

When used to designate a criminal proceeding the term *complaint* has a definite legal significance; it forms the initiatory step in the institution of a criminal prosecution before a magistrate. *People v. Liscomb*, 6 Thomp. & C. (N. Y.) 280. This case, however, was reversed in 60 N. Y. 559.

Writing and Verification.—A *complaint* need not necessarily be either in writing or verified. *State v. Northern Belle Mill, etc., Co.*, 12 Nev. 92.

Same—Writing.—A statute provided that an officer might make an arrest, without a warrant, for intoxication, and that when the person arrested was so far recovered as to render it proper to carry him before the court, the officer should make *complaint* against him. It was held that *complaint* signified only an oral charge, and that the officer need not make his *complaint* in writing. *Hobbs v. Hill*, 157 Mass. 556.

Same—Taxation.—But in *State v. Dodge County*, 20 Neb. 595, it was held that to justify the board of equalization in increasing the

assessment of an individual, a *complaint* must be made. Such *complaint*, if oral, must be reduced to writing and spread upon the records as the foundation of its action, and a mere recital that oral *complaint* was made to such board, without setting out the *complaint*, is not sufficient. See also the title TAXATION.

Same—Verification—Affidavit.—The term *complaint* does not import a verified pleading. *McMath v. Parsons*, 26 Minn. 246. So in *State v. Richardson*, 34 Minn. 117, it was held that a *complaint* is not necessarily an affidavit nor are they in legal practice or contemplation understood as convertible terms. The court said: "It may be conceded that a *complaint* is the initial proceeding in criminal prosecutions and examinations before magistrates, and that such *complaint* is required to be upon oath. *Campbell v. Thompson*, 16 Me. 117. It may, also, by itself, if the statement of the criminal charge be sufficient, constitute an examination so as to authorize the issuance of a warrant. *State v. Nerbovig*, 33 Minn. 480. And if a jurat be attached, and it be properly certified by the magistrate, as is frequently the case in practice, it will be essentially an affidavit. But a *complaint* is not necessarily an affidavit, nor are they in legal practice or contemplation understood as convertible terms. For, though a *complaint* may be reduced to writing and subscribed, it need not necessarily be certified by the magistrate, for the fact may otherwise appear by his records. And so a *complaint* may be merely formal, and made or entered by one who has but little, if any, knowledge about the facts, and the examination consist of the deposition of other witnesses, *State v. Armstrong*, 4 Minn. 335; while an affidavit, as the term is ordinarily used in such cases, is understood to be a sworn statement of facts or a deposition in writing, and to include a jurat, which means a certificate of the magistrate, showing that it was sworn to before him, including the date, and sometimes also the place. *Young v. Young*, 18 Minn. 90."

But, in *Campbell v. Thompson*, 16 Me. 120, it is said: "Where criminal prosecutions originate upon *complaint*, one made under oath or affirmation is implied. This may fairly be understood as a part of the technical meaning of the term, whenever used in a statute providing for the prosecution of an offense in that mode."

Taxation—County Board of Equalization. (See also the title TAXATION.)—A statute provided that a county board of equalization should have power to hear *complaint*, and to

COMPLETE. — To “complete” is defined by lexicographers as to consummate, execute, achieve, realize.¹

equalize valuations by taking from or adding to the value placed upon personal property. It was held that *complaint* did not mean a formal *complaint* at law, but that the board might, of its own motion, proceed to make an equalization of valuations. *Pulaski County Board of Equalization Cases*, 49 Ark. 518.

Indictment — Warrants. (See also the title **WARRANTS**.) — In *In re Durant*, 60 Vt. 176, it is said: “It is further claimed that the warrant upon which the relator is held does not sufficiently apprise him of that to which he is to answer. The language is, ‘to answer to a *complaint* charging him with the crime of perjury.’ It is not claimed, as it could not fairly be, but that this would be sufficient but for the use of the word *complaint*. As to that, it is insisted that the relator could not be arrested lawfully upon a *complaint* for perjury, and be held to appear before the county court; because perjury is by our statute a felony, and the proceeding must be by indictment, as the punishment may be by imprisonment more than seven years. We do not think the word *complaint* in this warrant imports that the instrument charging the perjury is a technical complaint, as the term is used in the statute. The warrant would have been sufficient if it had omitted the word *complaint*, or any corresponding word, and had read, ‘to answer to the crime of perjury.’” *Compare Com. v. Haynes*, 107 Mass. 197.

Distinguished from Information. — In *Goddard v. State*, 12 Conn. 448, it was held that a *complaint* for breach of Sabbath, to a justice of the peace, was not an information, and consequently the party accused was not entitled to trial by jury. The court said: “In England, there are four modes of prosecution at the suit of the king, says Blackstone: by presentment, indictment, information, and appeal. In Connecticut, says Judge Swift, there are also four modes: first, by *complaint* or presentment by a grand juror, which is authorized by statute and is unknown to the common law; secondly, by information by the state’s attorney; thirdly, by information *qui tam*; fourthly, by indictments. 2 Sw. Syst. 374. And in Webster’s Dictionary, the term *complaint* is said to be ‘an accusation or charge against an offender, made by a private person or an informer, to a justice of the peace, or other proper officer, alleging that the offender has violated the law, and claiming the penalty due to the prosecutor. It differs from an information, which is the prosecution of an offender, by the attorney or solicitor-general, and from a presentment or indictment, which are the accusation of a grand jury.’ Webst. Dict. *in verb.* When, then, we find that this is a proceeding not recognized by the common law as an information, and also find that it is well known in our statutes, in our commentaries and dictionaries, and in common parlance, as a *complaint*; all of which must have been well known to those who framed our constitution; the irresistible inference is, that these prosecutions by *complaint* were not intended to be included in the terms indictment

or information.” And in *People v. Ayhens*, 85 Cal. 88, *complaint* is distinguished from “information.”

Relation. — A statute provided that the attorney-general might bring an action in the name of the state upon his own information, or upon *complaint* of any private individual. The court said: “The word *complaint* cannot mean a pleading so called in the code, but seems to be used in a general sense, as a substitute for ‘relation.’” *State v. Baker*, 38 Wis. 81.

In the Sense of Cause of Action. — The plaintiff demurred to the defendant’s answer on the ground that the same did not state facts sufficient to constitute a good defense to the plaintiff’s *complaint*. It was held that this demurrer was not objectionable because of the use of the word *complaint* instead of the words “cause of action.” *Foster v. Dailey*, 3 Ind. App. 530.

Adultery — Complaint of Husband or Wife. — In *State v. Stout*, 71 Iowa 343, it was held, where a statute provided that no prosecution for adultery should be commenced but on the *complaint* of husband or wife, that the fact that the wife testified before the grand jury was not equivalent to a *complaint* by her. See also 1 ENCYC. OF PLEADING AND PRACTICE, p. 306.

Bill in Equity. (See also **BILL IN EQUITY**, vol. 4, p. 55). — In *U. S. v. Ambrose*, 108 U. S. 340, the court said: “The word ‘declaration,’ as a word of art in the law, is generally used to signify the plea by which a plaintiff in a suit at law sets out his cause of action, as the word *complaint* is in the same sense the technical name of a bill in chancery.”

1. *DeLafield v. Westfield*, 77 Hun (N. Y.) 130.

Full. — In *Bentley v. Cleaveland*, 22 Ala. 817, it is said: “The books say that such a defendant must answer ‘fully.’ It is evident that the word *complete* in our rule gives no strength to the sentence, nor does it enlarge the meaning. A ‘full’ answer is as extensive a term, in describing one which is ample and sufficient, as though the term *complete* had been superadded. The latter is mere tautology.”

True and Complete. — In *Steel v. Pope*, 6 Blackf. (Ind.) 178, it was held that a certificate that a copy of a warrant was a true copy was sufficient authentication. The court said: “He was therefore, by the statute, the proper person to authenticate it; and his certificate, that the copy was a ‘true’ one, was sufficient without adding *complete*. It could not be a true without being a *complete* copy of the warrant.”

Complete a Sale. (See also the title **BROKERS**, vol. 4, pp. 972, 975, 976.) — In *Carstens v. McReavy*, 1 Wash. 365, it is said: “What a broker must do to *complete* a sale is well defined in *McGavock v. Woodlief*, 20 How. (U. S.) 221, thus: ‘The broker must *complete* the sale; that is, he must find a purchaser in a situation and ready and willing to *complete* the purchase on the terms agreed on, before he is entitled to his commission.’”

COMPLY.—To “comply” is to acquiesce in; to be obsequious; to fulfil;

A Complete Purchaser. (See also the titles **FRAUDULENT SALES AND CONVEYANCES; RECORDING ACTS; VENDOR AND PURCHASER.**)—A *complete* purchaser is one who has purchased for a valuable consideration, actually paid the entire purchase money, and received or is entitled to receive a conveyance. *Rorer Iron Co. v. Trout*, 83 Va. 414; *Preston v. Nash*, 75 Va. 949.

Completion of Purchase. (See also the title **VENDOR AND PURCHASER.**)—Where a contract for sale stipulates that interest on the unpaid purchase money shall be paid until *completion*, that means that interest shall be payable until the purchase money is paid. *Lewis v. South Wales R. Co.*, 22 L. J. Ch. 209, 10 Hare 113. In delivering judgment in that case, Turner, V.C., said: “The question is, what is the meaning of the words ‘until the *completion* of the purchase’? Those words may no doubt import, and generally perhaps would be construed to refer to, the complete conveyance of the estate and final settlement of the business. But I do not think that is the only or necessary meaning of the words. They may mean, until the *completion* of the purchase by the purchaser, on whose part the purchase is completed, on the payment of the purchase money by him. * * * Is it reasonable to construe the words as importing that interest is to be paid on the purchase money until the final *completion* of the purchase, although the purchase money itself might be paid long before? I think it would be unreasonable to put such a construction on the words, the more so when it is considered that interest is the compensation for the delay in the payment of the principal. That an agreement might be so expressed as to make interest on the purchase money payable up to the final *completion* of the purchase by the conveyance of the estate, although the purchase money itself was sooner paid, need not be denied; but I think very strong words would be required for the purpose, and that the terms of this agreement do not warrant such a construction. *Stroud’s Jud. Dict.*”

In *Mattock v. Kinglake*, 10 Ad. & El. 50, 56, 37 E. C. L. 37, it was contended that the words “completion of the purchase” meant when the land was conveyed, but *Patterson, J.*, said they “only mean payment of the rest of the purchase money,” and it was therefore held that the purchase money and interest might be sued for without previously tendering a conveyance.

When House Is Completed—In Contract.—A written order for the delivery of lumber to be used in building the house of the drawee, and which he promises to pay for “when the house is *completed*,” becomes due when the house is substantially finished by any one, although the drawee knew that the person to whom the order requested him to deliver the lumber was building the house under a contract, and it is not *completed* according to the terms of the contract. *Russell v. Barry*, 115 Mass. 300.

Mechanics’ Lien. (See also the title **MECHANICS’ LIEN.**)—A mechanics’ lien law provided that every person save the original contractor

should within thirty days after the *completion* of any building, file his claim or lien. Construing this provision, the court said: “In the absence of any statutory qualification or definition of the term *completion*, there would be no room for its construction by the court, but it would be construed to mean actual *completion*, and would be a question of fact to be determined in each case. The statute has, however, provided that a substantial *completion* is all that is required, in any case, whether the work be done at the direct instance of the owner, or under the provisions of a contract between him and an original contractor, by declaring that a ‘trivial imperfection’ shall not be deemed such a lack of *completion* as to prevent the filing of a lien. *Harlan v. Stufflebeem*, 87 Cal. 508. What constitutes a trivial imperfection is still a question of fact in each instance.” *Willamette Steam Mills Lumbering, etc., Co. v. Los Angeles College Co.*, 94 Cal. 238.

Railroads. (See also the titles **MUNICIPAL AID; RAILROADS.**)—A condition in a vote of a municipal corporation granting aid in the construction of a railroad, that it shall be payable when the road is *completed* for use, is complied with when the road is constructed so as to be reasonably safe, fit, and convenient for the public use and accommodation, as new railroads are ordinarily used in similar localities. *Manchester, etc., R. Co. v. Keene*, 62 N. H. 81. See also *Tower v. Detroit, etc., R. Co.*, 34 Mich. 328.

Where an act provides that a railway shall be *completed* in five years, but the context shows the words are not compulsory, and no duty is imposed upon the company to make the line, the case is not affected by the fact that the company has *completed* a part of the line. *York, etc., R. Co. v. Reg.*, 1 El. & Bl. 863, 72 E. C. L. 863; *McCandless’s Appeal*, 70 Pa. St. 210.

“The word *completed*, when made use of in such a contract, may have a different meaning from what it would have in a contract for the construction of a road. * * * In a contract for construction it would mean a *completion* in accordance with specifications; but in a contract like the one in suit [a contract in aid of a railroad], it is not likely the parties have any such exact *completion* in mind, and a less perfect construction may satisfy its intent, provided the road is in condition to be opened for regular passenger and freight traffic, and is actually in use. The purpose of such a [contract] is accomplished when the road is thus put in condition for regular business.” *Tower v. Detroit, etc., R. Co.*, 34 Mich. 338.

Same—Constructing.—In *De Graff v. St. Paul, etc., R. Co.*, 23 Minn. 146, the court says: “The word ‘*completing*’ has substantially the same signification as the word ‘*constructing*.’ A railroad is *completed* or constructed when that is done which is necessary to make it a railroad—when it is fitted for use as a railroad; that is to say, when it is made ready and put in proper condition for the placing and running of regular trains upon it, or for operation, as it is usually termed. In this its natural and ordinary

to perfect or carry into effect; to complete; to perform or execute.¹

COMPOSITION.—See the titles COMPOSITION WITH CREDITORS, p. 376, *post*; COPYRIGHT; PATENT LAW.

sense the word *completing* does not include the equipment of the road with rolling stock or putting it into operation."

Same—Suburbs.—A condition precedent in a bond, that the road is to be *completed* to a certain village, is substantially complied with when it is made to the suburbs of that village in such a manner as to bear daily trains on it, carrying all the freight and travelers that offer, although some portion of the work is intended to be replaced with other and better materials. *O'Neal v. King*, 3 Jones L. (N. Car.) 517. The court says in this case: "What did the parties mean when they used the word *completed* in the bond? Did they mean that in every particular, however minute, the road should be perfect before the defendant's liability to pay should arise? Did they use the word in its full and critical sense, that no piece of iron or unsound sill should be found in the whole line of road? Or did they use it in its plain common-sense meaning? *Qui hæret in litera hæret in cortice* is an ancient maxim of the common law, and hence the rule that the law in such a case as this is satisfied with a substantial performance of the condition. When, therefore, it is said in the contract that the road shall be *completed* to Greenville Courthouse, and it is shown that the whole village is called by that name, and that the road is brought to the suburbs of the village, that part of the condition is complied with; and where it is shown that the whole of the road is finished so as to authorize the company to carry freight and passengers, and to demand and receive pay therefor, we hold that the condition of the bond is complied with, and that, in the language used, the road is *completed* to Greenville Courthouse."

Streets.—A statute provided that a town should not be obliged to *complete* certain streets and lanes sooner than they might deem it expedient. Construing this provision, Shaw, C. J., said: "By the word *complete*, as used in the Act passed in 1804, we do not suppose was intended that condition of the streets in which they are made smooth and finished, but some work by which they are made streets *de facto*." *Fernald v. Boston*, 12 Cush. (Mass.) 579. See also *Bowman v. Boston*, 5 Cush. (Mass.) 1.

Canals Completed—In Statute.—In *Newell v. People*, 7 N. Y. 130, in construing a statute providing that "the remainder of the revenues of the said canals shall in each fiscal year be applied * * * to the *completion* [of certain canals] until the said canals shall be *completed*," it was contended that by the expression "until the said canals shall be *completed*" was to be understood the time when the canals are constructed and ready for use. Welles, J., dissenting, said: "I incline to think this interpretation is too limited and contracted. The verb 'to *complete*,' like many others, is used with some indefiniteness of signification, and the idea conveyed by it frequently depends upon the connection in which it is found, or the object to which it refers. The connection here is where provision is made for the disposition of the remainders, and direction given for their application, and it is declared that they shall be applied until the canals shall be *completed*; that is, they shall be applied as long as the application shall be necessary to such *completion*, or until the application is *complete*. This, in my judgment, was the sense in which the words in question were intended to be used."

Machinery to Be Furnished Complete—In Contracts.—The phrase in an agreement, "in consideration of machinery to be furnished, *complete*, in the mill," includes not only the cost of the machinery, but the labor and material necessary to place it in proper position for use. *Grove v. Miles*, 58 Ill. 338.

Complete Inventory.—An inventory attached to a general assignment for the benefit of creditors, in these terms: "The entire stock of goods, wares, and merchandise in the storehouses, * * * consisting of dry-goods, boots, shoes, hats, caps [enumerating articles at length], in all to the value of about \$7,600, and choses in action," is full and complete within the meaning of the Code of *Tennessee*, requiring the inventory to be full and complete. *Rosenbaum v. Moller*, 85 Tenn. 653. See also the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 3, pp. III, 150, 155.

1. *Cleland v. Waters*, 16 Ga. 503, in which case it was held that a testator had used the phrase "*complied* with" in the sense of "carried into execution."

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CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW AND EVIDENCE* related to this subject, see the following titles in this work: *ACCORD AND SATISFACTION*, vol. 1, p. 408; *ASSIGNMENTS FOR THE BENEFIT OF CREDITORS*, vol. 3, p. 1; *CONSIDERATION*; *FRAUDULENT SALES AND CONVEYANCES*; *INSOLVENCY AND BANKRUPTCY*; *NOVATION*; *RELEASE*.

I. DEFINITION AND CHARACTERISTICS — 1. Definition. — A composition with creditors is an arrangement between a debtor and his creditors whereby the latter agree with the debtor, and mutually among themselves,¹ to receive, and the debtor agrees to pay, a certain part or proportion of the demands due the several creditors, in discharge of the whole of such demands.²

2. Consideration — Compromise of Debt Due with Single Creditor Void for Want of Consideration. — It is a familiar rule of law that an agreement between a debtor and a creditor whereby the latter agrees to discharge the former on payment of a less sum than the debt due, is void for lack of consideration, and that the payment of the less sum operates only as a discharge *pro tanto*.³

But a Composition Is Excepted from This Rule by the fact that there are more creditors than one who are parties to the agreement. The mutual covenants between the various creditors, therefore, each agreeing to relinquish part of his demand in order that, by the similar relinquishments of the other creditors, he may be made more nearly certain of the payment of the part which he does not release, constitute a consideration sufficient to sustain the contract,⁴

1. Every composition deed is, in its spirit if not in its terms, an agreement between the creditors themselves, as well as between them and the debtor. Duer, J., in Breck *v.* Cole, 4 Sandf. (N. Y.) 80. See also Montgomery Bank *v.* Ohio Buggy Co., 100 Ala. 626; Kullman *v.* Greenebaum, 92 Cal. 403, 27 Am. St. Rep. 150; Renard *v.* Tuller, 4 Bosw. (N. Y.) 107.

2. Other Definitions. — A composition with creditors is an arrangement between a debtor and his creditors whereby the latter agree with the debtor (and mutually among themselves) to receive, and the debtor agrees to pay, an agreed proportion less than twenty shillings in the pound, in satisfaction of the debts due or accruing due from the debtor to his creditors. Stroud's Judicial Dict.

A composition with creditors is an agreement by a debtor in failing circumstances, and a number of creditors, to take a less sum in discharge of the whole. Lanes *v.* Squyres, 45 Tex. 386.

A composition agreement is one between a debtor and creditor whereby the debtor agrees to give, and the creditor to take, a less sum at a time fixed, instead of the original debt according to its terms. Bailey *v.* Boyd, 75 Ind. 127. See also Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 385.

Letter of License — Deed of Inspectorship. — A letter of license is an agreement between an embarrassed debtor and his creditors that the latter shall for a time forbear to enforce their claims, and allow him meanwhile to carry on his business without molestation. A letter of license containing provisions that the business is to be carried on under the inspectorship and control of a committee of the creditors, is called a deed of inspectorship. Century Dictionary.

3. When Composition Between Single Creditor and Debtor Without Consideration. — Continental Nat. Bank *v.* McGeoch, 92 Wis. 310, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 386. See the titles *ACCORD AND SATISFACTION*, vol. 1, p. 413; *CONSIDERATION*.

The rule of the common law that as between a debtor and a single creditor the acceptance of a less sum than is due in satisfaction of a liquidated debt will only operate as a discharge *pro tanto*, is looked upon with disfavor by the courts, and they will lay hold on very slight considerations to sustain the transaction, as the rule is held to be entirely technical and not well supported by reasons. Foakes *v.* Beer, L. R. 9 App. 605; Bailey *v.* Day, 26 Me. 88; Hinckley *v.* Arey, 27 Me. 362; Brooks *v.* White, 2 Met. (Mass.) 283, 37 Am. Dec. 95; Jones *v.* Perkins, 29 Miss. 129, 64 Am. Dec. 136; Johnson *v.* Brannan, 5 Johns. (N. Y.) 268; Kellogg *v.* Richards, 14 Wend. (N. Y.) 119; Harper *v.* Graham, 20 Ohio 105; Smith *v.* Ballou, 1 R. I. 497. See also the title *ACCORD AND SATISFACTION*, vol. 1, p. 414.

The harsh rule of the common law has been abrogated by statute in at least one state. Jones *v.* Wilson, 104 N. Car. 9. And in the recent case of Clayton *v.* Clark, (Miss. 1897) 21 So. Rep. 565, it was held that part payment of a liquidated claim was a valid discharge, the court concluding, after full discussion, that the doctrine that such a compromise was without consideration arose from a mere dictum in Pinnel's Case, 5 Coke 117a, and never formed a rule of the common law.

4. Consideration of Composition — England. — Mallalieu *v.* Hodgson, 16 Q. B. 689, 71 E. C. L. 689; Steinman *v.* Magnus, 11 East 390; Evans *v.* Powis, 1 Exch. 601; Pfleger *v.* Browne, 28 Beav. 391; Norman *v.* Thompson, 4 Exch. 756;

and this is true although only a portion of the creditors enter into the composition agreement.¹

3. Form and Execution — *a. GENERALLY* — **If Essentials Present, Form Immaterial.** — The form in which a composition between a debtor and his creditors is made is immaterial. If its essential elements are material concessions to the debtor as to amount or terms of payment, and mutuality of contract between two or more creditors, whereby the debtor is released from a portion of his liability to the consenting creditors, it is a composition agreement though called by some different name, or apparently in form some other kind of transaction.²

Boothbey v. Sowden, 3 Campb. 175; *Good v. Cheesman*, 2 B. & Ad. 328, 22 E. C. L. 89; *Boyd v. Hind*, 1 H. & N. 938; *Garrod v. Simpson*, 3 H. & C. 395.

Canada. — *Fowler v. Perrin*, 16 U. C. C. P. 258.

United States. — *Bean v. Amsinck*, 10 Blachf. (U. S.) 361.

Alabama. — *Montgomery Bank v. Ohio Buggy Co.*, 110 Ala. 360.

California. — *Pierson v. McCahill*, 21 Cal. 122; *Kullman v. Greenbaum*, 92 Cal. 403, 27 Am. St. Rep. 150.

Connecticut. — *Warren v. Skinner*, 20 Conn. 559; *Huntington v. Clark*, 39 Conn. 540.

Illinois. — *Gillfillan v. Farrington*, 12 Ill. App. 101.

Indiana. — *Kahn v. Gumberts*, 9 Ind. 430; *Devou v. Ham*, 17 Ind. 472; *Evans v. Gallontine*, 57 Ind. 367; *Shinkle v. Shearman*, 7 Ind. App. 399.

Iowa. — *Murray v. Snow*, 37 Iowa 410.

Maryland. — *Gardner v. Lewis*, 7 Gill (Md.) 377.

Massachusetts. — *Eaton v. Lincoln*, 13 Mass. 424; *Perkins v. Lockwood*, 100 Mass. 249, 1 Am. Rep. 103; *Farrington v. Hodgdon*, 119 Mass. 453; *Brown v. Nealley*, 161 Mass. 3.

Minnesota. — *Sage v. Valentine*, 23 Minn. 102; *Murchie v. McIntire*, 40 Minn. 331; *Newall v. Higgins*, 55 Minn. 82.

Missouri. — *Mullin v. Martin*, 23 Mo. App. 537; *O'Shea v. Collier White Lead, etc., Co.*, 42 Mo. 397, 97 Am. Dec. 332.

New Hampshire. — *Browne v. Stackpole*, 9 N. H. 478.

New York. — *Pinneo v. Higgins*, 12 Abb. Pr. (N. Y. C. Pl.) 334; *Smythe v. Graydon*, 29 How. Pr. (N. Y. Supreme Ct.) 224; *Williams v. Carrington*, 1 Hilt. (N. Y.) 515; *Breck v. Cole*, 4 Sandf. (N. Y.) 79; *Fellows v. Stevens*, 24 Wend. (N. Y.) 294; *Blair v. Wait*, 69 N. Y. 113; *Solinger v. Earle*, 82 N. Y. 393; *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189; *Hanover Nat. Bank v. Blake*, 142 N. Y. 404, 40 Am. St. Rep. 607.

Ohio. — *Way v. Langley*, 15 Ohio St. 392.

South Carolina. — *Pierce v. Jones*, 8 S. Car. 273, 28 Am. Rep. 288; *Aiken v. Price*, 1 Dudley L. (S. Car.) 50.

Texas. — *Lanes v. Squyres*, 45 Tex. 382.

Vermont. — *Paddleford v. Thacher*, 48 Vt. 574.

Wisconsin. — *Continental Nat. Bank v. McGeoch*, 92 Wis. 286, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 386.

In *Steinman v. Magnus*, 11 East 393, Lord Ellenborough said: "It is true that if a creditor simply agree to accept less from his

debtor than his just demand, that will not bind him; but if, upon the faith of such an agreement, a third person be lured in to become surety for any part of the debts, on the ground that the party will be thereby discharged of the remainder of his debts, and still more when, in addition to that, other creditors have been lured in by the agreement to relinquish their further demands, upon the same supposition, that makes all the difference in the case, and the agreement will be binding."

In *Evans v. Powis*, 1 Exch. 607, the court said: "In this case the consideration for relinquishing the residue and receiving ten shillings in the pound in full is the binding engagement of another creditor to receive his debt in the same way. Both creditors having had a right to be paid in full, and each a chance of being paid more than the other if he pressed the debtor, each mutually agrees with the other to forego that right and chance, and be content with less, and the engagement of one creditor to take a smaller sum is the consideration for the engagement of the other to do the same."

In *Mallalieu v. Hodgson*, 16 Q. B. 689, 71 E. C. L. 689, Erle, J., said: "Each creditor agrees to lose part of his debt in consideration that the others do the same; and each creditor may be considered to stipulate with the others for a release from them to the defendants, in consideration for a release by him."

Must Be Mutual Relinquishment or Release. — In *Perkins v. Lockwood*, 100 Mass. 249, 1 Am. Rep. 103, a contract between debtor and creditor whereby the debtor was to be discharged on payment of a certain per cent. of the debt, on condition that no other creditor should receive a greater percentage, was held invalid, on the ground that, no other creditor being a party to the agreement, there was no mutual relinquishment or release, and consequently no consideration for the discharge.

Recital of Mutual Consideration. — Composition agreements sometimes recite that the creditors "each in consideration of the agreement therein contained on the part of the others" agree, etc., but such a recital is not essential; an agreement among themselves will be legally inferred from an instrument in which several relinquish part of their demands. *Renard v. Tuller*, 4 Bosw. (N. Y.) 107. See also *Horstman v. Miller*, 35 N. Y. Super. Ct. 29.

1. *Continental Nat. Bank v. McGeoch*, 92 Wis. 286. See also *infra*, this section, *Not Essential that All the Creditors Join*.

2. **Presence of Essential Elements All That Is Necessary.** — In *Murchie v. McIntire*, 40 Minn.

Either Oral or Written. — A composition with creditors may be either oral or written.¹

331, the defendants had become involved through the failure of a street railway company to meet its obligations to them arising out of contract. The creditors were advised of this situation and that the defendants contemplated bankruptcy proceedings. The creditors advised suit against the company, and had filed liens against the railway company's property and now proposed to bring suit to enforce those liens. The railway company proposed a compromise, meetings were called, and an agreement was entered into whereby a committee was designated by the creditors to receive the money offered by the company and to pay it over *pro rata* to the creditors of the defendant. This was done. In a suit by one of the creditors to enforce payment of the whole claim it was held that the element of mutuality of contract among the creditors existed, and that this agreement was a composition agreement.

In *Robbins v. Magee*, 76 Ind. 381, the debtor conveyed land by warranty deed without any limitations in the deed, and then executed an agreement with the grantees by which it was provided that they should take the property as trustees and apply the proceeds to the payment of such creditors as became parties. It was held that this was a composition, and not a voluntary assignment for the benefit of creditors, the distinction being that the composition requires the assent of the creditors, while the assignment does not. To the same effect are *Pontious v. Durlfinger*, 59 Ind. 27; *Collins v. Kemp*, 29 Ind. 281.

In *Patterson v. Boehm*, 4 Pa. St. 507, E. & Co. having assigned their effects to secure W. & B. and three others of their creditors, two of the partners, with W. & B., offered a composition to the general creditors on payment of fifty cents on the dollar. A deed was then prepared by which W. & B. agreed, on receiving an assignment of all the claims against E. & Co., that they would pay each of the creditors fifty per cent. of their debts, either out of the assigned funds, or absolutely, if such fund proved insufficient. All the creditors except J. having become parties to the deed, he agreed to execute it on receiving notes of the partners of E. & Co. for an additional sum and a guaranty of W. & B. The notes having been delivered, J. executed the deed. It was attempted in argument to uphold the transaction on the ground that it was not a composition, but a purchase by W. & B. of the debt due by E. & Co. The court, however, held that it was a composition.

There May Be Plurality of Creditors Without Mutuality of Contract. — The mere fact, however, that there are a number of creditors who are parties to the agreement, does not of itself make an agreement for indulgence to a creditor a composition agreement. Where the debtor has made a composition with each separately, the fact that the several agreements are made at the same time will not supply the element of mutuality. *Fitch v. Sutton*, 5 East 230; *Lowe v. Eginton*, 7 Price 604; *Greenwood v. Lidbetter*, 12 Price 183; *Argall v. Cook*, 43 Conn. 160; *Cutter v. Reynolds*, 8

B. Mon. (Ky.) 596; *Lanes v. Squyres*, 45 Tex. 382.

In *Sage v. Valentine*, 23 Minn. 102, where there was evidence tending to show that the plaintiffs agreed with the defendant to accept, and did accept, fifty per cent. of their claims on the understanding that certain other creditors of the defendant had agreed or would agree to take the same percentage in satisfaction of their claims, but there was no evidence tending to show that there was communication between the plaintiffs and the other creditors, directly or indirectly, or that the plaintiffs and the other creditors joined together or stipulated with one another in any agreement, it was held that the agreement lacked the element of mutuality; that it was, therefore, without consideration and was not a valid composition.

There May Be Mutuality but No Composition. — The mere fact, however, that an agreement between the debtor and a number of his creditors is mutual and reciprocal in its covenants as regards the various creditors, does not of itself make the transaction a composition. *Henry v. Patterson*, 57 Pa. St. 346; *Pitts Sons' Mfg. Co. v. Commercial Nat. Bank*, 121 Ill. 582. In this last-named case an agreement to refrain from suit for a specified time, although made between a debtor and a number of his creditors, was held to be in no sense a composition agreement, and it was held that there was no composition of the debt or displacement of the original contract. The fact that a number of the creditors joined in the agreement may be material as to the consideration of the agreement for extension, but in no way changes the character of the contract.

Mutuality Is a Question of Fact. — Whether or not the element of mutuality exists, is a question of fact to be determined by the tribunal whose function it is to decide matters of fact. *Minneapolis First Nat. Bank v. Steele*, 58 Minn. 126.

1. Oral or Written. — *Fellows v. Stevens*, 24 Wend. (N. Y.) 294; *Chemical Nat. Bank v. Kohner*, 85 N. Y. 194.

Composition Transferring Land. — If the composition transfers any interest in land other than an estate at will or for less than one year, it must be in writing. *Alchin v. Hopkins*, 1 Bing. N. Cas. 99, 27 E. C. L. 320. See the title FRAUDS, STATUTE OF.

Surety. — Where a surety guarantees the payment of the composition money, the composition must be in writing, since such an agreement is "a special promise to answer for the debt of another person," within the fourth section of the statute of frauds. *Emmet v. Dewhurst*, 3 Macn. & G. 587; *Williams v. Mostyn*, 33 L. J. Ch. 54. But where, A. being insolvent, a verbal agreement was entered into between several of his creditors and B., whereby B. agreed to pay the creditors ten shillings in the pound in satisfaction of their debts, which they agreed to accept and to assign their debts to B., it was held that this agreement was not within the statute of frauds, but that it was an

Seal Not Necessary. — The composition need not be under seal,¹ even where it discharges specialty debts.²

May Consist of Several Papers. — If in writing it may consist of one paper or different papers.³

b. PROVISION FOR DISCHARGE. — A composition agreement should contain a provision for the discharge of the debtor upon the payment of the agreed dividend, and where such a provision is omitted, it appears that the agreement will not, although executed, be pleadable in bar of an action by a creditor for the balance of his debt.⁴

original contract to purchase the debts. *Anstey v. Marden*, 1 B. & P. N. R. 124. See also the title *FRAUDS, STATUTE OF*.

1. Composition Need Not Be Sealed. — *Steinman v. Magnus*, 11 East 390, 2 Campb. 124; *Boothbey v. Sowden*, 3 Campb. 175; *Good v. Cheesman*, 2 B. & Ad. 328, 22 E. C. L. 89; *Tatlock v. Smith*, 6 Bing. 339, 19 E. C. L. 94, 3 M. & P. 676; *Bartleman v. Douglass*, 1 Cranch (C. C.) 450; *Fellows v. Stevens*, 24 Wend. (N. Y.) 294; *Paddleford v. Thacher*, 48 Vt. 574.

In *Paddleford v. Thacher*, 48 Vt. 574, the court said: "If there is a consideration, a discharge under seal is of no importance. The only additional effect of a sealed discharge is that it imports a sufficient consideration, and the creditor is not at liberty to disprove it; but when a consideration exists, a discharge without seal is just as effective as one under seal."

2. Composition Need Not Be Sealed, Though Debts Secured by Seal Instruments. — In *Van Bokkelen v. Taylor*, 62 N. Y. 105, reversing 2 Hun (N. Y.) 138, 4 Thomp. & C. (N. Y.) 422, the composition agreement or release signed by the creditors contained a two-cent internal revenue stamp opposite the signatures in the place appropriate for a seal. It was contended that, as some of the debts released by the instrument were secured by sealed instruments, the release must itself be sealed, and that it was without a seal, and therefore inoperative. The trial court found, however, that the release was in fact sealed, and the Court of Appeals refused to disturb this finding, saying: "There is nothing in the case to show that these [revenue] stamps were not used as seals or laid over some substance capable of receiving an impression and employed for that purpose. In the absence of any such evidence, the finding of the court, based upon an inspection of the instrument, cannot be disturbed. The release, however, being a composition by creditors in which several united, would have been operative without a seal."

This point was also raised in *Lowe v. Eginton*, 7 Price 604, but the case was decided upon another point.

3. Robbins v. Magee, 76 Ind. 381; *Eisenhart v. Lynn*, 29 W. N. C. (Pa.) 113.

4. Pierson v. McCahill, 21 Cal. 122.

When the creditors "agree to accept" a certain per cent. of the amounts due them, it has been held to be implied that the sum provided for was to be received instead of the full debt. *Farrington v. Hodgdon*, 119 Mass. 453.

Need Not Contain Release. — A composition agreement need not contain a technical release, for it operates of itself, when properly drawn, to discharge the debts, if its terms are

complied with. *Mr. O. F. Bump* in 4 So. L. Rev. 654. See also *Garrod v. Simpson*, 3 H. & C. 395, decided under the provisions of the English Bankruptcy Act, 1861.

Thus, in *Bartleman v. Douglass*, 1 Cranch (C. C.) 450, it appeared that, in accordance with the terms of a composition agreement, the defendant had executed a deed of his property to trustees, upon which the creditors were to execute a release in the defendant's favor, and that the plaintiff, who was one of the creditors, had refused to execute the release. It was held that the agreement and the deed executed in accordance therewith constituted a valid defense to an action of assumpsit, the plaintiff being bound to execute the release and compellable in equity to do so. See also *Butler v. Rhodes*, 1 Peake N. P. 238 (ed. 1795), 1 Esp. 236.

Provision Construed as Present Release. — Where a debtor surrenders all his property for the use of his creditors, and in consideration thereof they covenant that they will receive the same in full satisfaction of their demands, and will forever release and discharge him from all further claims, etc., this shall be construed as a present release. *Tuckerman v. Newhall*, 17 Mass. 581.

When Letter of License Operates as a Discharge. — A letter of license obtained by a debtor from his creditors contained a provision that if any creditor should, during the continuance of the license, molest or interfere with the debtor contrary to the true intent and meaning of the indenture, the debtor should thenceforth be discharged of all the debts of the creditor by whom the license should be so contravened, and that the said indenture might be pleaded in bar to such debts. It was held that the bringing of an action by a creditor who was a party to the deed during the continuance of the license was a molestation or interference within the meaning of the provision, and that the letter operated as a defeasance and was pleadable in bar as such. *Gibbons v. Vouillon*, 8 C. B. 483, 65 E. C. L. 483. See also *Bamford v. Clewes*, L. R. 3 Q. B. 729; *Corner v. Sweet*, L. R. 1 C. P. 456; *Ellis v. M'Henry*, L. R. 6 C. P. 228.

Where, under a letter of license, the debtor's business is to be carried on up to a certain future date, and his effects are then to be sold and divided among the creditors, and when the date is reached a part of the creditors agree to a further extension of time, a creditor who joined in the original letter of license, but not in the agreement for further time, cannot sue the insolvent for a debt existing at the time of the first agreement. *Cork v. Saunders*, 1 B. & Ald. 46.

c. SIGNING THE INSTRUMENT — Creditors Need Not Sign at Same Time and Place. — The parties need not sign the composition agreement on the same occasion or in the presence of each other. The agreement may be drawn and carried round to different parties to secure their signatures.¹

Signing by Agent. — A compromise agreement, like any other contract, may be entered into by a creditor through a duly authorized agent,² and even where the compromise is in the form of a deed it does not appear to be necessary that the agent should be appointed by power of attorney.³

Firm Creditor — Power of Partner to Sign Composition. — If a firm is among the creditors and parties to the composition, one of the partners may bind the firm by signing the firm name to the composition agreement, even though the agreement is under seal.⁴

When Execution by Debtor Unnecessary. — Where a composition agreement is drawn in the form of a release *in presenti* and contains no mutual obligations to be performed at a future time, it is not necessary that it be signed by the debtor in order to make it binding upon him.⁵

A composition deed by which a debtor conveyed his property to trustees for the benefit of his creditors contained a provision that if the debtor should perform the covenants contained in the deed, he might thereafter live without suit, molestation, etc., in his person, goods, estate, or effects, and that any creditor who should, contrary to the true intent and meaning of the instrument, sue or molest the debtor, should forfeit his debt. Subsequently, and after certain breaches of trust on the part of the trustees, one of the creditors filed a bill in equity for the purpose of carrying into execution the trust created by the instrument. It was held that the license contained in the instrument did not operate as a release and discharge, and consequently did not bar the suit, and that the suit was not within the forfeiture clause, since that was designed for the personal protection of the debtor from molestation, and did not apply to a suit brought for the very purpose of enforcing the terms of the deed itself. *O'Brien v. Osborn*, 16 Jur. 960, 10 Hare 92.

1. *Orlando F. Bump* in 4 So. L. Rev. 650, citing *Leicester v. Rose*, 4 East 372; *Cullingworth v. Loyd*, 2 Beav. 385; *Fawcett v. Gee*, 3 Anstr. 910; *Bean v. Amsinck*, 10 Blatchf. (U. S.) 361.

Last Signer. — The creditor who signs a composition last cannot claim that as to him there is no mutuality because no one else was induced to sign by his signature. *Hall v. Merrill*, 5 Bosw. (N. Y.) 266, 9 Abb. Pr. (N. Y.) 116.

2. **Signature by Agent.** — See *Hawley v. Beverley*, 6 M. & G. 221, 46 E. C. L. 221, 6 Scott N. R. 837; and the title *AGENCY*, vol. 1, p. 971.

A corporation may sign the compromise by an agent, and a compromise entered into by the cashier of a bank on behalf of the bank will be presumed to have been made with due authority, where there is no evidence that he acted without authority, and where it is shown that compromises were matters of frequent occurrence in the bank, and that the cashier acted after consultation with the president. *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189.

3. See *Hawley v. Beverley*, 6 Scott N. R.

837, 6 M. & G. 221, 46 E. C. L. 221; and the title *AGENCY*, vol. 1, p. 953.

4. **Partner May Bind Firm by Signing Composition.** — *Teede v. Johnson*, 11 Exch. 840; *Hawkshaw v. Parkins*, 2 Swanst. 539; *Halsey v. Whitney*, 4 Mason (U. S.) 206; *Smith v. Stone*, 4 Gill & J. (Md.) 310; *Beach v. Ollendorf*, 1 Hilt. (N. Y.) 41; *Bruen v. Marquand*, 17 Johns. (N. Y.) 58; *Wells v. Evans*, 20 Wend. (N. Y.) 251. See also *Evans v. Wells*, 22 Wend. (N. Y.) 324.

The power of a partner to compromise firm claims is fully treated under the title *PARTNERSHIP*.

In *Pierson v. Hooker*, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467, Chief Justice Kent, in holding that a deed of release executed in the firm name by one partner bound the firm, said: "Here was no attempt to charge the partnership with a debt by means of a specialty, but it is the ordinary release of a partnership debtor. It is a general principle of law that where two have a joint personal interest, the release of one bars the other (*Ruddock's Case*, 6 Coke 25); and I cannot perceive that the case of copartners in trade forms an exception to the general rule."

In *Bruen v. Marquand*, 17 Johns. (N. Y.) 58, a firm was held bound by a partner's signing and sealing a deed in his own name.

But a mere covenant not to sue contained in a composition deed and signed by one of two joint creditors cannot be pleaded as a release in bar of an action by both for the debt due them jointly; but the covenanting creditor is himself liable for a breach of the covenant. *Walmesley v. Cooper*, 11 Ad. & El. 216, 39 E. C. L. 51.

When the debtor has failed to make an instalment payment as required by the terms of a composition deed, a partner who has signed the deed in the name of his firm may maintain covenant for the nonpayment, and the other partner, not being a party to the deed, cannot join in covenant. *Metcalfe v. Rycroft*, 6 M. & S. 75.

5. **Signature of Debtor.** — *Townsend v. Newell*, 22 How. Pr. (N. Y. Supreme Ct.) 164, where, in an action by a creditor against the debtor upon a promissory note, representing a fraudulent preference given to the creditor, it was

d. AGREEMENT OF CREDITOR TO SIGN — *Estoppel*. — Where a creditor has, either verbally or in writing, agreed to sign a composition, and by so doing has induced other creditors to sign, or has caused the debtor or other creditors to take some material action in the matter which they would not otherwise have taken, and afterwards refuses to sign, he is estopped from recovering the amount of his original debt, and will be held to the terms of the composition.¹

held that a composition agreement entered into by the creditors in the form of a release *in presenti* was binding and valid although not signed by the debtor.

Where a composition agreement is entered into and signed by the creditors, conditional upon the debtor executing a deed of certain real estate to the creditors' attorney in fact, and the debtor executes the deed, which is accepted by the attorney, and the property is sold and the proceeds distributed, the compromise constitutes a bar to an action by one of the creditors against the debtor although no agreement in the nature of a counterpart was ever executed by the latter. *Eaton v. Lincoln*, 13 Mass. 424.

Composition with Future Covenants — Debtor Must Execute. — The creditors of a firm consisting of two partners executed a composition deed by which it was agreed that after receiving a dividend from the partnership property the creditors should look to each of the partners for a moiety only of such balance as should remain unpaid. The instrument also contained a covenant on the part of each partner individually to take upon himself and pay a moiety of the partnership indebtedness, but the instrument was not executed by either of the partners. It was held that no action could be maintained on the covenant against either partner, and that the partnership relation remained so that an accord and satisfaction with one of the partners was a bar to an action against the other. *Le Page v. McCrea*, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469.

Interest in Land. — Where the composition is a contract for an interest in or concerning lands, etc., within the statute of frauds, it is invalid unless signed by the debtor or his properly authorized agent. *Alchin v. Hopkins*, 1 Bing. N. Cas. 99, 27 E. C. L. 320.

1. When Debtor's Agreement to Sign Is Binding — England. — *Anstey v. Marden*, 1 B. & P. N. R. 124; *Norman v. Thompson*, 4 Exch. 755; *Butler v. Rhodes*, 1 Esp. 236; *Heathcote v. Crookshanks*, 2 T. R. 24; *Brady v. Sheil*, 1 Campb. 147; *Jolly v. Wallis*, 3 Esp. 228; *Bradley v. Gregory*, 2 Campb. 383; *Wood v. Roberts*, 2 Stark. 417, 3 E. C. L. 470; *Fawcett v. Gee*, 3 Anstr. 910; *Ex p. Sadler*, 15 Ves. Jr. 52.

Iowa. — *Murray v. Snow*, 37 Iowa 410.

Maryland. — *Gardner v. Lewis*, 7 Gill (Md.) 377.

Massachusetts. — *Farrington v. Hodgdon*, 119 Mass. 453.

New Hampshire. — *Browne v. Stackpole*, 9 N. H. 478.

New York. — *Fellows v. Stevens*, 24 Wend. (N. Y.) 294.

Vermont. — *Paddleford v. Thacher*, 48 Vt. 574.

In *Cork v. Saunders*, 1 B. & Ald. 46, where A., being insolvent, by agreement stipulated to assign his property immediately, the credit-

ors consenting that the business should be carried on for their benefit until the next Michaelmas, and that the property should then be divided among them, the insolvent assigned his effects. At the next Michaelmas several of the creditors who had signed this instrument agreed that the business should be carried on by the trustees for a further time. It was held that a creditor who had signed the first agreement, but had not in any way concurred in the second, could not maintain an action against the insolvent for a debt existing at the time of the first agreement.

Implied Agreement to Consent. — The agreement may sometimes be inferred from the fact that the creditor receives the composition paid under the deed. A debtor, who was indebted to the plaintiff as well as other creditors, executed a deed of composition securing to all his creditors ten shillings in the pound. The plaintiffs withheld their consent to the deed. The composition under the deed was paid to the plaintiffs, who kept the money without stating on what account it was received, or without giving an acknowledgment for it. They afterwards claimed to have received it on account of their original debt. It was held that the plaintiffs were precluded from claiming that it was paid on the original debt, and they must be taken to have received it under the composition deed. *Kitchin v. Hawkins*, 12 Jur. N. S. 928.

Agreement Held Not a Bar. — Where a plaintiff, the drawer of a bill of exchange accepted by the defendant, agreed with him and with the rest of his creditors to take a composition of eight shillings in the pound, to be secured by promissory notes to be given by the defendant payable on days certain, and that he should assign to the creditors certain debts upon which they would execute a general release; and the assignment was executed and all the creditors except the plaintiff received their composition and executed a release, and the plaintiff might have received his notes if he had applied for them, but it did not appear that the defendant had ever tendered them to the plaintiff or that he had ever applied for them, and the plaintiff afterwards, and after the days of payment of the notes had passed, sued the defendant on the bill of exchange, it was held that he was not precluded by his agreement from recovering. *Cranley v. Hillary*, 2 M. & S. 120.

So, where the plaintiff attended a meeting of the defendants' creditors, and concurred in certain resolutions for the execution of a release to the defendants, on their executing an assignment of all their effects to trustees for distribution among their creditors, and the defendants and trustees at first disputed the amount of the plaintiff's claim, but subsequently altogether refused to allow him to come in under the deed, it was held that his

c. NOT ESSENTIAL THAT ALL THE CREDITORS JOIN. — Unless it is expressly stipulated in the composition that a certain proportion of the creditors shall enter into it in order to make it binding, no particular number is essential, as long as there are more than one. It is not necessary that all, or even a majority, should enter into the composition in order to make it binding.¹

4. **Personal Representatives May Perform Composition.** — A composition is not personal to the debtor, and if he dies before the composition is completed his personal representatives may carry out its terms and obtain its benefits; and upon carrying out the composition the personal representatives are subrogated to the claims of the creditors.²

II. CONSTRUCTION OF COMPOSITION AGREEMENT — 1. General Rule *Intent Governs.* — The composition agreement is not to be construed technically, but so as to carry out the intent of the parties as gathered from the whole instrument. It should not receive a more comprehensive construction than

having signed the preliminary resolution was, under the circumstances, no bar to his right to sue the defendants for his original debt. *Garrard v. Woolner*, 1 M. & Scott 327.

An agreement for composition is not a bar unless the debtor has performed or agreed to perform his part of the composition. *Flack v. Garland*, 8 Md. 188; *Cutter v. Reynolds*, 8 B. Mon. (Ky.) 599.

The plaintiff, a creditor of the defendant, upon being informed by the latter of his inability to meet his engagements, advised him to ask an extension from his creditors, and to secure indulgence from them, promising to unite in any arrangement the other creditors would make. The defendant thereupon procured all his principal creditors to sign a composition agreement, but the plaintiff refused to sign, although he assured the defendant he would wait and not sue. Before the extension granted by the composition expired, the plaintiff brought suit upon his claim. It was held that the plaintiff's assurance that he would unite in any agreement assented to by the other creditors did not, under the circumstances, amount to an agreement to compromise, was without consideration, evidently reserved a *locus penitentiae*, and did not bar the action. *Hartell v. Morgan*, 1 Pittsb. (Pa.) 354. See also *Boyd v. Hind*, 1 H. & N. 938.

In *Loney v. Bailey*, 43 Md. 10, certain creditors were held entitled to recover the full amount of their claims, under the following facts: A bill was filed by one member of a firm against his copartners, praying the appointment of a receiver and for the adjustment of the partnership affairs. The creditors were not parties. A receiver was appointed who took charge of all the partnership effects and reported to the court a proposition of a party to purchase the entire stock of goods and debts due the firm at a certain price, and prayed the court to authorize the sale. With this report an agreement was filed, between the partners and a large number of the creditors, wherein the proposed sale was consented to and recommended, and by said agreement the creditors executing the same agreed with the partners that in consideration that the latter would assent to the sale, and of the dividends to be received from the proceeds thereof, the former would and did forever acquit, discharge, and release the firm and the several members

thereof individually from any and all balances that might remain due on their several claims. The partners all assented to the sale, and it was authorized, and the receiver was directed to give the usual notice to the creditors of the firm to file their claims, properly authenticated, on or before a certain day, preparatory to a proper distribution of the assets of the firm. Under this notice certain creditors who had not signed the agreement aforesaid filed their claims and received a dividend thereon. Prior to receiving such dividend the same creditors instituted an action at law to recover the amounts of their claims. It was held that the plaintiffs were entitled to recover the full amount of their claims less the dividend received thereon; that the filing of the claim, under the circumstances, and the receipt of the dividend, did not bind the plaintiffs to abide by and perform the agreement between the defendants and certain other creditors.

A creditor cannot be said in any sense to have acceded to the provisions of a composition agreement unless he has put himself in the same situation with regard to the debtor as if he had actually executed the deed. *Forbes v. Limond*, 4 De G. M. & G. 298.

1. **Not All Creditors Need Sign — England.** — *Good v. Cheesman*, 2 B. & Ad. 328, 22 E. C. L. 89; *Constantein v. Blache*, 1 Cox 287; *Brown v. Dakeyne*, 11 Jur. 39; *Lewis v. Jones*, 4 B. & C. 506, 10 E. C. L. 393; *Norman v. Thompson*, 4 Exch. 755.

Indiana. — *Devou v. Ham*, 17 Ind. 472.

Iowa. — *Lambert v. Shetler*, 71 Iowa 465.

Maryland. — *Gardner v. Lewis*, 7 Gill (Md.) 377.

Massachusetts. — *Eaton v. Lincoln*, 13 Mass. 424.

New York. — *Renard v. Tuller*, 4 Bosw. (N. Y.) 107; *Hall v. Merrill*, 5 Bosw. (N. Y.) 266, 9 Abb. Pr. (N. Y.) 116.

Wisconsin. — *Continental Nat. Bank v. McGeoch*, 92 Wis. 311, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 389.

A remark made by the court *arguendo* in *Lanes v. Squyres*, 45 Tex. 382, to the effect that all the creditors must join, is to be taken with reference to the facts and pleadings in the case, and was doubtless not intended to lay down a doctrine opposed to the well-established proposition of the text.

2. *Matter of Leslie*, 10 Daly (N. Y.) 76.

the reasonable import of the language would signify, and should be limited in its scope to such matters as were within the contemplation of the parties at the time of its execution.¹

2. "All Creditors" Include Secured Creditors. — When a composition agreement requires the assent of "all creditors" to render it valid, the assent of the secured as well as unsecured creditors is necessary.²

3. What Debts Included — *a. GENERALLY — Counterclaims Deducted.* — Where by a composition deed creditors agree to release a debtor from all causes of action in respect of debts then owing, the word "debts" is to be construed as the sum due after allowing for any counterclaim in favor of the debtor, and the discharge will only operate as to such balance.³

Proof to Show Amount of Claims Actually Held. — Where there are no words in the body of the deed referring to the amounts set opposite the signatures of the creditors, such amounts do not form a part of the deed, and the creditors do not covenant with the debtor that they do or will obtain or control claims to any particular amount, but the covenants in the instrument apply only to the amount of claims actually held by the creditors at the time.⁴

b. RESERVING AND SPLITTING CLAIMS — **Where Creditor Leaves Blank for Amount of Claim or Signs for Less than True Amount.** — If the composition is signed by the creditor leaving the space for the debts blank, or if he states a sum less than

1. Construction. — *Lipman v. Lowitz*, 78 Ill. 252; *Gloucester Bank v. Worcester*, 10 Pick. (Mass.) 528; *Averill v. Lyman*, 18 Pick. (Mass.) 346; *Preston v. Etter*, 140 Mass. 465.

The Phrase "Their Several Creditors" Not Equivalent to "All Their Creditors." — The courts will not by construction alter the sense of any unambiguous expressions in a deed of composition. In *Strickland v. Harger*, 16 Hun (N. Y.) 465, the composition agreement contained the clause: "Whereas, C. G. Harger & Son, bankers, are indebted to the undersigned, their several creditors, in divers amounts," it was held that the word "several" did not signify "all," and that there was no ground for the construction that it was not to be good until all the creditors had signed it, the court saying: "If it was intended that the signature of all the creditors was essential to the validity of the instrument, it was easy to say so."

Meaning of "Borrowed Money." — A composition with creditors contained a provision for the payment first of "all borrowed money and accommodation notes," and then of "all notes which were originally given in the course of business and have been extended by the holders thereof," etc. On exceptions taken to the claim of a creditor allowed as for borrowed money on the ground that it was not for "borrowed money" within the terms of the deed, it was held that the words "all borrowed money" included, in an ordinary sense, all sums of money loaned by a creditor to a debtor without regard to the mode or the existence of any security or evidence of indebtedness, and there being nothing in the context to limit the meaning of the words, it was incumbent on the exceptant to establish, by clear proof, that the words used had acquired or were used in a technical or peculiar sense. *Matter of Murray's Estate*, 24 Md. 520. See also *BORROW*, vol. 4, p. 731.

2. Secured Creditors Must Sign. — *Kinsing v. Bartholew*, 1 Dill. (U. S.) 155, *Artman v.*

Truby, 130 Pa. St. 619; *Cobleigh v. Pierce*, 32 Vt. 788. See also *Acker v. Phoenix*, 4 Paige (N. Y.) 305.

But in *Noyes v. Chapman-Drake Co.*, 60 Minn. 88, where a plaintiff held both a secured and an unsecured claim against the defendant, and joined with other creditors of the defendant in a composition agreement, describing themselves as "general creditors," and agreed to take from the defendant a certain consideration for their respective claims, the amount of each of which claims was stated, the plaintiffs stating only the amount of their unsecured claim, it was held that the term "general creditors" meant "unsecured creditors," and by executing the agreement the plaintiffs did not release their second claim.

What Are Unsecured Claims. — Where a composition agreement includes debts "not secured either by liens upon [the debtor's] property, or by personal sureties, or by parties bound to [the creditors] as co-obligators with" the defendant, it was held that a debt upon which the debtor was a co-obligor with a firm which was insolvent and had executed a deed of assignment for the benefit of creditors was included as an unsecured claim to the extent to which the firm failed to pay it, and that the holder of the claim, a creditor who had signed the composition, was bound by the agreement of composition. *Wakefield v. Georgetown First Nat. Bank*, (Ky. 1897) 40 S. W. Rep. 921.

3. Fazakerly v. McKnight, 6 El. & Bl. 795, 88 E. C. L. 795, 2 Jur. N. S. 1020.

4. Fowler v. Perley, 14 Allen (Mass.) 18.

Failure to Specify Amount Does Not Bar Action on Composition. — The fact that a creditor has signed a composition deed without stating the amount of his claim opposite his name in the schedule annexed thereto, as provided by the deed, does not constitute a defense in an action on the covenants of the deed brought by such creditor against the trustee thereunder to recover the amount of his composi-

his entire demand, other creditors not knowing of the balance, he is deemed to sign for the entire amount of his claim at the time of signing. He cannot split his claim, signing for part and reserving part, without the consent of all the parties to the agreement.¹

Reservation Allowed when Known and Assented to. — Although the creditor may not sign for part of his claim only, if all other creditors do not know of the reservation, yet if the fact of the reservation is known at the time by all the other creditors, or appears on the face of the instrument, such a reservation will then be valid.²

tion, where the trustee had notice of the amount of the plaintiff's claim before action. *Daniel v. Saunders*, 2 Chit. Rep. 564, 18 E. C. L. 421.

1. Creditor Cannot Sign for Part Only of His Claims. — *Bisset v. Burgess*, 23 Beav. 278; *Blackstone v. Wilson*, 26 L. J. Exch. 229; *Seager v. Billington*, 5 C. & P. 456, 24 E. C. L. 403; *Margetson v. Aitken*, 3 C. & P. 338, 14 E. C. L. 336; *Britten v. Hughes*, 5 Bing. 460, 15 E. C. L. 502; *Alsager v. Spalding*, 6 Scott 204, 4 Bing. N. Cas. 407, 33 E. C. L. 393; *Teede v. Johnson*, 11 Exch. 840; *Cecil v. Plaistow*, 1 Anstr. 202; *Hawley v. Beverley*, 6 Scott N. R. 837, 6 M. & G. 221, 46 E. C. L. 221; *Holmer v. Viner*, 1 Esp. 131; *Huntington v. Clark*, 39 Conn. 540; *Perry v. Armstrong*, 39 N. H. 583; *Van Bokkelen v. Taylor*, 62 N. Y. 105; *Robinson v. Striker*, 47 Hun (N. Y.) 546; *Russell v. Rogers*, 10 Wend. (N. Y.) 474, 25 Am. Dec. 574.

Where a creditor executes a composition deed without specifying the amount of his demand, he is bound by the terms of the composition to the extent of his claim, although the terms of the deed are to take the composition for the sums set opposite to the respective names of the creditors who execute the deed. *Harrhy v. Wall*, 2 Stark. 195, 3 E. C. L. 374, 1 B. & Ald. 103. In this case Lord Ellenborough is reported by Mr. Starkie to have said: "If the plaintiff had made a reserve for a future specification of his debt, and had executed the deed as an escrow only, I should have entertained no doubt upon the question; but he has executed the deed without any qualification, and the leaving a blank instead of specifying the amount of his debt is a circumstance to which other creditors might have objected, but to which he cannot object. It was not competent to him to carve out his claims and to sign for part only. If a creditor signs a deed of this nature and declines to specify the amount of the debt for which he compounds, he should not subscribe his name in an unqualified manner, which may have the effect of inducing others to sign, under the impression that he has compounded for the whole of his demand."

Secured Claims. — It is immaterial that part of the claims are secured and part unsecured. *Zoebis v. Von Minden*, 47 Hun (N. Y.) 213; *Harloe v. Foster*, 53 N. Y. 385. *Contra*, *Noyes v. Chapman-Drake Co.*, 60 Minn. 88, set out in note 2, p. 384, *supra*.

Claims Against Firm and Individual. — The plaintiffs held a claim against a firm in which B. was a partner, and also an individual claim against B. The latter, having become insolvent, proposed to the creditors to transfer all

his property to trustees, to be divided among his creditors. The plaintiffs, on being requested to accede to the arrangement and sign the composition, refused, on the ground that they would thereby release the firm. On being assured by B. that he was only a special partner, the plaintiffs consented to transfer the individual claim to R., with the understanding that he should execute the deed and release as creditor, holding any dividends received in trust for plaintiffs. Now, B., by the partnership agreement, was a special partner, as he had represented, but by reason of irregularity in the proceedings he had incurred the liability of a general partner, which fact he knew at the time, but did not disclose to the plaintiffs. Under these circumstances it was held that the case did not fall within the rule prohibiting a creditor who is a party to a composition deed or who assents thereto from reserving a portion of his claim from the operation of the compromise agreement, or stipulating for a secret advantage over other creditors; and that the compromise was no defense and did not discharge B. *Almon v. Hamilton*, 100 N. Y. 527.

Unliquidated Chose in Action. — A composition with creditors bars an action by one for breach of contract for which he made no provision on signing, as he should have done if he had wished damages therefor. *Textor v. Hutchings*, 62 Md. 150.

2. Payler v. Homersham, 4 M. & S. 423; *Rice v. Woods*, 21 Pick. (Mass.) 30; *Preston v. Etter*, 140 Mass. 465; *Garnier v. Papin*, 30 Mo. 243.

The Intent to Permit a Creditor to Reserve a Part may appear from the general construction of the whole instrument. In *Preston v. Etter*, 140 Mass. 465, the debtor conveyed his property by deed to trustees to dispose of the same and "apply the proceeds to the payment of certain promissory notes given to said creditors and indorsed by [his wife]," then after the payment of said notes to deliver up to the debtor all that might remain of said property discharged of said trust, said creditors "agreeing to grant [said debtor] a full discharge from all indebtedness upon the payment of said notes as aforesaid." The several creditors signed this deed, placing against their names respectively the amount of their debts, on account of which they had received notes of the debtor indorsed by his wife to the amount of thirty per cent. A creditor who held a promissory note of the debtor dated before and payable after the date of the deed signed the deed, and against his signature was the amount of a book account due him, not including the note. For the amount of such account he had received notes of the debtor, indorsed by his

c. CONTINGENT LIABILITY AS INDORSER.—A composition does not, unless by express stipulation, release from liability as indorser on a claim not yet due.¹

III. CONDITIONS IN COMPOSITION AGREEMENTS — 1. Cannot Be Added by Parol to Written Compromise.—Under the familiar rule that parol evidence is inadmissible to vary a contemporaneous writing, it is not permitted to show any oral condition affecting the validity of a written composition agreement.²

2. Strict Performance Required — a. GENERALLY.—As a composition is a contract existing entirely by virtue of the free consent of all the parties to it, it may contain or depend for validity upon any lawful conditions upon which the parties may agree. Generally such conditions relate to the number of creditors whose assent is necessary to render the agreement binding, or to the time when the provisions of the agreement are to be performed. And as the contract is one requiring the strictest good faith on all sides, every such condition must be strictly performed.³

wife as agreed, but he had not received such notes for thirty per cent. of the note above described. It was held that the note was not barred by the composition, the court saying that it was evidently not within the scope of the agreement.

Parol Evidence.—Parol evidence is admissible to show that certain claims were or were not intended to be included in the composition. *Hartford, etc., Transp. Co. v. Hartford First Nat. Bank*, 46 Conn. 569. But not when such evidence would contradict the plain letter of the instrument. *Van Brunt v. Van Brunt*, 3 Edw. Ch. (N. Y.) 14; *Rice v. Woods*, 21 Pick. (Mass.) 30; *Perry v. Armstrong*, 39 N. H. 583; *Matlack's Appeal*, 7 W. & S. (Pa.) 79. And parol evidence is inadmissible to show that a particular debt was not included in a composition agreement where, for a consideration paid by the debtor at the time, the agreement recites an absolute release from all debts. *Meyer v. McKee*, 19 Ill. App. 109.

1. Liability as Indorser on Claims Not Due.—*Lipman v. Lowitz*, 78 Ill. 252; *Hambien v. Ratigan*, 119 Mass. 153. In the latter case it was held that where a creditor who held a note and account which were due, and another note which was not due for more than thirty days afterwards, on which the debtor was indorser, joined in a composition whereby the creditors agreed to accept in discharge ten per cent. "to be paid within thirty days," the note on which the debtor was indorser was not included in the composition, and the creditor might recover the amount from the debtor, the maker having refused payment.

If it is intended to release such a contingent demand, that intention must appear on the face of the composition deed. *Hambien v. Ratigan*, 119 Mass. 153; *Pierce v. Parker*, 4 Met. (Mass.) 89.

A release of all debts, demands, and causes of action will not affect the claim of an indorser on a bill of exchange not yet due. *Margetson v. Aitken*, 3 C. & P. 338, 14 E. C. L. 336; *Crawford v. Swearingen*, 15 Ohio 264.

2. Condition Cannot Be Added by Parol.—*Van Bokkelen v. Taylor*, 62 N. Y. 105, *reversing* 2 Hun (N. Y.) 138, 4 Thomp. & C. (N. Y.) 422; *Strickland v. Harger*, 16 Hun (N. Y.) 465. See also *Acker v. Phoenix*, 4 Paige (N. Y.) 305.

But in *Tutt v. Price*, 7 Mo. App. 194, it was

held that parol evidence was admissible to show that an instrument entitled a "conditional release," but not containing any condition, was made upon condition that other creditors should come into it. *Van Bokkelen v. Taylor*, 62 N. Y. 105, was distinguished by the fact that in the case at bar there was not a release to be signed by all the creditors, but only a separate release signed by one creditor.

Delivery in Escrow.—In *Johnson v. Baker*, 4 B. & Ald. 440, 6 E. C. L. 551, before the execution of a composition deed, it was agreed, in the presence of the surety for the payment of the composition, that it should be void unless all the creditors executed it. The surety afterwards executed the deed in the ordinary way, without saying anything at the time of execution; the deed was then delivered to one of the creditors, that he might get it executed by the rest of the creditors. It was held that this was to be construed as a delivery in escrow, and that, all the creditors not having signed, the surety was not bound.

Representations of Agent Inducing Creditor to Sign.—And in *Laird v. Campbell*, 100 Pa. St. 159, an agent to whom a debtor had intrusted a composition deed to secure the signatures of certain creditors, told one creditor as an inducement to secure his signature that the composition was not to be valid unless all the creditors should sign. The composition agreement contained no such condition, and the agent had no authority to make such a representation. The creditor, in consequence of this representation, signed the composition. All the creditors did not sign, and it was held that as to the creditor in question the composition was not binding, on the ground that the representation was within the scope of the agency, and that the debtor could not have the benefit of the agreement except upon the condition which induced the making of it.

Conditions Must Be Declared or Clearly Deducible.—Conditions must be plainly declared or clearly deducible from unmistakable language. *Renard v. Tuller*, 4 Bosw. (N. Y.) 107; *Chase v. Bailey*, 49 Vt. 71.

3. Conditions to Be Performed Strictly—*England*.—*Lewis v. Jones*, 4 B. & C. 506, 10 E. C. L. 393; *Johnson v. Baker*, 4 B. & Ald. 440, 6 E. C. L. 551; *Enderby v. Corder*, 2 C. & P. 203, 12 E. C. L. 90; *Holmes v. Love*, 5 D.

b. DEBTOR MUST TENDER CONSIDERATION ACCORDING TO CONDITIONS.

— It is the duty of the debtor to tender the consideration to the creditors according to the conditions agreed upon as to time, place, etc., and his failure so to do avoids the composition.¹

& R. 56, 3 B. & C. 242, 10 E. C. L. 64; *Thorn-ton v. Sherratt*, 8 Taunt. 529, 4 E. C. L. 199; *Wiglesworth v. White*, 1 Stark. 218, 2 E. C. L. 89; *Deacon v. Stodhart*, 9 C. & P. 685; *Kester-ton v. Sabery*, 2 Chit. Rep. 541, 18 E. C. L. 411; *Spooner v. Whiston*, 8 Moo. 580, 17 E. C. L. 112.

United States. — *Clarke v. White*, 12 Pet. (U. S.) 178; *Danzig v. Gumersell*, 27 Fed. Rep. 185; *Kinsing v. Bartholew*, 1 Dill. (U. S.) 155. *California*. — *Magee v. Kast*, 49 Cal. 141.

Connecticut. — *Doughty v. Savage*, 28 Conn. 146.

Indiana. — *Kahn v. Gumberts*, 9 Ind. 430; *Pontious v. Durlfinger*, 59 Ind. 27.

Iowa. — *Melhop v. Tathwell*, 74 Iowa 571.

Massachusetts. — *Richardson v. Pierce*, 119 Mass. 165; *Walker v. Mayo*, 143 Mass. 42.

Missouri. — *Garnier v. Papin*, 30 Mo. 243.

New York. — *Durgin v. Ireland*, 14 N. Y. 322; *Smythe v. Graydon*, 29 How. Pr. (N. Y. Supreme Ct.) 11; *Van Bokkelen v. Taylor*, 62 N. Y. 105, reversing 2 Hun (N. Y.) 138, 4 Thomp. & C. (N. Y.) 422.

Pennsylvania. — *Lower v. Clement*, 25 Pa. St. 63; *Greer v. Shriver*, 53 Pa. St. 259; *Lane's Appeal*, 82 Pa. St. 289; *Laird v. Campbell*, 100 Pa. St. 165; *Artman v. Truby*, 130 Pa. St. 619.

Vermont. — *Dauchy v. Goodrich*, 20 Vt. 127; *Chase v. Bailey*, 49 Vt. 71.

In *Artman v. Truby*, 130 Pa. St. 619, the condition was that all the creditors should sign except certain named judgment creditors. One creditor, not among those named, purchased a number of the other claims and gave a verbal assent to the agreement, but did not sign it. The lower court instructed that signature was not necessary if assent was shown, and this instruction was held to be error.

A composition deed so drawn as clearly to evince an intention that all the creditors shall sign it does not become obligatory upon those who sign first until all the others have signed. This was held in a case where the agreement did not express the condition in terms. *Chase v. Bailey*, 49 Vt. 71.

Where, to a declaration upon a bill of exchange, the pleas stated in substance that in order to induce the other creditors of the defendant to come into an arrangement, the plaintiff agreed to accept ten shillings on the pound on their debts, and that A. B., another creditor, was induced to agree to accept the composition, it was held that the plea was insufficient, since it was quite consistent with what was stated that the plaintiff and A. B. agreed to accept on condition that all the other creditors should come in, and that the other creditors, on application, refused to do so. *Reay v. Richardson*, 2 C. M. & R. 422.

Failure to Keep Life Insured. — Where it is one of the conditions of a composition deed that the debtor shall insure his life and keep it insured to a certain amount, the deed is not binding on a creditor where the debtor fails to insure. *Hyde v. Watts*, 12 M. & W. 254.

Promise Not to Incur New Indebtedness. — Where creditors, at the debtor's request, agree to divide their debts into four parts, and take negotiable promissory notes therefor, extending payments to four fixed dates, and to permit the debtor in the meantime to continue business under certain stipulations agreed to on his part, one of which is that no new debts are to be incurred, and the agreement provides that if such debts are incurred all the notes shall thereupon become due, any creditor may, upon the contracting by the debtor of such additional indebtedness, accept payment in full from the debtor without being guilty of a violation of the agreement between the creditors and the debtor, and equity will not declare a trust upon the fund so received in favor of all the creditors. *Montgomery Bank v. Ohio Buggy Co.*, 110 Ala. 360, criticizing 100 Ala. 626.

The Debtor Cannot Impose New Conditions. — In *Melhop v. Tathwell*, 74 Iowa 571, a composition agreement was made which provided that the debtor should pay all the creditors fifty per cent. of their claims, which was to be accepted in full satisfaction. In a suit subsequently brought by one of the creditors to recover the full amount of the claim, the defendant firm offered to show that it had placed the money on deposit in a certain bank, and that its attorney had advised the plaintiff's attorney of that fact, and that the money would be paid upon his depositing in that bank his client's receipt acknowledging satisfaction in full of the claim. It was held that this evidence was properly excluded, because it did not tend to show an unconditional offer to pay as provided in the agreement; that the plaintiff had not agreed to accept the money from the bank or at its place of business, or to execute and deliver a written release. "Under the terms of the agreement they had the right to have the money paid to them in person, or at least to their attorney, who had the matter in charge."

1. Consideration Must Be Tendered. — *Stewart v. Tipton*, 56 Cal. 52; *Melhop v. Tathwell*, 74 Iowa 571; *Hazard v. Mare*, 6 H. & N. 434.

Where a creditor by a composition deed agrees to receive new notes of the debtor for an extended time in place of other notes held by him, it is necessary for the debtor, when sued on the original notes, in order to avail himself of the composition agreement, to plead and prove tender of the new notes, and also to aver readiness at all times to perform his part of the contract. *Warburg v. Wilcox*, 2 Hilt. (N. Y.) 118.

Default of Debtor in Making Payment at Day Specified. — Where by the terms of a composition agreement the debtor is to be discharged by making partial payments at specified times, but it is provided that if default should be made at the times so specified the instrument is to be void, a creditor has a right to refuse a payment tendered on a day other than that appointed and sue for his whole claim, but if he

3. Burden of Proving Performance. — The party who sets up a composition has the burden of proving that all its conditions have been strictly performed.¹

4. Breach and Its Effects — *a. GENERALLY* — **Condition that All Creditors Must Sign.** — When it is a condition of a composition agreement that all the creditors shall sign it, the agreement does not constitute a bar to an action by a signing creditor for the full amount of his claim, if other creditors refuse to sign. In such a case the payment of a dividend under the composition to a creditor who signs is simply a discharge *pro tanto*.²

Omission to Sign Not a Refusal. — If a composition deed is drawn with a proviso making it void in case any of the creditors refuse to execute it within a specified time, it is not rendered void by a creditor's mere omission to sign within the required time; to give effect to the proviso there must be an actual refusal of some one of the creditors to execute or otherwise consent to the deed.³

Conditions Annexed by Creditor to Signature. — It is permissible for any creditor, on signing the instrument, to annex any lawful condition to his signature, and such a condition thereupon becomes a part of his contract, and its breach renders the composition void as to him.⁴

b. IMMATERIAL BREACH. — Where the conditions are substantially performed, failure to perform in matters so trivial or immaterial as not to have any perceptible effect on the substance of the transaction will not avoid the composition.⁵

accepts the payment he thereby waives the forfeiture. *Penniman v. Elliott*, 27 Barb. (N. Y.) 315; *Shipton v. Casson*, 5 B. & C. 378, 11 E. C. L. 254. See also *Fessard v. Mugnier*, 18 C. B. N. S. 286, 114 E. C. L. 286; *In re Hatton*, L. R. 7 Ch. 723; *Hall v. Levy*, L. R. 10 C. P. 154; *Oughton v. Trotter*, 2 N. & M. 71, 28 E. C. L. 353.

But where the debtor makes the tender of an instalment at the day specified a creditor cannot refuse to accept it and sue on the original indebtedness. *Bamford v. Clewes*, L. R. 3 Q. B. 729.

Where creditors agree to accept a composition payable in instalments, some of which are guaranteed by a surety, if default is made in the payment of any one instalment the creditors have a right to sue the debtor, or to prove in his bankruptcy, for the balance of their original debts, after deducting what they have received, either from the debtor or the surety, in respect of the composition, and not merely for the amount of the unpaid instalments of the composition. And the surety, though he is entitled to prove in the debtor's bankruptcy for what he has paid in respect of the composition, has no right to put the creditors to an election whether they will carry out the composition arrangement *in toto* or reject it *in toto*. *Ex p. Gilbey*, 8 Ch. Div. 248.

1. Burden of Proof. — *Daglish v. Tennent*, 36 L. J. Q. B. 10, L. R. 2 Q. B. 49, 3 B. & S. 1, 15 W. R. 196 (opinion of Lush, J.); *Lower v. Clement*, 25 Pa. St. 63 (where the condition was that all the creditors in a certain place should sign); *Artman v. Truby*, 130 Pa. St. 619.

2. Walker v. Mayo, 143 Mass. 42; *Durgin v. Ireland*, 14 N. Y. 322; *Acker v. Phoenix*, 4 Paige (N. Y.) 305; *Greer v. Shriver*, 53 Pa. St. 259. See also *Cutter v. Reynolds*, 8 B. Mon. (Ky.) 596.

The rule is the same when the composition is void for fraud. See *infra*, this title, *Fraud in the Composition*.

3. Holmes v. Love, 5 D. & R. 56, 3 B. & C. 242, 10 E. C. L. 64, R. & M. 138, 21 E. C. L. 398.

Where Failure to Perform Is Creditor's Fault. — In *Thornton v. Sherratt*, 8 Taunt. 529, 4 E. C. L. 199, it is held that where the condition of the composition is that it is to be void unless the debtor continues to deal with the creditors, his refusal to buy from them unless they furnish him good marketable articles will not avoid the composition.

4. Creditor May Attach Condition to Signature. — *Lewis v. Jones*, 4 B. & C. 506, 10 E. C. L. 393; *Magee v. Kast*, 49 Cal. 141; *Garnier v. Papin*, 30 Mo. 243.

Such a condition becomes a part of the creditor's contract, and the courts have no power to excuse its non-performance. *Magee v. Kast*, 49 Cal. 141.

5. Immaterial Breach. — In *Fahey v. Clarke*, 80 Ky. 613, where creditors to the amount of four thousand dollars had signed, and one creditor for two dollars and fifty cents had not signed, an agreement containing a condition that it should not be valid unless all creditors signed, it was held that the condition had been substantially complied with, and the agreement was valid.

The mere fact that the composition notes were not given for the exact time agreed upon is an immaterial variation. *Renard v. Tuller*, 4 Bosw. (N. Y.) 107. So, also, is the fact that they were not tendered by the debtor until some time after the date agreed to be given to the notes. *Hall v. Merrill*, 9 Abb. Pr. (N. Y. Super. Ct.) 116.

Deed to Several Trustees, Only Part of Whom Accept. — Where a failing debtor transferred his personal estate to four trustees for his creditors, with the proviso "that the said parties of the second and third parts shall, on or before the first day of February next, make such proof, if required, and execute these presents," it was held that the deed was good

c. **RELEASE OF SURETIES BY BREACH.** — One who becomes surety for the performance of the terms of a composition agreement, or for the payment of any of the composition notes, is released from his obligation if any of the conditions of the composition are not fulfilled.¹

5. **Waiver of Conditions.** — A condition being made by the voluntary consent of the parties, its performance may be waived by them without invalidating the composition.

Accepting Benefits Under Composition After Knowledge of Breach. — And if a party enters into a composition, proceeds to act according to its terms, or accepts benefits under it, after he has knowledge of the breach of any of its conditions, he will be deemed to have waived performance of such conditions, and he cannot afterwards attack the composition or deny its validity on the ground of the breach of such conditions.²

IV. EFFECT OF COMPOSITION AS A DISCHARGE — 1. **Extinguishes Original Debt.** — The effect of any valid composition, when performed according to

although two of the trustees only had executed it; that the effect of the proviso was not to avoid the deed if the parties therein named should not execute it, but merely to take away from such parties the right to recover a dividend. *Small v. Marwood*, 9 B. & C. 300, 17 E. C. L. 385, 4 M. & R. 181.

1. **Release of Surety by Breach of Condition.** — *Johnson v. Baker*, 4 B. & Ald. 440, 6 E. C. L. 551; *Doughty v. Savage*, 28 Conn. 153. In this last-named case a composition agreement signed by the plaintiffs and other creditors of G. contained a condition that it should not be binding unless signed by all the creditors. Composition notes were delivered to the plaintiffs under the agreement, indorsed by the defendant as surety for G. The agreement was not signed by all the creditors, but this fact was not known to the defendant when he indorsed the notes. It was held that he could set up the noncompliance with the conditions as a defense, in a suit brought upon the notes as indorsed by him, the court saying: "The validity of the defendant's indorsement must depend upon the validity of the compromise agreement which it was designed to effectuate and to which the indorsement was, like other contracts of suretyship, accessory or collateral. In regard to that agreement, it was one of its express stipulations that it should not be binding on any of the parties unless it should be signed by all the creditors of the debtors therein mentioned. No authority can be necessary to show that, without a compliance with that stipulation, the agreement would not take effect as a consummated contract unless the execution of it by some of the creditors should be dispensed with."

The above case is criticised in *Whittemore v. Obear*, 58 Mo. 280, in which case a composition between creditors and their debtor and his surety provided that the surety should indorse certain notes of the debtor on condition that all creditors to amounts exceeding two hundred dollars should sign. It was held that it was the duty of the surety to see to it that all such creditors had signed the agreement, and that his indorsement of the notes, as to a creditor who was ignorant of any failure in the fulfilment of the condition or its procurement by fraud, was a waiver of that condition, and that the surety could not avail himself of such failure or fraud against such creditor; and

even if the creditor was aware of such failure or fraud and chose to waive the objection, it did not lie in the mouth of the surety to set it up as a defense.

2. **Waiver of Condition by Accepting Benefits, etc.** — *Browning v. Crouse*, 40 Mich. 339 (where the condition referred to the mode of payment); *Dauchy v. Goodrich*, 20 Vt. 127; *Penniman v. Elliott*, 27 Barb. (N. Y.) 315; *Jolly v. Wallis*, 3 Esp. 228; *Shipton v. Casson*, 5 B. & C. 378, 11 E. C. L. 254.

If a creditor who might have avoided a composition on the ground that it was not performed by the debtor within the time stipulated accepts payment of the composition percentage and surrenders his composition note after the expiration of that time and after he has knowledge of a fraud perpetrated by the debtor and another creditor, such act will constitute a waiver of his right to attack the composition on either of these two grounds. *Cobleigh v. Pierce*, 32 Vt. 788.

What Is Not a Waiver. — Mere failure on the part of the creditor to comply with some unreasonable requirement as to making known his intention to insist on the condition, or neglect to protest immediately against the violation of the condition, will not constitute a waiver so as to estop the creditor from impeaching the composition. *Danzig v. Gomersell*, 27 Fed. Rep. 185. In this case the creditors agreed to accept notes of a particular person. That person having died, the debtor wrote to the creditors notifying them of the death of the party, and suggesting a substitute, closing his letter with the request to advise him of their acceptance. It was held by Judge Brewer that a creditor who did not signify his intention to accept this proposition until notes signed by the new indorser had been accepted by the other creditors, and who then refused to accept them, might sue on his original claim.

Where the plaintiff signed an agreement to take fifty per cent. of his claim "on condition that all the creditors should sign," and received fifty per cent., and gave up his notes, but all the creditors did not sign, and some were paid in full, it was held that he might recover the balance of his claim from the debtor. *Greer v. Shriver*, 53 Pa. St. 259. To the same effect are *Lane's Appeal*, 82 Pa. St. 289; *Laird v. Campbell*, 100 Pa. St. 159.

its terms, is totally to extinguish the original debts, due from the debtor to the creditors, which are within the scope of the agreement. Every creditor whose debt is thus discharged is estopped from suing on the original claim as completely as if he had received his debt in full.¹

New Promise to Pay Debts Compounded. — A composition performed operates as such an absolute discharge of the debts included in its scope that a subsequent promise to pay any of those debts cannot be enforced, being entirely without consideration. The moral as well as the legal obligation of payment is considered to be discharged by the composition.²

1. Composition Extinguishes Claims. — *Fellows v. Stevens*, 24 Wend. (N. Y.) 294; *Zoebis v. Von Minden*, 47 Hun (N. Y.) 213; *Robinson v. Striker*, 47 Hun (N. Y.) 546. See also *Bartlett v. Rogers*, 3 Sawy. (U. S.) 62.

Compromise Must Be Executed. — Generally, unless the composition is performed, it will not discharge the debt, and upon failure to pay the composition notes the creditor may sue upon the original debt. *Mullin v. Martin*, 23 Mo. App. 537; *Pupke v. Churchill*, 16 Mo. App. 334; *Penniman v. Elliott*, 27 Barb. (N. Y.) 315; *Cobleigh v. Pierce*, 32 Vt. 788; *Mackenzie v. Mackenzie*, 16 Ves. Jr. 372; *Rosling v. Muggeridge*, 16 M. & W. 181; *Constable v. Andrew*, 2 Crompt. & M. 298, 4 Tyr. 206; *Leake v. Young*, 5 El. & Bl. 955, 85 E. C. L. 955. See also *supra*, this title, *Conditions in Composition Agreements*.

Agreements — Debtor Must Tender Consideration According to Conditions. — This depends to some extent, however, on the wording of the composition. And where the composition provides that notes for a certain percentage shall be given by the debtor in satisfaction of his debts, which notes shall be in satisfaction of the original indebtedness, nonpayment of the notes does not revive the original debt. *Mullin v. Martin*, 23 Mo. App. 537, *distinguishing* *Pupke v. Churchill*, 16 Mo. App. 334.

And in *Texas* it is held that if a composition, which is in condition to be enforced and upon which the creditor could sue, be not performed at maturity the failure does not revive the original debt, and the creditor's remedy is on the composition. *Bradshaw v. Davis*, 12 Tex. 349; *Lanes v. Squyres*, 45 Tex. 382.

Where the composition provides that the creditors shall accept the note of a third party in satisfaction, the nonpayment of the note does not revive the original claim. *Evans v. Powis*, 1 Exch. 601.

Right of Debtor Against Creditor Who Has Transferred Claim Before Signing Composition. — When a creditor enters into a composition agreement and releases a demand which he has previously transferred to another, he impliedly undertakes to protect the debtor against such demand, and if the demand is afterwards enforced against the debtor by the transferee the debtor may recover the amount of the creditor. *Hawley v. Beverley*, 6 Scott N. R. 837, 6 M. & G. 221, 46 E. C. L. 221; *Harloe v. Foster*, 53 N. Y. 385.

Compromise with Third Person in Reliance on Creditor's Representations. — Where a creditor who is applied to by a debtor in order to procure his assent to a proposition informs the debtor that his claim is owned by a third person, and the debtor, relying upon this state-

ment, effects a compromise with such third person and obtains a release from him, the creditor is estopped from asserting that the claim was not settled, even if he was the owner thereof. *Blair v. Wait*, 69 N. Y. 113, *affirming* 6 Hun (N. Y.) 477.

Fraud of Creditor — Composition No Bar to Accounting. — Where A., a debtor in failing circumstances, executed a composition deed in favor of his creditors, and B., claiming to be a creditor for a certain amount, had his name inserted in the schedule of the deed for that amount, assented to the deed, and received the composition payable thereunder, and it appeared that the claim arose out of a running account between A. and B., and that this account was vitiated by numerous false entries made by B., it was held that A. might maintain a bill in equity for an accounting, and that the composition deed constituted, under the circumstances, no bar to a decree in his favor. *Pike v. Dickinson*, L. R. 12 Eq. 64, L. R. 7 Ch. 61.

2. New Promise After Composition Is Without Consideration. — *Rasmussen v. State Nat. Bank*, 11 Colo. 301; *Warren v. Whitney*, 24 Me. 561, 41 Am. Dec. 406; *Zoebis v. Von Minden*, 47 Hun (N. Y.) 213; *Stafford v. Bacon*, 1 Hill (N. Y.) 532, 37 Am. Dec. 366 (a case involving accord and satisfaction); *Snevily v. Read*, 9 Watts. (Pa.) 400 (a case where the debtor was arrested on a *capias* and released by the creditor's attorney, practically *overruling* *Willing v. Peters*, 12 S. & R. (Pa.) 177); *Shepard v. Rhodes*, 7 R. I. 470, 84 Am. Dec. 573 (where the discharge was in consideration of a dividend under an assignment). See also *Watts v. Hyde*, 10 Jur. 127.

A consideration is necessary to support a subsequent promise to pay a debtor the balance of a debt which has been released by the creditor or discharged by a deed of composition or discharge. *Samuel v. Fairgrieve*, 21 Ont. App. 418.

In *Warren v. Whitney*, 24 Me. 561, 41 Am. Dec. 406, it was contended in argument that where the release is made at the instance and request of the debtor the new promise is binding. To this it was replied in the opinion that, "if the debt be released for the benefit of the debtor, it is not the less perfectly discharged."

In *Evans v. Bell*, 15 Lea (Tenn.) 569, the dictum in *Daniel on Negotiable Instruments*, § 182, to the effect that a note executed for the payment of a debt after a voluntary release would be good, is criticised, and the court, reviewing the cases cited by the eminent author, shows that they do not uphold his proposition.

Contra. — *Tuck v. Tooke*, 9 B. & C. 437, 17 E.

Subsequent Voluntary Payment of Some Creditors in Full.—But if the debtor subsequently chooses to pay some creditors in full he may do so, and other creditors cannot avoid the settlement on that ground, there having been no previous agreement that he should do so.¹

2. Discharges Collateral Security.—The effect of a composition when performed being to extinguish the debts compounded for, any collateral security held for those debts by the creditors reverts to the original owners by virtue of the performed composition.²

3. Discharges Surety on Original Debt.—Generally the effect of a composition on the obligation of one who is a surety for the payment of any of the debts compounded for is to release the surety, as its effect is to suspend the remedies on the debt, thus operating as an extension of time to the principal debtor and discharging the surety.³

C. L. 412, 4 M. & R. 393; *Took v. Tuck*, 12 Moo. 435, 4 Bing. 224, 13 E. C. L. 407; *Crossley v. Moore*, 40 N. J. L. 35, following dictum of Lord Kenyon in *Cockshott v. Bennett*, 2 T. R. 763.

In the opinion in *Trumbull v. Tilton*, 21 N. H. 143, the court, while not deciding the point, hints at a view contrary to the text.

Stafford v. Bacon, as reported in 25 Wend. (N. Y.) 384, is contrary to the text, but in a memorandum note in 2 Hill (N. Y.) 353, it is explained that the opinion in 25 Wend. (N. Y.) 384, was unintentionally handed to the reporter by one of the judges, and the whole court concurred in the opinion in *Stafford v. Bacon*, 1 Hill (N. Y.) 532, 37 Am. Dec. 366, supporting the text.

1. *In re Sturges*, 8 Biss. (U. S.) 79, 16 Nat. Bk. Reg. 304. In this case an insolvent firm had agreed with their creditors in a composition, and it was agreed in writing with the complaining creditors that none of the other creditors should receive better terms. After the composition was carried out the firm made additional payments to some of the creditors. The complaining creditors thereupon attacked the composition. It was held that the transaction was fair as to the other creditors. See also *Wilson v. Ray*, 10 Ad. & El. 82, 37 E. C. L. 50.

2. Extinguishment of Collateral Security.—*Cowper v. Green*, 7 M. & W. 633; *Bush v. Shipman*, 14 Sim. 239; *Matlack's Appeal*, 7 W. & S. (Pa.) 79; *Van Brunt v. Van Brunt*, 3 Edw. Ch. (N. Y.) 14; *Van Bokkelen v. Taylor*, 62 N. Y. 105; *Robinson v. Striker*, 47 Hun (N. Y.) 546, the court saying: "It is a principle of law too well settled to need the citation of authority, that the extinguishment of a debt deprives the holder of a collateral security of any right, title, or interest therein."

In *Harloe v. Foster*, 53 N. Y. 385, the creditors of an insolvent entered into a composition in which it was recited that the creditors were creditors to the sums set opposite their respective names, and that the creditors agreed with him and with each other to accept one dollar in full payment of their claims, and contained the usual words of release. One of the firm creditors signed for a sum which included the amount of an account owing to it by the defendant, and also a note of the defendant's which it had held but which it had previously transferred. It was held that by thus including the amount of the note in the

composition the firm assumed the obligation of protecting the debtor against the note, and the debtor, having been subsequently compelled to pay the note by the party to whom it was transferred, could recover the amount from the creditors who had transferred it. To the same effect is *Hawley v. Beverley*, 6 Scott N. R. 837, 6 M. & G. 221, 46 E. C. L. 221.

But in *Thomas v. Courtney*, 1 B. & Ald. 1, the creditors of an insolvent debtor agreed by an instrument not under seal that they would accept in satisfaction of their debts twelve shillings in the pound, payable by instalments, and would thereafter release him from all demands. One of the creditors who signed for the whole amount held at the time, as security for part, a bill of exchange drawn by the debtor for a valuable consideration and accepted by a third person. The money due on this bill having been afterwards paid by the acceptor, it was held that the creditor might retain it, the agreement of composition not containing any stipulation for giving up securities and the effect not being to extinguish the original debt. In commenting on this case it is said in *Chitty on Contracts*, 1054, note *u*: "It will be observed that in this case the acceptor of the bill held by the creditor had not, on taking it up, any remedy over against the debtor. Where the composition agreement shows that the debtor is to pay only a specific composition to each creditor in full, and there is no clause as to securities, the creditor cannot act upon securities held by him against third persons, if the latter, on satisfying such securities, would have the right to proceed against the debtor as for money paid for him. For in this event the debtor would indirectly pay a larger composition on the particular debt than the deed provides, in violation of the tacit understanding of the creditors to the contrary."

A creditor who holds security for a debt may allow the security to be sold under the composition deed, reserving for himself his full rights to the security. *Lee v. Lockhart*, 3 Myl. & C. 302.

Unless a creditor claims a benefit under a composition deed, he is not bound to notify the creditor that he holds securities of the debtor. *In re Thorn*, 2 Pa. St. 331.

3. Composition Discharges Sureties on Original Debts.—*Ex p. Glendinning*, Buck 517; *Ex p. Carstairs*, Buck 560; *Ex p. Wilson*, 11 Ves. Jr. 410; *Lewis v. Jones*, 4 B. & C. 506, 10 E. C. L. 393; *Ex p. Gifford*, 6 Ves. Jr. 805; *Davidson v.*

Stipulation Against Release.—But the creditor may stipulate that the surety shall not be released, and this reservation of remedies against the surety will be binding on him.¹

4. Discharges Incidental Liability of Third Party.—A release of a debt by composition operates as a release of the liability of a third party to the releasor, growing out of the debt so released.²

V. FRAUD IN THE COMPOSITION — 1. Where Fraud Exists, Innocent Parties Not Bound.—As the consideration of a composition is the surrender, by the creditors, of some portion of what is justly due them, the strictest good faith is required. Any departure from good faith in the slightest degree avoids the transaction as to innocent parties, who may thereupon ignore the composition and sue on their original claims.³

Innocent Creditor Need Not Rescind or Return Composition.—And an innocent creditor, thus suing on the original debt, need not rescind the composition or return any sums which may have been received under it; but such sums will be considered merely as payments *pro tanto* on the original debt.⁴

2. What Amounts to Fraud — a. FRAUDULENT REPRESENTATIONS BY DEBTOR.—If the debtor makes any material misrepresentation to a creditor

M'Gregor, 8 M. & W. 755; North v. Wakefield, 13 Q. B. 536, 66 E. C. L. 536; Boulton v. Stubbis, 18 Ves. Jr. 20; Duffy v. Orr, 5 Bligh N. S. 620; Lambert v. Shitler, 62 Iowa 72; Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; Paddleford v. Thacher, 48 Vt. 574.

Under the Bankrupt Act of June 22, 1874, a composition only discharged the debtor, and did not exonerate his sureties. Mason, etc., Organ Co. v. Bancroft, 4 Cent. L. J. 295; Guild v. Butler, 122 Mass. 498, 23 Am. Rep. 378.

1. Remedy Against Sureties Reserved.—*Ex p.* Carstairs, Buck 560; Maltby v. Carstairs, 7 B. & C. 735, 14 E. C. L. 113; Nichols v. Norris, 3 B. & Ad. 41, 23 E. C. L. 28; North v. Wakefield, 13 Q. B. 536, 66 E. C. L. 536; Stevens v. Stevens, 5 Exch. 306; Cowper v. Smith, 4 M. & W. 519; Green v. Wynn, L. R. 7 Eq. 28, L. R. 4 Ch. 204; Bateson v. Gosling, L. R. 7 C. P. 9; Smith v. Winter, 4 M. & W. 454; Gloucester Bank v. Worcester, 10 Pick. (Mass.) 528; Sohler v. Loring, 6 Cush. (Mass.) 537; Reed v. Tarbell, 4 Met. (Mass.) 93; Tobey v. Ellis, 114 Mass. 120; Coddington v. Davis, 1 N. Y. 186; Lysaght v. Phillips, 5 Duer (N. Y.) 106.

A necessary consequence of a reservation in a composition deed of a creditor's remedies against a surety is the continuance of the surety's right to be indemnified by the principal debtor, and this right will not be held to be abandoned unless a contract to abandon it is proved. Close v. Close, 4 De G. M. & G. 176. See also Kearsley v. Cole, 16 M. & W. 128.

2. Nicolai v. Lyon, 8 Oregon 56, where L., a broker, undertook to lend money for N., for compensation, upon first mortgage security, but through negligence lent the money on second mortgage security, thereby becoming liable to N. to make good the security. Before the loan came due N. signed a composition agreement with other creditors of the borrower, releasing the borrower from personal liability beyond the lien of the mortgage. It was held that the release of the borrower released L., the broker, from his contingent liability to N.

3. Strictest Good Faith Required — England.—Child v. Danbridge, 2 Vern. 71; Spooner v.

Whiston, 8 Moo. 580, 17 E. C. L. 112; Horton v. Riley, 11 M. & W. 492; Turner v. Hoole, D. & R. N. P. 27, 16 E. C. L. 418; Daughlish v. Tennent, L. R. 2 Q. B. 49, 8 B. & S. 1, 36 L. J. Q. B. 10, 15 W. R. 196.

California.—Kullman v. Greenbaum, 92 Cal. 403, 27 Am. St. Rep. 150; O'Brien v. Greenbaum, 92 Cal. 107.

Connecticut.—Huntington v. Clark, 39 Conn. 540.

Georgia.—Saul v. Buck, 72 Ga. 254; Woodruff v. Saul, 70 Ga. 271.

Illinois.—Heft v. Cahn, 73 Ill. 296.

Indiana.—Shinkle v. Shearman, 7 Ind. App. 399; Kahn v. Gumberts, 9 Ind. 430; McFarland v. Garber, 10 Ind. 151; Seving v. Gale, 28 Ind. 486; Evans v. Gallantine, 57 Ind. 367.

Massachusetts.—Partridge v. Messer, 14 Gray (Mass.) 180; Ramsdell v. Edgerton, 8 Met. (Mass.) 227, 41 Am. Dec. 503; Case v. Gerrish, 15 Pick. (Mass.) 49; Cobb v. Tirrell, 137 Mass. 143.

Missouri.—Enneking v. Stahl, 9 Mo. App. 390.

New York.—Russell v. Rogers, 10 Wend. (N. Y.) 479, 25 Am. Dec. 574; Fellows v. Stevens, 24 Wend. (N. Y.) 294; White v. Kuntz, 107 N. Y. 518, 1 Am. St. Rep. 886; Hanover Nat. Bank v. Blake, 142 N. Y. 407, 40 Am. St. Rep. 607; Martin v. Adams, 81 Hun (N. Y.) 9; Crandall v. Cochran, 3 Thomp. & C. (N. Y.) 203.

North Carolina.—Zell Guano Co. v. Emery, 113 N. Car. 85.

4. Rescission Unnecessary.—Elfert v. Snow, 2 Sawy. (U. S.) 94; Heft v. Cahn, 73 Ill. 296; Cobb v. Fogg, 166 Mass. 466; Cobb v. Tirrell, 137 Mass. 143; Enneking v. Stahl, 9 Mo. App. 390; Bank of Commerce v. Hoeber, 8 Mo. App. 171; Stuart v. Blum, 28 Pa. St. 225. But compare Gould v. Cayuga County Nat. Bank, 86 N. Y. 75.

Where the composition was paid in promissory notes the creditor need not return the notes before suing on the original claim. Cobb v. Tirrell, 137 Mass. 143.

It is immaterial that the debt was not due at the time the composition was agreed upon. Enneking v. Stahl, 9 Mo. App. 390.

to induce him to enter into the composition, or perpetrates any fraud whatever upon the creditors in the transaction, the composition is avoided thereby. Thus if the debtor misstates the amount of indebtedness, or the amount of his property, the composition will be void,¹ and the discharge of no effect.²

Misrepresentation as to Other Creditors' Acceptance. — If a debtor induces a creditor to sign a composition by false representations that other creditors have accepted it,³ or will accept it if he does so,⁴ the agreement is not binding on the creditor so induced to sign.

Misrepresentation of Law. — In order to render a composition void the misrepresentation must be of fact, and not of law, or of the legal effect of the proposed agreement of composition.⁵

1. Composition Obtained by Fraudulent Misrepresentations Void. — *Huntington v. Clark*, 39 Conn. 540; *Hefter v. Cahn*, 73 Ill. 296; *Devou v. Ham*, 17 Ind. 472; *Seving v. Gale*, 28 Ind. 486; *Stafford v. Bacon*, 1 Hill (N. Y.) 532, 37 Am. Dec. 366, 25 Wend. (N. Y.) 384; *Dolsen v. Arnold*, 10 How. Pr. (N. Y. Supreme Ct.) 528; *Irving v. Humphrey*, *Hopk.* (N. Y.) 284. See also *Browne v. Stackpole*, 9 N. H. 478.

If the debtor, having a dormant partner, puts him on the list of creditors, the composition is thereby rendered void. *Carter v. Connell*, 1 Whart. (Pa.) 392.

Implied Misrepresentation. — An implied misrepresentation, as by silence as to the amount of his property, is as fatal as an express misrepresentation of the same fact would be. *Vine v. Mitchell*, 1 M. & Rob. 337.

Misrepresentation by Agent. — A misrepresentation by an honest but ignorant agent will vitiate the composition. *Elfelt v. Snow*, 2 Sawy. (U. S.) 94; *Hefter v. Cahn*, 73 Ill. 296.

Misrepresentations by Partner will affect the firm. *Pierce v. Wood*, 23 N. H. 519.

No Technical Composition — Facts Not Amounting to Fraud. — Where a debtor, in order to procure a settlement with A., one of his creditors, agreed verbally that he would settle with all his creditors on a similar basis and promised to endeavor to procure their assent to such a settlement, and A. thereupon accepted the debtor's note indorsed by a third party for the amount of the settlement, it was held that a breach of this agreement did not constitute fraud on the part of the debtor so as to render the settlement with A. inoperative, although at the time of the agreement the debtor intended to pay some of his creditors in full should he afterwards be able to do so. The court proceeded upon the ground that it did not appear that A.'s action was brought about by the promise with regard to other creditors, and that there was no technical composition the validity of which depended upon the other creditors settling with and discharging the defendant upon the same terms. *Argall v. Cook*, 43 Conn. 160.

When There Is No Actual Loss from Misrepresentation. — Where a debtor induced A., one of his creditors, to sign a composition agreement at a certain rate by representing to him that no other creditor had received a higher rate or additional advantage, when in fact the debtor had given his promissory note for a large amount to another creditor in order to obtain his signature to the agreement, it was held, the note so made having been declared void, that

A. could not maintain an action for the misrepresentation, since he could not show that he was injured thereby, and was in fact in no worse condition than he would have been had the representation been true. *Bartlett v. Blaine*, 83 Ill. 25, 25 Am. Rep. 346.

2. Release Obtained by Misrepresentations Invalid. — *Wenham v. Fowle*, 3 D. P. C. 43; *Elfelt v. Snow*, 2 Sawy. (U. S.) 94; *Armstrong v. Mechanics' Nat. Bank*, 6 Biss. (U. S.) 520; *Seving v. Gale*, 28 Ind. 486; *Jackson v. Hodges*, 24 Md. 468; *Irving v. Humphrey*, *Hopk.* (N. Y.) 284; *Reynolds v. French*, 8 Vt. 85, 30 Am. Dec. 456.

A creditor who had obtained an assignment of a judgment from his debtor, more than six years afterwards executed a composition deed with the other creditors of the same debtor, and in the deed stated as the amount of his claim only the balance due after the assignment of the judgment. It subsequently appeared that previous to the execution of the deed the debtor had fraudulently released the judgment assigned. It was held that the creditor might maintain an action against the debtor for breaches of the covenants contained in the assignment, and that the composition deed constituted no bar, the creditor at the time of its execution being wholly ignorant of the fraudulent discharge given by the debtor, and relying wholly upon the assignment for the moneys due thereon, and honestly believing that the amount specified in the composition deed was the only demand which he held against the debtor at the time. *Russell v. Rogers*, 15 Wend. (N. Y.) 351, 10 Wend. (N. Y.) 474, 25 Am. Dec. 574.

Repudiating Compromise on Ground that Its Terms Are Not Understood. — Upon default to carry out the terms of a deed of composition and discharge, a new arrangement was made respecting the realization of a debtor's assets and their distribution, to which all the executing creditors appeared to have assented. It was held that a creditor who had benefited by the realization of the assets, and by his action given the body of the creditors reason to believe that he had adopted the new arrangement, could not repudiate the transaction upon the ground that the new arrangement was not fully understood, without at least a surrender of the advantage he had received through it. *Howland v. Grant*, 26 Can. Sup. Ct. 372.

3. Whiteside v. Hyman, 10 Hun (N. Y.) 218.

4. Cooling v. Noys, 6 T. R. 263.

5. Lewis v. Jones, 4 B. & C. 506, 10 E. C. L. 393.

b. FRAUDULENT CONVEYANCE BY DEBTOR.—If a debtor, after having conveyed his property ostensibly for a good and valuable consideration, but in fact upon a secret and fraudulent trust for his own benefit, induces his creditors to accept a composition and give a discharge by false representations as to his financial situation, the composition and discharge may be set aside in equity.¹

c. SECRET PREFERENCES OF CREDITORS—(1) *Constitute Fraud on Other Creditors.*—Any advantage obtained by any creditor in any agreement of composition without the knowledge and consent of all the other parties to the composition is a fraud on the other creditors, and renders the composition void as to those innocent creditors.²

1. Fraudulent Conveyance.—*Richards v. Hunt*, 6 Vt. 251, 27 Am. Dec. 545. In this case it was claimed that the creditors examined for themselves the state of the debtor's affairs, and therefore should be presumed to have known of the conveyances made by the debtor, and not to have been misled by his representations, but it was held otherwise, the court saying: "They [the creditors] found his property apparently gone from him—conveyance after conveyance on record, for considerations apparently good; and, in short, they found about him the usual indications of poverty. All this, however, was factitious. False colors were held out; false appearances were created; the facts were perverted; and, under the influence of this systematic chicanery, they were led to a false conclusion, deceived and defrauded. Although they may have pursued their own course of inquiry, and exercised their own observation and judgment, yet positive means were used to mislead them even here. This, as already observed, is equally fraudulent with positive assertion."

In *Pheitiplace v. Sayles*, 4 Mason (U. S.) 312, it is held that the mere fact that a debtor has made a previous assignment which would be fraudulent as to creditors will not be sufficient to cause a court of equity to set aside a release subsequently granted by his creditors, if the facts are known to the creditors or not intended to mislead them. See also *Clarke v. White*, 12 Pet. (U. S.) 178.

2. Secret Preferences Invalid—*England.*—*Child v. Danbridge*, 2 Vern. 71; *Howden v. Haigh*, 11 Ad. & El. 1033, 39 E. C. L. 315; *Mallalieu v. Hodgson*, 16 Q. B. 689, 71 E. C. L. 689; *Knight v. Hunt*, 5 Bing. 432, 15 E. C. L. 488; *Coleman v. Waller*, 3 Y. & J. 212; *Pendlebury v. Walker*, 4 Y. & C. 424; *Wood v. Barker*, L. R. 1 Eq. 139; *Spurrett v. Spiller*, 1 Ark. 105; *Geere v. Mare*, 33 L. J. Exch. 50, 2 H. & C. 339, 8 L. T. N. S. 463; *Ex p. Milner*, 54 L. J. Q. B. 425, 15 Q. B. Div. 605, 53 L. T. 652, 33 W. R. 867; *Cockshott v. Bennett*, 2 T. R. 765; *Estabrook v. Scott*, 3 Ves. Jr. 460; *Mawson v. Stock*, 6 Ves. Jr. 301; *Jackson v. Davison*, 4 B. & Ald. 605, 6 E. C. L. 658; *Jackson v. Lomas*, 4 T. R. 166; *Jackman v. Mitchell*, 13 Ves. Jr. 581; *Clark v. Upton*, 3 M. & P. 89; *Higgins v. Pitt*, 4 Exch. 312; *Turner v. Hoole*, D. & R. N. P. 27, 16 E. C. L. 418; *Wood v. Roberts*, 2 Stark. 417, 3 E. C. L. 470; *In re Cross*, 4 De G. & S. 364; *Smith v. Salzmann*, 9 Exch. 535.

United States.—*Bullene v. Blain*, 6 Biss. (U. S.) 22; *Brownsville Mfg. Co. v. Lockwood*,

3 McCrary (U. S.) 608; *Fenner v. Dickey*, 1 Flipp. (U. S.) 34; *Clarke v. White*, 12 Pet. (U. S.) 199; *Bean v. Brookmire*, 2 Dill. (U. S.) 108.

California.—*Kullman v. Greenebaum*, 92 Cal. 403, 27 Am. St. Rep. 150.

Connecticut.—*Doughty v. Savage*, 28 Conn. 146; *Baldwin v. Rosenman*, 49 Conn. 105.

Indiana.—*Morrison v. Schlesinger*, 10 Ind. App. 665, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 396.

Massachusetts.—*Walker v. Mayo*, 143 Mass. 42; *Huckins v. Hunt*, 138 Mass. 366; *Harvey v. Hunt*, 119 Mass. 279; *Fay v. Fay*, 121 Mass. 561; *Sternbug v. Bowman*, 103 Mass. 325; *Ramsdell v. Edgarton*, 8 Met. (Mass.) 227, 41 Am. Dec. 503.

Minnesota.—*Powers Dry-goods Co. v. Harlin*, (Minn. 1897) 71 N. W. Rep. 16.

Missouri.—*Bank of Commerce v. Hoeber*, 88 Mo. 37, 57 Am. Rep. 359, 11 Mo. App. 475, 8 Mo. App. 171; *O'Shea v. Collier White Lead, etc., Co.*, 42 Mo. 397, 97 Am. Dec. 332; *Luehrmann v. St. Louis Furniture Co.*, 21 Mo. App. 499.

Nebraska.—*Freiberg v. Treitschke*, 36 Neb. 880.

New Hampshire.—*Trumball v. Tilton*, 21 N. H. 128.

New Jersey.—*Feldman v. Gamble*, 26 N. J. Eq. 494; *Crossley v. Moore*, 40 N. J. L. 27.

New York.—*Eldridge v. Strenze*, 34 N. Y. Super. Ct. 491; *Payne v. Eden*, 3 Cai. (N. Y.) 213; *Yeomans v. Chatterton*, 9 Johns. (N. Y.) 295, 6 Am. Dec. 277; *Wiggin v. Bush*, 12 Johns. (N. Y.) 306, 7 Am. Dec. 324; *Tuxbury v. Miller*, 19 Johns. (N. Y.) 311; *Russell v. Rogers*, 10 Wend. (N. Y.) 474, 25 Am. Dec. 574; *Townsend v. Newell*, 22 How. Pr. (N. Y. Supreme Ct.) 164; *Gilmour v. Thompson*, 49 How. Pr. (N. Y. C. Pl.) 198; *Pinneo v. Higgins*, 12 Abb. Pr. (N. Y. C. Pl.) 334; *Breck v. Cole*, 4 Sandf. (N. Y.) 79; *Zoebis v. Von Minden*, 47 Hun (N. Y.) 213; *Fellows v. Stevens*, 24 Wend. (N. Y.) 294; *Bliss v. Matteson*, 45 N. Y. 22; *Harloe v. Foster*, 53 N. Y. 385; *Solinger v. Earle*, 82 N. Y. 393; *White v. Kuntz*, 107 N. Y. 518, 1 Am. St. Rep. 886; *Meyer v. Blair*, 109 N. Y. 600, 4 Am. St. Rep. 500; *Hanover Nat. Bank v. Blake*, 142 N. Y. 404, 40 Am. St. Rep. 607; *Hagaman v. Burr*, 41 N. Y. Super. Ct. 423.

Pennsylvania.—*Patterson v. Boehm*, 4 Pa. St. 507; *Shenandoah Methodist Episcopal Church v. Robbins*, 81* Pa. St. 361.

Texas.—*Willis v. Morris*, 63 Tex. 458, 51 Am. Rep. 655.

(2) *Secret Preferences Void*. — Any agreement for such a secret preference of any creditor is void and will not be enforced by the courts, on the ground that such agreement is fraudulent and to enforce it would be against public policy.¹

(3) *Securities Given Pursuant Thereto*. — Notes and securities given under such secret agreement are void between the original parties and third parties who take them subject to equities.²

Vermont. — Cobleigh v. Pierce, 32 Vt. 788.

Wisconsin. — Musgat v. Wybro, 33 Wis. 515.

The creditor need not first rescind the composition agreement and return the money received under it; but may sue for and recover the full amount of the original indebtedness, less the amount received under the composition agreement. Bank of Commerce v. Hoerber, 8 Mo. App. 171. See also *supra*, this section, *Fraudulent Representations by Debtor*.

Compounding Creditor May Deal with Assets Without Fraud.

— A debtor who has entered into a composition agreement with his creditors is still free to deal with his assets as he thinks fit, subject to the limitation that, like every other debtor, he is bound not to make any fraudulent disposition of them so as to defeat the just claims of his creditors. Beausoleil v. Normand, 9 Can. Sup. Ct. 711; Brosard v. Dupras, 19 Can. Sup. Ct. 531. In the latter case the debtor procured a composition agreement from his creditors, except one, a bank which was itself in process of liquidation. By a subsequent and separate arrangement the debtor compromised his claims with the bank for a cash payment, raising the money partly by loan from B., one of his creditors who was liable to the bank, as his surety, and partly by a loan from a third party, B. at the same time releasing a mortgage which he held from the debtor and receiving a new mortgage for a much less amount as security against the loan made by him. It was held that the transaction between the debtor and B. was valid, and not fraudulent as to the creditors who had assented to the composition. The court declared that although B. was a party to the composition, he was so as a creditor for another debt; that the loan was a later matter and not subject to the composition deed; and that the debtor had the right to secure its payment by a pledge of part of his assets.

1. *Secret Preference Void — England*. — Wells v. Girling, 1 B. & B. 447, 4 Moo. 78; Constanten v. Blache, 1 Cox 287; Bryant v. Christie, 1 Stark. 329, 2 E. C. L. 129; Clay v. Ray, 17 C. B. N. S. 188, 112 E. C. L. 188.

Canada. — Clarke v. Ritchey, 11 Grant's Ch. (U. C.) 499.

California. — Smith v. Owens, 21 Cal. 11.

Connecticut. — Clement's Appeal, 52 Conn. 464.

Indiana. — McFarland v. Garber, 10 Ind. 151.

Kentucky. — Goodwin v. Blake, 3 T. B. Mon. (Ky.) 106, 16 Am. Dec. 87.

Massachusetts. — Howe v. Litchfield, 3 Allen (Mass.) 443; Frost v. Gage, 3 Allen (Mass.) 560; Lothrop v. King, 8 Cush. (Mass.) 382; Brown v. Nealley, 161 Mass. 1.

Minnesota. — Newell v. Higgins, 55 Minn. 82, citing 3 AM. AND ENG. ENCYC. OF LAW (1st

ed.) 396, 398. See also Minneapolis First Nat. Bank v. Steele, 58 Minn. 126.

Missouri. — Bastian v. Dreyer, 7 Mo. App. 332.

New York. — Breck v. Cole, 4 Sandf. (N. Y.) 82; Hughes v. Alexander, 5 Duer (N. Y.) 488; Beach v. Ollendorf, 1 Hilt. (N. Y.) 41; Crandall v. Cochran, 3 Thomp. & C. (N. Y.) 203; Carroll v. Shields, 4 E. D. Smith (N. Y.) 466; Higgins v. Mayer, 10 How. Pr. (N. Y. Supreme Ct.) 363; Lawrence v. Clark, 36 N. Y. 128.

Ohio. — Way v. Langley, 15 Ohio St. 392.

Pennsylvania. — Callahan v. Ackley, 9 Phila. (Pa.) 99.

Texas. — Willis v. Morris, 63 Tex. 458, 51 Am. Rep. 655.

See also the cases cited in the last note *supra*.

It is immaterial that the fraudulent creditor was the last signer. Patterson v. Boehm, 4 Pa. St. 507.

And the secret agreement is equally fraudulent whether made before or after the composition. Zoebisch v. Von Minden, 47 Hun (N. Y.) 213.

The fact that there is some additional consideration for the fraudulent bargain is immaterial. Where the creditor is to be paid in full on condition that he will become security on the composition notes, the composition is nevertheless void. Wood v. Barker, L. R. 1 Eq. 139; Pendlebury v. Walker, 4 Y. & C. 424.

A secret advantage tendered by the debtor avoids the composition even though the creditor to whom it is tendered derives no benefit from it. Martin v. Adams, 81 Hun (N. Y.) 9.

A secret agreement for a preference obtained by one creditor is treated as oppression or duress towards the debtor, and he may defend against any promise to pay made under such circumstances; or, if he has actually paid, he may recover back the amount, as the law does not consider the parties as being *in pari delicto*, nor regard the payments thus made as voluntary, and allows such recovery on grounds of public policy. Bean v. Brookmire, 2 Dill. (U. S.) 116.

2. *Security Given Pursuant to Fraudulent Agreement Void Unless in Hands of Bona Fide Holder*. — Middleton v. Onslow, 1 P. Wms. 768; Clay v. Ray, 17 C. B. N. S. 188, 112 E. C. L. 188; Harvey v. Hunt, 119 Mass. 279; Fay v. Fay, 121 Mass. 561; Huckins v. Hunt, 138 Mass. 366; Newell v. Higgins, 55 Minn. 82, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 396, 398; Winn v. Thomas, 55 N. H. 294; Willis v. Morris, 63 Tex. 458, 51 Am. Rep. 655. See also the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 193.

In Sternburg v. Bowman, 103 Mass. 325, the plaintiff sued on notes which were made to enable him to represent himself to other creditors as having a larger claim against the de-

(4) *Recovery of Money Paid as Fraudulent Preference.*—Money paid under a secret agreement as an inducement to the creditor to sign, or in excess of his claim under the composition, may be recovered back by the debtor, as the law regards the payment as having been made under duress.¹

(5) *Preference Given by Third Party.*—Although the additional inducement to the creditor to sign does not come from the debtor himself, but from some third person, it is nevertheless a fraud on the creditors, and the effect on the composition is the same as if the debtor himself had given the inducement.²

fendant than he really had, and the notes were held void.

The debtor who gives the securities may plead the fraud in an action on the securities. *Willis v. Morris*, 63 Tex. 458, 51 Am. Dec. 655.

In *Breck v. Cole*, 4 Sandf. (N. Y.) 79, a promissory note, secretly given to the plaintiff in addition to the composition notes as an inducement to sign, was held void. See also *Russell v. Rogers*, 10 Wend. (N. Y.) 479, 25 Am. Dec. 574.

In *Davis v. Benton*, 24 Conn. 555, it was held that where A. gives to one of his creditors, for a part of his indebtedness, a note which the defendant indorses to the plaintiff, and the maker of the note had, when the note was given, placed property in the indorser's hands to be sold and applied to the payment of the note, and said property is sold by the indorser, the plaintiff may recover the proceeds from the indorser, not exceeding the amount of the note, although such note was given to induce the plaintiff to sign a composition deed with the other creditors of A., said deed having failed to be perfected.

Where, upon an assignment by a debtor for the benefit of creditors, a composition with the creditors is arranged, and one creditor, without the knowledge of the others who are unsecured, procures, in consideration that he shall sign the composition, a guaranty securing his existing claim and providing for future credit, such guaranty is fraudulent and unenforceable, both as to existing and subsequent indebtednesses, and the debtor himself may set up the fraud in defense of an action brought thereon. *Morrison v. Schlesinger*, 10 Ind. App. 665.

1. Recovery of Money Paid by Debtor Under Fraudulent Agreement.—*Smith v. Cuff*, 6 M. & S. 160; *Smith v. Bromley*, cited in 2 Doug. 696; *Bradshaw v. Bradshaw*, 9 M. & W. 29; *Atkinson v. Denby*, 7 H. & N. 934; *In re Lenzberg's Policy*, 7 Ch. Div. 650; *Alsager v. Spalding*, 4 Bing. N. Cas. 407, 33 E. C. L. 393; *Bean v. Brookmire*, 2 Dill. (U. S.) 108; *Crossley v. Moore*, 40 N. J. L. 27; *Pinneo v. Higgins*, 12 Abb. Pr. (N. Y. C. Pl.) 334.

Contra.—*Moses v. Katzenberger*, 1 Handy (Ohio) 46.

Money paid under a secret agreement cannot be recovered on the ground of public policy. It can only be recovered back on the ground of duress by the debtor, or the wife, or husband, or some one of the blood of the debtor. A brother-in-law who pays the money cannot recover it back. *Solinger v. Earle*, 82 N. Y. 393.

Bill to Relieve Against Fraudulent Agreement.—In *Small v. Brackley*, 2 Vern. 602, it was

held that a debtor who had procured a creditor's consent to a composition by secretly agreeing to give him a greater composition, could not maintain a bill to be relieved against such underhand agreement; that being himself guilty of great fraud, he was entitled to no relief in equity.

2. Undue Advantage Secured Through Third Party.—*Coleman v. Waller*, 3 Y. & J. 212; *Knight v. Hunt*, 5 Bing. 432, 15 E. C. L. 488; *Ex p. Milner*, 54 L. J. Q. B. 425, 15 Q. B. Div. 605, 53 L. T. 652, 33 W. R. 867; *Kullman v. Greenebaum*, 92 Cal. 403, 27 Am. St. Rep. 150; *Frost v. Gage*, 3 Allen (Mass.) 560; *Brown v. Nealley*, 161 Mass. 1; *Luehrmann v. St. Louis Furniture Co.*, 21 Mo. App. 499; *Bank of Commerce v. Hoerber*, 88 Mo. 37, 57 Am. Rep. 359, 11 Mo. App. 475, 8 Mo. App. 171; *Solinger v. Earle*, 82 N. Y. 393. But see *Continental Nat. Bank v. McGeoch*, 92 Wis. 286.

In *Coleman v. Waller*, 3 Y. & J. 212, where a creditor who had two distinct demands against his debtor seized his debtor's goods under an execution for one of the two debts, and afterwards at a meeting of some of the creditors of the debtor, when a composition was proposed, declared that he would not agree to it unless the debt for which the goods had been seized was secured to him, and one who was not a creditor guaranteed the debt, and the creditor withheld his execution and signed the composition, it was held that the transaction was a fraud on the rest of the creditors, and void.

In *Knight v. Hunt*, 5 Bing. 432, 15 E. C. L. 488, the plaintiff had refused to accede to a composition until a brother of the debtor agreed to supply him with coals to the value of half the debt; the coals were furnished but the notes remained unpaid, and the plaintiff brought suit upon them, and failed to recover. See, *contra*, *Babcock v. Gill*, 43 Barb. (N. Y.) 577.

It is immaterial that the debtor took no part in the transaction. *Luehrmann v. St. Louis Furniture Co.*, 21 Mo. App. 499.

But in *Martin v. Adams*, 81 Hun (N. Y.) 9, it is said that the debtor who has performed his agreement cannot be deprived of its benefits through the unauthorized act of a third party.

Promise to Pay Creditor's Agent for Procuring Compromise.—Where it is agreed between a debtor and the agent of one of his creditors that such agent is to urge a compromise on the ground of the general interest of all the creditors, concealing the fact that he is specially retained by the debtor, any promise by the debtor to pay the agent for such services will be void, because of its tendency to mis-

d. SECRET AGREEMENT FOR SECURITY. — If the secret agreement is for better security or better terms than the other creditors receive, it is void as if it were for more money.¹

3. Position of Creditor Who Has Received Fraudulent Preference — Whether a Recovery Under Composition Permitted. — Although there is no doubt that where a debtor and his creditors enter into a composition agreement, any security taken by one of the creditors for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, is void and inoperative,² yet there is a divergence of opinion as to the extent of the operation of the fraud upon the contract. It is held on the one hand that the fraud permeates and vitiates the whole composition agreement and disables the creditor from recovering anything under it,³ while other authorities maintain that such a composition agreement is independent of, and separable from, the fraudulent stipulation for a preference, and the creditor may recover the amount of the composition, while the stipulation itself is unenforceable.⁴

lead other creditors. *Bullene v. Blain*, 6 Biss. (U. S.) 22. See also *Eldridge v. Strenz*, 34 N. Y. Super. Ct. 491.

Purchase of Claims by Third Party. — Where a third person purchases from the creditors of a failing debtor at a stipulated per centum, taking the title of the debts to himself for a valuable consideration paid by himself, so that he is at liberty to enforce the claim against the original debtor, the transaction is one of purchase and sale wherein the liability of the debtor passes from the original creditor to the purchaser, and the debt is not compromised in such manner that an original creditor can enforce any balance of his indebtedness by proving simply that some other creditor received more than himself upon the sale of his claim. If, however, such third party acts as the agent of the debtor and takes the assignment of the claims for the debtor's benefit, and that fact clearly appears, the assignment may be considered as in substance a compromise made by the debtor himself. *Goldenburg v. Hoffman*, 7 Hun (N. Y.) 324; *affirmed sub nom. Goldenbergh v. Hoffman*, 69 N. Y. 322. See also *Cobb v. Fogg*, 166 Mass. 466, where the evidence was held to warrant a finding that the transaction was a composition agreement.

1. Agreement for Additional or Better Security. — *Leicester v. Rose*, 4 East 372; *Ex p. Sadler*, 15 Ves. Jr. 52; *Russell v. Rogers*, 10 Wend. (N. Y.) 479, 25 Am. Dec. 574; *Pinneo v. Higgins*, 12 Abb. Pr. (N. Y. C. Pl.) 334; *White v. Kuntz*, 107 N. Y. 518, 1 Am. St. Rep. 886; *Meyer v. Blair*, 109 N. Y. 600, 4 Am. St. Rep. 500. In the first case cited, Lord Ellenborough said: "The question is, whether any legal effect can be given to an agreement by which these creditors, the plaintiffs, are to have a better security for the same sum than the rest of the creditors, after having entered into an agreement with them importing that the same satisfaction was to be made to all by the same mode of payment. And as that satisfaction was not to be paid at the time in money, but in securities payable at a future day, it made a great difference to the creditors whether they were to rest on the insolvents' security alone, perhaps a desperate security, or to have other solvent persons to resort to, if necessary. * * * Therefore, though this be not like some of the cases mentioned where security

was obtained by the particular creditors for more than the others were to receive, yet the principle of all of them is the same, that where the creditors in general have bargained for an equality of benefit and mutuality of security, it shall not be competent for one of them to secure any partial benefit or security to himself." In this case, *Feise v. Randall*, 6 T. R. 146, is in effect *overruled*.

2. *Russell v. Rogers*, 10 Wend. (N. Y.) 474, 25 Am. Dec. 574. See also *supra*, this section.

3. *Howden v. Haigh*, 11 Ad. & El. 1033, 39 E. C. L. 315; *Doughty v. Savage*, 28 Conn. 146; *Huntington v. Clark*, 39 Conn. 554; *Powers Dry-goods Co. v. Harlin*, (Minn. 1897) 71 N. W. Rep. 16. See also *Mallalieu v. Hodgson*, 16 Q. B. 689, 71 E. C. L. 689; *Case v. Gerish*, 15 Pick. (Mass.) 49; *Chitty on Contracts* (11th Am. ed.) 1051.

In *Davidson v. M'Gregor*, 8 M. & W. 763, *Alderson, B.*, referring to *Howden v. Haigh*, 11 Ad. & El. 1033, 39 E. C. L. 315, said: "In that case, *Littledale, J.*, expresses a doubt whether the fraud can invalidate the whole of the transaction, and I must own I am alarmed at the extent to which that decision goes."

4. May Recover Under Corporation. — *Hanover Nat. Bank v. Blake*, 142 N. Y. 404, 40 N. Y. St. Rep. 607, *reversing* 66 Hun (N. Y.) 33. See also *Page v. Carter*, 16 N. H. 254, 41 Am. Dec. 726.

In the first case cited, the New York and English authorities are examined at length, and the court, by *Gray, J.*, expresses its conclusion as follows: "If we should say that the fraud of the secret agreement made by the creditor operated to avoid the whole transaction of composition, the result would be to leave him with the original indebtedness unreleased. * * * It ought not to be possible that through his fraud he may be reinstated in his original position as a creditor for the whole sum due. The operation of a secret agreement is such that the other innocent creditors may, because of the fraud of their debtor, elect to refuse to be bound by their agreement of composition with him. If the secret agreement is executory they may not so elect, and may rely that the creditor, secretly seeking to obtain some promise of advantage over them, will be prevented from enforcing it and from gaining anything by his fraud. Its illegality

Creditor Guilty of Fraud.—A creditor who has been guilty of fraud cannot attack the composition on account of a fraudulent preference accorded to some other creditor.¹

Knowledge of Creditors.—A creditor who accepts benefits under a composition, with knowledge of the fraud which vitiates it, cannot, of course, thereafter have it adjudged fraudulent.² In case of secret preference, however, it is immaterial that some of the creditors had some knowledge of the transaction; it is nevertheless void.³

COMPOS MENTIS.—See the title INSANITY.

COMPOUND A DEBT.—To “compound a debt” is to abate a part on receiving the residue.⁴

is a perfect defense in the hands of the promisor. The composition agreement is one thing, as an agreement between all the creditors to release some part of the insolvent's indebtedness to them, upon terms equal as to each; and the secret fraudulent agreement with one or more of them is a stipulation which, from its inception, was unlawful and which the law annuls. *Bliss v. Matteson*, 45 N. Y. 22. It was also suggested in the opinion below, in support of the rule there asserted, that if it did not obtain, there would be an inducement to an unscrupulous creditor to commit a fraud; for his only risk would be to lose his additional security, while assured of the amount of his composition. To a certain extent that may be true; but, on the other hand, it may be suggested that if it were the rule, the insolvent debtor would have the inducement to ensnare his creditors into some secret arrangement and thus, by trick and device, to leave them wholly remediless; disabled to recover the amount of the composition, and disabled from pursuing the original debt which the composition agreement released. It seems

wiser simply to regard the secret agreement as one which the law avoids for its fraud. The creditor makes it with the risk of its worthlessness, if repudiated, and the debtor makes it with the peril that its discovery will furnish cause for his other creditors to avoid the composition agreement.”

This case, in effect, *overrules* *Bradley, etc., Co. v. Lally*, 2 Misc. Rep. (N. Y. City Ct.) 285.

1. Creditor Himself Guilty of Fraud Cannot Attack Composition.—*Child v. Danbridge*, 2 Vern. 71; *Mallalieu v. Hodgson*, 16 Q. B. 689, 71 E. C. L. 689; *O'Brien v. Greenebaum*, 92 Cal. 104; *Russell v. Rogers*, 10 Wend. (N. Y.) 473, 25 Am. Dec. 574; *White v. Kuntz*, 107 N. Y. 518, 1 Am. St. Rep. 886.

2. *Martin v. Adams*, 81 Hun (N. Y.) 9.

3. That a few creditors had an understanding or impression of the secret agreement's existence, cannot change the rules of law. *O'Shea v. Collier White Lead, etc., Co.*, 42 Mo. 405, 97 Am. Dec. 332.

4. *Haskins v. Newcomb*, 2 Johns. (N. Y.) 408. See also the titles PAYMENT; COMPOSITION WITH CREDITORS, *ante*, p.

COMPOUNDING OFFENSES.

BY ALLEN P. HALLETT.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see 7 *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, 245.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *CONSIDERATION*, *post*; *CRIMINAL LAW*; *DURESS*; *ILLEGAL CONTRACTS*.

I. CONSIDERED AS AN OFFENSE AGAINST PUBLIC JUSTICE — 1. Definition. — To compound an offense is to take any valuable consideration, or any engagement or promise thereof, upon any agreement or understanding, express or implied, to conceal such offense, or to abstain from any prosecution therefor, or to withhold any evidence thereof.¹

1. Definition — Compounding Felonies. — To compound a felony is to enter into an agreement for a valuable consideration not to prose-

cute a person for felony, or to show him favor in a prosecution; as where a person takes back goods which have been stolen from him, upon

2. Nature of the Offense — At Common Law. — In very early times the offense of compounding — or theftbote, as it was then called — was considered to make the offender an accessory after the fact; but in later times it was regarded as a substantive offense and punishable as a misdemeanor.¹

As a Statutory Offense. — In most of the states of the Union the offense has become the subject of statutes. In many of them it has been made a felony in the case of the higher crimes,² but in others it is still a misdemeanor.³

3. Compared with and Distinguished from Similar Offenses. — The nature and characteristics of the offense of compounding place it intermediate between the crime of being an accessory after the fact and that of misprision, it partaking in some degree of the nature of both, yet distinguished from them in many material particulars.

Compared with and Distinguished from Accessory After the Fact. — It is similar to accessory after the fact in the matter of knowledge of the offense, but distinguished from it by the nature of the assistance rendered the offender. Being an accessory implies some active harboring or concealment,⁴ while compounding is but a passive forbearance to prosecute. It is, therefore, more closely allied to misprision.

Distinguished from Misprision. — But it is distinguished from misprision by the consideration or amends. Misprision is a bare concealment of a crime;⁵ compounding is a concealment for a reward.⁶

4. Elements of the Offense — a. THE AGREEMENT TO COMPOUND — (1) There Must Be an Agreement. — An agreement or understanding, express or implied, to conceal the crime, or to abstain from a prosecution therefor, or to

an agreement not to prosecute. 4 Stephens' Com. 232, 234; Rapalje & Lawrence's Law Dict.; Sweet's Law Dict.

The offense of taking a reward for forbearing to prosecute a felony, as where a party robbed takes his goods again or other amends upon an agreement not to prosecute. Burrill's Law Dict.; Black's Law Dict.

Of a similar nature to this offense of misprision of felony is the offense of compounding of felonies, mentioned in the books by the more ancient appellation of theftbote, which is where the party robbed not only knows the felon, but also takes his goods again or other amends upon agreement not to prosecute. 1 Hawk. P. C., c. 59, § 5; 4 Black. Com. 133; 1 Russ. on Crimes (9th ed.) 194.

Statutory Definition. — The definitions of the offense as given in the statutes against compounding in the various states of the Union differ only in immaterial particulars. It is usually provided that "every person who, having knowledge of the actual commission of a crime, or violation of statute, takes any money or property of another, or any gratuity or reward, or any engagement or promise thereof, upon any agreement or understanding, express or implied, to compound or conceal such crime or violation of statute, or to abstain from any prosecution therefor, or to withhold any evidence thereof, is punishable," etc.

1. 1 Russ. on Crimes (9th ed.) 194; 4 Black. Com. 133; State v. Dandy, 1 Brev. (S. Car.) 395.

Nature of the Offense. — The efficacy of punishment depends more upon its certainty than its severity. Hence it is a matter of public concern that all violations of the criminal law should be detected and punished. So that any individual who knows that an indictable offense has been committed, and conceals it,

thereby fails to discharge the duty of a good citizen. Upon this principle the bare concealment of treason or felony is an indictable offense, and the offense is aggravated by compounding the felony — that is, by an agreement not to prosecute or make known what has come to the knowledge of the party; for, although he is the person directly injured, the law does not allow him to take care of his private interest by accepting compensation at the expense of the public justice. In offenses less than felony this concealment or compounding is not indictable, but it is nevertheless against the policy of the law and the due course of justice; and the courts would not be true to themselves if they enforced a contract founded on such a consideration. Thompson v. Whitman, 4 Jones L. (N. Car.) 47.

2. See the statutes of Arizona, California, Florida, Idaho, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New York, North Dakota, Oregon, Tennessee, Vermont, Wisconsin.

3. See the statutes of Alabama, Arkansas, Colorado, Delaware, Illinois, Nebraska, New Jersey, New Mexico, Ohio, Pennsylvania, Texas, Virginia, Washington, West Virginia, Wyoming.

4. See the title ACCESSORIES, vol. I, p. 257.

5. See the title CRIMINAL LAW.

6. **Compounding and Misprision Distinguished.** — Lord Coke, in 3 Inst., p. 134, says of the ancient crime of theftbote: "This offense is more than misprision of felony, for that is not a concealment of his bare knowledge only, but theftbote is where the owner not only knows of the felony, but taketh of the thief his goods again or amends for the same to favor or maintain him, that is, not to prosecute him, to the intent that he may escape." Reg. v. Burgess, 16 Q. B. Div. 141.

withhold evidence thereof, is an essential ingredient of the offense of compounding.¹

Owner May Recover His Stolen Property. — The bare retaking of one's own goods which have been stolen, or the receiving back of embezzled funds, or the acceptance of security for their future repayment, is not unlawful unless there be some agreement, express or implied, to shield the thief.² The fact that the owner, after the return of the property, or the taking of the security, voluntarily abstains from prosecuting, while it may make him guilty of a misprison, cannot constitute a compounding.³

(2) *Effect of Subsequent Prosecution of Criminal.* — The offense of compounding is complete upon the making of the agreement, and the fact that the criminal is afterwards prosecuted does not affect it.⁴

1. There Must Be an Agreement. — An agreement not to prosecute, or in some other way to favor and protect the criminal, is an essential ingredient in the offense of compounding crime. *Brittin v. Chegary*, 20 N. J. L. 625.

2. Right of Owner to Recover Stolen Property. — 1 Hawk. P. C., c. 59, § 7; 1 Russ. on Crimes (9th ed.) 195.

This right is especially recognized in some of the statutes against compounding. See the statutes of *Colorado*, *Illinois*, *Nebraska*, *New Mexico*, and *Wyoming*.

It Is Not Compounding a Felony for an Official to Account for Moneys as received from his predecessor, and himself assume their payment upon the latter's assurance that he will make the amount good if the accounts are incorrect. *Van Ness v. Hadsell*, 54 Mich. 560.

Surrender of Forged Note to Forger Not Compounding. — The holder in good faith of a forged note, received from the forger as collateral security, may lawfully deliver it to the forger upon payment being made by him; and although such delivery necessarily puts it in the power of the forger to destroy or suppress the paper, and to that extent to hinder and prevent his prosecution, and although such necessary consequence must be presumed to be intended by the holder of the paper when he so delivers it, yet such delivery is not the compounding of a felony. And where the alleged forger paid the notes by the sale and transfer to the holder thereof of certain personal property, it was held that such sale could not be set aside by an attaching creditor of the alleged forger, on the ground that the consideration thereof was illegal, and that the transaction was therefore void, and vested in the transferee no title to the property. *Deere v. Wolff*, 65 Iowa 32. See also *Kissock v. House*, 23 Hun (N. Y.) 35.

Injured Party May Compromise the Civil Damage. — In *Stancel v. State*, 50 Ga. 152, it appeared that the defendant had suffered serious damages from an assault with intent to murder by one B.; that he had sued out a warrant against B., who was arrested and recognized under said warrant; that one M., as the friend of B., had applied to the defendant to settle the case; that the defendant had declined to settle, except for the damages, stating that if he settled the whole he should have to absent himself from court; that subsequently D., who was the defendant's attorney in the suit for damages, had, without any special authority from the defendant, and in his absence, settled

with B. for the damages; that in this settlement it was distinctly stated and stipulated that there was no settlement of the prosecution, although, as was then by the written settlement stated, the defendant expressed himself as satisfied, and suggested to the public officers this satisfaction as a matter for their consideration. It further appeared that the defendant was not present at court at the next term after the assault, although the bill was found on the testimony of other witnesses who were present at the assault. It further appeared that the defendant had received the money paid to D. It was held that there was not, under the law, sufficient evidence to justify a verdict of guilty, especially as it did not appear that the prosecution was in fact discontinued, or that D. acted at all on the proposals of M., or that the absence of the defendant from court was in pursuance of any understanding with any one that he should be so absent. And see *supra*, this title, *Illegality of Contracts in Respect to Compounding—Compromise of Civil Liabilities*.

Payment for Stolen Property Constitutes No Atonement or defense; nor can it be treated as tantamount to such a voluntary return of the property as will, under the provisions of the Penal Code, mitigate the penalty. *Trafton v. State*, 5 Tex. App. 480.

3. Bare Forbearance Does Not Constitute Compounding. — In order to render illegal the receipt of securities by a creditor from his debtor, where the debt has been contracted under circumstances which might render the debtor liable to criminal proceedings, it is not enough to show that the creditor was thereby induced to abstain from prosecuting. *Flower v. Sadler*, 10 Q. B. Div. 572.

A note was executed to secure the payment of money supposed to have been embezzled by the maker thereof, resulting in his release from arrest at the instance of the prosecutor, and the security afterwards resisted payment, attacking the consideration of the note as illegal, and contrary to public policy. It was held that the recovery of the money lost was the consideration of the note, and not the discharge of the maker from arrest; and though the latter might follow, as an incident of the settlement, it could not taint the transaction with illegality. *Armstrong v. Southern Express Co.*, 4 Baxt. (Tenn.) 376.

4. Effect of Subsequent Prosecution of Criminal. — The agreement not to prosecute constitutes the offense, and the offense is complete not-

b. THE CONSIDERATION OR AMENDS. — The second ingredient of the offense is that there should be a consideration for the agreement. This may be anything of value or the promise of it.¹ All that the law requires in this particular is that it should appear that the agreement was made for the sake of gain, and not merely from weak or compassionate motives.²

To Whom the Consideration Must Move. — It is not essential that the consideration should accrue to the benefit of the defendant. It is sufficient if he take it for the benefit of another.³

c. THE OFFENSE COMPOUNDED — (1) *In General* — **Must a Crime Have Been Committed?** — Whether it is necessary that a crime should have been actually committed, or committed by the person with whom or for whose benefit the composition is made, in order to constitute the offense of compounding, or whether a defendant would not be equally guilty who, believing that a crime had been committed and having knowledge of facts which would cast suspicion upon a certain person as the criminal, agreed with him for a reward to conceal these facts, does not seem to have been decided,⁴ but it has been held that a

withstanding the person compounding may be afterwards compelled by process to prosecute. *State v. Duhammel*, 2 Harr. (Del.) 532.

In *Reg. v. Burgess*, 16 Q. B. Div. 141, upon an appeal from a refusal to quash an indictment for compounding a felony where the thief had been convicted, Lord Coleridge, C. J., delivering the opinion of the court, said: "According to the contention, he could not be guilty of the offense because he did ultimately prosecute, and if so it is difficult to see when such an offense can be said to be complete. The way in which one of my learned brothers put the contention seems to me to be a *reductio ad absurdum* of the argument. It being admitted that such an agreement is unlawful in the sense that it is not enforceable at law, it is said that, if the maker of it keeps his agreement, he is guilty of an offense, but if, in addition to making such an illegal agreement, he is guilty of the further fraud towards the other party of breaking it, he is guilty of no offense at all. Thus stated, the proposition seems to me to be contrary to good sense, and to be a sufficient answer to itself."

Effect When Indictment Avers Continued Desistance. — In *Rex v. Stone*, 4 C. & P. 379, 19 E. C. L. 429, in a prosecution for compounding a felony, it was averred in the indictment that the defendants did desist and from that time hitherto have desisted from all further prosecution. Upon the trial it appeared in evidence that A. and her sister had been in the service of the defendant S., who found in their possession some articles which he claimed to be his; that the defendant S. charged them with stealing these articles, and having paid A. a sum of money which was the amount of her wages, he left the room, telling the other defendants to settle with A. and her sister; and that the other defendants then told them that they would both be transported if they did not go away and leave the money; that they accordingly did leave the money, and afterwards went before a magistrate to try to recover their wages; but these circumstances coming to the knowledge of the defendant S., he preferred an indictment against A. and her sister for robbing him, upon which indictment they were convicted. It was held that the defendants could not be convicted upon the indictment as drawn.

1. Promissory Note a Sufficient Consideration. — In *Com. v. Pease*, 16 Mass. 91, where the defendant was indicted for compounding a felony by receiving the promissory note of the guilty party, it was contended that this did not constitute an offense since the note was void. Parker, C. J., delivering the opinion of the court, said: "There seems to be no reason for this nice and critical construction of the words. The note, although voidable, is in fact of value to the holder, until it is avoided. It may never be disputed. Indeed, it would be hazardous ever to dispute it, for the promisee would then be released from his engagement not to prosecute; so that he holds a coercive power over the maker of the note as strong as the law. But further, what is the gist of the offense? It is the concealing of the crime, and abstaining from prosecution, to the detriment of the public. Now, if a man is induced to this by the promise of money, and actually takes an obligation for the money, everything necessary to constitute him criminal in the eye of the law seems to be done."

2. Com. v. Pease, 16 Mass. 91. See also *Ward v. Allen*, 2 Met. (Mass.) 53, 35 Am. Dec. 387.

3. To Whom the Consideration Must Move. — *Reg. v. Burgess*, 16 Q. B. Div. 141. In *State v. Ruthven*, 58 Iowa 121, it appeared in evidence that one H. had stolen from R. the brother of the defendant, sixty-five dollars; that the defendant, who was a deputy sheriff, had a warrant for the arrest of H., and that he procured from H.'s father a note for one hundred dollars secured by a mortgage to R., agreeing in consideration of said note not to arrest H., and that neither he nor his brother would prosecute him for the offense. The defendant asked the court to instruct the jury that if the defendant received no benefit or consideration running to himself, or if he received no part of the note, he was not guilty. The court refused to so charge, and upon appeal the ruling was affirmed. It was held that if the defendant corruptly exacted a consideration for an agreement not to prosecute, he was guilty of the offense under the statute, although he took the consideration for the benefit of another.

4. Must a Crime Have Been Committed? — Though this question does not seem to have

defendant charged with compounding a larceny cannot plead the acquittal of the person charged with the crime in bar of his own conviction.¹

(2) *Felonies* — **At Common Law.** — Theft is the only crime for the compounding of which there are any recorded prosecutions under the common law, but it should hardly be surmised from this that the offense had so limited an application.

By Statute. — Under the statutes of most of the states of the Union all felonies are made the subjects of the offense.²

Degrees. — In many of the states the offense of compounding felony is divided into two degrees or classifications according to the gravity of the felony compounded: first, offenses punishable with death or imprisonment in the penitentiary for life; and, second, offenses punishable by imprisonment in the penitentiary for any limited term.³

(3) *Misdemeanors* — (a) **At Common Law.** — There seems to be no authority upon the point whether the compounding of a misdemeanor was or was not an offense at common law, but as there are no recorded instances of prosecutions, it may be safe to infer that the common law deemed the compounding of a misdemeanor to be too slight an offense for it to take cognizance of.⁴

(b) **By Statute.** — But by statute in many of the states of the Union the compounding of a misdemeanor has been made an indictable offense.⁵

arisen in any criminal case, there are two civil cases in which the point has been considered, but the conclusions arrived at in the two cases are conflicting.

In *Chandler v. Johnson*, 39 Ga. 85, in an action upon a promissory note given, to which the defense was that it was given and received to compromise a felony, the court charged the jury that there must be proof that a felony was actually committed before the note sued upon could be deemed illegal on the ground of having been given in whole or in part to compound a felony, and that the jury must determine from the evidence whether a felony had in fact been committed or not. Upon appeal on exception taken to this instruction, the court said: "The charge of the court that the defendant must prove that a felony had been actually committed, was, we think, too strong, and calculated, without explanation, to mislead the jury. The natural inference from the charge is that it was upon the defendant to make out a clear case of guilt on his part. We do not think this is the law. It is sufficient if there be a *bona fide* charge against the defendant of a felony. Any stronger case than this, required to defend a note tainted with illegality by reason of its being given to compound a felony, would make the law a farce. It is a high requirement of public policy that felonies shall be punished, since the law frowns upon any attempt to suppress the investigation of such a charge, and the agreement not to prosecute is the illegality."

In *Swope v. Jefferson F. Ins. Co.*, 93 Pa. St. 251, this expression occurs in the opinion of the court: "The guilt of the party accused and an agreement not to prosecute are essential ingredients in the compounding of a felony. Though the proof of guilt need not be of that conclusive character that would be necessary to convict, there should be at least such preponderance of evidence as will justify the jury in finding that a felony was committed."

This question could hardly arise in those

jurisdictions where the statute reads, "having knowledge of the commission of a crime," as it does in *Alabama, Florida, Iowa, Maine, Massachusetts, Michigan, Oregon, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin*; and for stronger reasons, where the wording of the statute is "having knowledge of the actual commission of a crime," such as in *Arkansas, Arizona, California, Idaho, Indiana, Kansas, Mississippi, Missouri, Montana, Nevada, North Dakota, Pennsylvania*.

1. *People v. Buckland*, 13 Wend. (N. Y.) 592.

Indictment Need Not Aver that a Crime Had Been Actually Committed. — In prosecutions under section 6901 of the Revised Statutes for compounding or abandoning, or agreeing to compound or abandon criminal prosecutions, threatened or commenced, it is not necessary to aver in the indictment, or prove on the trial, that a crime had been actually committed by the person so prosecuted. *Fribly v. State*, 42 Ohio St. 205.

Indictment Must Charge that Defendant Had Knowledge of the Actual Commission of the Crime. — An indictment under section 2 of the act in relation to the compounding and concealing of crimes, etc., Act 1867, p. 104, must charge that the defendant had knowledge of the actual commission of the crime which it is alleged he agreed to compound. *State v. Henning*, 33 Ind. 189.

2. See the codes and statutes of the various states.

3. See the statutes of the following states and territories: *Arizona, California, Florida, Idaho, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New York, North Dakota, Oregon, Tennessee, Wisconsin*.

4. See dictum in *Thompson v. Whitman*, 4 Jones L. (N. Car.) 47.

5. See the statutes of the following states and territories: *Arizona, California, Colorado, Florida, Idaho, Illinois, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Missouri,*

(4) *Informations on Penal Statutes* — **English Statute.** — It was enacted by statute 18 Eliz., c. 5, § 4 (made perpetual by 27 Eliz., c. 10), that if any person, "by color or pretense of process, or without process upon color or pretense of any matter of offense against any penal law, make any composition, or take any money, reward, or promise of reward," without the order or consent of some court, he shall be guilty of a misdemeanor.¹

In the United States. — This statute, though sufficiently early to be common law in the United States, does not seem to be so regarded, but in many of the states the compounding of penalties has been made the subject of statutory enactment.²

5. Who May Commit the Offense — **At Common Law.** — It seems to have been apprehended by the older writers on criminal law that the ancient crime of theftbote could only be committed by the owner of the goods, and from analogy it has been argued that the more modern crime of compounding could only be committed by the person directly injured by the commission of the crime. But this view has been expressly negated in a recent decision.³

Montana, Nebraska, New Mexico, Nevada, New York, North Dakota, Ohio, Oregon, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

1. Informations on Penal Statutes. — 18 Eliz., c. 5, § 4; 1 Russ. on Crimes (9th ed.) 198.

Compounding of informations upon penal statutes is an offense of an equivalent nature in criminal causes; and is, besides, an additional misdemeanor against public justice, by contributing to make the laws odious to the people. At once, therefore, to discourage malicious informers, and to provide that offenses, when once discovered, shall be duly prosecuted, it is enacted by statute 18 Eliz., c. 5, that if any person, informing under pretense of any penal law, makes any composition without leave of the court, or takes any money or promise from the defendant to excuse him (which demonstrates his intent in commencing the prosecution to be merely to serve his own ends, and not for the public good), he shall forfeit ten pounds, shall stand two hours on the pillory, and shall be forever disabled to sue on any popular or penal statute. 4 Blackstone, p. 136.

In *Rex v. Southerton*, 6 East 127, an attorney was indicted for writing and sending the following letter: "Sirs: I am applied to to prosecute an information against you for selling certain medicines without stamps. I have told the parties that all such informations must now be prosecuted by the public officer, and have advised them to let me write you on the subject and hear what you have to say. If I can be of any service to you in stopping them, you will write me accordingly, and I will get the best terms I can." Lord Ellenborough, C. J., held that no offense had been committed under the common law, but that the defendant might have been indicted under the statute 18 Eliz., c. 5, § 4.

A. threatened B. that he would inform against him for selling spirits without a license, unless B. would give him a sum of money. B. had not in fact sold any spirits, but he gave A. the money to prevent an information. It was held that A. was indictable under the statute 18 Eliz., c. 5, § 4, although B. had not committed any offense, and although no information was ever preferred,

nor any process sued out. *Reg. v. Best*, 9 C. & P. 368, 38 E. C. L. 159.

Offenses Cognizable Only Before Magistrates Not Within the Statute. — The statute 18 Eliz., c. 5, does not apply to offenses cognizable only before magistrates. *Rex v. Crisp*, 1 B. & Ald. 282.

2. See the codes and statutes of the various states.

Compounding Penalties — **New York Statute.** — In *Bradway v. Le Worthy*, 9 Johns. (N. Y.) 251, the court said: "By the statute to redress disorders by common informers, etc., sess. 11, c. 9, § 8, it is declared that no informer, or plaintiff, in any action popular, shall compound or agree with the offender, without the order or consent of the court in which the suit shall be depending. This is a transcript of the English statute of 18 Eliz., c. 5, § 3, the construction of which in the English courts has been that it is in the discretion of the court to give leave to compound upon such terms as they shall think proper under the circumstances of the case. *Howell v. Morris*, 1 Wils. 79; *Rex v. Testerton*, 5 T. R. 258. And it seems to be a general rule of the court of K. B., when they give leave to compound a penal action, to require the king's half of the compensation to be paid. *Brown v. Bailey*, 4 Burr. 1929. This is a very salutary rule, and well calculated to prevent speculations on penal statutes; and we shall be disposed hereafter to adopt the principle of this rule, unless some special circumstances shall appear to prevent its application. In the present case, however, leave is given to discontinue on payment of costs only, without exacting the moiety of the penalty to which, by the statute, the overseers of the poor of the town where the offense was committed would be entitled."

In a popular action the plaintiff cannot discharge the judgment as to the people's moiety without payment. And if in such action the defendant, having been taken in execution, is discharged by the plaintiff without satisfaction, such discharge is no bar to an action for an escape. *Minton v. Woodworth*, 11 Johns. (N. Y.) 474.

3. Who May Commit the Offense. — In *Reg. v. Burgess*, 16 Q. B. Div. 141, it appeared that the prisoner was employed to levy a distress

Under the Statutes defining the offense of compounding it appears that any person who has knowledge of the commission of a crime, and who, for a consideration, agrees to conceal it, is guilty of the offense.¹

Prosecuting Attorney. — In some jurisdictions it would seem that even a prosecuting attorney is within the purview of the statute.²

Judicial Officers. — The offense of accepting a consideration by a justice of the peace or other judicial officer, to forego a prosecution, would seem, however, to partake more of the nature of bribery than of compounding, and it has been so held.³

for two weeks' rent on the goods of one B., and that upon that occasion A., whilst in possession as the prisoner's assistant, stole the sum of twenty-eight shillings belonging to B., and absconded. The prisoner was informed of this fact by B., and urged B. to put the matter into the hands of the police, but B. told the prisoner he would leave it in his hands, and the prisoner gave information of the theft to the police. Subsequently the prisoner entered into communication with A.'s mother, and by arrangements made with her the sum stolen was repaid to B., the prisoner agreeing in consideration thereof not to prosecute. A. was afterwards arrested by the police upon the information and description previously given by the prisoner, and upon the evidence of B. was convicted. Upon this state of facts the prisoner's counsel submitted that there was no case to go to the jury on the ground that the owner of the property stolen, or a person whose evidence should be necessary to convict the thief are the only persons who can compound a larceny, and that in this case the prisoner was not a necessary witness on the trial of A., and that therefore his undertaking could not impede the course of justice. The recorder overruled the objection, and the jury found the prisoner guilty. Upon appeal, Lord Coleridge, C. J., delivering the opinion of the court, said: "It is said that the offense alleged is the old offense of theftbote, and that no one can be guilty of that offense except the owner of the goods. I do not deny that by some writers, especially by Lord Coke, expressions have been used which may be read so as to afford some countenance to this contention. It seems to me, however, that when the writers in question so expressed themselves it was probably because the question whether the offense could be committed by persons other than the owner of the goods was not then present to their minds, and they were dealing with what would be the case on ninety-nine out of a hundred occasions, viz., the case where the person who was guilty of interfering with the course of justice for his own benefit was the owner of the goods. One can easily see, I think, how it has happened in this way that language has been used which seems to favor to some extent the contention for the defendant, but it must be observed that the writers of the passages to which I refer do not use any negative expression to the effect that the offense can only be committed by the owner of the goods. But, on the other hand, there are not wanting in some of the other authorities indications of the contrary view. The language used by Blackstone in his Commentaries concerning theftbote seems to me

to show that he can hardly have considered the offense as capable of being committed only by the owner of the goods. I admit that he does not say expressly that it can be committed by another person. But neither, on the other hand, do the writers who have been cited expressly say that it cannot. He says of theftbote, 'This is frequently called compounding a felony, and formerly was held to make a man an accessory, but is now punished only with fine and imprisonment. This perversion of justice in the old Gothic constitutions was liable to the most severe and infamous punishment, and the Salic law *'latroni eum similem habuit qui furtum celare vellet et occulte sine judice compositionem ejus admittere.'* This latter portion of what he says on the subject clearly seems inconsistent with the notion that he thought that the offense of compounding the felony could only be committed by the owner of the goods, for it seems to imply that the definition as given by the Salic law was a good definition of the offense of compounding a felony, and that any one was guilty of the offense *'qui furtum celare vellet et occulte sine judice compositionem ejus admittere.'* These expressions seem to me to indicate that there was present to his mind the possibility of the offense being committed by a person other than the owner of the goods. I am of opinion that the defendant, upon the facts stated, was guilty of the offense of compounding a felony, and that therefore the conviction must be affirmed."

1. See the codes and statutes of the various states.

2. **Prosecuting Attorney May Commit the Offense.** — It seems that under the statute of *Indiana* a prosecuting attorney might be guilty of the offense. *State v. Henning*, 33 Ind. 189. See also the statutes of *Kentucky* (B. & C. 1884), § 1360; *Dakota* Pen. Code 1885, § 185; *North Dakota* Rev. Codes 1895, § 6998.

3. **Deputy Sheriff** who has a warrant for the arrest of a felon, and receives money to suppress the prosecution, may be indicted under a statute providing for the punishment of any person having knowledge of the commission of an offense, who takes a valuable consideration upon an understanding to compound or conceal the offense, or not to prosecute the same. *State v. Ruthven*, 58 Iowa 121, applying Iowa Code, §§ 3951, 3952.

3. **Justice of the Peace.** — In *Watson v. State*, 29 Ark. 299, the information charged that T. and M. had stolen a cow, the property of one C., and that the defendant, who was a duly qualified and acting justice of the peace, upon affidavit being made before him by C., issued a warrant for the arrest of the said T. and M.,

6. Punishment. — At common law the offense of compounding, being a misdemeanor, was punished by fine and imprisonment; ¹ but where by statute the offense has been made a felony in certain cases, a heavier penalty is, of course, inflicted. In some of the states where it is still a misdemeanor by statute, the punishment is by fine of twice the sum or value of the thing agreed for or taken. ²

7. Advertising Reward for Return of Stolen Property. — By statute in *England* it has been made a misdemeanor for any person to advertise a reward for the return of stolen property, and to use words purporting that no questions will be asked. ³ By another section of the same statute it is made a felony for any person to take any reward for assisting the owner to recover his stolen property unless he shall use all due diligence to prosecute the thief. ⁴

and upon their being brought before him and the charge examined, found that there was probable cause to believe that they had committed the crime with which they were charged, and that said defendant "then and there well knowing the said crime to have been committed, but contriving and intending unlawfully to prevent the due course of law and justice in that behalf, and to cause and procure the said T. and the said M. for the felony aforesaid to escape with impunity, afterwards, to wit, on the day and year aforesaid, in the county and state aforesaid, unlawfully and for wicked gain's sake, did compound the said felony with the said T. and M., and did then and there exact, take and receive and have of the said T. and M. two horses, for and as a reward for compounding the said felony and desisting from all further prosecution against the said T. and M., or either of them, for the felony aforesaid; and that the said W. [the defendant], justice, etc., as aforesaid, on the day and year aforesaid, in the county and state aforesaid, did thereupon desist, and from that time hitherto hath desisted, from all further prosecution of the said T. and M. for the felony aforesaid." The defendant was convicted, but upon appeal it was held that the facts made out a crime of bribery and not of compounding a felony.

1. Punishment. — It is said to have been anciently punishable as felony, but it is now punished only with fine and imprisonment, unless it be accompanied with some degree of maintenance given to the felon which makes the party an accessory after the fact. 1 Hawk. P. C., c. 59, § 6; 2 Hale 400; 1 Russ. on Crimes (9th ed.) 195.

2. See the statutes of *Colorado, Illinois, Nebraska, New Mexico, Wyoming.*

3. Advertising Reward for Return of Stolen Property. — By statute 24 & 25 Vict., c. 96, § 50, it was enacted that "any person advertising a reward for the return of property stolen or lost, and using words purporting that no questions will be asked, or that a reward will be given for the property stolen or lost, without seizing or making any inquiry after the person producing it, or promising to return to any pawnbroker or other person money advanced or paid by him on such property, or any other sum or reward for the return of such property, and any person publishing such advertisement, is made subject to a fine of fifty pounds." 4 Blackstone's Com. 132, note.

4. Taking Reward for Assisting Owner to Recover Stolen Goods. — And by section 151 of the

same statute it is enacted that "whosoever shall corruptly take any money or reward, directly or indirectly, under pretense or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, obtained, extorted, embezzled, converted, or disposed of as in this act before mentioned, shall, unless he shall have used all due diligence to cause the offender to be brought to trial for the same, be guilty of felony." Upon an indictment under this statute it is not necessary to show that the prisoner had any connection with the commission of the previous felony; it is sufficient if the evidence satisfies the jury that the prisoner had some corrupt and improper design when he received the money, and did not *bona fide* intend to use such means as he could for the detection and punishment of the offender. Reg. v. King, 1 Cox C. C. 36.

Where A was charged with corruptly and feloniously receiving from B money under pretense of helping B to recover goods before then stolen from B, and with not causing the thieves to be apprehended, three questions were left for the jury: 1. Did A mean to screen the guilty parties, or to share the money with them? 2. Did A know the thieves, and intend to assist them in getting rid of the property by promising B to buy it? 3. Did A know the thieves, and assist B, as her agent, and at her request, in endeavoring to purchase the stolen property from them, not meaning to bring the thieves to justice? The jury answered the first two questions in the negative and the third in the affirmative. It was held that the receipt of the money under the above circumstances was a corrupt receiving of the money by A within the statute. Reg. v. Pascoe, 1 Den. C. C. 456, 18 L. J. M. C. 186; Roscoe's Cr. Ev. (10th ed.) 420.

Original Statute. — The original of this statute was the statute 4 Geo. I., c. 11, the enactment of which Mr. Blackstone states was brought about in this way. Referring to the taking of rewards under pretense of helping the owner to his stolen goods, he says: "This was a contrivance carried to a great length of villainy in the beginning of the reign of George the First; the confederates of the felons thus disposing of stolen goods at a cheap rate, to the owners themselves, and thereby stifling all further inquiry. The famous Jonathan Wild had under him a well disciplined corps of thieves, who brought in all their spoils to him; and he kept a sort of

II. WHEN AND HOW MISDEMEANORS MAY BE COMPOUNDED -- 1. **At Common Law.** — The compounding of misdemeanors, though not a criminal offense at common law, was yet in general considered to be illegal, and agreements made in respect thereto were ordinarily not enforceable. But such agreements were sometimes allowed after conviction with the sanction of the court, in cases where the offense principally and more immediately affected the individual, a trifling sentence being pronounced if the prosecutor declared himself satisfied with the amends made him by the defendant.¹

Assaults and Batteries. — In the case of assaults and batteries, where the injury done was slight, such compoundings were freely allowed.²

Public Nuisances. — Whether an indictment for a public nuisance was a proper subject for composition, seems to have been a disputed question and has led to some contrariety of opinion.³

public office for restoring them to the owners at half price. To prevent which audacious practice, to the ruin and in defiance of public justice, it was enacted by 4 Geo. I., c. 11, that whoever shall take a reward under the pretense of helping any one to stolen goods shall suffer as the felon who stole them; unless he causes such principal felon to be apprehended and brought to trial, and also gives evidence against them. Wild, still continuing in his old practice, was upon this statute at last convicted and executed." 4 Blackstone 134.

1. When and How Misdemeanors May Be Compounded at Common Law. — An agreement to put an end to a prosecution for a misdemeanor has been considered to be illegal as impeding the course of public justice, but it is sometimes done after conviction with the sanction of the court, in cases where the offense principally and more immediately affects the individual; the defendant being permitted to speak with the prosecutor before any judgment is pronounced, and a trivial punishment being inflicted if the prosecutor declares himself satisfied. And where in a case of an indictment for ill-treating a parish apprentice a security for the fair expenses of the prosecution had been given by the defendant after conviction, upon an understanding that the court would abate the period of his imprisonment, the security was held to be good upon the ground that it was given with the sanction of the court and to be considered as part of the punishment suffered by the defendant in expiation of his offense in addition to the imprisonment inflicted on him. 1 Russ. on Crimes (9th ed.) 195, citing *Beeley v. Wingfield*, 11 East 46.

2. Composition of Assaults. — In *Baker v. Townsend*, 7 Taunt. 422, 2 E. C. L. 421, the Court of Common Pleas held that, after conviction on an indictment for assault committed in relation to claim of right to land, when the defendant was brought up for judgment, the assaults, the costs of the indictment, and the disputed right of possession, and all matters in dispute, might lawfully be referred to arbitration. Gibbs, C. J., thus expressed himself: "The parties have referred nothing but what they have a right to refer. They have referred the several assaults; these may be referred. They have referred the right of possession; that may be referred. The reference of all matters in dispute refers all other their civil rights, which may well be referred."

In *Elworthy v. Bird*, 2 Sim. & S. 372, an

agreement for a separation of man and wife was enforced, though it embraced also a compromise of indictment for assault. The doctrine was fully discussed; and the vice-chancellor concisely remarks that "all the authorities concur that the policy of the law does permit the compromise of indictments for assaults, and such compromises are frequently recommended and approved by the court."

Composition of Prosecution for Disobeying Order of Maintenance. — A defendant, prosecuted by parish officers for disobeying an order of maintenance, was convicted, and sentence deferred by the court with a view to an arrangement; in the meantime he was committed to prison, and the officers demanded of him a sum considerably exceeding the amount of maintenance due, but part of which was to cover costs. A. paid part, and gave a note for the remainder; he was then brought before the court, fined one shilling, and discharged. It did not appear whether or not the particulars of the arrangement were communicated to the court, but A. made no complaint when brought up. In an action afterwards brought upon the note, it was held that no irregularity appeared in the compromise, and that the note was legal. *Kirk v. Strickwood*, 4 B. & Ad. 421, 24 E. C. L. 91.

Disturbing Religious Worship. — In *Edgcombe v. Rodd*, 5 East 294, the plaintiff had been charged before justices with a misdemeanor, that of disturbing the religious worship of a dissenting congregation. He sued them for false imprisonment, and they pleaded by way of defense that they had discharged them from the imprisonment, and that the prosecutor had agreed to proceed no further, in satisfaction of that same imprisonment. On argument this defense was properly held naught; and each of the judges declares his opinion that the agreement itself was unlawful as an obstruction to public justice. Le Blanc, J., observes that this "was a prosecution for a public misdemeanor, and not for any private injury to the prosecutor."

3. Public Nuisances — Compositions Allowed. — *Dobson v. Groves*, 6 Q. B. 637, 51 E. C. L. 637; *Crooke v. Powerscourt*, 16 W. R. 969.

In *Fallowes v. Taylor*, 7 T. R. 471, the magistrates had directed prosecutions for a public nuisance in a river; the plaintiff, by their order, had prepared bills of indictment against the defendant, who, in order to avoid the expense of the indictment, entered into

2. Under Statutes. — In many of the states of the Union statutes have been enacted directing how and under what circumstances this privilege of composition of misdemeanors shall be allowed.¹

Statutes Only Permissive. — Under all the statutes it would seem that the right to allow compositions rests in the discretion of the court, and the acknowledgment of satisfaction by the party injured does not entitle the defendant to be discharged.²

the bond on which the action was brought to remove the nuisance. Lord Kenyon, C. J., and Lawrence, J., clearly held this to be a lawful consideration for the bond.

Compositions Disallowed. — The plaintiffs, who were a local board, brought an indictment against the defendants for interfering with and obstructing a public road. At the trial of the indictment an agreement for compromise was made between the solicitors of both parties, and sanctioned by the judge, and was afterwards confirmed by a deed executed by the plaintiffs and defendants. By this deed the defendants covenanted to restore the road, which they had broken up, within seven years, and the plaintiffs covenanted that when that had been done they would consent to a verdict of "not guilty" on the indictment. The defendants failed to restore the road, and the plaintiffs then brought an action on their covenant, claiming specific performance and damages. It was held that as the indictment was for a public injury the agreement to consent to a verdict of "not guilty" was against public policy and illegal, and the plaintiffs could not maintain an action on the defendants' covenant. The action was therefore dismissed. *Windhill Local Board of Health v. Vint*, 45 Ch. Div. 351. See also *Reg. v. Blake-more*, 14 Q. B. 544, 68 E. C. L. 544.

1. See the statutes of *Arizona, California, Idaho, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New York, Ohio, Pennsylvania, Utah, Washington*.

2. Defendant Cannot Plead Composition. — In the case of an indictment for an assault, the acknowledgment of satisfaction by the party injured does not entitle the defendant to be discharged. The provision of the Gen. Stat., c. 171, § 28, is that "the court may, on payment of the costs accrued, order all further proceedings to be stayed, and discharge the defendant from the indictment." It is within the discretion of the court, and not within the power of any private person, to determine whether it is consistent with the ends of justice to suspend or terminate the prosecution. *Com. v. Dowdican*, 115 Mass. 133.

This point is ably discussed by Merrick, C. J., in *State v. Hunter*, 14 La. Ann. 71, where the learned judge, after speaking of the rights of the people to the protection afforded by the criminal law as distinguished from the right of the individual to compromise the personal damages for an assault, says: "Now, if it were in the power of the offender to compromise with those he had injured, against the wishes of those intrusted with the execution of the criminal law, these very purposes would be defeated. For just in proportion as the offense should be aggravated, in that proportion would be the exertions used to bring

about a compromise, and deprive the injured laws of their sanction. * * * Again, all those misdemeanors and assaults committed by the bold and unscrupulous upon the good-natured, the weak or timid, would be wholly unpunished, as such offenders would find no difficulty in procuring, by intimidation or cajolery, evidence of a compromise. It would, therefore, seem that the power to compromise misdemeanors ought not to be left exclusively to the injured party. Thus, if we look at the section with reference to objects of the criminal law, we shall find no difficulty in concluding that the state never intended to part with its control over prosecutions for assaults and battery and misdemeanors. But it sometimes happens that offenses are committed under such circumstances as imply no real intention of violating the law, and assaults are sometimes made under a misapprehension of facts and a momentary ebullition of anger, and without much harm to the party injured. In such cases, where the injured party voluntarily comes forward and declares that he is satisfied, and desires the prosecution to be dropped, the public justice gains nothing by a further prosecution, and the law permits the district attorney to enter the *nolle prosequi*. On the other hand, the production of a written compromise of an assault and battery by the bully, and the terror of a neighborhood, might be an aggravation of the public injury and a just cause for a more rigorous prosecution in order that there might be an adequate vindication of the laws."

Court Must Ratify Composition. — An action will not lie on an agreement entered into for the purpose of compounding any misdemeanor, unless it appears that satisfaction has been acknowledged in and approved by the court in which the prosecution was pending, according to the Gen. Stat., c. 170, § 33, and c. 171, § 28. *Partridge v. Hood*, 120 Mass. 403.

Court Cannot Allow Composition After Conviction — New York Statute. — An offense for an assault and battery or other misdemeanor, except in certain cases, may be compromised either before or after an indictment. 2 R. S. 730, § 68 *et seq.* But an acknowledgment of satisfaction by the injured party for the injury sustained by him after conviction will not authorize any court to discharge the defendant. *People v. Bishop*, 5 Wend. (N. Y.) 111.

Pennsylvania Statute. — The Criminal Procedure Act of Pennsylvania provides that: "In all cases where a person shall, on complaint of another, be bound by recognizance to appear * * * or shall be committed, or shall be indicted for assault and battery or other misdemeanor, to the injury and damage of the party complaining, and not charged to have been done with intent to commit a felony, or not being an infamous crime, and for which

Restrictions upon Power to Compromise. — In many of the states no restriction is placed upon the exercise of the judicial discretion, the statute permitting the court to compromise the misdemeanor when not obviously detrimental to the public interest; but in some of the states the statute excepts offenses committed (1) by or upon an officer of justice while in the execution of the duties of his office; (2) riotously; or (3) with an intent to commit a felony.¹

III. ILLEGALITY OF CONTRACTS IN RESPECT TO COMPOUNDING — 1. In General. — Any contract or transaction the consideration of which, or any part thereof, is an agreement to compound a felony or any misdemeanor, except in the cases heretofore discussed, is illegal.²

Other Contracts in Perversion of Justice. — So are all promises made in considera-

there shall also be a remedy by action, if the party complaining shall appear before the magistrate * * * or before the court in which the indictment may be, and acknowledge to have received satisfaction for such injury or damage, it shall be lawful for the magistrate, in his discretion, to discharge the recognizance * * * or in case of commitment to discharge the prisoner, or for the court also where such proceeding has been returned to the court, in their discretion to order a *nolle prosequi* to be entered on the indictment, as the case may require, upon payment of costs; provided that this Act shall not extend to any assault and battery or other misdemeanor committed by or on any officer or minister of justice." This Act, it will be observed, does not apply to all misdemeanors. It is expressly restricted to such as are (1) to the injury and damage of the party complaining; (2) such as are not charged to have been done with intent to commit a felony; (3) such as are not infamous crimes; and (4) those for which there shall also be a remedy by action. These conditions must all concur. *Pearce v. Wilson*, 111 Pa. St. 14, 56 Am. Rep. 243.

Prosecutions for Assaults and Batteries may be the subject of reference by the parties. *Noble v. Peebles*, 13 S. & R. (Pa.) 319.

Obtaining Money by False Pretenses. — The obtaining of money by one individual from another by false and fraudulent representations is such a misdemeanor which may lawfully be settled by the parties after the institution of a criminal proceeding. Hence, a promissory note given to the prosecutor to settle such an offense, and in consideration of the abandonment of a criminal prosecution begun thereon, is founded upon a valid consideration. *Rothermal v. Hughes*, 134 Pa. St. 510.

Serious Misdemeanors Cannot Be Compounded. — While misdemeanors of a private character affecting individuals principally may be compounded, and an obligation taken for the restitution of property obtained or payment of damages suffered may be enforced, public policy forbids that misdemeanors that seriously affect the public shall thus be disposed of. *Sharp v. Philadelphia Warehouse Co.*, 14 Phila. (Pa.) 513.

1. See the statutes of *California, Iowa, Montana, Utah, Washington*.

2. See *infra*, this title, *Effect of Illegality*, and cases there cited.

Agreement to Compound Need Not Be Express. —

It was not necessary for the defendants, who gave the note, to prove that the complainant, in terms, agreed to compound the crime, in order to render invalid the note. If it is apparent that such was the intention of the parties, and the agreement was such as to carry out that intent, it is enough. *Conderman v. Trenchard*, 40 How. Pr. (N. Y. Supreme Ct.) 71.

Whether Compounding Was Contemplated, Is a Question of Fact. — If it be a question whether the abandonment of a prosecution for perjury was the consideration of a certain act, or whether the consideration of the act was a general adjustment of disputed claims of property and indemnity, and the abandonment of the criminal prosecution the consequence only, and not the cause, of the arrangement agreed upon, it is a question of fact which should be submitted to the jury with proper instructions. *Grover v. Bruere*, 9 N. J. L. 319.

Evidence. — Where a promissory note is given to compound a felony, evidence is inadmissible that the district attorney advised the magistrate that the testimony for the state was insufficient to sustain the prosecution. *Bigelow v. Woodward*, 15 Gray (Mass.) 560, 77 Am. Dec. 389.

A Forgery Cannot Be Ratified. — The defendant's name was forged by one J. to a joint and several promissory note. While the note was current, the defendant discovered the forgery, and while denying that the signature to the note was his or written by his authority, but in order to prevent the prosecution of the forger, signed a memorandum holding himself responsible for the payment of the note at maturity. In an action against the defendant on the note, the trial judge moved that this memorandum was a ratification; but upon appeal it was held that the memorandum could not be construed as a ratification, inasmuch as the act it professed to ratify was illegal and void and incapable of ratification, but that it was in fact an agreement by the defendant to treat the note as his own in consideration that the defendant would forbear to prosecute J., and was therefore void as founded on an illegal consideration. *Brook v. Hook*, L. R. 6 Exch. 89.

Note Valid in Hands of Bona Fide Purchaser. — A note, of which the consideration is an agreement to suppress a criminal prosecution, is good in the hands of an innocent indorsee for value, unless void by the terms of the statute. *Wentworth v. Blaisdell*, 17 N. H. 275.

tion of the promisee's agreement not to appear as a witness;¹ or to use his influence to procure the settlement of a criminal charge;² or in securing a pardon,³ or judicial clemency.⁴ The doing of the two things last mentioned, if attempted or procured by lawful means, is not wrong in itself, but the law deems it contrary to public policy that it should be made the consideration of a promise of reward.⁵

2. Compromise of Civil Liabilities.—But, though the compounding of a criminal offense is illegal, it is perfectly lawful for the parties to compromise the civil liability arising from the commission of the offense, and if this be the sole purpose of the contract it is valid.⁶

1. Agreement Not to Appear as Witness.—Where G. had filed a caveat in the land office, charging fraud by M. in his application for a patent to certain lands; and it was agreed by H. that if M. and one C. would execute to him their promissory note, he (H.) would influence G. not to appear at the land office as a witness upon the investigation of the alleged fraud; and the note was executed and delivered to H. in an action upon the note. It was held that the courts will not sanction such a contract, it being contrary to law and good morals. *Hoyt v. Macon*, 2 Colo. 502.

2. Agreement to Secure Settlement of Criminal Charge.—A contract whereby an attorney-at-law undertakes, for a contingent fee, to procure a settlement of a criminal charge for fornication, is against the policy of the law, and cannot be enforced. *Ormerod v. Dearman*, 100 Pa. St. 561, 45 Am. Rep. 391.

A contract to pay one for the use of his influence in securing the consent of a prosecutor to dismiss certain prosecutions for felonies is contrary to public policy; and a declaration which seeks to recover for services so rendered is demurrable. *Rhodes v. Neal*, 64 Ga. 704, 37 Am. Rep. 93.

Agreement to Obtain Nolle Prosequi.—A mortgage to secure a sum of money due to the mortgagee, but executed upon consideration that he would obtain without improper means a *nolle prosequi* from the governor, on a pending indictment for a fraudulent conspiracy against the parties who obtained the money from him, is against public policy and void. *Wilkey v. Collier*, 7 Md. 273, 61 Am. Dec. 346.

Agreement Not to Search House.—A promissory note, given to secure the restoration of stolen property, is void if a part of its consideration is an agreement not to search the house of the thief for the property before the next day, pending negotiations for a settlement of the matter. *Merrill v. Carr*, 60 N. H. 114.

3. Agreement to Solicit Signatures to Petition for Pardon.—A contract founded upon a promise and engagement to procure signatures and obtain a pardon from the governor, for one convicted of a criminal offense and sentenced to punishment, is unlawful, and cannot be enforced by an action. *Hatzfield v. Gulden*, 7 Watts (Pa.) 152, 31 Am. Dec. 750.

Assumpsit will not lie to recover back money deposited for the purpose of being paid to a person for his interest in soliciting a pardon for a person under sentence of death. Lord Eldon, who sat in the case, said: "I cannot suffer this cause to proceed. I am of opinion this action is not maintainable; where a person interposes his interest and good offices to

procure a pardon, it ought to be done gratuitously, and not for money; the doing an act of that description should proceed from pure motives, not from pecuniary ones. The money is not recoverable." *Norman v. Cole*, 3 Esp. N. P. 253. See also *O'Reilly v. Cleary*, 8 Mo. App. 186.

Deposit of Promissory Notes to Be Delivered Upon Maker Securing a Pardon.—A contract conditioned for the execution and deposit of certain promissory notes by one under sentence for the commission of a crime, to be delivered to the prosecuting witness upon certain conditions, one of which was that the maker should receive a pardon or be acquitted on a re-trial, was held illegal and void as against public policy. *Haines v. Lewis*, 54 Iowa 301, 37 Am. Rep. 202.

Contract by Attorney for Services in Securing Pardon.—An agreement with an attorney-at-law to do what can legally be done to obtain from the governor a pardon or commutation of sentence of a person convicted of a crime it not unlawful, and the attorney can recover for services rendered thereunder. It will be assumed that the employment of an attorney to do what he can to obtain a pardon, etc., contemplates only such legal and proper acts as the law allows an attorney to agree to perform. *Bremsen v. Engler*, 49 N. Y. Super. Ct. 172.

4. Agreement to Use Influence to Secure Clemency.—A note given to a bank in consideration of assurances on the part of its officers that they would sign a petition to the judge for clemency towards a relative of the makers who is under arrest for robbing the bank, or that they would be more likely to do so, or that in any manner they would exercise, or be more likely to exercise, influence with the court to secure a lighter sentence, is based upon a consideration opposed to public policy, and is consequently void. *Buck v. Paw Paw First Nat. Bank*, 27 Mich. 294, 15 Am. Rep. 189.

5. *Norman v. Cole*, 3 Esp. N. P. 253.

6. Compromise of Civil Liability—England.—*Harding v. Cooper*, 1 Stark. 467, 2 E. C. L. 179; *Ward v. Lloyd*, 6 M. & G. 785, 46 E. C. L. 785; *Fisher v. Apollinaris Co.*, L. R. 10 Ch. App. 297; *Rourke v. Mealy*, 4 L. R. Ir. 166.

United States.—*Plant v. Gunn*, 2 Woods (U. S.) 372.

Arkansas.—*Breathwit v. Rogers*, 32 Ark. 758.

Connecticut.—*Von Windisch v. Klaus*, 46 Conn. 433.

Dakota.—*School Dist. No. 61 v. Alderson*, 6 Dakota 145.

3. Effect of Illegality — a. WHEN PARTIES STAND IN PARI DELICTO — (1) In General. — When a contract is illegal, and it appears that the parties to it

Florida. — Johnston *v.* Allen, 22 Fla. 224, 1 Am. St. Rep. 180.

Georgia. — Godwin *v.* Crowell, 56 Ga. 566; Dodson *v.* McCauley, 62 Ga. 130; Wheaton *v.* Ansley, 71 Ga. 35.

Illinois. — Schommer *v.* Farwell, 56 Ill. 542.

Iowa. — Deere *v.* Wolff, 65 Iowa 32; Malli *v.* Willett, 57 Iowa 705.

Massachusetts. — Abbott *v.* Fisher, 124 Mass. 414.

Missouri. — Cheltenham Fire-Brick Co. *v.* Cook, 44 Mo. 29.

New Hampshire. — Souhegan Nat. Bank *v.* Wallace, 61 N. H. 24.

New York. — Barrett *v.* Weber, 125 N. Y. 18.

South Carolina. — Mathison *v.* Hanks, 2 Hill L. (S. Car.) 625.

And see the title *CONSIDERATION, Pre-existing Legal and Equitable Obligations.*

Giving Security for Value of Goods Stolen. — The owner of the property stolen or wrongfully taken may reclaim the same, or receive compensation for the injury sustained, and this compensation may be by promissory note signed by sureties; and unless there is an agreement on his part to forbear the further prosecution of the case, or to suppress some of the evidence, the defense of compounding a felony will not be available against the note. Cass County Bank *v.* Bricker, 34 Neb. 516, 33 Am. St. Rep. 649.

The defendant, while a prisoner arrested on a charge of larceny, sent for the agent of the owner of the property stolen, and, admitting his guilt, offered to give security by mortgage for the value of the goods stolen. The agent informed him he would have to take his trial whether he gave a mortgage or not, and that he could not release him from his position even if he secured him, but after the security was given he let him know that he would endeavor to get a mitigation of the sentence, which he afterwards did. It was held that there was no sufficient evidence of any agreement to stifle the prosecution, and that the security was valid. Henry *v.* Dickie, 27 Ont. Rep. 416.

H., a married woman, was engaged in the grocery business on her own account, the management of which she intrusted to J., her husband, who made all the necessary purchases. Pursuant to an arrangement between J. and one R., who was a clerk of S. & W., wholesale grocers, goods were stolen from time to time by R. from his employers' store to supply the stores of H., and were put into her stock, R. receiving therefor about half their value, which he appropriated to his own use. Of these transactions H. had no knowledge. On discovery of the thefts, S. & W. demanded payment for said goods of H., who thereupon, with her husband, executed a bond and mortgage for the amount, the latter covering real estate owned by her. It was held that H. was bound to restore the goods or to pay their value, and this furnished a good consideration for the bond and mortgage; that whether a threat to sue her for the value of said goods, or to prosecute her husband and R. criminally

for the felony, operated on her mind and induced her to sign the securities, were questions of fact, and having been found against her on sufficient evidence, she was concluded thereby; and that, in the absence of evidence of some promise on the part of the mortgagees to forbear prosecution for the crime or to suppress evidence, it could not be held that the securities were given to compound a felony. Barrett *v.* Weber, 125 N. Y. 18.

Giving Security for Funds Embezzled. — A note given in settlement of a deficit of an agent, and for the purpose of securing to him further employment, is not invalid because the agent was liable to prosecution for his defalcation, in the absence of any threat to prosecute or agreement not to prosecute. Provident, etc., Assur. Soc. *v.* Edmonds, 95 Tenn. 53.

An employer has the right to receive money from an employee, or from his wife or any other person by his procurement, in payment for money embezzled by the employee, so long as he does not transgress the law by promising, either expressly or by implication, not to prosecute the employee criminally for the embezzlement. Miller *v.* Minor Lumber Co., 98 Mich. 163, 39 Am. St. Rep. 524.

An attorney having money of his client in his hands, and refusing to pay it over, the client sued out a warrant for his arrest on the charge of larceny for embezzlement, which was shown the attorney, who was told that unless he paid the claim or secured it, the prosecution would be pushed to a conclusion; the attorney thereupon gave his note for the amount, with security. It was held, in an action on the note, that it would not be regarded as having been given to compound a criminal offense, inasmuch as the statute allows the injured party to receive from the wrongdoer that which belongs to him. Nor was the character of the transaction, so far as respects the validity of the note, affected by the fact that it would not have been given had the principal maker not been threatened with the criminal prosecution. Ford *v.* Cratty, 52 Ill. 313.

An embezzler is under a legal and moral obligation to repay the person whose money he has wrongfully appropriated to his own use, and it is, therefore, not against public policy nor unlawful for him to give security for its return at a future day. The sureties on a bond given to secure the return of money embezzled by the principal in the bond cannot allege that the bond was given for an illegal consideration where there is no evidence that criminal proceedings had been stifled, or that fraud or coercion had been practiced upon the principal and his sureties. In an action upon such a bond it is not enough that the affidavit of defense alleges that the debt secured by the bond was for money embezzled; that the creditor accepted the bond in lieu of the money embezzled; and that the acceptance of the bond worked the release of the debtor "from all liability to prosecution for said crime of embezzlement." It must go further and allege the employment of criminal proceed-

stand *in pari delicto*, the law will not entertain any action in respect thereto, but leaves the parties where it finds them.¹

ings, or the threat to resort to them, as a means of coercion to compel the execution of the bond. *Portner v. Kirschner*, 169 Pa. St. 472, 47 Am. St. Rep. 925.

The plaintiff and one S. were under indictment for obtaining the notes of the defendant W., in the sum of six thousand dollars, by false pretenses. An action at the suit of W. was also pending against them to recover the amount of the notes, and S. had commenced proceedings in bankruptcy against W. The plaintiff authorized his counsel to make any agreement he deemed for his interests in said matters, who thereupon made an agreement with the counsel of W., who was also district attorney, that the plaintiff would testify in the three litigations to all he knew, and in consideration thereof, in case W. recovered judgment in the civil action, he would only enforce it against the plaintiff to the extent of one thousand dollars, and would give him control of the judgment against S. for whatever sum he paid, and if the plaintiff testified fully, W.'s counsel would recommend a *nol. pros.* against him. The plaintiff was called as a witness and testified as agreed, without knowledge at the time of the latter clause of the agreement. In an action to enforce the contract it was held by a divided court that the evidence did not sustain a finding that the intent of the agreement was to "stifle, embarrass and procure the discontinuance of the criminal proceedings," and so void as against public policy; but that the agreement was valid, was for a good consideration, and that an action lay to enforce the same. *Nickelson v. Wilson*, 60 N. Y. 362.

Civil Liabilities Arising from Forgeries.—Bankers allowed a customer to overdraw his current account on his depositing with them as security for the overdraft some bills of exchange drawn by him upon, and purporting to be accepted by, a third person. After the customer had overdrawn his account the bankers discovered that the acceptances were forgeries. They then communicated with the customer, and ultimately gave up the forged acceptances to him, receiving from him in exchange joint and several promissory notes of himself and his father. The customer was afterwards adjudicated a bankrupt. The notes were not paid at maturity. It was held that although the bankers had not prosecuted the bankrupt for the felony, and whether they had or had not agreed not to prosecute him, they were entitled to prove in the bankruptcy for the balance due to them upon the bankrupt's current account. *Ex p. Leslie*, 20 Ch. Div. 131.

The plaintiff being indebted to the defendant in the sum of seventy-one dollars for two notes which had been forged by the plaintiff and transferred to the defendant, it was agreed that a wagon belonging to the plaintiff and then in possession of the defendant should be exposed for sale at public auction, and that the plaintiff should not forbid the sale, and the defendant agreed, in consideration thereof, to surrender the notes. The wagon was accordingly sold, and purchased by the defendant,

who surrendered the notes to the plaintiff, by whom they were destroyed. At the time of the making of the agreement the plaintiff was not in custody nor was he threatened with an illegal arrest. In an action by the plaintiff to recover the value of the wagon, on the ground that the agreement was procured by threats, it was held that the allegation that the agreement was made to compound a felony was not maintained. *Kissock v. House*, 23 Hun (N. Y.) 35.

In re Mapleback, 4 Ch. Div. 150, it appeared that M., who then owed B. £100 for which he had given no security, wrote to B., telling him that he had forged his name to a bill of exchange for £100 which he had discounted with his bankers; that the bill was just due, and that he was unable to meet it; and entreated B. to pay the bill and thus save him and his family from the ruin which would result from exposure. M. promised if B. would do this to give him a bill of sale of all his property to secure what he owed him. B. acceded to the request; a bill of sale of all M.'s property was given to him to secure £200, and B. paid the £100 to the bankers. Soon afterwards M. was adjudicated a bankrupt, and upon an application made by the trustees in bankruptcy for an order declaring the bill void on the ground that B., in accepting it, compounded a felony committed by the bankrupt, the judge held that the bill of sale was valid, and upon appeal the ruling was affirmed.

Civil Liability for Homicide.—A widow, intending in good faith to institute a civil action for damages resulting to her from the homicide of her husband, having retained counsel to begin and conduct the same, but not having prosecuted nor attempted to prosecute for the public offense, and the person against whom the action was about to be brought having freely and voluntarily given his promissory notes in fair compromise and settlement of the contemplated suit, some of the notes being payable to the widow, and one of them to her counsel, the latter note to liquidate the fee of the counsel, and the compromise not extending to or affecting in any manner the criminal elements of the homicide, the notes were not without consideration, whether the maker committed or was concerned in the commission of the homicide or not; nor was the consideration in whole or in part illegal. *Dodson v. McCauley*, 62 Ga. 130.

1. Effect of Illegality When Parties Stand in Pari Delicto.—"It appears, then, to be the settled law in England, and we are satisfied that it is also the law here, that where two parties agree in violating the laws of the land the court will not entertain the claim of either party against the other for the fruits of such an unlawful bargain. If one holds the obligation or promise of the other to pay him money or do any other valuable act, on account of such illegal transaction, the party defendant may expose the nature of the transaction to the court, and the law will say, 'Our forms and rules are established to protect the innocent and to vindicate the injured, not to aid

(2) *Executory Contracts*. — When a contract made in consideration of the compounding a criminal offense is executory the law will not enforce it¹ or

offenders in the execution of their unjust projects; and if the party who has foolishly paid his money repents his folly and brings his action to recover it back, the same law will say to him, 'You have paid the price of your wickedness, and you must not have the aid of the law to rid you of an inconvenience which is a suitable punishment of your offense.' " Worcester *v.* Eaton, 11 Mass. 369. See generally the title *ILLEGAL CONTRACTS*.

1. *Contracts Made in Consideration of Compounding Not Enforceable Between the Parties* — *England*. — Keir *v.* Leeman, 6 Q. B. 308, 51 E. C. L. 308, 9 Q. B. 391, 58 E. C. L. 391; Bayley *v.* Williams, 4 Giff. 638; Collins *v.* Blantern, 2 Wils. 341; Kirk *v.* Strickwood, 4 B. & Ad. 421, 24 E. C. L. 91; Whitmore *v.* Farley, 45 L. T. 99, 29 W. R. 825, 14 Cox C. C. 617; Davies *v.* London, etc., Ins. Co., 8 Ch. Div. 469; Windhill Local Board of Health *v.* Vint, 45 Ch. Div. 351; Fivaz *v.* Nicholls, 2 C. B. 501, 52 E. C. L. 501; Cannon *v.* Rands, 11 Cox C. C. 631, 23 L. T. N. S. 817.

Canada. — Hart *v.* Meyers, 7 U. C. Q. B. 416; Dwight *v.* Ellsworth, 9 U. C. Q. B. 539; People's Bank *v.* Johnson, 20 Can. Supreme Ct. 541.

Alabama. — Wynne *v.* Whisenant, 37 Ala. 46; Wells *v.* Thompson, 50 Ala. 84; Moog *v.* Strang, 69 Ala. 98. Compare Bibb *v.* Hitchcock, 49 Ala. 468, 20 Am. Rep. 288.

Arkansas. — Breathwit *v.* Rogers, 32 Ark. 758; Rogers *v.* Blythe, 51 Ark. 519.

California. — Morrill *v.* Nightingale, 93 Cal. 452, 27 Am. St. Rep. 207.

Connecticut. — Smith *v.* Richards, 29 Conn. 232; McMahon *v.* Smith, 47 Conn. 221, 36 Am. Rep. 67.

Georgia. — Brown *v.* Padgett, 36 Ga. 609; Chandler *v.* Johnson, 39 Ga. 85; Southern Express Co. *v.* Duffey, 48 Ga. 358; Puckett *v.* Roquemore, 55 Ga. 235; Godwin *v.* Crowell, 56 Ga. 566; Small *v.* Williams, 87 Ga. 681.

Illinois. — Henderson *v.* Palmer, 71 Ill. 579, 22 Am. Rep. 117; Dionne *v.* Matzenbaugh, 49 Ill. App. 527; Halthaus *v.* Kuntz, 17 Ill. App. 434; Rouse *v.* Mohr, 29 Ill. App. 321.

Indiana. — Collier *v.* Waugh, 64 Ind. 456; Ricketts *v.* Harvey, 78 Ind. 152, 106 Ind. 564; Crowder *v.* Reed, 80 Ind. 1; Stout *v.* Turner, 102 Ind. 418; Budd *v.* Rutherford, 4 Ind. App. 386.

Iowa. — Peed *v.* McKee, 42 Iowa 689, 20 Am. Rep. 631; Smith *v.* Steely, 80 Iowa 738.

Kansas. — Friend *v.* Miller, 52 Kan. 139, 39 Am. St. Rep. 340; Ream *v.* Sauvain, 2 Kan. App. 550.

Kentucky. — Kimbrough *v.* Lane, 11 Bush (Ky.) 556; Averbek *v.* Hall, 14 Bush (Ky.) 505; Swan *v.* Chandler, 8 B. Mon. (Ky.) 97; Gardner *v.* Maxey, 9 B. Mon. (Ky.) 90.

Louisiana. — Ozanne *v.* Haber, 30 La. Ann. 1384.

Maine. — Shaw *v.* Reed, 30 Me. 105; Morrill *v.* Goodenow, 65 Me. 178.

Maryland. — Wildey *v.* Collier, 7 Md. 273, 61 Am. Dec. 346.

Massachusetts. — Jones *v.* Rice, 18 Pick. (Mass.) 440, 29 Am. Dec. 612; Clark *v.* Pom-

eroy, 4 Allen (Mass.) 534; Bigelow *v.* Woodward, 15 Gray (Mass.) 560, 77 Am. Dec. 389; Taylor *v.* Jaques, 160 Mass. 291; Partridge *v.* Hood, 120 Mass. 403.

Michigan. — Snyder *v.* Willey, 33 Mich. 495; Wisner *v.* Bardwell, 38 Mich. 278; Fosdick *v.* Van Arsdale, 74 Mich. 302; Case *v.* Smith, (Mich. 1895) 65 N. W. Rep. 279.

Mississippi. — Wilkins *v.* Riley, 47 Miss. 366. *Missouri*. — Murphy *v.* Bottomer, 40 Mo. 67; Sumner *v.* Summers, 54 Mo. 340; Baker *v.* Farris, 61 Mo. 389; Janis *v.* Roentgen, 52 Mo. App. 114.

New Hampshire. — Hinds *v.* Chamberlin, 6 N. H. 225; Shaw *v.* Spooner, 9 N. H. 197, 32 Am. Dec. 348; Clark *v.* Ricker, 14 N. H. 44.

New Jersey. — Den *v.* Moore, 5 N. J. L. 540. Compare Price *v.* Summers, 5 N. J. L. 667.

New York. — Steuben County Bank *v.* Mathewson, 5 Hill (N. Y.) 249; Conderman *v.* Trenchard, 40 How. Pr. (N. Y. Supreme Ct.) 71; Smith *v.* Rowley, 66 Barb. (N. Y.) 502; Conderman *v.* Hicks, 3 Lans. (N. Y.) 108; Fellows *v.* Van Hyring, 23 How. Pr. (N. Y. Supreme Ct.) 230; Buffalo Press Club *v.* Greene, 5 Misc. Rep. (Buffalo Super. Ct.) 501; Loomis *v.* Cline, 4 Barb. (N. Y.) 453; Porter *v.* Havens, 37 Barb. (N. Y.) 343; Bettinger *v.* Bridenbecker, 63 Barb. (N. Y.) 395.

North Carolina. — Cameron *v.* McFarland, 2 Law Repos. (N. Car.) 415, 6 Am. Dec. 566; Thompson *v.* Whitman, 4 Jones L. (N. Car.) 47; Garner *v.* Qualls, 4 Jones L. (N. Car.) 223; Vanover *v.* Thompson, 4 Jones L. (N. Car.) 485; Lindsay *v.* Smith, 78 N. Car. 328, 24 Am. Rep. 463; Guilford County *v.* March, 89 N. Car. 268.

Ohio. — Raguet *v.* Roll, 7 Ohio, pt. 1, 76; Springfield F. & M. Ins. Co. *v.* Hull, 51 Ohio St. 270, 46 Am. St. Rep. 571.

Pennsylvania. — National Bank *v.* Kirk, 90 Pa. St. 49; Bredin's Appeal, 92 Pa. St. 241, 37 Am. Rep. 677; Riddle *v.* Hall, 99 Pa. St. 116; Pearce *v.* Wilson, 111 Pa. St. 14, 56 Am. Rep. 243; Oakford *v.* Johnson, 2 Miles (Pa.) 203.

Rhode Island. — Foley *v.* Greene, 14 R. I. 618, 51 Am. Rep. 419.

South Carolina. — Bell *v.* Wood, 1 Bay (S. Car.) 249; Corley *v.* Williams, 1 Bailey L. (S. Car.) 588; Mathison *v.* Hanks, 2 Hill L. (S. Car.) 625; Groesbeck *v.* Marshall, 44 S. Car. 538.

Tennessee. — Porter *v.* Jones, 6 Coldw. (Tenn.) 313; Cain *v.* Southern Express Co., 1 Baxt. (Tenn.) 315.

Texas. — Welborn *v.* Norwood, 1 Tex. Civ. App. 614.

Vermont. — Mattocks *v.* Owen, 5 Vt. 42; Hinesburgh *v.* Sumner, 9 Vt. 23, 31 Am. Dec. 599; Bailey *v.* Buck, 11 Vt. 252; Bowen *v.* Buck, 28 Vt. 308; Smith *v.* Pinney, 32 Vt. 282; Pierce *v.* Kibbee, 51 Vt. 559.

Wisconsin. — Fernekes *v.* Bergenthal, 69 Wis. 464; Schultz *v.* Catlin, 78 Wis. 611.

Reasons of the Rule. — Agreements founded on the suppression of criminal prosecutions are void, as they have a manifest tendency to subvert public justice. Stifling a prosecution of forgery comes within the rule that where

allow any damages for its breach.¹

the welfare of society and the vindication of the law are the chief objects, the defendant may give in evidence the illegality of the contract as a bar to a suit to enforce it; and this to prevent the evil which would be produced by enforcing the contract or allowing it to stand. *Bredin's Appeal*, 92 Pa. St. 241, 37 Am. Rep. 677.

"The doctrine is indisputable, that any contract or security made in consideration of dropping a criminal prosecution, soliciting a pardon, or compounding a public offense, is invalid. Such contracts having a tendency to obstruct the administration of justice, or thwart the public interest in bringing offenders to justice by way of example, are properly discountenanced in law and in equity. Every consideration of sound public policy dictates that violations of the criminal law of the state should be duly prosecuted. To sanction the submission of the offense to the arbitrament or compromise of the injured party, and on the condition that public justice shall be eluded, would do violence to the just principles of the social compact." *Willey v. Collier*, 7 Md. 273, 61 Am. Dec. 346.

Confession of Judgment in Consideration of Compounding Void.—A judgment confessed by warrant of attorney, in consideration of stifling a prosecution for forgery, is void, and it was error for the court to refuse to open such judgment and permit the defendants to show the illegal consideration, although they were parties thereto. *Bredin's Appeal*, 92 Pa. St. 241, 37 Am. Rep. 677.

An Agreement by the Payee of a Bill of Exchange to discharge a person liable upon it, in consideration that the latter would not move the court of King's Bench against him for a misdemeanor, is illegal and void. *Pool v. Bousfield*, 1 Campb. 55.

Agreement of Landlord to Subordinate His Lien.—Where a landlord and another person, from whose service the tenant was enticed away by the landlord, have conflicting liens on the tenant's crop, a promise or agreement by the landlord, who has the superior lien, to subordinate his lien to that of the other, if the latter will forbear to sue him for damages for enticing away his servant, is supported by a valid and sufficient consideration; but an agreement by the latter not to prosecute the landlord criminally for having enticed away his servant would be contrary to public policy, and would not support the landlord's promise to give priority to the latter's lien. *Wells v. Thompson*, 50 Ala. 83.

Garnishment of Debt Released Under Illegal Agreement.—C. stole from H. forty-six bushels of wheat. A warrant was issued, but no arrest was made. By a compromise entered into between the parties C. was to return to H. forty-six bushels of wheat, pay H.'s attorney for his services in the criminal proceeding, pay the expense of following up the stolen property, and release a debt of eighty-six dollars which H. owed to C.; H., on his part, agreed to acknowledge satisfaction for the injury done him by the larceny of the wheat and procure the dismissal of the prosecution. The wheat was returned, and the attorney's fees

and other expenses paid by C.; H. made the necessary acknowledgment of satisfaction, and the prosecution was dismissed. Subsequently an action was brought by the plaintiff against the defendant C. and a garnishee process served upon H.; H. returned his certificate to the effect that he was not indebted to C. He was thereupon, by an order, required to appear and answer written interrogatories. He did so, and answered in effect that the eighty-six dollars due to C. had been paid by his agreement not to prosecute. It was held that such agreement was void, and that the plaintiff was entitled to recover the amount of the debt from C. *Saxon v. Conger*, 6 Oregon 389.

Money Loaned to Compound Felony Not Recoverable.—It is illegal, in a private individual, to suppress a prosecution for a crime, or the evidence necessary to support such a prosecution. And a note given for money knowingly lent, to be applied to such a purpose, is void. *Plumer v. Smith*, 5 N. H. 553, 22 Am. Dec. 478.

Where A. against whom proceedings in a case of bastardy had been instituted, and B., who was acting as his friend in the matter, were falsely told by the woman's agent that there were four several charges against A. growing out of the bastardy case, and that he had writs out against him, and he would be sent to the penitentiary unless he settled, and under the pressure of these fraudulent charges and threats, A. made the settlement and procured of B. a note of five hundred dollars, which was given to the woman, and in return gave B. his note for five hundred dollars, upon which suit was afterward brought, and there was no ground for the two charges of attempted abortion and abduction, it was held that A. was not guilty of compounding a felony, and was not *in pari delicto* with the woman and her agents, and that A. could not, as against B., make such defense. *Keith v. Buck*, 16 Ill. App. 121.

Mortgage for Money Loaned to Compound Felony is Void.—Where parties knowingly advance means to aid another to compromise a felony, and are present and assist in the negotiation, the mortgage taken by them for such consideration is void. *Fellows v. Hyring*, 23 How. Pr. (N. Y. Supreme Ct.) 230.

1. No Right of Action Arises from Breach of Illegal Agreement.—A. was in prison in Massachusetts upon an indictment for having fraudulently obtained goods from the prosecutor by false pretenses. It was then agreed by the prosecutor that he would procure a *nol. pros.* and stop the prosecution if B., a friend of A., would pay the costs, and give his notes for a specified sum, to be allowed on the debt due from A. for the goods. The prosecutor procured the *nol. pros.* to be entered, and A. to be thereby discharged. B. refused to give the note as he promised. It was held that the consideration for the promise was illegal, and that no action by the prosecutor could be maintained upon it. *Shaw v. Reed*, 30 Me. 105.

An agreement to withdraw from a prosecution for a felony, provided the person accused will promise to bring no action for trespass and false imprisonment or for malicious prose-

(3) *Executed Contracts* — **Money Paid Cannot Be Recovered.** — So, when the contract is executed and money has been paid or property transferred in accordance therewith, the aid of the law cannot be invoked for its recovery.¹

Deeds. — Where a deed of property is made upon an illegal consideration and the grantee has gone into possession, the law will not assist the grantor to avoid his deed or recover the property.² And for like reasons, where the grantor has not surrendered possession, the law will not assist the grantee to gain it.³

cution, is void, and cannot be enforced; and if the person accused subsequently sues the prosecutor, the action will not be stayed upon the ground that it is brought against good faith. *Rawlings v. Coal Consumers' Assoc.*, 43 L. J. M. C. 111, 30 L. T. N. S. 469, 22 W. R. 704.

1. Money Paid or Property Transferred Cannot Be Recovered. — *Taylor v. Blake*, 11 Minn. 255; *Daimouth v. Bennett*, 15 Barb. (N. Y.) 541; *Collins v. Lane*, 80 N. Y. 627; *Haynes v. Rudd*, 102 N. Y. 372, 55 Am. Rep. 815; *Dixon v. Olmstead*, 9 Vt. 310, 31 Am. Dec. 629.

The obligor in such an illegal contract stands in no better position in the eyes of the law than the obligee. It will not be enforced, and if money is paid thereon the courts will not aid in recovering it back, but will leave both parties in the exact position in which they have placed themselves. *Kimbrough v. Lane*, 11 Bush (Ky.) 556.

Where a person who is charged with the crime of larceny pays money to the person from whom the property was stolen, for the purpose of reimbursing the latter for the expenses he had incurred in searching for the property, and the circumstances tended to show that the party paying the money was guilty of the charge, the purpose of making the payment was a sufficient consideration to support the agreement under which the payment was made, and the money could not be recovered back. *Bothwell v. Brown*, 51 Ill. 234.

Where a convict pays money to secure a pardon he cannot, after the contract is executed, recover back the money paid. In such a case it is immaterial that the contract was made while the civil rights of the convict were suspended, or that the parties were not *in pari delicto*. *O'Reilly v. Cleary*, 8 Mo. App. 186; *Norman v. Cole*, 3 Esp. N. P. 254.

If one indicted for larceny voluntarily repay the sum alleged to have been stolen, without any unlawful agreement, he cannot recover it back, though he be afterwards tried on the indictment and acquitted. If the repayment be made upon an illegal agreement that the prosecution shall be settled or discontinued, the bargain is corrupt, and for that reason the money cannot be recovered back. The law will leave the parties where it finds them. *Puckett v. Roquemore*, 55 Ga. 235.

Money May Be Recovered from a Bailee. — The officers of a company, believing that the retention of money by one of their agents amounted to felony, directed his arrest. Certain friends of his came to the officers of the company and proposed to deposit a sum of money by way of security for any deficiency. On the same day the company was advised that the acts of

the agent did not amount to felony, and the directions for the arrest were withdrawn. Later in that day the friends of the agent had a second interview with the officers of the company, and agreed to deposit a sum of money as security for his defaults, no mention being made of the withdrawal of the directions for the arrest. The sum of money was afterwards deposited with trustees on an agreement for the security of the company. It was held that the change of circumstances ought to have been stated to the intending sureties, and that the agreement must be rescinded and the money returned to the sureties. It was held further that even if the agreement was illegal as compounding a felony, the court would interfere in a case where the money was actually in the hands of trustees, and pressure had been exercised. *Davies v. London, etc., Ins. Co.*, 8 Ch. Div. 469.

Trustee in Bankruptcy May Recover. — A banking company commenced a prosecution against a customer for having obtained credit from them under false pretenses, which is, by section 13 of the Debtors Act, 1869, made a misdemeanor. At this time the bank had notice of an act of bankruptcy committed by the customer. On the day on which the summons was to be heard by the magistrate, H. (whose wife was an aunt of the customer's wife) signed an undertaking that, if the magistrate would allow the summons to be withdrawn, he would pay the bank the sum which the customer had obtained from them by the false pretenses. An application was made to the magistrate by the customer's solicitor to allow the summons to be withdrawn. The application was assented to by the bank's solicitor, and was granted by the magistrate. H. then paid the money to the bank. The bank manager believed that H. was paying the money out of his own pocket. The customer was soon afterwards adjudicated a bankrupt, upon the act of bankruptcy of which the bank had notice. The trustee in the bankruptcy discovered that the money which H. had paid to the bank had been previously handed to him by the bankrupt's wife, she having, with the bankrupt's knowledge, taken it for the purpose of paying the bank out of a bag of money belonging to the bankrupt. It was held that the consideration for the payment to the bank being the stifling of a prosecution, there was no legal consideration, and that the trustee, to whom, by virtue of the relation back of his title to the act of bankruptcy, the money really belonged, could recover it. *Ex p. Wolverhampton, etc., Banking Co.*, 14 Q. B. Div. 32.

2. *Worcester v. Eaton*, 11 Mass. 369.

3. *Southern Express Co. v. Duffey*, 48 Ga. 358.

In Equity. — Although equity has the power to set aside illegal contracts and deeds, and will sometimes exercise it where the best interests of society require that relief should be afforded,¹ it is the usual practice of courts to refuse to cancel contracts² and deeds³ made upon illegal considerations, and to leave the parties to their strict technical rights.⁴

b. **COMPOUNDING UNDER DURESS.** — But when the parties do not stand

1. In Equity. — In *Porter v. Jones*, 6 Coldw. (Tenn.) 313, the court, by Andrews, J., discussing the right of a court of equity to set aside illegal contracts, and the circumstances under which the right will be exercised, says: "There are many cases in which, were the rights or interests of the parties only concerned, courts would absolutely refuse them aid; yet, as the public good demands a decision upon their claims, the courts will entertain the cause and make the decision. The decree is made upon the facts and the law of the private right; but the community is a *quasi* party to the cause; and for the protection of the community courts may overlook the individual turpitude which has forfeited the private right, and make such decision, consistent with the public interests, as they would have made had the party been innocent. From these principles it follows, and thus it has been held, that the active interposition of equity to set aside and cancel an illegal contract is matter of sound discretion in the court, and not of absolute right in the party. The inquiry is, Has the complainant made such a case as would, were he innocent, entitle him to relief? And if so, does the best interest of society require that relief shall be afforded, notwithstanding the guilt of the party? If not, then the court will refuse its aid, and will leave the parties in whatever difficulties their conduct may have involved them."

2. Equity Will Not Cancel Contracts. — *Rock v. Mathews*, 35 W. Va. 531.

In *Atwood v. Fisk*, 101 Mass. 363, 100 Am. Dec. 124, it was held that a bill in equity will not lie to compel the surrender or cancellation of an overdue promissory note and a mortgage given to secure its payment, on the ground that the consideration for the note and mortgage was a promise of the payee to forbear to prosecute for an embezzlement. The court, by Ames, J., said: "It has also long been settled that the law will not aid either party to an illegal contract to enforce it against the other, neither will it relieve a party to such a contract who has actually fulfilled it, and who seeks to reclaim his money or whatever article of property he may have applied to such a purpose. The meaning of the familiar maxim, *In pari delicto potior est conditio defendentis*, is simply that the law leaves the parties exactly where they stand; not that it prefers the defendant to the plaintiff, but that it will not recognize a right of action, founded on the illegal contract, in favor of either party against the other. They must settle their own questions in such cases without the aid of the courts. In the somewhat quaint language of Lord Chief Justice Wilmut, in *Collins v. Blanton*, 2 Wils. 350, 'All writers upon our law agree in this; no polluted hand shall touch the pure fountains of justice. Whoever is a party

to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul, o procul este, profani!*" In this respect the rule in equity is the same as at law. Equity follows the rule of the law, and will not interfere for the benefit of one such party against a *particeps criminis*. The suppression of illegal contracts is far more likely in general to be accomplished, by leaving the parties without remedy against each other. And so the modern doctrine is established that relief is not granted where both parties are truly *in pari delicto*."

3. Equity Will Not Set Aside Deeds. — *Allison v. Hess*, 28 Iowa 388; *Thomas v. Cronise*, 16 Ohio 54; *Wilcox v. Daniels*, 15 R. I. 261; *Teague v. Williams*, 6 Tex. Civ. App. 468; *Swartz v. Gillett*, 2 Pin. (Wis.) 238.

A conveyance of land made in consideration of compromising alleged causes of action for slander and malicious prosecution, and also in consideration of forbearing to urge a prosecution for perjury, is a contract executed, and not to be set aside in equity upon allegations that there was no legal foundation for such suits or prosecution. *Moore v. Adams*, 8 Ohio 372, 32 Am. Dec. 723.

The plaintiff's husband being charged by the defendant with embezzlement from him to a large amount, she, at her husband's request, and, as she claimed, upon an understanding and implied agreement on the part of the defendant that he would refrain from prosecuting the husband, executed a conveyance of real estate to the defendant, but without any compulsion or other duress than that arising from the circumstances. It was held that this did not amount to a case of legal duress, and that, although the deed might be void on the ground that it was executed in consideration of compounding a criminal offense, and was therefore contrary to the statute, yet equity would not relieve the party who executed it upon or for such immoral and illegal consideration and purpose; both parties to the conveyance being *in pari delicto*. *Smith v. Rowley*, 66 Barb. (N. Y.) 502.

In an Action to Cancel Two Mortgages it appeared that the first was a forgery by the plaintiff's son; that the plaintiff gave the second to secure the forged notes, in consideration of defendant's agreement not to prosecute. It was held that the first would be canceled, but that as to the second, plaintiff having entered into the illegal contract, and not having withdrawn from it until his son was prosecuted by other persons, equity would not interfere. *Shattuck v. Watson*, 53 Ark. 147.

4. Harrington v. Bigelow, 11 Paige (N. Y.) 349.

in pari delicto, and it appears that the contract or deed was obtained by duress, equity will not refuse its aid. Thus, when the inequality in the situation of the parties is such that it is apparent that the act was not voluntary, as where one of the parties exacts a security which the other is driven to give in order to save one dear to him from exposure, disgrace, and ruin, equity will set aside the contract or deed so obtained.¹

1. Equity Will Set Aside Deed for Duress —
England. — *Williams v. Bayley*, L. R. 1 H. L. 200; *Davies v. London, etc., Ins. Co.*, 8 Ch. Div. 477; *Claridge v. Hoare*, 14 Ves. Jr. 59.
Georgia. — *Mills v. Hudgins*, 97 Ga. 417.
Massachusetts. — *Bryant v. Peck, etc., Co.*, 154 Mass. 461.

Michigan. — *Meech v. Lee*, 82 Mich. 274.
New York. — *Schoener v. Lissauer*, 107 N. Y. 111.

Rhode Island. — *Foley v. Greene*, 14 R. I. 618, 51 Am. Rep. 419.

Tennessee. — *Coffman v. Lookout Bank*, 5 Lea (Tenn.) 232, 40 Am. Rep. 31.

Reason of the Rule. — In *Bayley v. Williams*, 4 Giff. 638, where agreements and securities were given by a father to protect his son from criminal prosecution for the forgery of his father's name to certain promissory notes, the court, in holding the agreements and securities to be void, said: "If the fair result of the evidence shows that the agreements were executed under influence felt by the plaintiff and exercised by the defendants, if the fear of the criminal prosecution against the plaintiff's son, or if the result of the discovery of a criminal act, for which the plaintiff was not liable, was used by the defendants against the plaintiff to operate upon his fears so as to induce him to give a security which would relieve his son from a criminal prosecution, according to the law of this court a security obtained under such circumstances cannot stand. The inequality of the situation of the parties, the one exacting a security which the other is driven to give in order to save his son from exposure, disgrace, and ruin, taints the security obtained under the influence of such fears. If the main and inspiring purpose was the relief of the son from the consequences of his crime; if this was the main consideration operating on the father's mind, and was the origin and real cause of the transaction, the intervention of other circumstances, or other collateral advantages to the father, will not be enough to justify the court in upholding such a security."

Illustrations. — G., who was treasurer of a town, became a defaulter. One of the selectmen of the town applied to G.'s maiden aunt, to whom he was a stranger, and after referring to the defalcation, of which she had just before been informed, stated that her nephew had exposed himself to a criminal prosecution and imprisonment in the state prison, and that unless she immediately secured the town against loss criminal proceedings would on that day be instituted. The aunt was an elderly woman, feeble in body, of an excitable temperament, wholly without business experience or self-reliance, and was greatly attached to her nephew, having lived in the same house with him from his birth. She was greatly agitated, and expressed herself as willing to do anything to save her nephew from the state

prison. The selectman left her in this frame of mind, and half an hour after returned with a lawyer, who drew a mortgage of certain real estate which she owned, which she signed without deliberation or asking advice of her friends, and in the belief that the town would at once procure the prosecution if she did not, and solely to save her nephew from such punishment. Upon a bill for a foreclosure of the mortgage brought by the town, it was held that a court of equity would refuse to enforce a contract of suretyship entered into under such circumstances. *Sharon v. Gager*, 46 Conn. 189.

A son carried to bankers, of whom he, as well as his father, was a customer, certain promissory notes with his father's name upon them as indorser. These indorsements were forgeries. On one occasion the father's attention was called to the fact that a promissory note of his son with his (the father's) name on it was lying at the bankers', dishonored. He seemed to have communicated the fact to the son, who immediately redeemed it; but there was no direct evidence to show whether the father did or did not really understand the nature of the transaction. The fact of the forgery was afterwards discovered; the son did not deny it; the bankers insisted (though without any direct threat of a prosecution) on a settlement, to which the father was to be a party; he consented, and executed an agreement to make an equitable mortgage of his property. The notes, with the forged indorsements, were then delivered up to him. It was held that the agreement was invalid. A father appealed to, under such circumstances, to take upon himself a civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with a moral certainty of a conviction, even though it is not put forward by any party as the motive for the agreement, is not a free and voluntary agent, and the agreement he makes under such circumstances is not enforceable in equity. *Williams v. Bayley*, L. R. 1 H. L. 200.

Persuasion by Defaulter Not Duress. — Where a wife executed and acknowledged a deed conveying land to a bank whose money her husband had embezzled to a large amount, to save him from arrest and criminal prosecution, and it appeared that the wife was urged to make the conveyance by her husband and brother, who informed her that if she would do so the bank would not prosecute, and the bank had no knowledge of any such representations being made to induce the execution of the deed, nor authorized any to be made, and none of its officers had any conversation with the grantor on the subject, it was held that a court of equity would not set the deed aside for fraud, duress, or imposition. *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36 Am. Rep. 147.

COMPOUND INTEREST. (See the title INTEREST.)—"Compound interest" is interest upon interest.¹

COMPREHENSION.—See UNDERSTANDING.

COMPRISE.—See note 2.

COMPROMISE. (See also the titles ACCORD AND SATISFACTION, vol. 1, p. 408; AGENCY, vol. 1, p. 930; COMPOSITION WITH CREDITORS, p. 376, *ante*; COMPOUNDING OFFENSES, p. 399, *ante*; CONSIDERATION, *post*. As to the power of a person occupying a fiduciary relationship to enter into a compromise, see such titles as ATTORNEY AND CLIENT, vol. 3, p. 1133; EXECUTORS AND ADMINISTRATORS, etc.)—"Compromise" has been defined as an agreement between two or more persons who, to avoid a lawsuit, amicably settle their differences on such terms as they can agree upon.³

Subsequent Deed Cutting Off Equities.—A wife executed a deed of a house and lot owned by her, under duress caused by the threatened prosecution of her husband for embezzlement from the grantee. Afterwards, and while her husband was out of the country, the grantee purchased her furniture in consideration of the execution by her of a quit-claim deed of the premises, which she was informed would cut off her option to avoid the former deed. After she had surrendered possession of the premises, her husband was arrested for other embezzlements discovered after the execution of the second deed, and she filed a bill to set aside both deeds. And it was held that by executing the second deed she parted with whatever rights she had in the premises. *Miller v. Minor Lumber Co.*, 98 Mich. 163, 39 Am. St. Rep. 524.

Creditor Cannot Use Criminal Process to Obtain Security for His Debt.—S., a trader in Yarmouth, N. S., had a number of creditors in Montreal. J., one of such creditors, preferred a criminal charge against S., sent a detective to Yarmouth with a warrant, caused such warrant to be indorsed by a local magistrate, and had S. brought to Montreal, when the other creditors there issued writs of *capias* for their respective claims. The father of S. came to Montreal, and in consideration of the release of S. on both the civil and criminal charges transferred all his property for the benefit of the Montreal creditors, and S. was released from jail, having given his own recognizance to appear on the criminal charge. In the settlement, to the claims of the creditors were added the costs of both the civil and criminal suits. In a suit to set aside the transfer as being obtained by duress, and to stifle the criminal prosecution, the evidence showed that the creditors, in taking the proceedings they did, expected to obtain the security of the friends of S. It was held, affirming the judgment of the court below, that the nature of the proceedings and the evidence clearly showed that the criminal process was only used for the purpose of getting S. to Montreal to enable the creditors to put pressure on him, in order to get their claims paid or secured, and the transfer made by the father under such circumstances was void. *Shorey v. Jones*, 15 Can. Supreme Ct. 398.

1. *Wilson v. Davis*, 1 Mont. 194.

2. **Comprising.**—A statute provided that whenever an injunction should be refused by a judge of a court of equity the clerk of the

court should forthwith transmit the original papers, *comprising* the bill or petition, exhibits, and the said court's order of refusal, to the court of appeals. In construing this statute, the court, in *Steigerwald v. Winans*, 17 Md. 66, said: "Although the word *comprising* does not, under all circumstances, imply including only the things enumerated, yet, in the connection in which it is employed in the Code, we understand it as being used as determining what are the 'original papers,' which are only to be transmitted, and on which the decision of the court is to be given."

"**Comprised in the Same Account**" Equivalent to "Would Have Been Comprehended In."—See *Knox v. Gye*, L. R. 5 H. L. 656

3. *Treitschke v. Western Grain Co.*, 10 Neb. 360; *Collins v. Welch*, 58 Iowa 74; *Dorsheimer v. Case*, 2 Ct. of Cl. 113, 114. In the last case, where an Act of Congress had authorized the commissioner of internal revenue and the secretary of the treasury to *compromise* all suits relating to internal revenue, it was held that they might make the payment of the taxes due to the United States upon property seized, and against which proceedings *in rem* had been instituted, a part of such *compromise*.

A *compromise* imports a mutual yielding of opposing claims; the surrender of some right or claimed right in consideration of a like surrender of some counterclaim. *Gregg v. Weathersfield*, 55 Vt. 385. See also *Bellows v. Sowles*, 55 Vt. 391.

Ratiofication by Principal.—See the title AGENCY, vol. 1, p. 1201.

Admissions.—As to the admissibility of admissions with a view to a *compromise*, see the title ADMISSIONS, vol. 1, p. 714.

Code of Louisiana.—In *Oglesby v. Attrill*, 105 U. S. 610, it is said: "A *compromise* by the code of Louisiana is defined to be 'an agreement between two or more persons, who, for promoting or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which any one of them prefers to the hope of gaining balanced by the danger of losing' (art. 3071); and has, between the interested parties, a force equal to the authority of a thing adjudged. It cannot be attacked on account of any error in law or any lesion. Art. 3075." See also *Shiff v. Shiff*, 20 La. Ann. 274; *Sharp v. Knox*, 4 La. 461.

Authority to Compromise. (See also the titles AGENCY, vol. 1, p. 1031; ARBITRATION AND AWARD, vol. 2, p. 624.)—Under an authority

COMPTABLES — The word *comptables* was a technical term of French law, denoting officers who received and were accountable for the king's revenues.¹

COMPTE ARRÊTÉ. — A *compte arrêté* is an account stated in writing and acknowledged to be correct on its face by the party against whom it is stated.²

COMPULSION — COMPULSORY. (See the titles DURESS; UNDUE INFLUENCE. See also VOLUNTARY.) — See note 3.

to *compromise* it was held that the agent might refer the question of the amount to be paid to arbitration. The court said: "The next inquiry is, was the submission to arbitration by agent within the scope of his authority? He was appointed for the purpose of *compromising* this claim for damages. This *compromise* he certainly had authority to make in any of the ordinary modes of *compromising* similar matters. For although he was in one sense a particular agent, *i. e.*, to *compromise* this one claim, he had general powers so far as this claim was concerned, and was not therefore in the restricted sense a special agent. He might effect the objects of his appointment in any of those modes, which it is to be presumed the town would have expected him to resort to. Damages had not been assessed to the satisfaction of the plaintiff by the selectmen. He had therefore a right of appeal. On this appeal the question would be settled by the umpirage of a committee selected by the parties and magistrate before whom the appeal was brought. This would, of course, be in the mind of the town. The appointment of this agent was doubtless to save expense and delay. We think he might *compromise* by agreement with the plaintiff for any less sum than that claimed, or he might agree to pay the same sum claimed. And we see no good reason why he might not resort to any other mode of *compromise* which must be as beneficial as this by agreement. First, then, he should attempt an agreement as he did. This failing, he might resort to arbitration, which is almost the only other mode of *compromising* disputed claims, and one so common as must have been in the mind of the inhabitants in conferring the agency. He clearly might refer it, and then agree to give the sum awarded, after he should know it, which was the fact here. And we also consider he might, in the proper sense, refer or arbitrate the matter. *Buckland v. Conway* 16 Mass. 395." *Schoff v. Bloomfield*, 8 Vt. 478.

Same — Speculation. — A power of attorney to *compromise* a debt does not authorize the attorney to enter into any speculation by which the value of the security may perchance be enhanced, nor does it authorize the discharge of the security but upon the receipt of the debt or such an amount as upon *compromise* might be taken in satisfaction thereof. *Chilton v. Willford*, 2 Wis. 1.

Distinguished from Accord and Satisfaction. — The plaintiff was the assignee of a contract with the defendants for cutting timber on certain land. After working for some time, the defendants made complaint of his manner of doing the work, and directed their workmen to take possession of the premises, and declared the contract forfeited. This the workmen attempted to do, but were only in possession about two hours when they were ejected by the plaintiff's employees, and the plaintiff re-

sumed possession, and was not afterwards disturbed. On the following day the plaintiff with his attorney, and one of the appellants and his attorney, met for the purpose of an adjustment of the difficulties. A contract in writing was entered into whereby it was agreed that the former contract should be surrendered and canceled, that the defendants should pay the plaintiff a certain sum, in full, for all improvements made on the premises, and should pay him on a settlement for all the work done under the contract according to the terms thereof. The parties attempted to settle the balance due under the old contract, but were unable to do so. It was held that this agreement was not an accord, but a *compromise*. The court said: "This case was unfortunately tried on a wrong basis throughout. It was assumed that the agreement of May, 1892, was an accord, and, as its terms had not been fully carried out, that there had been no satisfaction; that the agreement was therefore inoperative, and the parties were remitted to their rights and liabilities under the original contract. This was a radical error. The agreement of May, 1892, was a *compromise* of disputed rights. The defendants claimed that the plaintiff was violating the contract in such manner as to entitle them to rescind, and they had in fact taken possession of the land a short time before by force. The plaintiff, on the other hand, claimed that he was pursuing his contract rights, and he had in turn ousted the defendants by force from the land. The parties then came together, agreed upon a settlement, put its terms in writing, which was signed by both, and partly carried out. Such an agreement is not an accord, but a *compromise*, and is as binding as any other contract." *Flegal v. Hoover*, 156 Pa. St. 276.

Compromise of Doubtful Claims as Consideration.

— See the title CONSIDERATION, *post*.

1. *Exchange Bank v. Reg.*, L. R. 11 App. 165. It was further said in that case that the term is never used in the general sense of debtor or person responsible.

2. *Chevalier v. Hyams*, 9 La. Ann. 484. See generally the title ACCOUNTS, vol. 1, p. 433.

3. **Acknowledgments.** (See the title ACKNOWLEDGMENTS, vol. 1, p. 483.) — In a certificate of acknowledgment of a married woman, the use of the terms, "without undue influence or *compulsion* of her husband," is a sufficient compliance with a statute which requires the acknowledgment to be that the deed was executed "of her own free will," without undue influence or *compulsion* of her husband. *Tubbs v. Gatewood*, 26 Ark. 128.

A certificate of acknowledgment by a married woman that she executed the same voluntarily, without any fear, threats, or *compulsion*, shows a substantial compliance with a statute providing that she shall sign of her own free will and accord, and without con-

COMPULSORY PARTITION.—See the title PARTITION.

COMPULSORY PAYMENT.—See the titles EXTORTION; PAYMENT; TAXATION.

COMPULSORY PROCESS. (See ENCYC. OF PLEADING AND PRACTICE, titles HABEAS CORPUS; SERVICE OF PROCESS; SUBPENA; SUMMONS.)—"Compulsory process" for a witness signifies and means a process which will compel the attendance of such witness; a process which will bring a witness into court who refuses to come without.¹

COMPULSORY PURCHASE. (See also the title EMINENT DOMAIN.)—The taking of property under the power of eminent domain has been called a "compulsory purchase."²

COMPUTATION OF TIME.—See the title TIME, COMPUTATION OF.

COMPUTE.—See note 3.

CONCEAL—CONCEALMENT. (See also ABSCOND, vol. 1, p. 201; and the titles ATTACHMENT, vol. 3, pp. 195, 197, 202; CARRYING WEAPONS, vol. 5, p. 729; EXECUTIONS; FRAUD AND MISREPRESENTATIONS.)—To conceal is to hide or withhold from observation; to cover or keep from sight.⁴ The

straint. The court says: "A voluntary act proceeds from one's own free will; done by choice or by one's own accord; unconstrained by external interference, force, or influence; not prompted or suggested by another. Wor. Dict.; Imp. Dict. 'Voluntarily' expresses by the use of one word all the force and meaning of the phrase, 'of her own free will and accord.' *Compulsion* and constraint are synonyms when used in reference to extrinsic power, force, or influence, as when exercised by one person on another. Mrs. Hester's acknowledgment that she signed the mortgage 'voluntarily, without any fear, *compulsion* or threats of her said husband,' is of equivalent import and meaning with the expression, 'of her own free will and accord, and without fear, constraints, or threats on the part of her husband.'" Gates v. Hester, 81 Ala. 359. See generally CONSTRAINT.

Compulsory Synonymous with Involuntary.—See *Re Whitney*, 2 Lowell (U. S.) 455.

1. *Ex p. Marmaduke*, 91 Mo. 238. That case arose under the Constitution of *Missouri*, which provided that in all criminal prosecutions the accused should have the right to have *compulsory* process for witnesses in his favor.

2. *Little Rock Junction R. Co. v. Woodruff*, 49 Ark. 381.

3. **Libel and Slander.**—An allegation, in a plea of justification in libel, that the plaintiff, the cashier of a bank, "unfairly and secretly *computed*" the amount of a certain note does not necessarily imply that he was guilty of "moral obliquity," of which he was accused in the language alleged to be libelous. *Kerr v. Force*, 3 Cranch (C. C.) 8.

Estimate in the Sense of Compute.—See *Tully v. Felton*, 177 Pa. St. 344. See also ESTIMATE.

4. *Ray v. Donnell*, 4 McLean (U. S.) 514; *Driskell v. Parrish*, 3 McLean (U. S.) 631; *Taylor v. Bruscup*, 27 Md. 226. In the last case it was held that an application by an administrator to the Orphans' Court, invoking its authority to require the production of any part of the personal estate of his intestate, must allege that the same is *concealed*. The court said: "The argument of the appellee, that the

word *conceal* is manifestly the synonym of 'withholding,' is not sustained by any lexicographer we have consulted, or the popular sense of the term. Secrecy is an essential ingredient of the act of *concealment*. 'To hide or withhold from observation, to cover or keep from sight,' are the meanings technically and popularly conveyed by the word *conceal*. It can scarcely be imagined that the extraordinary power of requiring an answer upon oath, with the summary process of attachment, sequestration, and commitment, were to be exercised by a court of special limited jurisdiction in every case in which the administrator or executor should allege a third person withheld property which belonged to the estate of the deceased." See also the title EXECUTORS AND ADMINISTRATORS.

Concealment Implies Design or Purpose.—*Jordan v. Pickett*, 78 Ala. 339; *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 425; *American Artistic Gold Stamping Co. v. Glens Falls Ins. Co.*, 1 Misc. Rep. (N. Y. C. Pl.) 114. But compare *Harper v. Pope*, 9 Mo. 402, set out *infra*, this note.

Harbor or Conceal—Fugitive from Labor. (See also HARBOR; and see the title APPRENTICES, vol. 2, p. 507.)—In *Driskill v. Parrish*, 3 McLean (U. S.) 631, it was held that "to harbor or *conceal*" a fugitive from labor, under an act imposing a penalty for so doing, must be with a view to elude the claim of the master.

In the Act of Congress "harbor" and *conceal* were not synonymous; there may be a harboring without *concealment*. *Van Metre v. Mitchell*, 2 Wall. Jr. (C. C.) 311. The court said: "What amounts to *concealment*, also, may depend much on circumstances. It does not necessarily require that the subject of it be secreted in a garret or a cellar, a barn or a covered wagon. The highways of a remote and uncultivated county * * * may be better places of *concealment* than the byways of many other places."

A similar statute was interpreted in the same way in *Alabama*, where it was held that harboring and *concealing* were distinct offenses, and that a person might be convicted of the former, though there were no *conceal-*

word "conceal," according to the best lexicographers, signifies to withhold

ment. McElhanev *v.* State, 24 Ala. 71. The contrary was held in Driskill *v.* Parrish, 3 McLean (U. S.) 631, where it was said that the two constituted one and the same offense.

To *conceal* another's slave is to hide and harbor the slave. Therefore, a verdict which finds *concealing* and employing, finds harboring, hiding, *concealing*, and employing. Cook *v.* State, 26 Ga. 593.

Statutes of Limitations—Debtor. (See also the title LIMITATION OF ACTIONS.) Where a party in Kansas passed under his real name, engaged in the same line of business he had always pursued, lived as open and public a life as others engaged in the same business, and in his life and conduct there did nothing to prevent his neighbors or those coming into the vicinity from knowing who he was or whence he came, or to prevent the service of process upon him, it was held that it could not be said that he *concealed* himself within the meaning of the *Kansas* statute of limitations, although he had before coming to this state absconded from his former place of residence, and although his creditors at such former residence had failed after reasonable diligence to ascertain his whereabouts. Frey *v.* Aultman, 30 Kan. 181.

In Rhoton *v.* Mendenhall, 17 Oregon 199, it was held that the word *concealed*, as used in the *Oregon* statute of limitations, meant some affirmative act done in that state, such as passing under an assumed name, change of occupation, or any act by the defendant which tends to prevent the community in which he lives from knowing who he is or whence he came. The court cited Frey *v.* Aultman, 30 Kan. 181, set out *supra*.

Same—Intent.—In Harper *v.* Pope, 9 Mo. 402, it was held that the *concealment* mentioned in the statute of limitations need not be with a fraudulent intent. The court said: "It is contended that the term *concealing*, *ex vi termini* imports a wrongful act, and so also it may be said of every act of a debtor the effect of which would be to prevent his creditors from commencing an action against him; besides, the statute couples it with the words, 'any other improper act,' thereby showing that the *concealment* must be improper. But does it follow that every improper act of a party is fraudulent? If a debtor should improperly or even fraudulently attempt to *conceal* himself, but should so far fail in his attempt as to defeat the service of process on him, I apprehend it would be a matter of but little consequence to inquire into his intention. Equally unimportant would be the inquiry into the intention of a party who continued *concealed*, so as to prevent the service of process. I am led then to the conclusion that that construction should be given to the statute which shall refer the question rather to the effect of a debtor's act than to his intention. The necessity is not perceived of imposing the burden upon a plaintiff of establishing before a jury the existence of a fraudulent act in the mind of his debtor. An issue thus framed would be less tangible than one upon the consequence of a party's act, and would not so well promote the ends of justice."

Same—Cause of Action.—The word *conceal*, according to the best lexicographers, signifies to withhold or keep secret mental facts from another's knowledge, as well as to hide or secrete physical objects from sight or observation. Hence the *concealment* of the fact of the falsification of certain facts which would constitute a cause of action is a *concealment* of a cause of action, within an exception to a statute of limitation. Gerry *v.* Dunham, 57 Me. 334.

Concealment of a cause of action must be something more than mere silence; it must be an arrangement or contrivance to prevent subsequent discovery, and must be of an affirmative character. Boyd *v.* Boyd, 27 Ind. 429.

Same—Concealment of Crime.—The words "*conceals* the facts of the crime," in a statute of limitations, have been held to mean the *concealment* of the fact that a crime has been committed, unconnected with the fact that the accused is the perpetrator. The *concealment* must be the result of some positive act of the accused, calculated to prevent a discovery of the commission of the offense with which he stands charged. Robinson *v.* State, 5 Cent. L. J. 453.

A statute provided that a prosecution for larceny should be barred in two years, except where the person committing the offense *concealed* the fact of the crime. It was held that it does not follow that because the owner of the stolen goods has no knowledge of the fact that the goods have been stolen, there has been a *concealment* of the fact on the part of the thief. Free *v.* State, 13 Ind. 324.

Insolvency. (See also the title INSOLVENCY AND BANKRUPTCY.)—In O'Neil *v.* Glover, 5 Gray (Mass.) 159, the court said: "What facts, under the insolvent law, would constitute a *concealment* of property, is a question of greater difficulty. The words of the statute have just been cited. By the *concealing* of property to prevent its being attached or taken on any legal process, is physical *concealment* meant, a literal secreting or hiding of the property only; or does it also include the doing of any acts by which, in substance and effect, the title of the party to the estate, real or personal, shall be concealed, his property in the chattel or land or stock so covered up that it cannot be reached by the process of the law? We think the latter is the true construction of the statute."

Same—Real Property.—A statute authorized proceedings against any person suspected of having fraudulently received, *concealed*, embezzled, or conveyed away any property of an insolvent. The statute was held to apply to real property. The court said: "The term 'received,' and perhaps the term *concealed*, will apply to the obtaining of real estate as well as personal. One who takes an apparently legal title to real estate, which is void in consequence of some secret defect or vice, in common parlance is said to cover up such estate, or to *conceal* it." Harlow *v.* Tufts, 4 Cush. (Mass.) 453.

Revenue Laws. (See also the title REVENUE LAWS.)—A statute provided that collectors should have authority to search vessels for

or keep secret mental facts from another's knowledge, as well as to hide or secrete physical objects from sight or observation.¹

concealed goods, and all such goods on which the duty should not have been paid should be forfeited. The court said: "The term **concealed** used in this section is one of plain interpretation, and obviously applies to articles intended to be secreted and withdrawn from public view on account of their being so subject to duties, or from some fraudulent motive." The fraudulent removal from the storehouses agreed upon by the collector and the importer, by some person other than the claimants, who were *bona fide* purchasers, and without their knowledge and consent, is not such a **concealment**. *U. S. v. 350 Chests of Tea, 12 Wheat. (U. S.) 486.*

The mere act of resisting the officers of the customs, in the seizure of goods, and casting the packages of goods out of a window of a stable, whereby they were entirely removed from the possession of the officers, does not *per se* constitute a **concealing** of the goods, which under statute would work a forfeiture, although it may have led to a **concealment**. *U. S. v. Farnsworth, 1 Mason (U. S.) 1.*

Homicide. (See also the title **HOMICIDE**).—**Concealed** is not synonymous with "lying in wait" in a statute defining murder; in order to constitute homicide murder, the concealment must be for the purpose of killing. A person concealed may kill another without being guilty of murder. *People v. Miles, 55 Cal. 207.*

Same — Claim Against the County. (See also the titles **COUNTIES**; **HOMICIDE**; **MUNICIPAL CORPORATIONS**).—A statute gave a penalty against a county where a person was killed by a party or parties disguised. It was held that a person in ambush or **concealed** in the bushes was not a person disguised. The court said: "**Conceal** means, first, to hide, or withdraw from observation; second, to withhold from utterance or declaration. The synonyms of **conceal** are, to hide, disguise, dissemble, secrete. To hide is generic; **conceal** is simply not to make known what we wish to secrete; disguise, or dissemble, is to **conceal** by assuming some false appearance; to secrete is to hide in some place of secrecy. A man may **conceal** facts, disguise his sentiments, dissemble his feelings, or secrete stolen goods. The verb 'disguise' means, first, to change the guise or appearance of, especially to **conceal** by an unusual dress; to hide by a counterfeit appearance; second, to affect or change by liquor, to intoxicate. The noun 'disguise' means, first, a dress or exterior put on to **conceal** or deceive; second, artificial language or manner, assumed for deception; third, change of manner by drink; slight intoxication. This learning I derive from Mr. Webster, and I am satisfied with it. I can hardly conceive of things better distinctly marked and different than that of a person or persons in ambush, or **concealed** in the bushes, where a person so **concealed** lies in wait to attack by surprise; and a person or persons in disguise, or disguised by an unusual dress." *Dale County v. Gunter, 46 Ala. 142.*

Receiving Stolen Goods. (See also the title **RECEIVING STOLEN GOODS**).—A statute en-

larged the common-law offense of receiving stolen goods, providing that it should be an offense to aid in the **concealment** of any property stolen. In construing this statute, the court said: "If we narrow down the word **concealment** as an equivalent to or synonymous with the words 'hide' or 'secrete,' then the charge was too general in its terms. But if we give it a more enlarged sense, and one that comports with its literal signification, we shall find the charge to have been correct; and, further, we shall carry out the evident intention of the legislature, by making the remedy commensurate with the evil. * * * Any disposition of the property which would have a tendency to **conceal** it from the observation of the owner is within the meaning of this law, and it cannot be presumed that the thief could convert the stolen property to his own use without using means to **conceal** it from the owner; therefore, it will follow that the charge of **concealment** may be well sustained by evidence tending to show that the defendant aided the thief in converting the stolen property to his own use." *People v. Reynolds, 2 Mich. 424.*

Same — Horse.—It was held within a statute against **concealing** stolen goods that an attempt to destroy the means of identifying a horse was equivalent to **concealment**. The court said: "The charge of the court in regard to what constitutes **concealing** the property is unexceptionable. A horse may be **concealed**, within the meaning of the statute, by destroying the means of identifying him as well as in any other manner. The word **conceal** was not used in the statute in a technical sense. It includes all acts done which render the discovery or identification of the property more difficult." *State v. Ward, 49 Conn. 442.*

Prosecution for Concealing Property with Intent to Defraud Creditors.—Upon the question of what constitutes the offense of buying, receiving, or **concealing** personal property, for the purpose of hindering, delaying, or defrauding any person who has a valid claim thereto, under the Code of *Alabama*, the court, in *Thomas v. State, 92 Ala. 51*, said: "The word **conceal** in this statute is employed in its primary sense: 'to hide from sight or observation; to secrete; to cover.' It implies some act done, or procured to be done, which is intended to prevent or hinder the discovery of the thing searched for. A mere failure or refusal to give information is not enough. If it were, a mere stranger, having knowledge of the whereabouts of property to which another has a claim, and refusing to disclose it, would incur the odium attached to this statutory crime." In that case it was held that knowledge of the claim must precede the act of buying, selling or **concealing**. See also the titles **FALSE PRETENSES**; **LIENS**; **RECEIVING STOLEN GOODS**.

A Deed which has been recorded according to law cannot be said to be **concealed**. *Dick v. Balch, 8 Pet. (U. S.) 30.*

1. *Gerry v. Dunham, 57 Me. 339.*

Insurance. (See also the titles **FIRE INSURANCE**; **LIFE INSURANCE**; **MARINE INSURANCE**.)

CONCEALED WEAPONS. — See the title CARRYING WEAPONS, vol. 5, p. 732.

— In *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 425, Shaw, C. J., said: "*Concealment* is the designed and intentional withholding of any fact material to the risk, which the assured, in honesty and good faith, ought to communicate to the underwriter; mere silence on the part of the assured, especially as to some matter of fact which he does not consider it important for the underwriter to know, is not to be considered as such *concealment*. *Aliud est celare, aliud tacere*. And every such fact, untruly asserted or wrongfully suppressed, must be regarded as material, the knowledge or ignorance of which would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of the premium. If the fact so untruly stated or purposely suppressed is not of this character, it is not a misrepresentation or *concealment* within this clause of the conditions annexed to the policy."

Concealment is the wilful withholding of some facts material to the risk, which the insurer had a right to know, and which the insured was under duty to disclose. *American Artistic Gold Stamping Co. v. Glens Falls Ins. Co.*, 1 Misc. Rep. (N. Y. C. Pl.) 114.

A neglect to communicate that which a party knows and ought to communicate is called a *concealment*. *McNamara v. Dakota F. & M. Ins. Co.*, 1 S. Dak. 349.

Vendor and Purchaser — Fraudulent Concealment. (See also the titles FRAUD AND MISREPRESENTATION; FRAUDULENT SALES AND CONVEYANCES; VENDOR AND PURCHASER.) — In *Steele v. Kinkle*, 3 Ala. 357, it is said: "A fraudulent *concealment* is the failure to disclose a material fact, which the vendor knows himself, which he has a right to presume the person he is dealing with is ignorant of, and [with] the existence of which the other party cannot, by ordinary diligence, become acquainted. Although fraud may be inferred from other facts, it is never presumed, and it would be the grossest injustice to infer fraud from the mere silence of a vendor of the existence of an incumbrance, where the abstract of the title was sufficient to put the purchaser on inquiry."

So, in *Bartholomew v. Warner*, 32 Conn. 103, it is said that the term *conceal* implies something more than a mere failure to disclose. See also the title IMPLIED WARRANTY.

In *Young v. Bumpass*, Freem. (Miss.) 249, it is said that: "The true definition of undue *concealment*, which amounts to fraud in the sense of a court of equity, and for which it will grant relief, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate, and which the other party has a right, not merely *in foro conscientia*, but *juris et de jure*, to know. 1 Story Eq. 216." See also *Paul v. Hadley*, 23 Barb. (N. Y.) 524.

CONCEALMENT OF BIRTH OR DEATH.

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As to other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ABORTION*, vol. I, p. 186; *CRIMINAL LAW*; *HOMICIDE*.

I. ORIGIN AND HISTORY OF STATUTES — 1. In England. — While the killing of a child born alive is murder or manslaughter,¹ the killing of an infant while it is yet in its mother's womb is not homicide.² In order to establish homicide in any degree, therefore, in cases of infanticide, it is necessary to prove that the infant was living when born; but in one class of cases, namely, in the case of the murder of bastard children by their unnatural mothers, this proof was attended with so much difficulty that it was enacted in England by statute 21 James I., in 1624, that if any woman, on being delivered of a child which if born alive would be a bastard, endeavored privately, either by drowning or secret burial, or in any other way, either by herself or the procuring of others, to conceal the death of the child, so that it might not come to light whether it was born alive she should suffer death, as in the case of murder, unless she could prove by at least one witness that the child was born dead.³ A similar

1. *Rex v. Senior*, 1 Moo. C. C. 344; *Reg. v. West*, 2 C. & K. 784, 61 E. C. L. 784; *Peters v. State*, 67 Ga. 29. And see the title *HOMICIDE*.

When Child Deemed to be Born Alive. — A child born alive within the meaning of the law is where the whole body is brought into the world alive. If the child dies in the progress of the birth it is not deemed to be born alive so as to make the killing murder. *Rex v. Poulton*, 5 C. & P. 329, 24 E. C. L. 344.

If a child has breathed before it is born, this is not sufficiently life to make the killing of such child murder. There must be an independent circulation in the child, or the child cannot be considered alive for this purpose. *Rex v. Enoch*, 5 C. & P. 539, 24 E. C. L. 446.

2. 4 Bl. Com. 198; 1 Russ. on Crimes (9th ed.) 670. And see the title *ABORTION*, vol. I, p. 186.

3. **Statute 21 James I. Construed Favorably to Accused.** — This statute has frequently been reprobated by courts and text-writers as barbarous and sanguinary, *State v. Conover*, 4

Crim. L. Mag. 236; and on account of its severity was always construed in a manner favorable to the accused mother; thus, where it appeared that a woman who was alone in a chamber went to bed without pain, and during the night awoke and knocked for help, but could get none, and was delivered of a child, which she concealed in a trunk and did not discover it until the following night, it was held that she was not within the statute. *Davis's Case*, Kel. 32, 2 Bacon's Abr. 107.

So if the mother confessed herself with child or made provision for the birth by preparing clothing. *Rex v. Peat*, 1 East P. C. 228, 2 Bacon's Abr. 107.

The presence of an accomplice at the birth took the case out of the statute. *Rex v. Peat*, 1 East P. C. 229.

The Statute Created No New Offense, but only made the concealment undeniable evidence of murder, and consequently it was not necessary to conclude the indictment *contra formam statuti*. *Rex v. Davis*, Kel. 32, 1 East P. C.

enactment remained in force until 1803, when it was superseded by 43 Geo. III., c. 58, which abolished the harsh presumption created by 21 James I., and declared that the ordinary rules of evidence should govern in the trial of a mother for the murder of her bastard offspring, but permitted the jury in such a case to find an attempt to conceal the birth, although acquitting on the charge of murder.¹ This statute was repealed by 9 Geo. IV., c. 31, in 1828,² which was in its turn replaced by 24 and 25 Vict., c. 100, § 60. The last named statute is still in force. It makes concealment of birth by any secret disposition of the dead body of a newly born infant, whether it died before or after its birth, a substantive offense. This enactment is not confined to bastards, nor does it limit criminal liability to the mother of the child, but renders criminal every person who endeavors to conceal the birth.³

2. In the United States. — The statutes in the United States, tracing back to the Provincial Statutes, owe their origin to the statute of James I. They are in the main modeled after that statute. Some of them make the offense consist in concealing the "death" of the child; others, like the statutes of 9 Geo. IV. and 24 and 25 Vict., in concealing the "birth."⁴ By many of these statutes the concealment of the death of a bastard child is made a substantive statutory offense, a misdemeanor by some, a felony by others.⁵ Some of the statutes make a separate substantive offense of concealing pregnancy and being willingly and of purpose delivered alone in secret.⁶ Other statutes create two offenses; one consisting in secretly disposing of the dead body of a new-born child, the other in endeavoring to conceal the birth of such child.⁷

II. ESSENTIALS OF THE OFFENSE — EVIDENCE — 1. In General. — As this offense is entirely statutory, and as the statutory definitions of the offense vary somewhat in different jurisdictions, the local statute must be considered in determining what are the precise elements of the criminal act, and also in deciding how far a decision under any other statute is applicable.

2. Intent of Act of Concealment. — In order to constitute the offense of concealing birth or death, there must be an intent to conceal the birth or

348. See also *Dunn v. State*, 57 Ark. 562; *State v. Jeffreys*, 3 Murph. (N. Car.) 481.

In *North Carolina* this statute was in force until repealed by act of the legislature. *State v. Jeffreys*, 3 Murph. (N. Car.) 480.

1. This statute did not make the concealment an offense for which an indictment could be preferred. *Rex v. Parkinson*, cited in 1 Russ. on Cr. (9th ed.) 774.

As to a verdict for concealment under this statute, where murder was charged, see *Rex v. Maynard, R. & R.* 240; *Rex v. Cole*, 3 Campb. 371; 2 *Leach C. C.* 1095; *Dobson's Case*, 1 Lew. 43; *Moylan's Case*, 1 Lew. 44.

Making Provision for Birth. — Like 21 James I., this statute was liberally construed in favor of the accused. Thus where a woman was delivered of a child whose dead body was found at her father's house, in a bed among the feathers, and there was no evidence to show who placed it there, but it was proved that the woman had sent for a surgeon at the time of her confinement, and had prepared child's clothes, the judge directed an acquittal on the charge of endeavoring to conceal the birth. *Rex v. Higley*, 4 C. & P. 366, 19 E. C. L. 421.

2. Statute 9 Geo. IV., c. 31, makes concealment of birth a substantive misdemeanor. Its terms do not limit it to bastards only, but it was directed only against concealment by the mother

of the infant. It continued the provision of 43 Geo. III., c. 58, allowing an acquittal of a mother charged with murder, and a verdict of concealment of birth.

3. The Present English Statute, like its two predecessors, allows a person indicted for murder to be convicted of concealment.

4. Statutes in United States. — *Sullivan v. State* 36 Ark. 64; *Dunn v. State*, 57 Ark. 560; *Com. v. Williams*, 6 Gray (Mass.) 12; *State v. Kirby*, 57 Me. 30; *State v. Conover*, 4 Crim. L. Mag. 233; *Pennsylvania v. McKee*, Add. (Pa.) 1.

5. Concealment a Substantive Offense. — *Dunn v. State*, 57 Ark. 562; *Brightly's Purdon's Dig.* (Pa.) 472. See the statutes of the several states.

Under an indictment for concealing the death of a bastard child, under Mansf. Dig., § 1543 (Ark.), providing that "every such mother shall suffer the same punishment as for manslaughter," it is error to treat the indictment as charging the crime of manslaughter. The statute defines a new offense, which consists not in causing the child's death, but in concealing it. If the mother has, in fact, killed her child, she may be indicted and punished for the homicide. *Dunn v. State*, 57 Ark. 562.

6. State v. Conover, 4 Crim. L. Mag. 233.

7. State v. Stewart, 93 N. Car. 539.

death, or to conceal the body of the child,¹ and if the facts are such as to show that the disposal of the body, although apparently equivocal in character, was not intended to be a concealment, there can be no conviction.²

3. Birth and Death of Child — Birth Alive Held Essential. — Under the humane interpretation given by the courts to the cruel enactment of James I., presumptive evidence was required that the child was born alive;³ and in the *United States* it is held, under some enactments making concealment a substantive crime, that evidence that the child was born dead takes the case out of the statute.⁴

Birth Alive Immaterial. — Under the present *English* statute, as under 9 Geo. IV., c. 31, it is immaterial that the child was born dead;⁵ but it has been held that the foetus must have attained a sufficient development in the womb to give it a chance of life in order to be a "child" within the statute.⁶

1. Intent. — *Reg. v. Clarke*, 4 F. & F. 1040; *Reg. v. Brown*, L. R. 1 C. C. 244; *State v. Conover*, 4 Crim. L. Mag. 233.

Where it was shown that on the day following the night on which the child was born, the mother buried it in a rather secluded spot near the house, in a shallow grave, covering the body first with dirt, next with stones, and spreading leaves and brush over all; that she had denied her pregnancy and informed no one of the birth; that when she saw persons at the grave on the day after the burial, she left home and walked several miles, until she could go no further on account of weakness; it was held that there was evidence on which the jury might find a purpose to conceal the birth, although the mother testified that the child, as a result of a fall, was born dead before its time, that there was no intention to conceal the birth, and that she had no friends near, and the people had threatened to burn her house. *State v. Ihrig*, 106 Mo. 267.

2. Involuntary Delivery While at Stool. — Where the statute declares that any woman shall be guilty of a misdemeanor who, after being delivered of a child, shall by secret disposition of the dead body endeavor to conceal its birth, it is necessary to prove some act of disposal after the child's death; and where a woman had gone to a privy for another purpose, and the child came from her unawares and fell into the soil and was suffocated, it was held that a conviction was improper, although she had denied the birth of the child. *Reg. v. Turner*, 8 C. & P. 755, 34 E. C. L. 622, *construing* 9 Geo. IV. See also *Reg. v. Derham*, 1 Cox C. C. 56.

But where the child is found under the seat of a privy it is for the jury to say whether it was cast there by the mother after its death, or came from her unawares while there for another purpose. *Reg. v. Coxhead*, 1 C. & K. 623, 47 E. C. L. 623.

A woman who was pregnant with a child which, if born alive, would have been a bastard, and who had informed her mother and her paramour of her condition, having gone to a privy for another purpose, being suddenly taken with the pains of labor, and too weak to arise, was delivered of a child which dropped into a vault below. She testified that she had not felt the child move for several days before her delivery, and supposing it was dead, said nothing about it. The body was not found for some weeks, and was then in so decom-

posed a condition that it was impossible to say whether the child had been born alive. It was held by the court, the defendant having waived a jury, that the facts would not warrant a conviction for concealment of birth. *State v. Conover*, 4 Crim. L. Mag. 233.

3. Presumptive Evidence of Birth Alive. — 4 Bl. Com. 108. In *Pennsylvania v. McKee*, Add. (Pa.) 1, the court, speaking upon this subject, said: "Want of hair, nails, etc., or other circumstances of a premature birth, must be evidence in favor of the prisoner. Circumstances of maturity, marks of violence, etc., are evidence against her." See, to the same effect, *Rex v. Peat*, 1 East P. C. 229; *State v. Joiner*, 4 Hawks (N. Car.) 352.

4. Statutes under Which Birth Alive Essential. — In *Maine*, where the statute renders criminal the concealing the death of the child "so that it is not known whether it was born dead or alive," the accused is entitled to an acquittal if it be made to appear that the child was born dead, for the statute looks to a concealment "so that it is not known" at any time, past or present, whether or not the child was born alive. *State v. Kirby*, 57 Me. 33.

In *North Carolina*, under an enactment the wording of which was closely modeled on the statute of James I., but which made the concealment of the death of a bastard a misdemeanor, it was held necessary to prove the birth of the child alive, it being considered that the concealment of the birth of a child born dead was no offense within the statute; but it was held that the presumption was that the child was born alive, and the burden of showing the contrary was on the accused. *State v. Joiner*, 4 Hawks (N. Car.) 350.

Under the present Code of North Carolina, it appears that the offense denounced in the statute (N. Car. Code 1883, § 1004) is the secret disposal of the dead body of a child born alive, or the endeavor to conceal the birth of such a child. *State v. Stewart*, 93 N. Car. 539.

See also *State v. Conover*, 4 Crim. L. Mag. 233; *State v. Love*, 1 Bay (S. Car.) 167.

5. Under the statute of 9 George IV., c. 31, and under the present *English* statute, it is immaterial whether the child died before, at, or after its birth. *Reg. v. Coxhead*, 1 C. & K. 623, 47 E. C. L. 623.

6. When Foetus Deemed a "Child." — It has been held that it must appear that the child has gone such a length of time in the womb that it would, in the ordinary course of things,

It is essential also to show the death of the child.¹

Under some statutes in the *United States*, the birth of the child alive or dead is deemed immaterial, although the death of the infant must be alleged and proved.²

4. What Is Sufficient Concealment or Disposal.—The gist of the offense created by the statutes as to concealing the birth or death of children lies in an act of concealment, and a concealment must, therefore, be alleged and proved.³ It appears that the act of concealment to be within the statutes must be an endeavor to effect a perpetual concealment,⁴ not from an individual, but from the world at large.⁵

Need Not Be Final.—The concealment need not be final, but if intended as temporary merely, and made with the intention of a subsequent final disposition, is within the statute.⁶

Existence of Confidant Does Not Prevent Act Being Concealment.—The act of conceal-

when born, have a fair chance of life. Under seven months it may fairly be presumed that it would not be born alive. *Reg. v. Berriman*, 6 Cox. C. C. 388.

In *Reg. v. Colmer*, 9 Cox C. C. 506, it was held, however, that a foetus not bigger than a man's finger, but having the shape of a child, is a child within the statute 24 and 25 Vict., c. 100, § 60.

On an indictment for concealing the birth of a child it appeared that the prisoner had been confined of a child which had not attained to seven months from conception. It had never lived, and was slightly malformed. It was left to the jury to say whether the offspring had so far matured as to become a child, or was only a foetus, or the unformed subject of a premature miscarriage. *Reg. v. Hewitt*, 4 F. & F. 1101.

1. Proof of Child's Death Essential to Concealment of Birth.—*Reg. v. Bell*, 8 Ir. R., C. L. 542; *Rex v. Davis*, 1 Russ. on Cr. (9th Am. ed.) 779; *Perkins's Case*, 1 Lew. 44.

Act of Disposal After Death.—As a consequence of the language of 9 Geo. IV, c. 31, and 24 and 25 Vict., c. 100, § 60, it is necessary to prove some act of disposal after the death of the child in order to constitute the offense. *Reg. v. Turner*, 8 C. & P. 755, 34 E. C. L. 622.

Dead Body Must Be Found.—In *Reg. v. Williams*, 11 Cox C. C. 684, it is held that a dead body must be found and identified as that of the child of which the mother is alleged to have been delivered.

Secret Disposition of Living Child.—Where a mother, to conceal the birth, put her child alive in the corner of a field to die from exposure, and it was found dead, she was held not to have committed this statutory offense, though she was guilty of a crime at the common law. *Reg. v. May*, 10 Cox C. C. 448, 15 W. R. 751, 16 L. T. N. S. 362.

2. Birth Alive or Dead Immaterial—Death Must Be Proved.—*State v. Ellis*, 43 Ark. 93; *State v. White*, 76 Mo. 96.

Where a statute makes penal the concealing of the death of a child so as to prevent its coming to light whether the child is born dead or alive, it is immaterial whether the child be born alive or dead, but it must be averred and proved that there was an attempt to conceal the child's death, and therefore the death is a material fact. *Douglass v. Com.*, 8 Watts

(Pa.) 535, where an indictment was held bad because there was no direct averment of the child's death. See also *Boyles v. Com.*, 2 S. & R. (Pa.) 40.

3. As to what is a sufficient allegation of concealment, see 4 ENCYC. PL. AND PR. 625.

4. Endeavor to Conceal so that Fact of Birth Alive Not Known.—See *State v. Kirby*, 57 Me. 30, where, under a statute denouncing concealing the birth of a child "so that it is not known whether it was born dead or alive," it was held that the words "is not known" mean is not known at any time past or present, and therefore that evidence that the child was born dead entitles the accused to acquittal.

5. Concealment through Fear of an Individual.—Where a girl secretly threw her dead child into a pond, and said she should have had it buried in the churchyard only that she was afraid of provoking her father, *Coltman, J.*, said that if the jury should believe this, she was not guilty, as the offense contemplated by the statute (9 Geo. IV., c. 31) was the endeavor to conceal the birth from the world at large, and not from an individual. *Reg. v. Morris*, 3 Cox C. C. 489.

6. Temporary Disposition of Body of Child.—*Reg. v. Goldthorp*, 2 Moo. C. C. 244; *Reg. v. Farnham*, 1 Cox C. C. 349; *Reg. v. Gogarty*, 7 Cox C. C. 107.

Thus where the mother of a child, of which she had been recently delivered, placed it under a bolster on which she laid her head, the act being done with the intention of concealing the body, it was held that she might properly be convicted of endeavoring to conceal the birth by secretly disposing of the dead body, although she meant to remove the body elsewhere when an opportunity offered. *Reg. v. Perry, Dears*, C. C. 471, 6 Cox C. C. 531, 1 Jur. N. S. 408.

The previous doctrine overruled by these cases was that the act of disposal must have been intended to be final, and therefore, if a prisoner was interrupted in the act of disposal, or the body was deposited in a place from which a further removal was contemplated, that the act did not apply. *Rex v. Snell*, 2 M. & Rob. 44; *Reg. v. Ash*, 2 M. & Rob. 294; *Reg. v. Bell*, 2 M. & Rob. 294; *Reg. v. Watkins*, 1 Russ. on Cr. (9th Am. ed.) 777; *Reg. v. Halton*, 2 M. & Rob. 294; *Reg. v. Jones*, 2 M. & Rob. 294; *Reg. v. Waterage*, 1 Cox C. C. 338.

ment is not taken out of the statute by the fact that some confidant or participant in the act is informed thereof under a request of secrecy.¹

"Secret Disposition" under 24 and 25 Vict. — Under the English statutes, "a secret disposition" must be shown. What is a secret disposition must depend on the circumstances of the case.² A complete exposure may be a secret disposition, as where the body is placed in a secluded spot;³ and, on the other hand, a disposition in a closed box, where it is known to be constantly resorted to, may indicate that the body is placed there specially for the purpose of discovery, and, therefore, not be a secret disposition within the statute.⁴

Concealment Must Be Such that Birth Dead or Alive May Not Come to Light. — Under a statute which is directed against concealing the death of a child "so that it may not come to light whether it was born dead or alive, or whether it were murdered or not," the act of concealment does not constitute the crime, unless the concealment is effected in such a way as to render it doubtful whether the child was born dead or came to its death by violence.⁵

Illustrations. — In the note will be found stated the facts of several cases where the evidence as a whole was held sufficient or insufficient to warrant a conviction for concealing birth. Of course, in every case the evidence fails unless it connects the accused with the crime.⁶

1. Mother May Be Guilty, Although There Is Confidant. — Reg. v. Morris, 3 Cox C. C. 489; State v. Hill, 58 N. H. 475.

And so, of course, where the statute is directed against the guilty mother, "her aiders, abettors, counselors, and procurers." State v. Conover, 4 Crim. L. Mag. 233.

Under the statute 21 James I., it was held to take the case out of the operation of the act, that an accomplice was present at the birth. Rex v. Peat, 1 East P. C. 229.

2. Bovill, C. J., in Reg. v. Brown, L. R. 1 C. C. 244.

3. Exposure May Be "Secret Disposition." — Per Bovill, C. J., in Reg. v. Brown, L. R. 1 C. C. 244. The facts of this case were that the prisoner had thrown the body of her child over a wall four and a half feet high into a field. It was apparently thrown from a public house yard to which the prisoner had no right of access. A person looking over the wall into the yard could see the body, but persons going through the yard or using it in the ordinary way could not. The field where the body was found was used for grazing, and those going into it in the course of their ordinary business would not come near the body, nor see it, though there was nothing to conceal it except its situation. It was held that there was evidence of a secret disposition to go to the jury.

In Reg. v. Piche, 30 U. C. C. P. 409, the court said: "The most open place, as it is said, might be the most secret place of deposit, if removed from the ordinary haunts and visitation of others. So the most public place of deposit might also be the most secret place, if it were not likely to be resorted to, or were not likely to be suspected as a place of concealment for such a purpose."

Questions for Court and Jury. — Upon indictments for this offense, it is for the court to say whether there has been a secret disposing of the body, *i. e.*, a disposing of it in such a place as that the offense may have been committed, but it is for the jury to say whether, under the circumstances of the case, there has been such a disposing of the body with intent to conceal its birth. Reg. v. Clarke, 4 F. & F. 1040.

4. Placing Body in Position to Attract Attention. — Leaving the dead body of a child in a small box inside a large one which was closed, but not locked or fastened, the boxes being in a bedroom, but in such a position as to attract the attention of those who daily resorted to the room, is not a secret disposition of the body. Reg. v. George, 11 Cox C. C. 41.

Placing the body in an open box in the prisoner's bedroom, and afterwards, on inquiry by the medical man, informing him that the child was in the box where it was found, is not a secret disposition. Reg. v. Sleep, 9 Cox C. C. 559. In this case, Byles, J., said: "There must be a secret disposition [of the body] for the purpose of concealing the birth, * * * and a disposition could only be secret by placing it where it was not likely to be found."

5. Com. v. Clark, 2 Ashm. (Pa.) 105. In this case the court said: "The legislature were aware that such concealments were too often preceded by the actual murder by the mother of her illegitimate offspring; and to arrest the tendency to the commission of the more serious crime, they punished the mere concealment of the death of the bastard child, provided such concealment took place under circumstances rendering it equivocal whether such death was the result of natural causes or of violence. * * * Concealment of death at or about birth, and the dangers connected with such concealment, were the evils proposed to be remedied. It was not mere concealment of the death of a bastard child that required penal infliction, but it was such concealment as prevented the fact from coming to light whether it was born alive or dead, or whether it were murdered or not."

6. Instances of Concealment — Placing Child in Unlocked Box. — Although the fact of the mother having placed the dead body of her newly born child in an unlocked box is not of itself sufficient evidence of concealment of birth, yet where the proof was that the prisoner was a house servant, and went to bed on the 18th of December, and remained in her room until the 20th, when, being discharged, she removed the box to her mother's, and being

5. Bastardy of Child — Bastardy an Essential Element under Some Statutes. — Under the former *English* enactments and under several of the statutes in the *United States*, it is essential to prove that the child the concealment of whose birth or death is charged to constitute the offense would, if born alive, have been a bastard.¹

Bastardy Not an Element under Other Statutes. — But under the recent English acts, and under some of those now in force in the *United States*, the fact that the child, if born alive, would have been a bastard, is not made an element of the offense.²

6. Who May Commit the Offense — Aiders and Abettors — English Statutes. — Under the early English statutes, the mother only could be convicted of con-

asking by the police to take out its contents, was seen to take out a bundle and throw it into the mouth of a flour sack behind the door, and this bundle contained the dead body of a child, this was held sufficient evidence of concealment, even though the box was unlocked and the housemaid had access to it. *Reg. v. Cook*, 11 Cox C. C. 542.

Placing Child Behind a Trunk in a Room. — It appeared that the prisoner, who lived alone, had placed the dead body of the child behind a trunk in the room she occupied, between the trunk and the wall, and on being charged with having had a child, denied it, but when pressed by one of the women present, she pointed out where the body was, and the woman went and got it. Until so pointed out the body could not be seen by any one in the room. The jury having found her guilty of concealment, the court refused to interfere. *Reg. v. Piche*, 30 U. C. C. P. 409.

Throwing a Child Down a Privy by its mother is evidence of an endeavor to conceal the birth. *Rex v. Cornwall*, R. & R. C. C. 337.

Replacing of Things Concealing Body. — It appeared that the child was discovered in an outhouse, alive, but concealed from view by four bundles of rick pegs lying horizontally in front and partly over it, but not touching it; the child was left as it was found, and about an hour afterwards the rick pegs were found to have been partially removed and placed on one side of the child, which was dead, and there was evidence to show that the prisoner alone had been in the outhouse during that hour. Lord Campbell, C. J., said: "There cannot be any reasonable doubt that the prisoner visited the outhouse after the child was dead, and although she did not remove it, any replacing of the clothes or other things by which the body was concealed from view would, I think, be an endeavor to conceal by a secret disposal of the dead body, within the statute." *Reg. v. Hughes*, 4 Cox C. C. 447.

Evidence Insufficient. — Where it appeared that the body of the child was found, a few hours after its birth, on the floor of an attic in a house where the mother lived as a domestic servant, the head severed from the body, and both lying in sheets which had been removed from the bedroom below, which was occupied by the prisoner and her mistress, and in which there was evidence to show that the birth had taken place, but it was doubtful whether the severance of the head from the body was effected there or in the attic; it was held that there was no evidence to warrant the jury in

finding a verdict for endeavoring to conceal the birth. *Reg. v. Goode*, 6 Cox C. C. 318.

Where the body of the child was found, three days after it was born, behind the door of a privy belonging to the house where the mother lived as a domestic servant, in a tub covered over with a small cloth, it was held that there was no conclusive evidence to warrant a verdict of concealment of birth. *Reg. v. Opie*, 8 Cox C. C. 332.

Child Removed by Accomplices — Mother's Complicity Unproved. — Mere proof that a woman was delivered of a child and allowed two others to take away its body was insufficient to convict for concealment of birth, where there was no proof that the child was taken away at her request or privy. *Reg. v. Bate*, 11 Cox C. C. 686.

Body Placed in Dust Bin. — A child was found in a dust bin a day or two after its birth, having been accidentally strangled by the umbilical cord. The mother of the child was a servant in the house where the body was found. Martin, B., was of opinion the dust bin was a place in which the body might be disposed of so as to conceal it, but it was not shown who put the body there, and the prisoner was acquitted. *Reg. v. Clarke*, 4 F. & F. 1040.

1. 21 James I., c. 27; 43 Geo. III., c. 58; Douglass v. Com., 8 Watts (Pa.) 536; Com. v. Clark, 2 Ashm. (Pa.) 111; Boyles v. Com., 2 S. & R. (Pa.) 43.

Arkansas Statute. — Under a statute providing that "if any woman shall endeavor privately, * * * to conceal the death of any issue of her body, male or female, that it may not come to light * * * every such mother shall suffer the same punishment as for manslaughter; nothing in the last preceding section shall be so construed as to prevent such mother from being indicted for the murder of such bastard child," the word "bastard" will be supplied by intendment in construing the sections together, and the first section must be understood as if the word "bastard" were used in it. *Sullivan v. State*, 36 Ark. 66.

Admissible Evidence of Child's Bastardy. — Evidence that the prisoner told a person that she had only mentioned her being with child to the father of it, who had lately got married, has been held admissible to prove the child's bastardy. *Rex v. Poulton*, 5 C. & P. 329, 24 E. C. L. 344. This was an indictment under 9 Geo. IV., c. 31, but the indictment alleged bastardy, proof of which was therefore essential.

2. 9 Geo. IV., c. 31; 24 and 25 Vict., c. 100, § 60; N. Car. Code 1883, § 1004.

cealing the birth of the child,¹ and a person assisting the mother could be indicted only as an aider and abettor.² But by statute 24 and 25 Vict., c. 100, § 60, "every person" may commit the offense as a principal, and may, therefore, be convicted, though the mother is acquitted, and this whether the indictment is for the crime of concealing the birth of the child or for its murder.³

Statutes in the United States. — Some of the statutes in the United States specially provide that the mother, her aiders and abettors, counselors and procurers, shall be punishable.⁴ And under statutes framed against the mother only, aiders and abettors and procurers may be proceeded against and punished by virtue of a general statute declaring such participants in all crimes punishable.⁵ In *Kentucky* it has been held that the offense does not admit of aiders and abettors.⁶

CONCEIVE. — To "conceive" is to think; to understand.⁷

CONCEPTION. (See also the titles BASTARDY, vol. 3, p. 871; CONCEALMENT OF BIRTH OR DEATH; RAPE. And see PREGNANCY; QUICK WITH CHILD.) — "Conception" is the act of conceiving; the first stage of generation on the part of the female.⁸

CONCERN — CONCERNED — CONCERNS. — The verb "to concern" signifies to relate or belong to; to affect the interest of; to be of importance to.⁹

1. See Stat. 43 Geo. III., c. 58; 9 Geo. IV., c. 31; Reg. v. Wright, 9 C. & P. 754, 38 E. C. L. 322.

2. 1 Russ. on Crimes (9th Am. ed.) 775; Reg. v. Bird, 2 C. & K. 817, 61 E. C. L. 817.

Consequently, if there was no evidence to convict the mother, all were entitled to acquittal. Reg. v. Skelton, 3 C. & K. 119; Reg. v. Waterage, 1 Cox C. C. 338.

Mother Acting Through Agent Guilty. — Under 9 Geo. IV., c. 31, if an accomplice was employed by the mother as her agent, to secretly bury or otherwise dispose of the dead body, the mother would be guilty as principal. Rex v. Douglas, 7 C. & P. 644, 32 E. C. L. 670, R. & M. C. C. 480; Reg. v. Bird, 2 C. & K. 817, 61 E. C. L. 817.

3. See Stat. 24 and 25 Vict., c. 100, § 60; 1 Russ. on Crimes (9th Am. ed.) 775.

4. State v. Conover, 4 Crim. L. Mag. 233; State v. Stewart, 93 N. Car. 539.

5. **Indictment of Aiders and Abettors and Accessories.** — In *State v. Sprague*, 4 R. I. 257, it was held that although the *Rhode Island* statute which defines the crime of concealment of birth is directed only against the mother of the child, yet that by virtue of a general enactment which provided that "every person who shall aid, assist, abet, counsel, hire, command, or procure another to commit any crime or offense shall be proceeded against as principal or as accessory before the fact, according to the nature of the offense committed," one who counsels and procures a woman to commit this offense may be punished under an indictment properly framed. But the participation in the offense by the mother as the principal offender is essential, and must be alleged and proved. Under the *Rhode Island* statute, a concealment of birth is a misdemeanor merely, and it was contended that, being a misdemeanor, all the participants, if guilty at all, must be guilty as principals and charged as doers. But the court held that one might be convicted as principal, although charged only in language appropriate to an accessory before the fact, by

reason of the general words of the statute, which allow participants to be charged as principals or accessories "according to the nature of the offense."

In *Wisconsin* all crimes punishable by imprisonment in state prison admit of accessories before the fact, and therefore, although the crime of concealing birth is but a misdemeanor, yet, as it is punishable by imprisonment in state prison, one who counsels and procures the commission of this offense by the mother may be indicted with her as an accessory before the fact, and punished accordingly. *Nichols v. State*, 35 Wis. 308.

6. In *Kentucky* it is held that the statute defining the crime and punishment of concealment of birth is intended to apply to the mother only, and therefore the offense does not admit of aiders and abettors, although, if the child was born alive and concealed so that death ensued, all the participants would be guilty of murder; and it was held that the general statute making accessories before the fact liable as principals, being designed to apply only in cases where the offense existed at the common law, or where the offense, although created by statute, applies to all who are guilty, did not affect the case. *Frey v. Com.*, 83 Ky. 190.

7. *Hays v. Paul*, 51 Pa. St. 143. In that case it was held that this meaning must be given to the word in an instruction, and not that of "to imagine," "to fancy."

Apprehend in the Sense of Conceive. — *Golden v. State*, 25 Ga. 531.

8. Worcester's Dict.

9. **Covenant Not to Be Concerned in a Business.** — In *Hill v. Hill*, 55 L. T. 769, the defendant covenanted, so long as the plaintiffs should carry on their business, not to "engage in or be in any way concerned or interested in any similar business within ten miles of the Royal Exchange." It was held that the covenant was broken by the covenantor being employed

as servant in such a business at a weekly salary. Kekewich, J., said: "I am of opinion that the words '*concerned in*' were intended to cover this exact case, and I must regard them as meaning 'having something to do with' a similar business. If the defendant has that, then I think he is *concerned in* a similar business." See also *Jones v. Heavens*, 4 Ch. Div. 636. And see the titles *COVENANTS*; *RESTRAINT OF TRADE*.

Concerning Boundaries.—A statute provided that a surveyor might administer an oath to every person whom he examined *concerning* any boundary. In *Manary v. Dash*, 23 U. C. Q. B. 584, the court said: "Evidence that particular parts of a concession had not been surveyed at all can hardly be called evidence '*concerning* any boundary, post, or monument, or any original landmark, line, limit, or angle of any township, concession, range, lot, or tract of land which' a surveyor is employed to survey, unless we interpret evidence '*concerning* any boundary,' etc., to mean evidence that there never was any such boundary."

Jurisdiction.—Where a statute provided that a court should have jurisdiction "in controversies *concerning* the title or boundaries of land," it was held that the mere fact that the title to land was drawn in question did not confer jurisdiction. *Greathouse v. Sapp*, 26 W. Va. 87. See also *Neal v. Com.*, 21 Gratt. (Va.) 511; *Hutchinson v. Kellam*, 3 Munf. (Va.) 202; *Skipwith v. Young*, 5 Munf. (Va.) 276; *Miller v. Little Kanawha Nav. Co.*, 32 W. Va. 51.

Interested.—Where a fire policy required a certificate of a loss under the hand of a notary not *concerned* in the loss as a creditor or otherwise, it was held that *concerned* meant interested. *McRossie v. Provincial Ins. Co.*, 34 U. C. Q. B. 59. See also the title *FIRE INSURANCE*.

Gaming. (See also the title *GAMING*.)—In *Miller v. State*, 48 Ala. 122, the defendant was indicted and convicted for being interested or *concerned* in the keeping or exhibition of a gaming table. It was held that having a place in the room where the game called "keno" is exhibited and carried on, and selling the cards which are used in playing the game to those who play, is being interested or *concerned* in keeping or exhibiting a table for gaming.

Concerning Lotteries. (See also the titles *LOTTERIES*; *POSTAL LAWS*.)—An Act of Congress prohibits the sending of letters or circulars, *concerning* lotteries, through the mail. In construing this statute, the court, in *Commerford v. Thompson*, 2 Flipp. (U. S.) 614, said: "Whether it was intended to apply only to mail matter posted in the interest of lottery companies, gift concerts, and other similar enterprises, by their managers or agents, for the purpose of attracting custom, or equally to letters addressed to such companies, is the main question in this case. Its solution depends largely upon the construction to be put upon the word *concerning*. It is obvious that this word was not intended to be used in its broadest sense, of 'pertaining to or relative to,' as such construction would include every letter of which the enterprises mentioned in the section were wholly or in

part the subject; comprising not only letters written in the interest of these enterprises, but letters of inquiry, letters seeking legal advice, letters written for the purpose of suppressing their business, and even the correspondence carried on between the defendant and the general post office in this case. This certainly was not the intention of Congress. The word 'circular' we think affords a clew to the meaning of the section. This word obviously refers to circulars sent out by lottery companies for the purpose of advertising their schemes." Accordingly it was held that the statute did not apply to letters addressed to the secretary of a lottery company.

Prosecution.—Under a statute giving costs to the prosecutor, if he be an overseer of the poor or other civil officer, "who shall prosecute upon the account of any fact committed or done, that *concerned* him," as officer, to prosecute, it was held that wherever the prosecution was for the good of the public, it *concerned* the officer to prosecute, and entitled him to costs. *Reg. v. —*, 15 Q. B. 1060, 69 E. C. L. 1060. See also *Reg. v. Waldegrave*, 2 Q. B. 341, 42 E. C. L. 703.

Guaranty. (See also the title *GUARANTY*.)—A guaranty addressed "to whom it may *concern*," is in the nature of an open letter of credit. When it accompanies a negotiable instrument, it is evidently intended to give the instrument currency, and any person who advances money on the faith of it may enforce payment from the guarantor. *Sawyer v. Hopgood*, (City Ct.) 13 N. Y. St. Rep. 711. In that case the court said: "The defendant must have known that his guaranty would *concern* any person to whom the payee might offer the note for sale or discount. It concerned the payee, because he parted with the five hundred dollars worth of goods on the faith of it. It was calculated to produce this effect, and was therefore presumably intended to have this effect."

Concerns and Accounts.—The plaintiff, a commission merchant, agreed to account for merchandise consigned to him for sale, on commission, to a third person, to whom the consignor was indebted, and "to pay to him or order any balance which may eventually be due on settling my *concerns* and accounts" with said consignor. In construing this agreement, the court said: "The words *concerns* and 'accounts' are mercantile terms, and have an appropriate technical import. The subject matter, in this case, in reference to which they are used, was the merchandise on consignment, and they mean in this instance nothing more nor less than the ordinary incidents to a sale of consigned goods. They should not be perverted so as to include any other right or interest, or duty, than such as are incidental to the sale on commission of the goods, in relation to which the orders were drawn and accepted. They cannot comprehend any other contract, or any other claim or liability existing or consequential, certain or contingent, between Bruce and the consignors, unknown to Burdet, and not referred to in the orders." *Bruce v. Burdet*, 1 J. J. Marsh. (Ky.) 82.

Exemption.—Where, in an act of incorporation of a turnpike company, there is an ex-

CONCESSION — CONCESSI. — See note 1.

CONCLUSIVE. (See the titles EVIDENCE; ESTOPPEL; REASONABLE DOUBT.) — The term "conclusive" means, in its technical sense, possessing weight and force that cannot be contradicted. But in a proper sense it has the meaning of putting an end to debate or question; leading to a conclusion or decision.²

emption from toll of all persons traveling upon the "ordinary domestic business of family concerns," this does not extend to the case of a physician going to visit his patients. *Centre Turnpike Co. v. Smith*, 12 Vt. 212.

Concerned in a Contract. — A shareholder in a company which had a contract with a local authority would seem not to be *concerned* in that contract within section 193 of the English Public Health Act of 1875, which provided that "officers or servants appointed or employed under this Act by the local authority, shall not in any wise be *concerned* or interested in any bargain or contract made with such authority for any of the purposes of this Act." *Todd v. Robinson*, 14 Q. B. Div. 741. But to do a part of a work for another, knowing that the other had contracted with the local authority to do the work, is to be *concerned* in the bargain or contract for the work. *Nutton v. Wilson*, 58 L. J. Q. B. 443.

Smuggling. — The owner of a vessel who knowingly lets it for the purpose of goods to be landed without payment of duty, is, if the goods are so landed, liable to penalties under 8 and 9 Vict., c. 87, § 46, as a person *concerned* in the illegal unshipping of goods. *Atty.-Gen. v. Robson*, 5 Exch. 790.

Policy of Insurance for Whom It May Concern. — See the titles INSURANCE; FIRE INSURANCE; MARINE INSURANCE.

1. **Concession — Concessi.** (See also the titles DEEDS; and see GRANTS.) — In *Western Min., etc., Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 446, it is said: "A grant of land is a mere transfer of such title or right thereto as the grantor, at the time of the grant, may hold or have, absolutely or contingently. The Latin word *concessio*, derived from the operative word in the Latin assurance, heretofore used in England, formerly was employed to designate that species of assurance. And the English word *concession*, derived from the Latin word, in its ordinary use is exactly or nearly the equivalent of the word 'grant,' though the former is not now, in Virginia or West Virginia, generally used — as the latter is — with reference to the conveyance of land or transfer of title, right, or claim thereto."

Covenant. — In *Hamilton v. Wright*, 28 Mo. 205, the court said: "It is almost an axiom in the law that the words *demisi*, *concessi*, or 'demise and grant,' in a lease for years, contain an implied covenant for quiet enjoyment, and that the lessor had power to demise." See also *Frost v. Raymond*, 2 Cal. (N. Y.) 188. And see the titles COVENANTS; LEASES.

In Spanish Law, *concession* is defined as "whatsoever is granted as favor or reward, as the privileges granted by the prince." *De Haro v. U. S.*, 5 Wall. (U. S.) 626.

2. *Hoadley v. Hammond*, 63 Iowa 602.

Conclusively is defined by Webster as "decisively, with final determination." See *Hilliard v. Beattie*, 58 N. H. 112.

In *Joslyn v. Pulver*, 59 Hun (N. Y.) 140, it is said: "Webster defines *conclusive* in law to be 'that of which, from its nature, the law allows no contradiction or explanation, an inference which the law makes as peremptory that it will not allow it to be overthrown by any contrary proof, however strong.'"

Instructions. (See also the titles EVIDENCE; REASONABLE DOUBT. And see generally ENCYC. OF PLEADING AND PRACTICE, title INSTRUCTIONS.) — The trial court directed that a certain fact must be established by evidence which should be to the minds of the jury clear, satisfactory, and *conclusive*. This was held no error. The court said: "By these instructions, the court below did not attempt to weigh the evidence for the jury, but simply directed them that, in order to reach certain *conclusions*, the evidence must be 'clear, satisfactory, and *conclusive*' to their minds. The jury, under the instructions, were left to determine whether the evidence possessed the qualities described by the instruction. The word *conclusive* is not used in its legal sense, as possessing weight and force that cannot be contradicted; but rather in its common acceptance, in which it means 'decisive,' 'putting an end to debate or question,' leading to a *conclusion* or decision.'" *Hoadley v. Hammond*, 63 Iowa 602.

Appeal. — In *Central R., etc., Co.'s Appeal*, 67 Conn. 197, it was held that a provision that the decision of a superior court judge on a contested election case should be *conclusive*, did not affect the right of appeal on questions of law.

Same — Conclusive Accounts. — A *New Jersey* statute provided that the decree of the Orphans' Court on the settlement of the accounts of executors should be *conclusive* on all parties. In *Burrough v. Mickle*, 3 N. J. L. 474, the court, in construing this provision, said: "The word *conclusive*, here made use of, I apprehend to be in contradistinction to the imperfect or *inconclusive* accounts sometimes formerly made without notice or citation; but, in my opinion, this does not destroy the provision in the 19th section, made in explicit and unequivocal language, declaring that all final sentences or decrees of the Orphans' Court shall be subject to removal by certiorari into this court, in cases where no appeal is given." See also the title EXECUTORS AND ADMINISTRATORS.

Treaties — Concluded. (See the title TREATIES.) — Certain articles between Great Britain and the United States were to take effect when terms of peace were agreed upon and *concluded* between Great Britain and France. Upon the meaning of the terms "agreed upon and *concluded*," the court, in *Hylton v. Brown*, 1 Wash. (U. S.) 350, said: "Let us examine these expressions, and see what they mean. 'Agreed upon;' that is, when the ministers have come to an understanding, as to the

CONCLUSIVE PRESUMPTIONS.—See the title *PRESUMPTIONS*, and references there given.

CONCUBINAGE. (See also the titles *ABDUCTION*, vol. 1, p. 162; *FORNICATION*; *LEWD AND LASCIVIOUS COHABITATION AND CONDUCT*; *PROSTITUTION*.)—“Concubinage” is defined to be the cohabiting of a man and a woman who are not legally married; the state of being a concubine.¹

CONCURRENCE.—See *ASSENT*, vol. 2, p. 1004; *CONSENT*.

CONCURRENT.—The word “concurrent” means, literally, running together.²

terms of the treaty, and have reduced them to writing. *Concluded*; that is, when the agreement, thus understood, has received its last form, by being signed and duly executed by the minister. It is this which *concludes* all agreements, whether made by nations or by individuals.”

1. State v. Gibson, 111 Mo. 92.

Single Act—Distinguished from Prostitution.

—Cohabiting with a female for a single act of sexual intercourse is sufficient to constitute concubinage, within *Missouri Rev. Stat.*, § 3484, inhibiting abduction of a female under eighteen years of age for the purpose of prostitution or *concubinage*. In *State v. Gibson*, 111 Mo. 92, the court said: “This instruction necessitates the determination of the meaning of the word *concubinage*. Under the provisions of our statute, ‘words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import.’ 2 Rev. Stat. 1889, § 6570. If, as we take it, the word employed is to be taken in its ordinary sense, in the popular acceptance of the term, we must turn to the standards of our language in order to ascertain the accepted meaning of the term. When we do this, we find that *concubinage* is defined by Webster to be ‘the cohabiting of a man and a woman who are not legally married; the state of being a concubine.’ And in turning to the word ‘cohabit’ we find that one of its prominent meanings is ‘to dwell or live together as husband and wife.’ And Webster also defines *concubine* as ‘a woman who cohabits with a man without being his wife.’ On turning to the law dictionaries, we find *concubinage* defined as ‘a species of loose, informal marriage, which took place among the ancients, and which is yet in use in some countries.’ *Black Law Dict.*; *Whart. Law Dict.*; *Bouv. Law Dict.* It is well enough, in this connection, to place in juxtaposition and in sharp contrast with the word *concubinage* the other word the section in question employs, ‘prostitution,’ which is defined by Webster: ‘The act or practice of prostituting or offering the body to an indiscriminate intercourse with men; common lewdness of a female.’ And in the legal authorities the term is defined as ‘the common lewdness of a woman for gain; the act of permitting a common and indiscriminate sexual intercourse for hire.’ 2 *Bouv. Law Dict.*; *Com. v. Cook*, 12 Met. (Mass.) 97. Thus contrasted, it is easy to see that the two words *concubinage* and ‘prostitution’ have, and were intended to have, a widely different meaning. To hold otherwise would be to say

that the two words meant the same thing, and that therefore the legislature, in framing the section under discussion, employed a useless and meaningless word; which is a supposition not to be indulged, as abundant authorities show.” To the same effect see *State v. Feasel*, 74 Mo. 524; *State v. Overstreet*, 43 Kan. 305; *Henderson v. People*, 124 Ill. 607; *People v. Bristol*, 23 Mich. 127; *State v. Bobbst*, 131 Mo. 328.

“No great length of time or long-continued illicit intercourse is necessary to the establishment of the relation of *concubinage*. That relation, like marriage, may be contracted or assumed in a day as easily as in a year. Any remarks in *Slocum v. People*, 90 Ill. 274, to the contrary, are not approved.” *Henderson v. People*, 124 Ill. 608.

2. *East Texas F. Ins. Co. v. Blum*, 76 Tex. 653.

Insurance—Total Concurrent Insurance.—A policy for one thousand dollars issued upon property already insured for three thousand dollars provided that other insurance should avoid the policy. It also contained the words, “Total *concurrent* insurance, four thousand dollars.” It was held that these words included the amount of the policy on which they were written, and that an additional insurance for one thousand dollars was not warranted. *East Texas F. Ins. Co. v. Blum*, 76 Tex. 653. The court said: “The word *concurrent* means, literally, ‘running together,’ and in the connection here used has the sense of ‘co-operating,’ ‘contributing to the same event.’ Worcester. ‘Acting in conjunction; agreeing in the same act; contributing to the same event or effect; co-operating; accompanying.’ Webster. In the absence of something in the context showing that the word was not used in its ordinary sense, it must be understood so to have been used; and nothing of that kind is found. To be *concurrent*, the insurance must operate at the same time, upon the same property, and look to the indemnity of the insured in case of its loss or destruction from casualty insured against.”

All Policies Concurrent.—The plaintiff made an addition to a building in which was property insured in several companies, all the companies, except one, granting permission, and that company gave permission to erect the addition, “all policies *concurrent*.” It appeared that it was known to the agent who signed this permission that the other companies had given permission. It was held that the property in the addition was covered by all the policies. The court said: “Viewed in the light of these facts and circumstances, it is impossible to give this contract the con-

CONCURRENT CAUSES. (See the titles NEGLIGENCE; PROXIMATE AND REMOTE CAUSE.)—"If two distinct causes are operating at the same time to produce a given result, which might be produced by either, they are concurrent causes; they run together, as the word signifies, to the same end."¹

CONCURRENT CONDITIONS.—See the title CONDITIONAL SALES, *post*.

CONCURRENT COVENANTS. (See the title COVENANTS.)—Concurrent covenants are those where mutual conditions are to be performed at the same time; and in covenants of this character, if the one party is ready and offers to perform his part of the covenant, and the other refuses or neglects to perform his part, the party who is ready has fulfilled his engagement and may maintain an action for the breach or default of the other.²

CONCURRENT JURISDICTION. (See also the titles COURTS; JURISDICTION; PRIVATE INTERNATIONAL LAW; UNITED STATES COURTS.)—See note 3.

CONCURRENT NEGLIGENCE.—See the titles CONTRIBUTORY NEGLIGENCE; PROXIMATE AND REMOTE CAUSE.

CONCURSO.—*Concurso* is, in civil law, the litigation or opportunity of litigation between various creditors, each claiming, it may be, adversely to one another, to share in a fund or an estate; the object being to assemble in one accounting all the claimants on the fund. It is usual in cases of insolvency and injunction against a debtor's further transactions.⁴

CONDEMNATION. (See also the title EMINENT DOMAIN.)—Condemnation is the act of condemning; that is, pronouncing a judicial sentence against. Used of the sentence or judgment of any court of competent jurisdiction, but most commonly of the decree by which property is seized and made subject to forfeiture.⁵

struction claimed by the defendants, as if it had read as a part of the sentence preceding it, 'provided the other policies *concur* in giving permission.' The other companies had *concurred* in giving permission, and this was known to both parties. The only reasonable conclusion seems to us to be, that the parties intended by the words 'all policies *concurrent*,' to agree that the policy to which this permission was attached and made part should *concur* with the other policies in the terms of the permission; and therefore that the property in the addition at the time of the loss was covered by all the policies." *Butterworth v. Western Assur. Co.*, 132 Mass. 494.

1. *Herr v. Lebanon*, 149 Pa. St. 222.

2. *Snow v. Johnson*, 1 Minn. 48; *Bailey v. White*, 3 Ala. 330.

3. *States.* (See also the title STATES.)—Under the enabling acts by which the states of Wisconsin and Minnesota were formed, *concurrent jurisdiction* is given to those states over the navigable rivers forming the boundary between them. In construing this provision, the court, in *J. S. Keator Lumber Co. v. St. Croix Boom Corp.*, 72 Wis. 62, said: "When, therefore, by such compact, it was in effect provided that each such state shall have *concurrent jurisdiction* on that portion of the river St. Croix constituting the boundary line between them, it included the exercise of such legislative powers by each state over the whole river as were consistent with the exercise of similar powers over the same portions of the river by the other state. In other words, by such compact each state secured to itself such *concurrent jurisdiction* upon the half of the river within the territorial limits of

the other state, by reducing what would otherwise have been its exclusive jurisdiction upon its own half to mere *concurrent jurisdiction*. The result is that neither of these states could, as against the other, rightfully assume, or authorize the assumption of, permanent and exclusive occupancy, possession, and control of the entire navigable portions of the river. *Delaware River Bridge Co. v. Trenton City Bridge Co.*, 13 N. J. Eq. 46; *Atty.-Gen. v. Delaware, etc., R. Co.*, 27 N. J. Eq. 631."

4. *Century Dict.* In *Schroeder v. Nicholson*, 2 La. 355, *Porter, J.*, said: "The suit in *concurso* is a remedy provided by state laws, to enable creditors to enforce their claims against a debtor. Its constitutionality, so far as it affects creditors, citizens of this state, cannot be questioned. This has been settled by the highest authority."

5. *Condemnation and Confiscation Distinguished.*—In allowing the claim of an owner of cotton seized, and holding that he was entitled to judgment for the proceeds in the treasury, although placed there under a decree of a court of admiralty to be distributed in prize, on the ground that a court of admiralty is without jurisdiction to distribute in prize a moiety previously awarded to a naval officer as informer by a district court in proceedings for the confiscation of enemy's property, the Court of Claims, by *Davis, J.*, said: "A suit for confiscation is an action of an entirely different nature from a proceeding in prize. Confiscation is the act of the sovereign against a rebellious subject. *Condemnation* as prize is the act of a belligerent against another belligerent. Confiscation may be effected by such means, either summary or arbitrary, as the

CONDITIONAL CONTRACTS. (See also the titles **CONDITIONAL SALES**, *post*; **CONDITIONS**, *post*; **CONTRACTS**.)—A conditional contract is an executory contract the performance of which depends upon a condition. It is not simply an executory contract, since the latter may be an absolute agreement to do or not to do something; but it is a contract whose very existence and performance depend upon a contingency and condition.¹

CONDITIONAL FEE. (See also the titles **CONDITIONS**; **ESTATES**; **REAL PROPERTY**.)—Conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others, as to the heirs of a man's body, by which only his lineal descendants are admitted, in exclusion of collateral heirs.²

CONDITIONAL PUBLICATION.—See the title **LIBEL AND SLANDER**.

sovereign, expressing its will through lawful channels, may please to adopt. *Condemnation* as prize can only be made in accordance with principles of law recognized in the common jurisprudence of the world. Both are proceedings *in rem*; but confiscation recognizes the title of the original owner to the property which is to be forfeited, while in prize the tenure of the property seized is qualified, provisional, and destitute of absolute ownership. The Peterhoff, Blatchf. P. C. 620. To confiscate property seized upon land, resort must be had to the common-law side of the court. Confiscation Cases, 20 Wall. (U. S.) 110. Prize proceedings are always in admiralty." Winchester's Case, 14 Ct. of Cl. 13. See also **CONFISCATION**; **PRIZE**; and the title **WAR**.

Condemnation Money.—Where a Georgia statute (Act Dec. 16, 1811, § 3; Prin. Dig. 437) declared that "no injunction shall be sanctioned or granted by any judge of the superior courts of this state until the party requiring the same shall have previously given to the party against whom such injunction is to operate, by application to the clerk of the superior court for that purpose, a bond with good and ample security for the eventual *condemnation* money, together with all further costs," the court held that "the eventual *condemnation* money" secured by the injunction bond was the amount ultimately fixed and settled by the judgment or decree of the court in the case, Warner, J., saying: "The term *condemnation* is defined by Bouvier in his Law Dictionary 295, to be 'a sentence or judgment which *condemns* some one to do, to give, or to pay something; or which declares that his claim or pretensions are unfounded.' 'Judgments are the sentence of the law, pronounced by the court upon the matter contained in the record.' 3 Bl. Com. 395. The 'eventual *con-*

demnation money,' then, is that which the law sentences the party to pay; expressed by the judgment of the court, the legitimate organ of the law." Lockwood v. Saffold, 1 Ga. 72.

An appeal had been taken by a defendant from a judgment against him in ejectment, and an appeal bond had been given, conditioned for the prosecution of the appeal with effect, and the payment of the *condemnation* money should the judgment be against the appellant. On a suit upon this bond, it was held that the plaintiff could not recover the mesne profits. The court said: "By the *condemnation* money is meant the damages that should be awarded against the appellant, by the judgment of the court. It does not embrace damages not included in the judgment. The damages actually sustained by a plaintiff in ejectment by the detention of the property, are usually recovered in an action of trespass for mesne profits, when, by the judgment of the court, the plaintiff becomes entitled to the possession." Doe v. Daniels, 6 Blackf. (Ind.) 10.

Marine Insurance. (See also the title **MARINE INSURANCE**.)—A policy of insurance provided that the insured should not "abandon in case of capture, until *condemned*." Construing this policy, the court said: "By the word *condemned*, connected as it is with the words 'in case of capture,' a *condemnation* on proceedings founded on the capture is intended, which could only be in a court of prize, and it cannot be strained to mean anything else." Barney v. Maryland Ins. Co., 5 Har. & J. (Md.) 143. See also the title **ABANDONMENT AND TOTAL LOSS**, vol. 1, p. 23.

1. Nashville, etc., R. Co. v. Jones, 2 Coldw. (Tenn.) 584, quoting Story on Contracts, § 20.

2. Simmons v. Augustin, 3 Port. (Ala.) 96.

Volume VI.

CONDITIONAL SALES.

BY JOSEPH R. LONG.

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CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles: *ASSIGNMENTS*, vol. 2, p. 1007; *BAILEMENTS*, vol. 3, p. 732; *BILLS OF SALE*, vol. 4, p. 555; *CHattel MORTGAGES*, vol. 5, p. 945; *CONDITIONS*, *post*; *CONTRACTS*; *FRAUDULENT SALES AND CONVEYANCES*; *LIENS*; *MORTGAGES*; *RECORDING ACTS*; *SALES*; *WARRANTY*.

I. DEFINITION AND NATURE¹ — **Definition.** — A conditional sale is a sale in which the transfer of title to the thing sold to the purchaser, or his retention of it, is made to depend upon the performance of some condition.²

1. Scope of This Article. — It is designed in this article to discuss the law relating to conditional sales, properly so called, that is, sales in which the vendee's title is to be acquired or divested by the fulfilment of some condition. The law of conditions in sales, such as that the vendor has title, or that the quantity or quality of the thing sold shall correspond with the terms of the agreement, or that the vendee shall have a right to inspect, or that the stipulations as to time and place of performance of the contract shall be complied with, will be found discussed elsewhere in this work. See the titles *CONTRACTS*; *SALES*; *WARRANTY*.

2. Definitions of Conditional Sales. — A conditional sale is one which depends for its validity upon the fulfilment of some condition. *Bouvier's Law Dict.*

A sale which takes effect or is to become complete on the performance of a condition. *Anderson's Law Dict.*

A sale the binding effect of which, notwithstanding delivery of the thing sold, is made to depend on due payment or other performance by the buyer so that meanwhile the title or ownership is not vested in him. *Century Dict.*

A Conditional Contract of Sale Differs from a Purely Executory Contract in this particular, that an executory contract is absolutely to sell at a future time, and a conditional contract is conditionally to sell. In the one case the performance of the contract is suspended and transferred to a future time; in the other case the very existence and performance of the contract depend upon a contingency. *Story on Sales*, § 246.

A Mere Promise to Sell When Certain Conditions Are Complied with does not confer a title, but only creates an obligation which may be enforced by an action to compel a specific performance, or for the recovery of damages. *Knox v. Payne*, 13 La. Ann. 361.

In Order to Constitute a Conditional Sale it is essential that the title to the property should remain in the vendor, for there can be no conditional sale if the title is transferred to

the vendee. *Frick v. Hilliard*, 95 N. Car. 117. But see *infra*, this title, *Sales Dependent upon Conditions Subsequent*.

Vendor Remaining in Possession. — Where a bill of sale is made under an oral agreement that it shall be delivered only upon the happening of a certain event, the sale, being conditional, is not avoided by the fact that the vendor continued in possession until the performance of the condition. *Roberts v. Hawn*, 20 Colo. 77. See *Edwards v. Harben*, 2 T. R. 587; *Hamilton v. Russell*, 1 Cranch (U. S.) 310.

Where a sale of personal property was conditioned upon payment at a certain time, and the bill of sale and other papers were deposited with a third person to be held until payment, which was never made, and the vendor remained in possession, it was held that no title passed. *McDonald v. Hallicy*, 5 Colo. App. 438.

Examples of Conditional Sales. — A sale and delivery of personal property with an agreement that title is to remain in the vendor until payment is a conditional sale. *Fields v. Williams*, 91 Ala. 502; *Piedmont Land, etc., Co. v. Thomson-Houston Motor Co.*, (Ala. 1892) 12 So. Rep. 768; *McRea v. Merrifield*, 48 Ark. 160; *Edgewood Distilling Co. v. Shannon*, 60 Ark. 133; *Fleury v. Tufts*, 25 Ill. App. 101; *Thomas v. Winters*, 12 Ind. 322; *Forrest v. Hamilton*, 98 Ind. 91; *Sacra v. Semple*, 2 Tex. Unrep. Cas. 644; *Edison General Electric Co. v. Walter*, 10 Wash. 14. See *infra*, this title, *Sales Dependent upon Conditions Precedent — Conditions Precedent to Be Performed by the Vendee — Payment*.

A sale of a horse on the agreement that the title shall remain in the seller until the residue of the purchase money is paid is a conditional sale. *Vasser v. Buxton*, 86 N. Car. 335.

A written agreement reciting that A has bought from B a threshing machine for four hundred and fifty dollars, and that one hundred and twenty-four dollars is yet due B thereon, and that it is agreed that title to the property shall not pass but remain in B till said amount is fully paid to him, signed by A, is a conditional sale, creating an indebtedness and

The Condition May Be Either Precedent or Subsequent. — In the former case no title passes until the condition is performed; ¹ in the latter case title passes to the purchaser at once, subject to be divested by the performance of the condition. ²

Mutual or Concurrent Conditions. — So, also, a sale may be made upon mutual or concurrent conditions, where both parties are to do some act simultaneously, as in the case of cash sales, where the seller is to deliver the property and the buyer is to pay the price at the same time. In such cases neither party can maintain an action for breach of contract without showing performance or tender on his part. ³

Express or Implied Conditions. — Conditions of any class may be either express or implied. ⁴

Character of Sale a Question of Intent. — Whether a sale is absolute or conditional ⁵

rendering A liable. *Forrest v. Hamilton*, 98 Ind. 91.

An agreement for the sale of looms to be immediately delivered to the buyer for use in his business, and to be paid for in quarterly payments and the title to remain in the seller until paid for, is a conditional sale. *Forrest v. Nelson*, 108 Pa. St. 481.

A sale of goods under an agreement that the seller shall retain title until they are paid for, but that the purchaser may sell at retail and as soon as the seller's agent calls shall pay for the goods so sold, the seller retaining title to the rest, the purchaser at the time of sale accepting a draft on time for the price, is a conditional sale, leaving the title in the seller. *Mack v. Story*, 57 Conn. 407.

A Sale of Goods by Sample, with an agreement that they may be exchanged if inferior to the sample, is a conditional sale. *Fisher v. Merwin*, 1 Daly (N. Y.) 234.

For Additional Examples of contracts held to be conditional sales, see *Crimp v. McCormick Constr. Co.*, 34 U. S. App. 479, 71 Fed. Rep. 356; *Davidson v. Davis*, 125 U. S. 90; *Warren v. Liddell*, 110 Ala. 232; *Rodgers v. Bachman*, 109 Cal. 552; *Wright v. Barnard*, 89 Iowa 166; *Aultman v. Olson*, 43 Minn. 409; *Journey v. Priestly*, 70 Miss. 584; *Griffin v. Pugh*, 44 Mo. 326; *Page v. Edwards*, 64 Vt. 124; *Wadleigh v. Buckingham*, 80 Wis. 230.

1. See *infra*, this title, *Sales Dependent upon Conditions Precedent*. *Carnall v. Clark*, 27 Ark. 500.

2. See *infra*, this title, *Sales Dependent upon Conditions Subsequent*.

3. See *infra*, this title, *Sales Dependent upon Conditions Precedent—Conditions Precedent to Be Performed by the Vendor and Vendee Concurrently*.

4. See *infra*, this title, *Sales Dependent upon Express Conditions*, and *Sales Dependent upon Implied Conditions*.

5. **The Distinction Between Absolute and Conditional Sales** is well illustrated in the case of *Green v. Bennett*, 23 Mich. 464, in which, under a contract for the sale of the wood and timber on certain lands, to be removed at certain specified times, it was held that if the contract be construed as making an absolute sale, the wood and timber remain the property of the purchaser, though not removed within the time provided, and the taking and removal of the same by the seller is a wrongful conversion for which the purchaser has a clear right of action, though he may be liable for a breach of his covenant to remove the same

within the times specified. But if the contract be conditional, and the provision for the removal of the timber within the specified periods is in the nature of a condition instead of a covenant, then the purchaser, if the seller should insist upon the condition, would lose all right to the wood and timber not removed within the time specified, and the seller would have the right to insist upon this breach of condition, and hold the wood not thus removed, and this would constitute his only security against, and remedy for, the failure to perform the condition.

Where a note is given for the purchase price the sale may be a conditional sale; but if the note is secured upon other property, it is an absolute sale. *Silver Bow Min., etc., Co. v. Lowry*, 6 Mont. 288.

A sale of a slave, coupled with an agreement for her return to the vendor if not paid for by a given time, is a conditional and not an absolute sale. *Mount v. Harris*, 1 Smed. & M. (Miss.) 185, 40 Am. Dec. 89.

For Additional Examples of sales held conditional and not absolute, see *Dresser Mfg. Co. v. Waterston*, 3 Met. (Mass.) 9. See also *Hunter v. Warner*, 1 Wis. 141.

For sales held to be absolute and not conditional, see *Gilman Linseed Oil Co. v. Norton*, 89 Iowa 434, 48 Am. St. Rep. 400; *Morse v. Sherman*, 106 Mass. 430; *Greenville First Nat. Bank v. Cook Carriage Co.*, 70 Miss. 587; *Ranney v. Higby*, 4 Wis. 154; *Aultman v. Silha*, 85 Wis. 359.

A sale of merchandise on a certain date "provided it is not sold at New York," is absolute if the goods had not already been sold, a future sale not being referred to. *Blydenburgh v. Welsh*, 1 Baldw. (U. S.) 331.

A contract by which A "bargained" a hog to B before it was altered, with an agreement that A was to alter the hog and keep it until it recovered from the operation, and if it did not so recover, to pay B forty dollars, shows an unconditional sale. *Marble v. Moore*, 102 Mass. 443.

Where, upon the dissolution of a partnership, one of the partners released to the others all his interests in the assets, and they then set off to him a certain portion of goods under a stipulation that if they amounted to more than his share he should return the surplus, it was held that this stipulation did not render the transaction a conditional sale, and an absolute title vested. *Mafflyn v. Hathaway*, 106 Mass. 414.

depends primarily upon the intention of the parties to be gathered from the terms of the contract and the circumstances of the case,¹ and is a question of fact to be determined by the jury.² Where the other circumstances indicate that the parties intended an absolute sale, the contract will be so construed, notwithstanding an express agreement that title is to remain in the vendor until the performance of some condition.³

The Burden of Proving that a sale is absolute⁴ or conditional rests upon the party having the affirmative.⁵

A Sale Absolute in Its Inception May Be Changed into a Conditional Sale by the subsequent agreement of the parties.⁶ Similarly a conditional sale may be changed to an

1. Whether Sale Is Conditional a Question of Intent. — *Walter A. Wood Mowing, etc., Mach. Co. v. Brooke*, 2 Sawy. (U. S.) 576; *Rodgers v. Bachman*, 109 Cal. 552; *Keitt v. Counts*, 15 S. Car. 493.

As between the parties, whether a sale is completed or only executory is a question of intent. *Lingham v. Eggleston*, 27 Mich. 324; *Hamilton v. Gordon*, 22 Oregon 557.

The intention of the parties to a sale, as to the time when the title is to pass, can be ascertained only from the terms of the agreement as expressed in the language and conduct of the parties, and as applied to known usage and the subject-matter. It must be manifested at the time the bargain is made. *Foster v. Ropes*, 111 Mass. 10. See the title SALES.

Entire Transaction Must Be Considered. — In determining whether an arrangement under which chattels have been delivered by one party to another constituted a conditional or an absolute sale with a reservation of a lien to secure the payment of the purchase price, the entire transaction must be considered and its legal effect ascertained not alone by any particular provision of the written contract itself, but from all the stipulations and agreements contained therein, as well as the notes given in connection therewith. *Andrews v. State Sav. Bank*, 20 Colo. 313, 46 Am. St. Rep. 291.

A Bill of Sale Absolute in Terms May Be Shown by the Parol Testimony of both parties to evidence a conditional sale. *Smith v. Tilton*, 10 Me. 350.

But in a suit between a vendor and a creditor of the vendee parol evidence was held inadmissible to prove that the sale was conditional when it was evidenced by a writing importing an absolute sale, and the creditor relied upon such writing, and the vendee's representations that it was correct, in making his attachment. *Dixon v. Blondin*, 58 Vt. 689. See also *Davis v. Bradley*, 24 Vt. 55.

2. Character of Sale a Question of Fact for Jury — *Illinois*. — *Wabash, etc., R. Co. v. Shryock*, 9 Ill. App. 323; *Frederick v. Case*, 28 Ill. App. 215.

Indiana. — *King v. Wilkins*, 11 Ind. 347.

Massachusetts. — *Sawyer v. Spofford*, 4 Cush. (Mass.) 598; *Scudder v. Bradbury*, 106 Mass. 422; *Hill v. Freeman*, 3 Cush. (Mass.) 257; *Armour v. Pecker*, 123 Mass. 143.

Michigan. — *Gurney v. Collins*, 64 Mich. 458.

New Jersey. — *H. B. Claffin Co. v. Elliot Furniture Co.*, 58 N. J. L. 379.

New Mexico. — *Crabtree v. Segrist*, 3 N. Mex. 278, affirmed in 131 U. S. 287.

New York. — *Kraemer v. Sieburg*, (City Ct.) 2 N. Y. Supp. 393.

Pennsylvania. — *Rohn v. Dennis*, 109 Pa. St. 504.

South Carolina. — *Keitt v. Counts*, 15 S. Car. 493.

Where Delivery Accompanies the Sale it is a question of fact for the jury, to be determined from all the evidence, whether the sale was absolute or conditional. *Wabash, etc., R. Co. v. Shryock*, 9 Ill. App. 323.

3. Sale Held Absolute Notwithstanding Reservation of Title. — *Talbot v. Sandifer*, 27 S. Car. 624; *Aultman v. Silha*, 85 Wis. 359.

If the vendor takes the purchaser's note for the purchase price and takes a mortgage on other property to secure the note, the sale is absolute, notwithstanding an agreement between the parties that the title to the property sold shall not pass until the payment of the note. *Silver Bow Min., etc., Co. v. Lowry*, 6 Mont. 288.

Notwithstanding an express provision in the contract that the title in the thing sold shall remain in the vendor until the payment of the purchase price, the intent, thus evidenced, to make the sale conditional, may be rebutted by the terms and stipulations of the notes given in pursuance of the agreement. *Andrews v. State Sav. Bank*, 20 Colo. 313, 46 Am. St. Rep. 291.

The Optional Payment of the Purchase Price is as essential to constitute a transaction a conditional sale as the conditional passing of the title; and a transaction that in express terms imposes an unconditional liability upon the vendee to pay the purchase price for the property delivered, however characterized by the parties, is essentially and in legal effect an absolute and not a conditional sale. *Andrews v. State Sav. Bank*, 20 Colo. 313, 46 Am. St. Rep. 291. See also *Hart v. Barney, etc., Mfg. Co.*, 7 Fed. Rep. 543.

Where the vendee is liable absolutely for the price the sale is absolute, notwithstanding an agreement that title shall remain in the vendor until payment. *Palmer v. Howard*, 72 Cal. 293, 1 Am. St. Rep. 60.

4. The burden is upon the party alleging a sale to prove either an absolute sale or a sale upon a condition precedent which has been performed. *Sawyer v. Spofford*, 4 Cush. (Mass.) 598.

5. See *infra*, this title, *Rights of Parties — Of the Vendor — Against Third Persons — Generally*.

6. Change of Absolute to Conditional Sale. — A contract of absolute sale may be changed by subsequent agreement while still executory, into a bailment with option to purchase upon compliance with certain conditions. *Goss Printing Press Co. v. Jordan*, 171 Pa. St. 474.

A contract absolute in its inception, and con-

absolute sale¹ or may be rendered absolute by a breach of the condition.²

II. SUBJECTS OF CONDITIONAL SALES.—The subject-matter of a contract of conditional sale may be either real³ or personal property.⁴

III. VALIDITY OF CONDITIONAL SALES—1. **Generally.**—Sales of personal property on condition that title is not to vest in the purchaser until the payment of the purchase money, or upon some other condition, are of very frequent occurrence, and the validity of such sales as between the parties thereto is unquestioned.⁵

summed by delivery, will not be converted into a conditional sale by an ambiguous phrase indorsed upon it afterwards, even if such would have been its effect if a part of the original contract. *Caraway v. Wallace*, 2 Ala. 542.

Where goods are purchased and paid for at a stipulated price, the sale is not affected or qualified by an agreement made in the bill of sale that the seller shall receive such sum as the goods may sell for above the price paid. *Jewett v. Lincoln*, 14 Me. 116, 31 Am. Dec. 36.

If one sells and delivers property to another absolutely, and the parties subsequently make it a conditional sale, a change of possession is necessary to protect the property from attachment by the creditors of the vendee. *Wright v. Vaughn*, 45 Vt. 369.

Effect of Warranty.—A warranty in a contract of sale, that the article shall pass inspection, is nothing more than a warranty of the soundness of the goods sold, and does not change the sale into an executory contract. *Gibson v. Stevens*, 8 How. (U. S.) 384. See also *Tagg v. Behring*, (Pa. 1887) 10 Atl. Rep. 782.

1. *Ingersoll-Sergeant Drill Co. v. Worthington*, 110 Ala. 322.

A contract originally a conditional sale may be subsequently changed to an absolute sale with a mortgage from the vendee to secure the purchase money. *Griffith v. Morrison*, 58 Tex. 46. But such change does not occur unless the mortgage be in fact executed. *McRea v. Merrifield*, 48 Ark. 160.

2. *Jones v. Wright*, 71 Ill. 61; *Corlies v. Gardner*, 2 Hall (N. Y.) 345.

Where goods are sold and delivered to be paid for in part in secured notes, provided they be found, upon investigation, to be satisfactory, and if not part of the goods are to be returned or payment otherwise provided for, and the notes are returned as unsatisfactory, but the goods are not returned, nor payment otherwise provided for, the sale becomes absolute, and the vendee becomes liable for the price in money. *George v. Swafford*, 75 Iowa 491.

3. For a discussion of conditional sales of real property see the titles **VENDOR AND PURCHASER**; **VENDOR'S LIEN**.

4. See the cases cited throughout this article.

Personal as well as real property may be the subject of conditional sale. *Mount v. Harris*, 1 Smed. & M. (Miss.) 185, 40 Am. Dec. 89.

The Good Will of a Newspaper Establishment, though incorporeal in its nature, may be the subject of a conditional sale. *Boon v. Moss*, 70 N. Y. 465.

5. **Conditional Sales Held Valid**—Canada. — A reservation of title until the payment of notes given for the price of the property sold is valid

and effective. *Goldie v. Rascony*, 4 Montreal L. R. Super. Ct. 313.

Arkansas.—A conditional sale, if clearly proven to be a real sale and not a mere transaction to disguise a loan, will be held valid, though every transaction of this sort is viewed with jealousy. *Johnson v. Clark*, 8 Ark. 321.

Connecticut.—It is well settled that a contract for the sale of personal property to be at once delivered to the vendee, but the title to remain in the vendor until the price is paid, is valid. *Cooley v. Gillan*, 54 Conn. 80.

Indiana.—That there may be a conditional sale of personal property whereby the vendor retains the ownership until the price is paid, although he parts with possession, is well settled in this state. *Steele v. Aspy*, 128 Ind. 367; *Dunbar v. Rawles*, 28 Ind. 225, 92 Am. Dec. 311; *Baals v. Stewart*, 109 Ind. 371.

But in order that the title may not pass in such cases, there must be a plain and express stipulation to that effect. It is not the policy of the law to encourage such sales, or to construe as conditional a sale where the reservation is equivocal or doubtful. *Steele v. Aspy*, 128 Ind. 367.

Massachusetts.—It is competent for the parties expressly to agree in a contract of sale that the title to the property shall not pass except on the performance of a precedent or concurrent condition, such as the payment of the price. It is then a conditional sale strictly, and it is familiar law that the title will remain in the seller. *Per* Colt, J., in *Morse v. Sherman*, 106 Mass. 430.

Michigan.—In *F. J. Dewes Brewery Co. v. Merritt*, 82 Mich. 198, *Champlin, C. J.*, said: "This court has gone very far in sustaining conditional sales, and has never declared them void, or different from what the parties have intended by their agreement." *Citing* *Couse v. Tregent*, 11 Mich. 65; *Dunlap v. Gleason*, 16 Mich. 158, 93 Am. Dec. 231; *Preston v. Whitney*, 23 Mich. 260; *Johnston v. Whittemore*, 27 Mich. 463; *Whitney v. McConnell*, 29 Mich. 12; *Smith v. Lozo*, 42 Mich. 6; *Marquette Mfg. Co. v. Jeffery*, 49 Mich. 283; *Edwards v. Symons*, 65 Mich. 348; *Kendrick v. Beard*, 81 Mich. 182.

Missouri.—*Rogers Locomotive Works v. Lewis*, 4 Dill. (U. S.) 158.

New Hampshire.—It is competent for the parties to a sale to contract that title shall not pass until payment. *Porter v. Pettengill*, 12 N. H. 299; *Luey v. Bundy*, 9 N. H. 298, 32 Am. Dec. 359.

New York.—In *Humeston v. Cherry*, 23 Hun (N. Y.) 141, the court said: "It is to be regretted that courts have held that what are improperly called conditional sales of personal property are valid. The doctrine that on a sale

Rule as to Third Persons. — In most jurisdictions, in the absence of fraud, the rule is the same as to third persons, though in some states it is held otherwise, and in a number of states all conditional sales must be recorded in order to be valid as against third persons without notice.¹

of personal property there can be a delivery and yet that the vendor can retain title, is an evasion of the statute as to mortgages of personal property, and is contrary to good policy and to sound principle. But it is the law of this state." See also, that such sales are valid, *Frank v. Batten*, 49 Hun (N. Y.) 91; *Boon v. Moss*, 70 N. Y. 465; *Rathbun v. Waters*, 1 N. Y. City Ct. 36.

Upon the question of the validity of a sale made upon a condition as to payment, the condition not being performed, the intent of the purchaser to pay or not is immaterial, where no fraud is imputed to him, or where he testifies that he had no intention of taking the goods, and it is not error to exclude an inquiry as to whether he intended to pay. *Jessop v. Miller*, 2 Abb. App. Dec. (N. Y.) 449.

Tennessee. — Contracts of conditional sale are valid in Tennessee. *Bradshaw v. Thomas*, 7 Yerg. (Tenn.) 497; *Houston v. Dyche*, Meigs (Tenn.) 76, 33 Am. Dec. 130.

West Virginia. — *McGinnis v. Savage*, 29 W. Va. 362.

Sale of Stock on Conditions. — In case of the sale of the capital stock of a bank, although such sale would have carried with it all the property of the bank, it was held competent to sell the stock on condition that the purchaser should pay a certain sum for certain specified property of the bank, and the seller had the right to annex such condition to the sale. *Norton v. Bohart*, 24 Mo. App. 240.

1. Conditional Sales Valid as to Third Persons. (See *infra*, this title, *Rights of Parties* — *Of Third Persons*.) — *In re Binford*, 3 Hughes (U. S.) 295; *Rodgers v. Bachman*, 109 Cal. 552; *New Haven Wire Co. Cases*, 57 Conn. 352; *De Saint Germain v. Wind*, 3 Wash. Ter. 189; *Wadleigh v. Buckingham*, 80 Wis. 230. See cases cited in preceding note.

In *Harkness v. Russell*, 118 U. S. 663, *Bradley, J.*, in sustaining a contract of conditional sale, said: "Such contracts are well known in the law and often recognized; and when free from any fraudulent intent are not repugnant to any principle of justice or equity, even though possession of the property be given to the proposed purchaser. * * * The intent of the parties will be recognized and sanctioned where it is not contrary to the policy of the law. This policy, in England, is declared by statute. It has long been a provision of the English bankrupt laws beginning with 21 James I., c. 19, that if any person becoming bankrupt has in his possession, order, or disposition, by consent of the owner, any goods or chattels of which he is the reputed owner, or takes upon himself the sale, alteration, or disposition thereof as owner, such goods are to be sold for the benefit of his creditors. This law has had the effect of preventing or defeating conditional sales accompanied by voluntary delivery of possession, except in cases like those before referred to; so that very few decisions are to be found in the English books directly in point on the question under consid-

eration. * * * This presumption of property in a bankrupt, arising from his possession and reputed ownership, became so deeply embedded in the English law that, in process of time, many persons in the profession, not advertent to its origin in the statute of bankruptcy, were led to regard it as a doctrine of the common law; and hence, in some states in this country, where no such statute exists, the principles of the statute have been followed, and conditional sales of the kind now under consideration have been condemned, either as being fraudulent and void as against creditors, or as amounting in effect to absolute sales with a reserved lien or mortgage to secure the payment of the purchase money. This view is based on the notion that such sales are not allowed by law, and that the intent of the parties, however honestly formed, cannot legally be carried out. The insufficiency of this argument is demonstrated by the fact that conditional sales are admissible in several acknowledged cases, and, therefore, there cannot be any rule of law against them as such. They may sometimes be used as a cover for fraud, and when this is charged, all the circumstances of the case, this included, will be open for the consideration of a jury. Where no fraud is intended, but the honest purpose of the parties is that the vendee shall not have the ownership of the goods until he has paid for them, there is no general principle of law to prevent their purpose from having effect. In this country, in states where no such statute as the English Act referred to is in force, many decisions have been rendered sustaining conditional sales accompanied by delivery of possession, both as between the parties themselves and as to third persons."

Alabama. — In *Fairbanks v. Eureka Co.*, 67 Ala. 109, *overruling Sumner v. Woods*, 52 Ala. 94; *Dudley v. Abner*, 52 Ala. 572, it was held that possession under a conditional sale was only *prima facie* evidence of title, and that a *bona fide* purchaser from the vendee acquired no title as against the original vendor. In so holding, *Brickell, C. J.*, said: "It has been for many years a necessity here to make contracts for the purchase of personal property dependent on the condition of paying the purchase money. Such contracts are, and have been, of almost daily occurrence; and no greater insecurity in the transaction of business could be introduced than would follow from a continued departure from the well-settled law affirming the validity of such contracts, and a continued adherence to the doctrine announced in *Sumner v. Woods*, 52 Ala. 94; *Dudley v. Abner*, 52 Ala. 572."

Delaware. — Conditional sales of personal property are valid in Delaware; and where delivery of property is made upon agreement that no title shall pass until payment is made or something is done or occurs, no title passes to the party to whom it is delivered until such payment is made or such thing is done or occurs, and he can deliver none to his vendee,

2. Conflict of Laws — Rights of Parties Determined by Lex Fori. — Where a contract of conditional sale is made in one state and the property sold is afterwards removed to another state in which the rights growing out of such contract are sought to be enforced, the law of the latter state will generally determine the rights of the parties to the contract,¹ and though the contract be invalid where made, if valid under the laws of the state to which the property has been removed, it will be enforced.² Conversely, a contract valid where made has been upheld in a state to which the property was removed, although such contract would have been invalid under the Recording Acts of the latter state.³ So, also, where the sale is made in a state in which conditional sales are not required to be recorded in order to be valid as against third parties, and the property is removed to a state in which such registration is required, the condition is void as to third persons without notice unless recorded according to the laws of the latter state.⁴

IV. CONDITIONAL SALES DISTINGUISHED FROM OTHER CONTRACTS — 1. From Chattel Mortgages⁵ — Character of Transaction Determined by Intention of Parties. — It is often difficult to determine whether a particular transaction constitutes a mortgage, or a conditional sale in which a right is reserved to the grantor to redeem or repurchase the property at a stipulated price within a given time. The question must be determined by a consideration of the peculiar circumstances of each case,⁶ and in all cases the only safe criterion is the intention of the

although the latter be ignorant of the contract. *Watertown Steam Engine Co. v. Davis*, 5 Houst. (Del.) 192.

Missouri. — *Wangler v. Franklin*, 70 Mo. 659.

Contra — Illinois. — In Illinois conditional sales, while valid as between the parties, are void as to third persons without notice. *Simpson Brick Press Co. v. Wormley*, 61 Ill. App. 460. See *infra*, this title, *Rights of Parties — Of Third Persons*.

1. *Hart v. Barney, etc., Mfg. Co.*, 7 Fed. Rep. 543; *The Marina*, 19 Fed. Rep. 760; *Marvin Safe Co. v. Norton*, 48 N. J. L. 410, 57 Am. Rep. 566. But see *Gross v. Jordan*, 83 Me. 380. See the title **CONFLICT OF LAWS**.

2. Although a conditional sale of chattels, followed by delivery of possession to the vendee, with a reservation of title in the vendor till payment of purchase price, is void as against *bona fide* purchasers from the vendee under the theory of the law obtaining in *Pennsylvania*, yet if the purchase from the vendee is entirely completed within the state of *New Jersey*, where such purchases are held subject to the superior title of the conditional sale, the purchaser's rights will be determined by the law of *New Jersey*, and he will take no title, although the conditional sale itself was completed in *Pennsylvania*, and, as to the parties thereto, is governed by *Pennsylvania* law. *Marvin Safe Co. v. Norton*, 48 N. J. L. 410, 57 Am. Rep. 566.

Foreign and Local Law Presumed to Be the Same in the Absence of Contrary Proof. — Where the performance of a contract of conditional sale made in one country is demanded in another and there is no proof of a law of the former determining the rights of the parties different from the law of the country where the remedy is sought, the court will assume that such rights would be the same as those existing by virtue of the laws of the latter country. *Peabody v. Maguire*, 79 Me. 572.

3. Contracts Valid where Made, Held Valid in

Another State. — In *Colorado* there can be, as against third parties, no sale of personal property with a valid reservation of the title or lien for the benefit of the vendor, but such conditions in the sale of property in a state where they are allowable will be upheld in *Colorado* upon the removal of the property thereto. *Harper v. People*, 2 Colo. App. 177.

A conditional sale not evidenced in writing, valid in *New Hampshire*, will be held valid in *Vermont*, unless the vendor is estopped. *Dixon v. Blondin*, 58 Vt. 689.

Similarly, in *Gross v. Jordan*, 83 Me. 380, it was held that property sold conditionally in Massachusetts and removed to Maine, being redeemable by statute in the former state, was redeemable also in the state of *Maine*.

4. *Hart v. Barney, etc., Mfg. Co.*, 7 Fed. Rep. 543; *Cunningham v. Cureton*, 96 Ga. 489.

The *New Jersey* Act of 1889, requiring conditional sales of personal property to be recorded, applies to a contract of sale made in New York of property to be delivered to and held by the purchaser in New Jersey. *Knowles Loom Works v. Vacher*, 57 N. J. L. 490.

Under *Ohio* Rev. Stat., §§ 7913, 7972, requiring contracts of conditional sales to be recorded, an action will not lie against the administrator of an insolvent estate for the recovery of a chattel sold conditionally in another state, but brought to Ohio, where the contract was not recorded as required by the statute. *Jones v. Molster*, 11 Ohio Cir. Ct. Rep. 432.

5. For a Further Discussion of this branch of the subject, see the titles CHATTEL MORTGAGES, vol. 5, p. 945; MORTGAGES.

6. 1 *Jones on Mortgages*, § 258; *Hughes v. Sheaff*, 19 Iowa 335; *Edrington v. Harper*, 3 J. J. Marsh. (Ky.) 354, 20 Am. Dec. 145; *Cornell v. Hall*, 22 Mich. 377.

The line of discrimination between mortgages and conditional sales cannot be marked out by any general rule, but in every case the true nature of the transaction and the inten-

parties, to be ascertained from the circumstances attending the transaction and the conduct of the parties, as well as from the terms of the written contract.¹

The Inclination of the Courts in Doubtful Cases is to construe the transaction as a mortgage rather than as a conditional sale, on the ground that an error which converts a conditional sale into a mortgage is less harmful than one which changes a mortgage into a conditional sale.² But the power of individuals capable of acting for themselves to enter into a contract of conditional sale is undeniable, and when the facts show that this is the character of their agreement it will be upheld as readily as any other contract;³ but the intention of the parties must be clearly proved.⁴

Function of Court and Jury. — When the true intention of the parties is not apparent upon the face of the written instrument, the question whether the transaction was intended as a conditional sale or a mortgage is to be decided by the jury under the instructions of the court from all the facts and circumstances of the particular case.⁵

The Character of the Transaction Is Fixed at Its Inception, and nothing short of a new

tion of the parties must be determined by its own circumstances. *Johnson v. Clark*, 5 Ark. 321.

1. Whether Conditional Sale or Mortgage a Question of Intention. — 1 Jones on Mortgages, § 258; *Eiland v. Radford*, 7 Ala. 724, 42 Am. Dec. 610; *Porter v. Clements*, 3 Ark. 364; *Johnson v. Clark*, 5 Ark. 321; *Hughes v. Sheaff*, 19 Iowa 335; *Hinkley v. Wheelwright*, 29 Md. 341; *Hicks v. Hicks*, 5 Gill & J. (Md.) 75; *Cornell v. Hall*, 22 Mich. 377; *Turner v. Kerr*, 44 Mo. 429; *Smith v. Crosby*, 47 Wis. 160; *Rockwell v. Humphrey*, 57 Wis. 410.

The question as to the character of the transaction is to be determined by the real agreement of the parties, and not by what they said about it. *Ruffier v. Womack*, 30 Tex. 332; *Hudson v. Wilkinson*, 45 Tex. 444.

The Intention Must Be Collected from the Whole Transaction, and not from any particular feature of it. *Palmer v. Howard*, 72 Cal. 293, 1 Am. St. Rep. 60; *Robertson v. Campbell*, 2 Call. (Va.) 421.

So, also, where there are two instruments which are parts of the same transaction, they must be construed together in order to determine the nature of the contract. *Ruffier v. Womack*, 30 Tex. 332; *Stryker v. Hershey*, 38 Ark. 264; *Hicks v. Hicks*, 5 Gill & J. (Md.) 75.

Where the intention is not clearly expressed in the written instrument, and this is not the whole contract of the parties, parol evidence is admissible to show what their real agreement was. *Kendrick v. Beard*, 81 Mich. 182. See also *Eckford v. Berry*, 87 Tex. 419, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 425.

2. Doubtful Cases Held to Be Mortgages Rather than Conditional Sales. — 1 Jones on Mortgages, § 258.

United States. — *Conway v. Alexander*, 7 Cranch (U. S.) 218; *Pioneer Gold Min. Co. v. Baker*, 23 Fed. Rep. 258.

Alabama. — *Sewall v. Henry*, 9 Ala. 24; *Locke v. Palmer*, 26 Ala. 312; *Parish v. Gates*, 29 Ala. 254; *Douglass v. Moody*, 80 Ala. 61.

Indiana. — *Davis v. Stonestreet*, 4 Ind. 101; *Plummer v. Shirley*, 16 Ind. 380; *Heath v. Williams*, 30 Ind. 495.

Iowa. — *Hughes v. Sheaff*, 19 Iowa 335.

Maryland. — *Hinkley v. Wheelwright*, 29 Md. 341.

Minnesota. — *Niggeler v. Maurin*, 34 Minn. 118.

Mississippi. — *Barnes v. Holcomb*, 12 Smed. & M. (Miss.) 306; *Klein v. McNamara*, 54 Miss. 90.

New York. — *Brown v. Dewey*, 2 Barb. (N. Y.) 28; *Matthews v. Sheehan*, 69 N. Y. 585.

Texas. — *Fowler v. Stoneum*, 11 Tex. 478, 62 Am. Dec. 490; *Ruffier v. Womack*, 30 Tex. 332; *Hubby v. Harris*, 68 Tex. 91.

Wisconsin. — *Rockwell v. Humphrey*, 57 Wis. 410; *Aultman v. Silha*, 85 Wis. 359.

As the lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves of the advantages of this superiority in order to obtain inequitable advantages. For this reason the leaning of courts has been against them, and doubtful cases have generally been decided to be mortgages. *Per Marshall, C. J.*, in *Conway v. Alexander*, 7 Cranch (U. S.) 218.

Courts Discountenance Conditional Sales Only to Prevent Fraud. — Courts of equity will often treat as a mortgage what at law would be a conditional sale, but this is done only upon equitable grounds and to prevent fraud. *Dunbar v. Rawles*, 28 Ind. 225, 92 Am. Dec. 311.

3. *Conway v. Alexander*, 7 Cranch (U. S.) 218; *Hughes v. Sheaff*, 19 Iowa 335; *Hinkley v. Wheelwright*, 29 Md. 341; *Ruffier v. Womack*, 30 Tex. 332.

4. Intention Must Be Clear. — To make an instrument in the nature of a mortgage a conditional sale, the intention of the parties at the time of contracting must be clearly proved, or necessarily implied from the attendant circumstances. *Wheeland v. Swartz*, 1 Yeates (Pa.) 579.

When the transaction grows out of a pre-existing debt or loan of money, it must clearly appear that such debt is extinguished, or it will be held that the new arrangement is a mere change in the security. *Ruffier v. Womack*, 30 Tex. 332; *Dougherty v. McCogan*, 6 Gill & J. (Md.) 275.

5. *Alstin v. Cundiff*, 52 Tex. 453; *Ruffier v. Womack*, 30 Tex. 340; *Hudson v. Wilkinson*, 45 Tex. 444.

agreement between the parties can alter the original nature of the contract.¹

The General Test to be applied in determining whether the transaction is a mortgage or a conditional sale is this: If the transfer is intended merely to secure an existing indebtedness, it is a mortgage; but if the debt be extinguished, or if the money advanced is not by way of a loan, and the grantor has the privilege of refunding if he pleases and thereby of entitling himself to a reconveyance, the transaction is a conditional sale.²

1. Nature of Transaction Not Changed.—*I Jones on Mortgages* 263; *Kearney v. Macomb*, 16 N. J. Eq. 189; *Ruffier v. Womack*, 30 Tex. 332.

For a contract, in effect a conditional sale, afterwards so modified as to make it a conditional sale, see *Griffith v. Morrison*, 58 Tex. 46.

A stipulation that if goods sold for a certain sum when resold should bring more than the said sum, the excess less expenses of sale should be credited to the vendors, does not *ex necessitate* change the sale into a pledge or mortgage. *Reeves v. Sebern*, 16 Iowa 234, 85 Am. Dec. 513.

2. General Test.—4 Kent Com. 144, note; *I Jones on Mortgages*, § 258.

Alabama.—*Sewall v. Henry*, 9 Ala. 24.

Arkansas.—*Porter v. Clements*, 3 Ark. 364; *Johnson v. Clark*, 5 Ark. 321; *Stryker v. Hershby*, 38 Ark. 264.

Mississippi.—*Magee v. Catching*, 33 Miss. 672.

Missouri.—*Slowey v. McMurray*, 27 Mo. 113, 72 Am. Dec. 251.

New York.—*Robinson v. Cropsey*, 2 Edw. Ch. (N. Y.) 138; *Glover v. Payn*, 19 Wend. (N. Y.) 518; *Holmes v. Grant*, 8 Paige (N. Y.) 243.

North Carolina.—*Poindexter v. McCannon*, 1 Dev. Eq. (N. Car.) 377, 18 Am. Dec. 591.

Texas.—*Ruffier v. Womack*, 30 Tex. 332; *Hudson v. Wilkinson*, 45 Tex. 444.

Virginia.—*Robertson v. Campbell*, 2 Call (Va.) 421; *McComb v. Donald*, 82 Va. 903.

The general tests in doubtful cases as to whether the transaction is a conditional sale or a mortgage are the adequacy of consideration, and the continuance or extinguishment of the debt. *Parish v. Gates*, 29 Ala. 254; *Sewall v. Henry*, 9 Ala. 24; *Eiland v. Radford*, 7 Ala. 724, 42 Am. Dec. 610.

The inquiry in every case must be whether the contract in the specific case is a security for the repayment of money or an actual sale. *Conway v. Alexander*, 7 Cranch (U. S.) 218.

Sales of Land.—The same general test applies in the case of transactions involving real estate. *Hughes v. Sheaff*, 19 Iowa 335; *Hoopes v. Bailey*, 28 Miss. 328; *Klein v. McNamara*, 54 Miss. 90; *Roddy v. Brick*, 42 N. J. Eq. 218; *Brown v. Dewey*, 2 Barb. (N. Y.) 28; *Alstin v. Cundiff*, 52 Tex. 453; *Calhoun v. Lumpkin*, 60 Tex. 185; *Earp v. Boothe*, 14 Gratt. (Va.) 368.

The Distinction Between a Mortgage and a Conditional Sale is discussed in *Turner v. Kerr*, 44 Mo. 429, by *Currier, J.*, as follows: "A mortgage and a conditional sale are said to be nearly allied to each other, the difference between them being defined to consist in this: that the former is a 'security for a debt,' while the latter is a purchase accompanied by an agreement to re-sell on particular terms.

* * * In considering the subject, it is at

once to be admitted that a conveyance to secure a subsisting debt is a mortgage, whatever may be the form of the deed, or however absolute it may appear upon its face. It is also true that where the facts of the transaction leave it questionable whether a mortgage or a conditional sale was intended, the doubt is to be resolved in favor of the theory of a mortgage. But it is not true, as a result of the adjudged cases, that a deed absolute in its terms, delivered in payment of a debt, is converted into a mortgage merely because the grantee therein (the creditor) gives a cotemporaneous stipulation binding him to reconvey on being reimbursed, within an agreed period, an amount equal to his debt and the interest thereon. In passing on transactions of this class, the understanding and purposes of the parties thereto are to be considered and respected as in other cases. If they intended an extinguishment of the debt, and the vesting of an absolute title, subject only to an agreement to reconvey upon specific terms—as a payment of an amount equal to the canceled debt and interest—the objects of the arrangement are not to be defeated by turning the transaction into a mortgage, when the parties intended no such result. That the amount of money to be paid as a condition to the right to demand a reconveyance is measured by the amount of the debt and interest, is a circumstance of no controlling importance. It settles nothing. It may often happen that a creditor would consent to take an absolute title stipulating for a reconveyance, when he would reject a mortgage because of the delay and expense to which he might be subjected upon a foreclosure. Such arrangements operate beneficially to the debtor, securing to him additional time and renewed opportunities to extricate himself from embarrassment. Where the parties intend a conditional sale, and not a mortgage, and make their contracts in accordance with their intentions, it is not the province of the courts to circumvent and frustrate their intentions. It is nevertheless true that neither the intention of the parties nor their express contracts can change the essential nature of things. A conveyance to secure a debt is a mortgage, and the stipulations of the parties cannot make it otherwise. But a conveyance to pay a debt is a totally different affair. If the conveyance extinguishes the debt, and the parties so intend, so that a plea of payment would bar an action thereon, a subsequent or cotemporaneous stipulation in the interest of the debtor, securing to him an opportunity to re-acquire the title, ought not to be construed to the creditor's prejudice. Such a transaction is no mortgage, but a conditional sale."

A conditional sale passes title to the vendee in the first instance with a reservation to the vendor to re-purchase at a fixed price and in a

Sale with Agreement for Repurchase. — Thus it is generally held that a sale absolute in terms with a reservation to the grantor of the right to repurchase upon

specified time; a mortgage is a conditional transfer of property which becomes absolute in law if the condition be not performed. *Luckett v. Townsend*, 3 Tex. 119, 49 Am. Dec. 723; *Fowler v. Stoneum*, 11 Tex. 478, 62 Am. Dec. 490.

Examples of Conditional Sales. — A written contract stipulating for a lease of personal property valued at a fixed sum, to be paid in monthly instalments, and providing that if the lessee should be in default thereof he would return it or pay interest on the deferred instalments at the owner's option, that the property should not be removed from the premises, and that no agreement of sale should be implied, and that no sale of the property should be valid without the owner's receipt, was held to be a conditional sale and not a chattel mortgage, and the owner was permitted to recover the property from the purchaser's vendee, who had full knowledge of the non-compliance with the conditions and terms of the contract. *Gerow v. Castello*, 11 Colo. 560, 7 Am. St. Rep. 260.

An agreement to convey property on the payment of certain sums of money and the performance of certain conditions, followed by delivery of possession, constitutes a conditional sale and not a mortgage. *Rowan v. Union Arms Co.*, 36 Vt. 124.

A written contract reciting an agreement for the sale and purchase of a canalboat for three hundred dollars, provided that amount should be paid by the vendee in freighting goods on the canal under the direction of the vendor, is a conditional sale and not a mortgage, and until payment no title vests in the vendee which can be levied on and sold under a *fi. fa.* against him. *Strong v. Taylor*, 2 Hill (N. Y.) 326.

An agreement under which personal property is delivered by the owner to another, title remaining in the owner until payment of the notes given for the price, and to vest in the vendees upon payment, is a conditional sale and not a mortgage. *Plummer v. Shirley*, 16 Ind. 380.

An Instrument Purporting to Mortgage a mule to secure the payment of a note given in part for the purchase price of the mule, but providing that the mule shall remain the property of the mortgagee until paid for, is in effect a conditional sale, with reservation of title so far as the price of the mule is concerned. *Smith v. De Vaughn*, 82 Ga. 574.

If the Purchaser Pays Part of the Price he acquires an equitable interest in the property which a creditor may reach and subject by paying or tendering the balance due, or asking a specific performance in equity. *Bingham v. Vandegrift*, 93 Ala. 283.

For Additional Cases of Contracts Held to Be Conditional Sales and not mortgages, see *Rogers Locomotive Works v. Lewis*, 4 Dill. (U. S.) 158; *Blanchard v. Cooke*, 144 Mass. 207; *Buse v. Page*, 32 Minn. 111; *Grant v. Skinner*, 21 Barb. (N. Y.) 581; *Morgenstern v. Davis* (Supreme Ct.) 14 N. Y. Supp. 31; *Caldwell v. Singer Mfg. Co.*, 7 Ohio Cir. Ct. Rep. 460; *Gambling v.*

Read, Meigs (Tenn.) 281; *Buson v. Dougherty*, 11 Humph. (Tenn.) 50; *Luckett v. Townsend*, 3 Tex. 119, 49 Am. Dec. 723; *Hubby v. Harris*, 68 Tex. 91; *Leavell v. Robinson*, 2 Leigh (Va.) 161.

Examples of Mortgages. — An instrument must be considered as a mortgage if, taken alone or in connection with surrounding facts, it appears to have been given as a security; thus an instrument purporting to be a bill of sale, but stating that it was given as security for money advanced, and reciting a consideration of only twelve hundred dollars, but purporting to convey goods worth three thousand dollars, was held to be a mortgage only. *Cooper v. Brock*, 41 Mich. 488.

The delivery of slaves at a fixed price to be paid at a future day, upon payment of which the owner was to make proper titles to the wife of the person to whom the slaves were delivered, was held not to be a conditional sale, but a transfer of the property with a security intended to operate as a mortgage. *Weaver v. Lapsley*, 42 Ala. 601, 94 Am. Dec. 671.

Where personal property was delivered by the owner to another to be paid for in stated instalments, and if so paid for to become the property of the borrower but if not so paid for to remain the property of the owner, the borrower to keep the property insured for the benefit of the owner and in good order, and in case of default the owner was to retake the property and dispose of it to the best advantage, rendering to the borrower all surplus, if any, over the price agreed upon and expenses of sale, it was held that this last provision with other features of the transaction showed that the title passed, and that the parties attempted to reserve a mere lien for the price, which to be valid as against third persons must conform to the requirements of the law as to chattel mortgages. *Palmer v. Howard*, 72 Cal. 293, 1 Am. St. Rep. 60.

Pledge. — The delivery of chattels by a debtor to his creditor as security for the debt, with power to sell the chattels and to satisfy the debt out of the proceeds of the sale, or to retain the property until the debt is paid by the debtor, constitutes a pledge and not a sale. *Houser v. Kemp*, 3 Pa. St. 208. See also *Wilkie v. Day*, 141 Mass. 68.

Where an Absolute Conveyance Is Made upon an Application for a Loan, with an agreement to reconvey upon payment of the money advanced, the transaction is generally considered to be a mortgage. 1 Jones on Mortgages, § 266.

For Additional Cases of Contracts Held to Be Mortgages and not conditional sales, see *Damm v. Mason*, 98 Mich. 237; *Kollock v. Emmert*, 43 Mo. App. 566; *Frick v. Hilliard*, 95 N. Car. 117; *Tufts v. Haynie*, 4 Ohio Cir. Ct. Rep. 404; *Talbott v. Sandifer*, 27 S. Car. 624; *Fowler v. Stoneum*, 11 Tex. 478, 62 Am. Dec. 490; *Clark v. West Pub. Co.*, (Tex. Civ. App. 1894) 26 S. W. Rep. 527.

Where a Note Is Given for the Price of Personal Property purchased containing a stipulation that the property shall be a security for the

agreed terms is a conditional sale and not a mortgage.¹ But in such cases the party seeking a reconveyance to himself must strictly comply with the conditions imposed upon him.²

Express Reservation of Title. — Where by the written contract of the parties it is expressly provided that the title to the property shall remain in the vendor until the purchase money is fully paid, and there is no reservation of a lien,³ the transaction is a conditional sale and not a mortgage.⁴

payment of the note, the character of the transaction depends upon whether the title of the property is retained by the vendor or is parted with by the terms of the contract. In the former case the transaction is a conditional sale, in the latter it is a mortgage. *Frick v. Hilliard*, 95 N. Car. 117.

Thus an instrument under seal signed by B, promising to pay C one hundred and fifty dollars "for one bay horse bought of him, and to secure him the horse stands his own security," was held to be a conditional sale and not a mortgage, and not void for want of registration. *Clayton v. Hester*, 80 N. Car. 275, *overruling Deal v. Palmer*, 72 N. Car. 582. See also *Gaither v. Teague*, 7 Ired. L. (N. Car.) 460.

Where, upon the sale of a chattel, the purchaser gave his note with sureties for the price, and it was agreed by parol between the parties at the time that the chattel should belong to the sureties until the note was paid, it was held that the effect of the agreement was to pass the title to the chattel from the seller to the sureties, and not from the seller to the purchaser and then from him to his sureties for their indemnity, for in the latter case it would have been a mortgage, which would have been void for want of registration. *Worthy v. Cole*, 69 N. Car. 157.

1. Sale with Agreement for Repurchase Held Conditional. — *Alabama*. — *Eiland v. Radford*, 7 Ala. 724, 42 Am. Dec. 610; *Sewall v. Henry*, 9 Ala. 24; *Murphy v. Barefield*, 27 Ala. 635; *Swift v. Swift*, 36 Ala. 147; *Beck v. Blue*, 42 Ala. 32, 94 Am. Dec. 630; *Logwood v. Hussey*, 60 Ala. 477. So, also, in a case involving real estate. *West v. Hendrix*, 28 Ala. 226.

Arkansas. — *Johnson v. Clark*, 5 Ark. 321.

Mississippi. — *Magee v. Catching*, 33 Miss. 672.

New York. — *Mahler v. Schloss*, 7 Daly (N. Y.) 291.

North Carolina. — *Poindexter v. McCannon*, 1 Dev. Eq. (N. Car.) 377, 18 Am. Dec. 591.

Virginia. — *Chapman v. Turner*, 1 Call (Va.) 281, 1 Am. Dec. 514.

There is no difference in point of law between a sale for a price paid or to be paid which is to become absolute on a particular event, and a purchase accompanied by an agreement to resell upon certain agreed terms. In both cases the sale is to be regarded as conditional; and if the condition which is to defeat it is promptly performed, in the one case the title will not vest in the vendee, and in the other it will be divested. *Sewall v. Henry*, 9 Ala. 24.

Where A was seized of land subject to a charge of £1,000 to the wife of B, and conveyed the land to trustees for B and wife by a deed reciting that they had agreed to accept the land in lieu and satisfaction of the £1,000,

and that A had agreed to convey for that purpose, and the deed contained a covenant that if A paid the £1,000 within ten years the trustees should reconvey, it was held that this was not a mortgage but a conditional sale. *Goodman v. Grierson*, 2 B. & B. 274.

A written instrument, in form a deed of bargain and sale conveying personal property absolutely, but reserving to the grantor the right to redeem by a certain time, and stipulating that in case of failure to redeem he should pay for the use of the property, where it appeared that the consideration was paid at the grantor's request, to satisfy a debt which he owed to a third person, to secure which the property was mortgaged, and there was no evidence that the agreed price was disproportionate to the value of the property, was held to be a conditional sale and not a mortgage. *Logwood v. Hussey*, 60 Ala. 417.

An absolute bill of sale and a bond to reconvey on repayment of the purchase money on a certain day, otherwise the bond to be void, in the absence of proof that a security for the payment of money loaned was intended, constitutes a conditional sale and not a mortgage. *Thompson v. Chumney*, 8 Tex. 389.

Where a conveyance of land was absolute in form, and a separate paper gave the right to repurchase by a specified day, and it appeared that the transaction did not originate in a proposition for a loan, and that no debt existed or continued between the parties, it was held that it would be deemed a conditional sale and not a mortgage. *Mitchell v. Wellman*, 80 Ala. 16.

So where the agreement to reconvey was oral. *Douglass v. Moody*, 80 Ala. 61.

2. 4 Kent Com. 144; *Slowey v. McMurray*, 27 Mo. 113, 72 Am. Dec. 251; *Robertson v. Campbell*, 2 Call (Va.) 421. So, also, in the case of a sale of real estate, *Hoopes v. Bailey*, 28 Miss. 328.

3. Reserving Lien. — Where a note given for the purchase of machinery provided that it should be a lien upon the property for which it was given until it was paid in full at maturity, at which time the property should be at the disposal of the vendors, the transaction was held to be a mortgage and not a conditional sale, the reservation of the lien being inconsistent with the retention of the title by the vendors. *Frick v. Hilliard*, 95 N. Car. 117. See also *Langdon v. Buel*, 9 Wend. (N. Y.) 80.

4. Express Reservation of Title until Payment — *United States*. — *The Marina*, 19 Fed. Rep. 760.

Alabama. — *Sumner v. Woods*, 52 Ala. 94, 67 Ala. 139, 42 Am. Rep. 104; *Bingham v. Vandegrift*, 93 Ala. 283.

Georgia. — *Jowers v. Blandy*, 58 Ga. 379; *Smith v. De Vaughn*, 82 Ga. 574. See also *Boyd v. Lofton*, 34 Ga. 494.

2. From Bailments and Leases. — In general, where personal property is delivered by the owner to another with the understanding that the latter may purchase it on compliance with certain conditions, and if he pays for it within a specified time he is to become the owner, but otherwise he is to pay a certain sum for the use of the property, the transaction is a bailment and not a conditional sale;¹ but the delivery of property to an intended purchaser who is to have the use thereof, the owner reserving to himself the naked title and the right to reclaim the property if not paid for, where it appears from the contract between the parties that such reservation is made for the sole purpose of securing the payment of the purchase money, constitutes a conditional sale and not a bailment.²

Instalment Sales — Conditional Sales Disguised as Leases. — The delivery of personal property under a contract that the party receiving it is to pay for it in instalments at specified times, and when so paid for it is to become his property, but that the title is to remain in the original owner until all the purchase money has been paid, constitutes a familiar example of a conditional sale.³ It frequently happens, however, especially in the case of the transfer of such articles as sewing machines, pianos, organs, and furniture, that in order to afford the vendor a better security against the claims of third persons, and to avoid the inconvenience of a chattel mortgage,⁴ such transfers are made under the name of leases and the payments to be made are denominated rent. There has been some conflict among the authorities as to the exact nature of such transactions, but in most jurisdictions the courts, looking to what is obviously the real intent of the parties,⁵ hold these contracts to be conditional sales and not contracts of letting and hiring, notwithstanding the use of terms appropriate to such contracts.⁶ If it appears from the face of the contract that the

Indiana. — *Plummer v. Shirley*, 16 Ind. 380.

Massachusetts. — *Nichols v. Ashton*, 155 Mass. 205.

North Carolina. — *Ellison v. Jones*, 4 Ired. L. (N. Car.) 48; *Ballew v. Sudderth*, 10 Ired. L. (N. Car.) 176; *Parris v. Roberts*, 12 Ired. L. (N. Car.) 268, 55 Am. Dec. 415; *Vasser v. Buxton*, 86 N. Car. 335; *Frick v. Hilliard*, 95 N. Car. 117; *Pate v. Oliver*, 104 N. Car. 458.

Virginia. — *McComb v. Donald*, 82 Va. 903.

West Virginia. — *McGinnis v. Savage*, 29 W. Va. 362.

Wisconsin. — *W. W. Kimball Co. v. Mellon*, 80 Wis. 133; *Wadleigh v. Buckingham*, 80 Wis. 230.

See also *Baldwin v. Crow*, 86 Ky. 679; *Grant v. Skinner*, 21 Barb. (N. Y.) 581.

1. See the title **BAILMENTS**, vol. 3, p. 739, and cases cited; *Sargent v. Gile*, 8 N. H. 325; *Ludden, etc., Southern Music House v. Dusenbury*, 27 S. Car. 464.

For Other Cases of contracts held to be bailments and not sales, see *Union Stock Yards, etc., Co. v. Western Land, etc., Co.*, 18 U. S. App. 438; *Bridgeport Organ Co. v. Guldin*, 3 Pa. Dist. Rep. 649; *Wieder v. Roeschman*, 13 Pa. Co. Ct. Rep. 94; *Farmers' Nat. Bank v. Henderson*, (Tex. Civ. App. 1895) 29 S. W. Rep. 562; *Rumpf v. Barto*, 10 Wash. 382.

For contract held to be neither absolute nor conditional sale, but a hiring, see *Tomlinson v. Roberts*, 25 Conn. 477, 68 Am. Dec. 367; *Hughes v. Kelly*, 40 Conn. 148.

2. Delivery with Reservation of Title Conditional Sale and Not Bailment. — *Fleury v. Tufts*, 25 Ill. App. 101; *Bryant v. Crosby*, 36 Me. 562, 58 Am. Dec. 767; *Haak v. Lindeman*, 64 Pa. St. 499, 3 Am. Rep. 612. See also *Page v. Edwards*, 64 Vt. 124.

A note stating that it is given in payment for a chattel which is to remain the property of the vendor until the note is paid evidences a conditional sale, and not a bailment. *Vaughn v. Hopson*, 10 Bush (Ky.) 337.

Where property is delivered for a consideration, and no option is given to the person receiving it upon any contingency to return it, and none to the owner to reclaim it except upon the failure of the vendee to make payment or to retain possession, the transaction is a conditional sale, and not a bailment. *Bryant v. Crosby*, 36 Me. 562, 58 Am. Dec. 767.

3. See notes immediately following.

That such a sale is not absolute, see *Kohler v. Hayes*, 41 Cal. 455.

4. The object of such a device is frequently to make such conditional sales valid not only between the parties, but also, if possible, against innocent purchasers from and creditors of the vendee. *McGinnis v. Savage*, 29 W. Va. 362.

5. **The Transaction Is Not Changed by the Agreement Assuming the Form of a Lease.** — In determining the real character of a contract courts will always look to its purpose rather than to the name given to it by the parties. *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664.

6. **Contracts Providing for Payment in Instalments Conditional Sales and Not Leases** — *United States.* — *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664.

California. — *Parke, etc., Co. v. White River Lumber Co.*, 101 Cal. 37; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353.

Connecticut. — *Hine v. Roberts*, 48 Conn. 267, 40 Am. Rep. 170; *Loomis v. Bragg*, 50 Conn. 228, 47 Am. Rep. 638.

transaction is in fact a sale, and not a renting, it is immaterial what name the

District of Columbia. — *Sanders v. Wilson*, 19 D. C. 555.

Georgia. — *Puffer v. Peabody*, 59 Ga. 295; *Hays v. Jordan*, 85 Ga. 741; *Cottrell v. Merchants'*, etc., Bank, 89 Ga. 508; *Ross v. McDuffie*, 91 Ga. 120.

Illinois. — *Murch v. Wright*, 46 Ill. 487, 95 Am. Dec. 455; *Lucas v. Campbell*, 88 Ill. 447; *Latham v. Sumner*, 89 Ill. 233, 31 Am. Rep. 79.

Kentucky. — *Greer v. Church*, 13 Bush (Ky.) 430.

Maine. — *Gorham v. Holden*, 79 Me. 317; *Gross v. Jordan*, 83 Me. 380.

Mississippi. — *Dederick v. Wolfe*, 68 Miss. 500, 24 Am. St. Rep. 283, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 426; *Ham v. Cerniglia*, 73 Miss. 290, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 426.

Missouri. — *Sumner v. Cottey*, 71 Mo. 121.

New Hampshire. — *Gerrish v. Clark*, 64 N. H. 492.

New Jersey. — *Cole v. Berry*, 42 N. J. L. 308, 36 Am. Rep. 511.

New York. — *Campbell Printing Press*, etc., Co. v. *Oltrogge*, 13 Daly (N. Y.) 247; *Puffer v. Reeve*, 35 Hun (N. Y.) 480, 15 Abb. N. Cas. (N. Y.) 388.

North Carolina. — A. D. *Puffer*, etc., Mfg. Co. v. *Lucas*, 112 N. Car. 377, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 426; *Clark v. Hill*, 117 N. Car. 11. See also *Barrington v. Skinner*, 117 N. Car. 47. But see *Foreman v. Drake*, 98 N. Car. 311.

Rhode Island. — *Goodell v. Fairbrother*, 12 R. I. 233, 34 Am. Rep. 631; *Carpenter v. Scott*, 13 R. I. 477.

Tennessee. — *Singer Mfg. Co. v. Cole*, 4 Lea (Tenn.) 439, 40 Am. Rep. 20; *Meagher v. Holtenberg*, 9 Lea (Tenn.) 392; *Cowan v. Singer Mfg. Co.*, 92 Tenn. 376.

Vermont. — *Bradley v. Arnold*, 16 Vt. 382; *Whitcomb v. Woodworth*, 54 Vt. 544; *Collender Co. v. Marshall*, 57 Vt. 232.

Washington. — *J. M. Brunswick*, etc., Co. v. *Tacoma Mill Co.*, 3 Wash. Ter. 164; *De Saint Germain v. Wind*, 3 Wash. Ter. 189; *Quinn v. Parke*, etc., Machinery Co., 5 Wash. 276.

West Virginia. — *Baldwin v. Van Wagner*, 33 W. Va. 293.

See also *Currier v. Knapp*, 117 Mass. 324; *Knittel v. Cushing*, 57 Tex. 354, 44 Am. Rep. 598; *McGinnis v. Savage*, 29 W. Va. 362.

In the American editor's note to *Benj. on Sales* (4th Am. ed.), p. 10, it is said: "The hardship of a forfeiture, where nearly all the price has been paid under the name of rent, has led to much litigation, in which the claim for the buyer is always made that the transaction is in fact a sale with a lien for price reserved. Generally, however, the courts have enforced these contracts according to their plain terms, and have held that if the buyer saw fit to sign a lease, he must be regarded as bailee, and not as purchaser." But with the exception of the *Pennsylvania* cases (to be presently noticed) this proposition is supported only by the following decisions: *Sargent v. Gile*, 8 N. H. 325; *Bailey v. Colby*, 34 N. H. 29, 66 Am. Dec. 752; *Austin v. Dye*, 46 N. Y. 500; *Bean v. Edge*, 84 N. Y. 510; *Haviland v. Johnson*, 7 Daly (N. Y.) 297. And all the latest

authorities as above cited are directly opposed to it.

The conclusive argument, it would seem, is stated by *Davis, J.*, in *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, where he says: "It was evidently not the intention that this large sum should be paid as rent for the mere use of the engine for one year. If so, why agree to sell and convey the full title on the payment of the last instalment?"

In *Michigan* an agreement for the leasing of a chattel at an agreed periodical rental, and for its sale to the lessee at the expiration of the term of the lease for a specified sum, does not make the lessee a purchaser of the chattel, but merely gives him the right to use it with an option to purchase on the terms stated. *Powell v. Eckler*, 96 Mich. 538. See *Dunlap v. Gleason*, 16 Mich. 158, 93 Am. Dec. 231; *Whitney v. McConnell*, 29 Mich. 12.

Illustrations. — An instrument reciting a lease of a piano for a specified sum as rent, to be paid in monthly instalments, and providing that in case the lessee fails to make any of the payments the piano is to be returned to the lessor; that upon payment of the full sum mentioned as rent the lessor shall give an absolute bill of sale; and that title shall remain in him until the last payment is made, is a conditional sale. *Sanders v. Wilson*, 19 D. C. 555.

An agreement between A and B under which the latter received from the former a piano, the price of which was fixed at seven hundred dollars, and paid fifty dollars on the receipt of the instrument, this being called rent for the first month, and was to pay fifty dollars monthly for thirteen months, these payments as rent being counted as part of the price, is a conditional sale. *Murch v. Wright*, 46 Ill. 487, 95 Am. Dec. 455. In this case *Lawrence, J.*, said: "It was a mere subterfuge to call this transaction a lease, and the application of that term in the written agreement between the parties does not change its real character. It was a conditional sale, with a right of rescission on the part of the vendor in case the purchaser should fail in payment of his instalments—a contract legal and valid as between the parties, but made with the risk, on the part of the vendor, of losing his lien in case the property should be levied upon by creditors of the purchaser while in possession of the latter."

Where a sewing machine was delivered under a writing purporting to hire the same for five dollars per month, the company agreeing, when eighty-five dollars was paid in such monthly advances or otherwise, to sell and deliver the machine under a receipted bill of sale, it was held that the writing showed a sale and that the machine was liable to attachment against the purchaser. *Lucas v. Campbell*, 88 Ill. 447.

Where A received from B an organ and signed and delivered to him the following agreement prepared by B: "The subscriber has this 21st day of December, 1877, rented of B one choral organ, during the payment of rent as herein agreed, for the full rent of \$190, payable as follows: one melodeon valued at

parties choose to give it.¹

Conditional Sale Distinguished from Executory Conditional Contract of Purchase. — In some jurisdictions a distinction is made between the possession of personal property under a contract of conditional sale, and possession under a bailment with an executory conditional agreement for the purchase of the property. In the former case, as where the property is delivered to the vendee with a reservation of title in the vendor until payment of the price, the property is subject to execution at the suit of creditors of the vendee, and may be transferred by him to *bona fide* purchasers;² while in the case of a bailment with an option

\$50 as first payment, and one note for \$140 due January 15, 1879; with the understanding that if I shall have punctually paid all said rent I shall be entitled to a bill of sale of the organ, and if I fail to pay any of said rent when due all my rights herein shall terminate and said B may take possession of said organ," it was held that this was not a lease of the organ, but a conditional sale, and that B could not recover upon the one hundred and forty dollar note after the organ had been returned. *Hine v. Roberts*, 48 Conn. 267, 40 Am. Rep. 170.

A contract purporting to rent a sewing machine for fifteen months for ninety-five dollars, the machine to remain the property of the lessor until the amount is paid and then to become the property of the hirer, without further payment, is not a contract of letting but one of sale. *Singer Mfg. Co. v. Cole*, 4 Lea (Tenn.) 439, 40 Am. Rep. 20.

The leasing of furniture for a stipulated rent per month, it being agreed that when the value of the furniture is paid the title shall vest in the lessee, constitutes a sale upon a condition precedent; and, under *West Virginia Code*, c. 74, § 3, a reservation of the title, unless a notice is duly recorded, is void as to creditors of the purchaser. *Baldwin v. Van Wagner*, 33 W. Va. 293.

A contract by which the vendee of personal property agrees to pay the entire value thereof in monthly instalments in one year, and if he so pays the property is to be his, and if not, the vendor's, is a conditional sale and not a lease. *Collender Co. v. Marshall*, 57 Vt. 232. See also *Kimball v. Post*, 44 Wis. 471.

Where the publisher of a newspaper contracted to sell the newspaper establishment, including presses, machinery, type, etc., the purchase price, with the exception of a cash payment, to be paid in annual instalments, the vendee to have full ownership upon the performance of the conditions of the agreement, and meanwhile to take possession and use the property as "tenant or bailee," the vendor having the right in case of nonperformance to take possession, it being further agreed that the property should not be sold, save certain specified articles which if sold were to be replaced by other similar property subject to the same conditions, it was held that the transaction was a conditional sale, and title did not vest in the vendee until payment of the purchase price. *Boon v. Moss*, 70 N. Y. 465.

1. *Greer v. Church*, 13 Bush (Ky.) 430.

2. The Distinction Stated in the Text is recognized especially in *Pennsylvania and Alabama*. In *Forrest v. Nelson*, 108 Pa. St. 481, *Sterrett, J.*, said: "A present sale and delivery of personal property to the vendee, coupled

with an agreement that the title shall not vest in the latter unless he pays the price agreed upon at the time appointed therefor, and that in default of such payment the vendor may resume possession of the property, is quite different in its effect from a bailment for use, or, as it is sometimes called, a lease of the property, coupled with an agreement whereby the lessee may subsequently become owner of the property upon payment of a price agreed upon. As between the parties to such contracts both are valid and binding; but as to creditors, the latter is good while the former is invalid." See *Chamberlain v. Smith*, 44 Pa. St. 431; *Henry v. Patterson*, 57 Pa. St. 346; *Rowe v. Sharp*, 51 Pa. St. 26; *Becker v. Smith*, 59 Pa. St. 469; *Crist v. Kleber*, 79 Pa. St. 290; *Enlow v. Klein*, 79 Pa. St. 488. And see the opinion of *Jenkins, J.*, in *Ott v. Sweatman*, 166 Pa. St. 217, quoted in vol. 3, pp. 739-740, in which the Pennsylvania doctrine is clearly announced, with a full citation of the authorities. See *infra*, this title, *Rights of Parties — Of Third Persons*. See also, in Alabama, *McCall v. Powell*, 64 Ala. 254.

Where the contract provides that no title to the property shall pass until the payment of the hire, but no provision is made for the return of the property, the transaction is not a bailment but a conditional sale. *Farquhar v. McAlevy*, 142 Pa. St. 233.

A written contract reciting a lease of horses for one hundred and twenty-five dollars to be paid by a certain date, the lessor, in case of nonpayment, to have the possession of the horses, title being reserved in him until payment, shows a sale and not a hiring. *Summerson v. Hicks*, 134 Pa. St. 566; *Wyckoff v. Summerson*, (Pa. 1890) 19 Atl. Rep. 809.

A sale of a chattel on credit, with a reservation of title until the payment of the notes given for the price, the chattel to be in the possession of and used by the vendee, but the vendor having the right to retake it on default in payment, is a conditional sale on credit with a provision for converting the sale into a bailment upon nonpayment. *Wire Book Sewing Mach. Co. v. Crowell*, (Pa. 1887) 6 Cent. Rep. 186.

Where a sewing machine was delivered by A to B under a contract by which the latter was to hold it as the agent of A for a certain time, at a specified rent, and to redeliver it upon default in the payment of rent, but B had an option to purchase at a nominal price on payment of the rent, it being expressly agreed that the transaction was not a sale, it was held that this was a bailment and not a conditional sale. *Wheeler, etc., Mfg. Co. v. Heil*, 115 Pa. St. 487, 2 Am. St. Rep. 575.

to purchase, the property does not pass as in favor of such creditors and purchasers.¹

Question for Court. — If the contract is in writing, the question whether it is a conditional sale or a bailment is for the court.²

3. From Consignments. — The delivery of goods by the owner to another, to be sold by the latter on the account of the former, is a consignment and not a conditional sale, and creates a mere contract of agency.³ But where the goods are to be sold by the party receiving them on his own account, the owner merely reserving title until the purchase money is paid, the transaction is a conditional sale.⁴

V. SALES DEPENDENT UPON EXPRESS CONDITIONS. — The conditions upon which the validity of a sale is to depend are generally expressed in the contract between the parties, and in such case no precise words are necessary to constitute a condition, either precedent or subsequent. Doubtful cases are to be determined by the intention of the parties as indicated by the circumstances of the particular case.⁵

VI. SALES DEPENDENT UPON IMPLIED CONDITIONS. — Where it appears from the circumstances of the case that the parties intended a sale to be conditional, although no condition has been expressly stated, a condition to be attached to the sale may be implied.⁶ Thus where goods are delivered to the buyer

1. *McCall v. Powell*, 64 Ala. 254; *Ballard v. Burgett*, 40 N. Y. 314; *Austin v. Dye*, 46 N. Y. 500. And see preceding note.

2. *Forrest v. Nelson*, 108 Pa. St. 481.

3. **Conditional Sales Distinguished from Consignments.** — *Renoe v. Western Star Milling Co.*, 53 Kan. 255; *Cortland Wagon Co. v. Sharny*, 52 Minn. 216; *Peet v. Spencer*, 90 Mo. 384; *Ferd Heim Brewing Co. v. Linck*, 51 Mo. App. 478. These cases hold that such contracts are not within the meaning of the statutes requiring contracts of conditional sale to be recorded. See also *Robinson's Appeal*, 63 Conn. 290.

For a contract held to be not a contract of agency for the sale of goods on commission, but a contract of sale or return, see *Ex p. White*, L. R. 6 Ch. 397, affirmed as *Towle v. White*, 21 W. R. 465. See also *Nutter v. Wheeler*, 2 Lowell (U. S.) 346. See the title SALES.

Where the manufacturers of agricultural implements delivered them to agents to be sold, with the understanding that the agents were to pay for them if sold within the year, otherwise to "take them for the next season," the transaction being entered upon the agents' books and the manufacturers' invoices as a sale, it was held that the property passed upon delivery, and hence to the agents' assignees in bankruptcy. *Walter A. Wood Mowing, etc., Mach. Co. v. Brooke*, 2 Sawy. (U. S.) 576.

A contract by which a brewing company agreed to ship to a firm all beer ordered by them at an agreed price per barrel, the title to remain in the company until the beer was sold, and by which the firm agreed to take and pay for the beer on the conditions named, was valid as to the creditors of the firm, and created a mere agency, under which the firm were to take and sell the beer, and pay over from the proceeds the agreed price per barrel. *F. J. Dewes Brewery Co. v. Merritt*, 82 Mich. 198.

4. See *infra*, this title, *Rights of Parties — Of Third Persons*.

A written agreement by manufacturers to furnish their machines to a dealer to be sold by him on commission, to be paid for partly in cash and partly in purchaser's notes, which the dealer is to indorse and make good, the title not to pass from the manufacturers until full settlement, shows a conditional sale, and under the *Wisconsin Rev. Stat.*, § 2713, is void as to attaching creditors unless recorded. *Rawson Mfg. Co. v. Richards*, 69 Wis. 643; *Thomas v. Richards*, 69 Wis. 671.

Where goods are furnished by one person to another to be sold by the latter as the agent of the former, at wholesale prices, to be accounted for as the sales are made, the transaction is a conditional sale and title remains in the original owner, and the goods are not liable to attachment as the property of the agent. *Thornton v. Cook*, 97 Ala. 630.

5. *Story on Sales*, § 252.

No Technical Words Are Necessary to create the condition or to declare its nature. Whether the contract is upon condition precedent or subsequent is a question to be resolved by the intention and understanding of the parties, to be collected by carefully considering the entire instrument. *Carnes v. Apperson*, 2 Sneed (Tenn.) 562.

As to the necessity for reducing contracts of conditional sale to writing and registration, see *infra*, this title, *Recording Acts*.

Oral Condition Attached to Written Contract Held Void. — Where a partner, being sick at the time, conveyed to his copartner, by a written instrument, all his interest in the firm, agreeing with him verbally at the same time that in case he should recover the sale was to be null and void, and he was to continue in the firm as before, it was held that this verbal condition was nugatory and the sale absolute. *Wallace v. McVey*, 6 Ind. 300. See also that a verbal reservation of title is void in *Texas*, *Hastings v. Kellogg*, (Tex. Civ. App. 1896) 36 S. W. Rep. 821, following *Harrold v. Barwise*, 10 Tex. Civ. App. 138.

6. *Story on Sales*, § 253.

in a cash sale there is an implied condition of immediate payment.¹

VII. SALES DEPENDENT UPON CONDITIONS PRECEDENT — 1. **Generally.** — In general, wherever some act remains to be done in relation to the property which is the subject of sale, and there is no evidence to show any intention of the parties to make an absolute and complete sale, the performance of such act is a prerequisite to a consummation of the contract, and until it is performed the property does not pass to the vendee.²

2. **Conditions Precedent Must Be Strictly Performed.** — As a general rule, a condition precedent in a sale, as in other contracts, must be strictly performed,³ unless the performance is waived⁴ or prevented by the other party,⁵ or becomes impossible without the fault of the party from whom performance is required.⁶

3. **Conditions Precedent to Be Performed by the Vendor** ⁷ — *a. GENERALLY* — **LORD BLACKBURN'S FIRST RULE.** — Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, in other words, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property.⁸ This principle is known as Lord Blackburn's first rule.

1. See *infra*, this title, *Sales Dependent upon Conditions Precedent* — *In Cash Sales*.

2. **General Rule as to Conditions Precedent.** — *Moffatt v. Green*, 9 Ind. 198; *Newcomb v. Cabell*, 10 Bush (Ky.) 460; *Stone v. Peacock*, 35 Me. 388; *Southwestern Freight, etc., Co. v. Stanard*, 44 Mo. 71, 100 Am. Dec. 255; *Wallingford v. Burr*, 15 Neb. 204; *Fuller v. Bean*, 34 N. H. 290; *Ockington v. Richey*, 41 N. H. 275; *Prescott v. Locke*, 51 N. H. 94, 12 Am. Rep. 55; *Gibbs v. Benjamin*, 45 Vt. 124.

If anything remains to be done as between the seller and the buyer before the goods are to be delivered a present right of property does not attach in the buyer. 2 Kent Com. 495.

3. *Benjamin on Sales*, § 858; *Russell v. Witt*, 38 Ind. 9. See the title **CONTRACTS**.

4. *Benjamin on Sales*, § 858. See *infra*, this title, *Waiver of Conditions*.

5. **Performance of Condition Prevented by Other Party.** — A waiver is implied in all cases in which the party entitled to exact performance either hinders or impedes the other party in fulfilling the condition, or incapacitates himself from performing his own promise, or absolutely refuses performance, so as to render it idle and useless for the other to fulfil the condition. *Benjamin on Sales*, § 858. See also §§ 859-860.

The vendor cannot maintain an action on a contract for the sale and delivery of personal property so long as anything remains undone necessary to transfer the title thereto, but where such thing remains undone through the fault of the vendee, he may be liable for a breach of the contract. *Indianapolis, etc., R. Co. v. Maguire*, 62 Ind. 140.

6. *Benjamin on Sales*, §§ 861-869. See the title **CONTRACTS**.

7. A further and more specific treatment of that part of the law of sales comprehended in the present section of this article will be found under the title **SALES**, in connection with the discussion of executory and executed contracts of sale.

8. **Lord Blackburn's First Rule.** — *Blackburn*

on Sales, p. 151; 1 *Benj. on Sales* (6th Am. ed.), § 364; *Elgee Cotton Cases*, 22 Wall. (U. S.) 180; *Schneider v. Westerman*, 25 Ill. 514; *Wollensak v. Briggs*, 119 Ill. 453; *Riddle v. Varnum*, 20 Pick. (Mass.) 280; *Foster v. Ropes*, 111 Mass. 10; *Martin v. Hurlbut*, 9 Minn. 142; *Smith v. Sparkman*, 55 Miss. 649, 30 Am. Rep. 537; *Davis v. Hill*, 3 N. H. 382, 14 Am. Dec. 373; *McDonald v. Hewett*, 15 Johns. (N. Y.) 349, 8 Am. Dec. 241; *Blossom v. Shotter*, 59 Hun (N. Y.) 481; *Hubler v. Gaston*, 9 Oregon 66, 42 Am. Rep. 794; *Hamilton v. Gordon*, 22 Oregon 557.

No title passes where anything remains to be done by a seller of merchandise to put the same in a deliverable shape, and the purchaser has an option of refusal to accept in case such things are not done. *Blossom v. Shotter*, 59 Hun (N. Y.) 481.

Where a quantity of turpentine in casks was sold in lots at so much per hundred weight it was held that the property passed in those lots only in which the casks were filled up as agreed, since as to them only had the vendor done everything necessary to put them in a deliverable state. *Rugg v. Minett*, 11 East 210.

Where goat skins were sold by the bale, each containing a specified number, it was held that the property did not pass, because by the usage of trade it was the duty of the seller to count the skins in each bale, which was not done when the goods were destroyed by fire. *Zagury v. Furnell*, 2 Campb. 240.

Condition Fully Performed as to Part of Goods Sold. — Where the vendor has performed everything that is required of him as to a portion of the things sold, but something still remains to be done as to the rest, the portion in regard to which the vendor has performed all his duty becomes the property of the vendee, but the portion in respect to which something is yet to be done still belongs to the vendor, and it makes no difference as to the operation of this rule whether the contract is an entirety or not. *Thompson v. Conover*, 32

The General Rule Will Not Prevail where by the terms of the agreement the title is to vest in the buyer immediately, notwithstanding something remains to be done by the seller after delivery. In all cases, however, the intention of the parties as to the time when the title is to pass can be ascertained only from the terms of the agreement as expressed in the language and conduct of the parties, and as applied to known usage and the subject matter.¹

b. LORD BLACKBURN'S SECOND RULE. — The second rule on this subject laid down by Lord Blackburn is as follows: Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in a state in which they ought to be accepted;² or, as the rule has been otherwise stated, if anything remains to be done on the part of the vendor, as between him and the vendee, such as weighing, measuring, or counting out of a common parcel, before the goods purchased are to be delivered, until that is done the right of property does not attach in the vendee.³

But Where the Goods Are Actually Delivered, this in general indicates an intent of the parties that the title shall pass at once, and the weighing, measuring, or counting after delivery (in this case generally to be done by the vendee or by a third person) are to be considered, not as any part of the contract of sale, but as referring to the adjustment of the final settlement of the price.⁴

N. J. L. 466. See also *Rapelye v. Mackie*, 6 Cow. (N. Y.) 250.

1. *Foster v. Ropes*, 111 Mass. 10; *Riddle v. Varnum*, 20 Pick. (Mass.) 280.

Sale Held Absolute Notwithstanding Something to Be Done by Vendor. — Under a contract for the sale of a field of growing wheat in payment of a precedent indebtedness, it was held that a stipulation that the wheat should be cut, threshed, and delivered by the vendor at the railroad station did not render the sale conditional. *Emery v. Scarlett*, 8 Pa. Co. Ct. Rep. 123.

2. Lord Blackburn's Second Rule. — Blackburn on Sales, 152; 1 Benj. on Sales, § 364.

Illinois. — *O'Keefe v. Kellogg*, 15 Ill. 347; *Frost v. Woodruff*, 54 Ill. 155; *Graff v. Fitch*, 58 Ill. 373, 11 Am. Rep. 85.

Iowa. — *Snyder v. Tibbals*, 32 Iowa 447.

Maine. — *Houdlette v. Tallman*, 14 Me. 400; *Stone v. Peacock*, 35 Me. 385.

Massachusetts. — *Macomber v. Parker*, 13 Pick. (Mass.) 175; *Sherwin v. Mudge*, 127 Mass. 547.

Michigan. — *Lingham v. Eggleston*, 27 Mich. 324.

New Hampshire. — *Messer v. Woodman*, 22 N. H. 172, 53 Am. Dec. 241; *Warren v. Buckminster*, 24 N. H. 336; *Fuller v. Bean*, 34 N. H. 290; *Gilman v. Hill*, 36 N. H. 311; *Ockington v. Richey*, 41 N. H. 275; *Prescott v. Locke*, 51 N. H. 94, 12 Am. Rep. 55; *Smart v. Batchelder*, 57 N. H. 140.

New York. — *Ward v. Shaw*, 7 Wend. (N. Y.) 404; *Andrew v. Dietrich*, 14 Wend. (N. Y.) 31; *Rapelye v. Mackie*, 6 Cow. (N. Y.) 250; *Outwater v. Dodge*, 7 Cow. (N. Y.) 85; *Kein v. Tupper*, 52 N. Y. 550.

3. Hudson v. Weir, 29 Ala. 294; *Jones v. Pearce*, 25 Ark. 545; *Cook v. Logan*, 7 Iowa 142; *Crawford v. Smith*, 7 Dana (Ky.) 59; *Joyce v. Adams*, 8 N. Y. 291; *Hamilton v.*

Gordon, 22 Oregon 557; *Nicholson v. Taylor*, 31 Pa. St. 128, 72 Am. Dec. 728; *Thomas v. Tolford*, 70 Wis. 155.

The General Rule as to Sales of Personal Property is that where any operation, as surveying, weighing, measuring, counting, or the like, remains to be performed in order to ascertain the price, or the quantity, or the parcel to be delivered, the contract is incomplete and the property does not pass. *Mason v. Thompson*, 18 Pi k. (Mass.) 305; *United Soc. v. Brooks*, 145 Mass. 410.

For Examples, see bricks to be counted, *Dunlap v. Berry*, 5 Ill. 327, 39 Am. Dec. 413; hay to be weighed, *Davis v. Hill*, 3 N. H. 382, 14 Am. Dec. 373; *Messer v. Woodman*, 22 N. H. 172, 53 Am. Dec. 241. See also *Hughes v. Wiley*, 36 Kan. 731; *Snyder v. Tibbals*, 32 Iowa 447; grain to be separated, *Rosenthal v. Risley*, 11 Iowa 541; timber to be cut and measured by vendor, *United Soc. v. Brooks*, 145 Mass. 410; hog to be fattened and weighed, *Rourke v. Bullsens*, 8 Gray (Mass.) 549; lumber to be estimated, *Galloway v. Week*, 54 Wis. 604.

The rule holds not only when the sale is of a certain quantity to be taken from a large bulk, but also when the sale is of the entire quantity, provided it is made at the rate of so much the pound, measure, or number, for the price is not determined until the weighing, measuring, or counting. *Prescott v. Locke*, 51 N. H. 94, 12 Am. Rep. 55; *Pothier's Contr. of Sale*, § 309.

4. Title Passing on Delivery. — 1 Benjamin on Sales, §§ 378, 418; *Chamblee v. McKenzie*, 31 Ark. 155; *King v. Jarman*, 35 Ark. 190, 37 Am. Rep. 11; *Sedgwick v. Cottingham*, 54 Iowa 512; *Macomber v. Parker*, 13 Pick. (Mass.) 175; *Odell v. Boston*, etc., R. Co., 109 Mass. 5; *Russell v. O'Brien*, 127 Mass. 349. *Adams Min. Co. v. Senter*, 26 Mich. 73; *Cunningham*

4. Conditions Precedent to Be Performed by the Vendee — *a. GENERALLY.* —

Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into his possession.¹

b. PAYMENT — (1) *Generally.* — The most common condition precedent to be performed by the vendee is the payment of the purchase price of the thing sold. The sale and delivery of personal property on condition that the title is not to vest in the vendee until the purchase money is paid or secured does not pass title to the property until the condition be performed or waived; and the vendor, on the nonperformance of the condition, may recover the property from the vendee or from a third person deriving title from him.²

v. Ashbrook, 20 Mo. 555; *Scott v. Wells*, 6 W. & S. (Pa.) 357, 40 Am. Dec. 568; *Burrows v. Whitaker*, 71 N. Y. 291, 27 Am. Rep. 42; *McNeil v. Keleher*, 15 U. C. C. P. 470; *Haxall v. Willis*, 15 Gratt. (Va.) 434.

In *Riddle v. Varnum*, 20 Pick. (Mass.) 280, Dewey, J., said: "The general doctrine on this subject is, undoubtedly, that when some act remains to be done in relation to the articles which are the subject of the sale, as that of weighing or measuring, and there is no evidence tending to show an intention of the parties to make an absolute and complete sale, the performance of such act is a prerequisite to the consummation of the contract, and until it is performed the property does not pass to the vendee. But in the case of sales where the property to be sold is in a state ready for delivery, and the payment of money, or giving security therefor, is not a condition precedent to the transfer, it may well be the understanding of the parties that the sale is perfected, and the interest passes immediately to the vendee, although the weight or measure of the articles sold remains yet to be ascertained. Such a case presents a question of the intention of the parties to the contract."

Where a crop of wheat was sold by sample to be shipped by rail and delivered to the vendee at a certain depot by the vendor at his own expense, and to be taken from the depot by the vendee to his mill, where it was to be weighed and tested by the sample, and when so weighed and tested to be paid for, but after the wheat was so delivered by the vendor, and a part of it had been removed by the vendee, the remainder was destroyed by fire in the depot before it could be removed, it was held that title thereto had passed and the loss fell on the vendee. *Haxall v. Willis*, 15 Gratt. (Va.) 434. In this case Daniel, J., discussed the second rule laid down by Lord Blackburn as follows: "The second rule, as above stated, it cannot be denied, lays down the law as contended for by the appellants [that the property remained in the vendor]. It will be seen, however, on looking into the cases referred to by the author as establishing the rule, that in no one of them had there been any actual change in the possession of the goods; that in the three cases of *Rugg v. Minett*, 11 East 210; *Zagury v. Furnell*, 2 Campb. 240, and *Simmons v. Swift*, 5 B. & C. 857, 12 E. C. L. 388, on which he mainly relies as illustrations of the rules, the acts of measuring, counting, and weighing, by the terms of the agreement, or the usages

of the trade, were to be done either by the seller alone, or by him and the buyer concurrently; and that in neither one of these cases do the judges use any expression from which the inference can be fairly drawn that they would have held the measuring, counting, or weighing as necessary precedents to the vesting of the property, if by the terms of the agreement those acts had been left to be performed by the buyers alone. * * * Whilst, therefore, there appears to my mind to be great force in the reasons assigned by Mr. Blackburn against the adoption of the second of the rules stated by him, it seems to me also that he has in fact stated the rule in terms broader than the decisions and opinions to which he refers as having established it will justify. There are, however, among the many cases cited by the counsel for the appellants, several, as, for instance, *Ward v. Shaw*, 7 Wend. (N. Y.) 404; *Andrew v. Dieterich*, 14 Wend. (N. Y.) 31; and *Logan v. Le Mesurier*, 6 Moo. P. C. 116, in which the rule upon the subject is stated to be as they contend it is. Still, there is, I think, a decided preponderance of authority in favor of the proposition that where the subject matter of the contract has not only been completely ascertained and identified, but actually delivered, the mere fact that the weighing, counting, or measuring is yet to be done by the buyer, in order simply to ascertain the aggregate sum of money which he is to pay as the price, does not of itself show such a defect in the transfer of the title as will prevent the risk of loss from being cast on the buyer."

1. Benjamin on Sales, § 366; *Segrist v. Crabtree*, 131 U. S. 287; *Standard Implement Co. v. Parlin, etc., Co.*, 51 Kan. 544; *Ballantyne v. Appleton*, 82 Me. 570; *Pinkham v. Appleton*, 82 Me. 574. See the sections immediately following.

It is perfectly well established that where there is a condition precedent attached to a sale, either expressly agreed on or understood by the usage of trade, the title will not pass until the condition is performed, unless there be an express or implied waiver of its performance by the vendor. *Caraway v. Wallace*, 2 Ala. 542.

2. No Title Passes until Payment — *United States*. — *Davison v. Davis*, 125 U. S. 90.

Alabama. — *Warren v. Liddell*, 110 Ala. 232; *Bolling v. Kirby*, 90 Ala. 215, 24 Am. St. Rep. 789.

Arkansas. — *McRea v. Merrifield*, 48 Ark. 160.

Payment Condition Precedent to Delivery. — Where the terms of sale are agreed upon and the bargain consummated, the contract of sale may become absolute vesting title to the property in the vendee, although the goods be not actually

California. — Putnam *v.* Lamphier, 36 Cal. 151; Sere *v.* McGovern, 65 Cal. 244.

Colorado. — McDonald *v.* Hallicy, 5 Colo. App. 438.

Connecticut. — New Haven Wire Co. Cases, 57 Conn. 352. See also Lloyd *v.* Holly, 8 Conn. 494.

Georgia. — Flanders *v.* Maynard, 58 Ga. 56; Jowers *v.* Blandy, 58 Ga. 379.

Illinois. — Fairbanks *v.* Malloy, 16 Ill. App. 277; Fleury *v.* Tufts, 25 Ill. App. 101.

In this state the condition is operative only between the parties. See *infra*, this title, *Rights of Parties — Of Third Persons.*

Indiana. — Domestic Sewing Mach. Co. *v.* Arthurhultz, 63 Ind. 322.

Kansas. — Richardson *v.* Great Western Mfg. Co., 3 Kan. App. 445.

Kentucky. — Patton *v.* McCane, 15 B. Mon. (Ky.) 558.

Maine. — Tibbetts *v.* Towle, 12 Me. 341; George *v.* Stubbs, 26 Me. 243; Sawyer *v.* Fisher, 32 Me. 28; Hotchkiss *v.* Hunt, 49 Me. 213; Brown *v.* Haynes, 52 Me. 578.

Maryland. — Corse *v.* Patterson, 6 Har. & J. (Md.) 153.

Massachusetts. — Ullman *v.* Barnard, 7 Gray (Mass.) 554.

Michigan. — Smith *v.* Lozo, 42 Mich. 6; Wiggins *v.* Snow, 89 Mich. 476; Gill *v.* De Armand, 90 Mich. 425. See also Hughes *v.* Daniells, 87 Mich. 190.

New Hampshire. — Weeks *v.* Pike, 60 N. H. 447; Singer Mfg. Co. *v.* Bullard, 62 N. H. 129.

New York. — Boon *v.* Moss, 70 N. Y. 465; Rodney Hunt Mach. Co. *v.* Stewart, 57 Hun (N. Y.) 545.

Ohio. — Sage *v.* Sleutz, 23 Ohio St. 1; Sanders *v.* Keber, 28 Ohio St. 630; Call *v.* Seymour, 40 Ohio St. 670.

Pennsylvania. — Rose *v.* Story, 1 Pa. St. 190, 44 Am. Dec. 121; Henry *v.* Patterson, 57 Pa. St. 346; Hineman *v.* Matthews, 138 Pa. St. 204. See also Creps *v.* Dunham, 69 Pa. St. 456. But see, as to third persons, *infra*, this title, *Rights of Parties — Of Third Persons.*

South Carolina. — Dupree *v.* Harrington, Harp. L. (S. Car.) 391; Bennett *v.* Sims, Rice L. (S. Car.) 421; Talmadge *v.* Oliver, 14 S. Car. 522.

Tennessee. — Gambling *v.* Read, Meigs (Tenn.) 281; Carnes *v.* Apperson, 2 Sneed (Tenn.) 562.

Texas. — Griffith *v.* Morrison, 58 Tex. 46; Sinker *v.* Comparet, 62 Tex. 470; Sacra *v.* Semple, 2 Tex. Unrep. Cas. 644.

Vermont. — Bradley *v.* Arnold, 16 Vt. 382; Davis *v.* Bradley, 24 Vt. 55, 28 Vt. 118, 65 Am. Dec. 226; West *v.* Bolton, 4 Vt. 558.

Wisconsin. — See Hunter *v.* Warner, 1 Wis. 141.

For Additional Cases in support of the text, see the sections immediately following, and *infra*, this title, *Rights of Parties — Of Third Persons.*

Where on a sale of personal property no time is stipulated by the contract for payment of the price, payment is a condition precedent implied

by law, and the property will not vest in the vendee until he has performed the condition or the vendor waives it. Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190.

When a chattel is delivered to one who has bargained for the purchase thereof, and agreed to pay therefor at a future day, under an express agreement that no title shall vest in him until payment, the property of the vendor is not divested, and the purchaser takes at most only a right by implication to the use of the chattel until default in the stipulated payments. Herring *v.* Hoppock, 15 N. Y. 409; Rosendorf *v.* Baker, 8 Oregon 240.

Where chattels are sold with a reservation of title until payment, the fact that the vendee is charged with the price on the vendor's books, and that there are other items of debit and credit, the latter exceeding in amount the price of the property, does not pass title to the vendee. Pecan Lake Mill Co. *v.* American Cooperage Co., (Miss. 1894) 15 So. Rep. 580.

Reservation of Title Not Extended to After-acquired Property. — Where the contract allowing the vendor to retain title until payment does not by express terms cover property acquired afterwards by the vendee, the court will not extend it by implication to include such property. Edwards *v.* Symons, 65 Mich. 348. In this case the court said: "The rule of law that permits a vendor to retain the title to goods bartered by him, and placed apparently in the exclusive possession, control, and ownership of the vendee, until the whole purchase price is paid, without notice to parties dealing with such vendee, is, at best, a harsh one, and should not be enforced except in cases where the agreement to so hold the title is positive and unambiguous."

Payment to a Third Person. — Where the owner of goods then held under attachment at the suit of a creditor contracted to sell them if the vendee would pay the creditor's claim, it was held that such payment was a condition precedent to the vesting of title in the vendee. Tomlinson *v.* Collins, 20 Conn. 364.

Title Vesting in Third Person. — Where the vendee in a sale of a chattel was required to furnish security on the note given for the price, which was done, title to vest and remain in the surety until the vendee paid the note, and the property was delivered to the vendee, who retained it until the maturity of the note, which was paid by the surety, it was held that the title remained in the surety as against the vendee and third persons until the note was paid or payment tendered. Burke *v.* Harrison, 5 Sneed (Tenn.) 237. See also Myres *v.* Yapple, 65 Mich. 403.

Mortgage as Security. — Where a sale and delivery of personal property was made on condition that the buyer should give a mortgage on the property transferred as security, such a sale is conditional and the title does not pass until the execution of the mortgage. Thorpe *v.* Fowler, 57 Iowa 541.

And the vendor has an equitable lien enforceable against all but *bona fide* purchasers

delivered; but in such case the vendee ordinarily acquires a mere right of property, and not of possession, and the payment or tender of the price is a condition precedent implied in the contract to his right of possession.¹

Risk of Loss. — Where personal property is sold and delivered to the vendee under an agreement that title is to remain in the vendor until payment, the loss or destruction of the property while in the possession of the vendee before payment, without his fault, does not relieve him from the obligation to pay the price.²

Liability for Price Not Affected by Offer to Return Property. — The vendee cannot relieve himself from liability on a contract of conditional sale in which title is reserved until payment, by returning or offering to return the property.³

(2) *By Note.* — Where a sale is made on condition that the vendee shall give a note or other security for the price, the property in the goods so sold and delivered does not vest in the purchaser until the condition is complied

without notice. *Husted v. Ingraham*, 75 N. Y. 251; *Metropolitan Concert Co. v. Sperry*, (Supreme Ct.) 9 N. Y. St. Rep. 342.

In such case the vendee takes subject to the lien of the condition, although the mortgage was not in fact executed. *Alexander v. Heriot*, *Bailey Eq.* (S. Car.) 223.

Payment May Be Enforced by a decree of foreclosure upon property sold with a reservation of title until payment. *Campbell Printing Press, etc., Co. v. Powell*, 78 Tex. 53.

Title Passing Notwithstanding Nonpayment. — Where upon a contract for the purchase of two thousand five hundred lottery tickets the purchaser agreed to give his bond with approved security on the delivery of the tickets, which were selected and set apart for the purchaser in books of one hundred tickets each, some of which the purchaser received and paid for, but the others were not delivered, and one of the tickets so purchased and set apart but not delivered drew a prize in the drawing, and several days thereafter the purchaser tendered the required bond and security and demanded the tickets, and the managers refused to deliver the prize ticket, it was held that the property in the tickets passed when the selection was made and assented to, and that they remained in the vendor's possession merely as collateral security, and the purchaser was entitled to the prize. *Thompson v. Gray*, 1 Wheat. (U. S.) 75. In so holding, Marshall, C. J., said: "The stipulation respecting security could not in such a case be considered as a condition precedent, on the performance of which the sale depended." See, for similar cases, *Duncan v. Lewis*, 1 Duv. (Ky.) 183; *Baldwin v. Com.*, 11 Bush (Ky.) 417.

Statute Requiring Trader to Disclose Name of Principal Not Applicable in Conditional Sales — Mississippi. — The Mississippi statute (Code Miss., § 1300), providing that if any person shall transact business as a trader or otherwise in his own name, and fail to disclose the name of his principal or partner by a sign placed conspicuously at the house where the business is transacted, all the property used in the business shall be treated in favor of his creditors as his property, does not apply to the purchase of property under a recorded agreement that the title is to remain in the seller until payment of the price, so as to entitle the successor of the purchaser to hold the property as against

the seller. *John Van Range Co. v. Allen*, (Miss. 1890) 7 So. Rep. 499.

Nor is the property liable to sale under execution by the vendee's creditors. *Adams v. Berg*, 67 Miss. 234. *Compare Paine v. Hall Safe, etc., Co.*, 64 Miss. 175.

1. 2 Kent Com. 492. See the title SALES.

2. *Burnley v. Tufts*, 66 Miss. 48, 14 Am. St. Rep. 540; *Tufts v. Wynne*, 45 Mo. App. 42; *Tufts v. Griffin*, 107 N. Car. 47, 22 Am. St. Rep. 863. See also *McPherson v. Acme Lumber Co.*, 70 Miss. 649. *Compare Randle v. Stone*, 77 Ga. 501.

Where on a sale of a pair of horses title was to remain in the vendor until payment, and the vendee assumed control of the horses though they remained in the vendor's stable, and one of the horses died, it was held that the loss fell on the vendee. *Humeston v. Cherry*, 23 Hun (N. Y.) 141.

Emancipation of Slaves Sold Conditionally. — Where slaves were sold and delivered under an agreement that the title should remain in the vendor until payment, but while in the possession of the vendee, and before payment, the slaves were emancipated, it was held that the loss fell upon the vendee, the retention of title operating as a mere lien. *Planters' Bank v. Vandyck*, 4 Heisk. (Tenn.) 617.

3. *Appleton v. Norwalk Library Corp.*, 53 Conn. 4; *Fleury v. Tufts*, 25 Ill. App. 101.

Under a contract for the sale of property with a reservation of title to the vendor until payment, with the right to retake the property on default by the vendee, the vendee has no option to return the property on his own default. *Beach's Appeal*, 58 Conn. 464.

Sale on Instalments — Right of Vendee to Return Property. — Where A and B made a contract by which A was to sell a complete set of a certain work for ninety dollars, B paying twelve dollars on delivery of the books and six dollars every other month thereafter until the whole was paid, and on failure to pay any instalment within thirty days after due all remaining instalments were immediately to become due, A having the option to take back the books and retain all the instalments previously paid, it was held that the right to take back the books was one that belonged to A alone, and did not give B the right to return them, that the agreement of B to take and pay for the books was absolute, and that on default

with or waived.¹ But title does not necessarily pass, when the note is given, before the note is paid.²

(3) *In Cash Sales*³ — **General Rule.** — Where goods are sold to be paid for in cash on delivery, such payment is a condition precedent, and until it is made or waived no title passes to the vendee.⁴

of payment of any instalment A had a right to sue for and recover the whole of the price remaining unpaid. *Appleton v. Norwalk Library Corp.*, 53 Conn. 4. See also *Beach's Appeal*, 58 Conn. 464.

1. Payment by Note — *Florida.* — *Young v. Kansas Mfg. Co.*, 23 Fla. 394.

Illinois. — *Van Duzor v. Allen*, 90 Ill. 499.

Iowa. — *Thorpe v. Fowler*, 57 Iowa 541. See *Budlong v. Cottrell*, 64 Iowa 234.

Maine. — *Hotchkiss v. Hunt*, 49 Me. 213; *Seed v. Lord*, 66 Me. 580.

Massachusetts. — *Whitwell v. Vincent*, 4 Pick. (Mass.) 449, 16 Am. Dec. 355; *Whitney v. Eaton*, 15 Gray (Mass.) 225; *Farlow v. Ellis*, 15 Gray (Mass.) 229; *Salomon v. Hathaway*, 126 Mass. 482; *Hirschorn v. Canney*, 98 Mass. 149.

New York. — *Osborn v. Gantz*, 38 N. Y. Super. Ct. 148, 60 N. Y. 540; *Corlies v. Gardner*, 2 Hall (N. Y.) 345.

Texas. — *Lang v. Rickmers*, 70 Tex. 108.

Wisconsin. — *Congar v. Galena*, etc., R. Co., 17 Wis. 477.

Illustrations. — Where goods were sold at auction, to be paid for in an approved note at six months, and were delivered, but the vendee refused to give the note, it was held that the sale and delivery were conditional, and that, as the condition was not complied with, the vendor might treat the sale as an absolute one, and maintain an action for the goods forthwith. *Corlies v. Gardner*, 2 Hall (N. Y.) 345.

Where A sold B a quantity of goods on condition of receiving B's note, indorsed by C, and B evaded giving the security until he had got the goods shipped, and then tendered his own note, it was held that the delivery of the goods and giving the note were to have been concurrent acts, and that the further removal of the goods might be enjoined by the chancellor. *Bainbridge v. Caldwell*, 4 Dana (Ky.) 211.

Where a merchant in New York sold goods to a merchant in Boston, on condition that he should send his notes in payment therefor, and shipped the goods to Boston, mailing a bill of lading to the vendee and requesting him to send his notes in payment, which was never done, it was held that no title passed to the conditional vendee. *Hirschorn v. Canney*, 98 Mass. 149.

A sale of goods to be paid for by note or a certain per cent. off for cash is a conditional sale. *Hill v. Freeman*, 3 Cush. (Mass.) 257; *Tyler v. Freeman*, 3 Cush. (Mass.) 261.

On a contract for the sale of printing presses, reciting that settlement should be made by notes within one year, with interest, and that a policy of insurance should be given on the purchase, and security for the payment made by note, and also that the title should remain in the seller "until the payment has been made or security given for the deferred payments as above agreed," the giving of notes

alone without security is not sufficient to transfer the title. *Campbell Printing Press, etc., Co. v. Walker*, 114 N. Y. 7.

Where the condition of a sale was the delivery of a note with surety, and, upon objection made, the party offering the note altered it by inserting the words "with interest," without the consent of the surety, it was held that the surety was discharged, and therefore, the vendee not complying with the condition, the title to the property did not pass. *Kountz v. Hart*, 17 Ind. 329.

Where goods are sold to be paid for by note, the sending of the note to the vendor after delivery of the goods, after the vendee has become insolvent and given notice to the vendor of his inability to pay, and after the vendor has retaken the goods, is not such a performance of the conditions as will pass title to the property. *Seed v. Lord*, 66 Me. 580.

Giving Note for Wrong Amount by Mistake. — Where a horse was sold for eighty dollars on condition that neither the property nor the possession should pass until the purchaser had executed a note for the price, and by mistake the note executed and delivered in pursuance of the contract was for only eight dollars, it was held that the property in the horse was not changed. *Litterel v. St. John*, 4 Blackf. (Ind.) 327.

2. *Heinbockle v. Zugbaum*, 5 Mont. 344, 51 Am. Rep. 59; *Loomis v. Martin*, 10 N. Y. Wkly. Dig. 18; *Knowlson v. Sprong*, 10 N. Y. Wkly. Dig. 81.

The giving of a note for the balance due on the price of property sold with a reservation of title until payment will not vest title in the vendee in the absence of an express agreement. *Levan v. Wilten*, 135 Pa. St. 61. See the title PAYMENT.

3. See the title SALES.

4. In Cash Sales No Title Passes until Payment — *Alabama.* — *Shines v. Steiner*, 76 Ala. 458.

Delaware. — *Watertown Steam Engine Co. v. Davis*, 5 Houst. (Del.) 192.

Illinois. — *Dole v. Kennedy*, 38 Ill. 282; *Roddin v. Shurley*, 66 Ill. 23; *Canadian Bank v. McCrea*, 106 Ill. 281.

Indiana. — *Evansville, etc., R. Co. v. Erwin*, 84 Ind. 457; *Lanman v. McGregor*, 94 Ind. 301.

Maine. — *Houdlette v. Tallman*, 14 Me. 400; *Dwinel v. Howard*, 30 Me. 258; *Stone v. Perry*, 60 Me. 48; *Peabody v. Maguire*, 79 Me. 572.

Maryland. — *Powell v. Bradlee*, 9 Gill & J. (Md.) 220.

Massachusetts. — *Deshon v. Bigelow*, 8 Gray (Mass.) 159; *Farlow v. Ellis*, 15 Gray (Mass.) 229; *Adams v. O'Connor*, 100 Mass. 515, 1 Am. Rep. 137; *Com. v. Devlin*, 141 Mass. 423.

Missouri. — *Southwestern Freight, etc., Co. v. Plant*, 45 Mo. 517; *State v. Greentree Brewery Co.*, 32 Mo. App. 276.

New York. — *Leven v. Smith*, 1 Den. (N. Y.) 571; *Fleeman v. McKean*, 25 Barb. (N. Y.) 474.

But an Unconditional Delivery of the property will pass the title, notwithstanding cash is not in fact paid.¹

Conditional Delivery — Immediate Payment — Inadvertent Delivery. — But title will not pass if the delivery be conditional or made in the expectation of immediate payment,² or if made inadvertently.³

Custom. — So, also, where by a custom of trade a sale for cash is understood to mean a sale on short time, the contract imports that the delivery is qualified,

Dows v. Kidder, 84 N. Y. 121; *Empire State Type Founding Co. v. Grant*, 114 N. Y. 40; *Hill v. McKenzie*, 3 Thomp. & C. (N. Y.) 122.

Pennsylvania. — *Welsh v. Bell*, 32 Pa. St. 12; *Miller v. Munhall*, 34 Leg. Int. (Pa.) 321; *Windle v. Moore*, 1 Chester Co. Rep. (Pa.) 409.

Vermont. — *Turner v. Moore*, 58 Vt. 455.

In a sale of chattels, when the price is to be paid on delivery to the purchaser, the title remains in the seller until the delivery. And this is so even where partial payment is made to bind the bargain, if no credit is contemplated after the delivery. *Pierson v. Hoag*, 47 Barb. (N.Y.) 243.

But in *Wabash*, etc., *R. Co. v. Shryock*, 9 Ill. App. 323, it is held that a sale for cash may or may not be conditional, according to circumstances and the intention of the parties, and it is error to instruct a jury that in a sale for cash the property does not pass until the price is paid. See also, to the same effect, *Scudder v. Bradbury*, 106 Mass. 422.

Sale Presumed to Be for Cash in Absence of Evidence to Contrary. — Where no time is agreed on for payment, it is understood to be a cash sale, and the payment and the delivery are immediate and concurrent acts, and the vendor may refuse to deliver without payment, and if the payment be not immediately made the contract becomes void. 2 Kent Com. 496; *Southwestern Freight, etc., Co. v. Stanard*, 44 Mo. 71, 100 Am. Dec. 255; *Dudley v. Sawyer*, 41 N. H. 327; *Coil v. Willis*, 18 Ohio 28; *Wabash Elevator Co. v. Toledo First Nat. Bank*, 23 Ohio St. 311. See the title SALES.

Sale of Agricultural Products — Georgia. — Section 1593 of the Georgia Code, providing that "cotton, corn, rice, or other products sold by planters and commission merchants on cash sale, shall not be considered as the property of the buyer, or the ownership given up, until the same shall be fully paid for, although it may have been delivered into the possession of the buyer," does not include turpentine and rosin, so as to prevent the title thereto from passing to the buyer until payment. *Roberts v. Savannah, etc., R. Co.*, 75 Ga. 225.

1. Condition Waived by Absolute Delivery. — *Blackshear v. Burke*, 74 Ala. 239; *Mixer v. Cook*, 31 Me. 340; *Foley v. Mason*, 6 Md. 37; *Powell v. Bradlee*, 9 Gill & J. (Md.) 220; *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446; *Scudder v. Bradbury*, 106 Mass. 422; *Haskins v. Warren*, 115 Mass. 514; *Leatherbury v. Connor*, 54 N. J. L. 172; *Chapman v. Lathrop*, 6 Cow. (N. Y.) 110, 16 Am. Dec. 433; *Leedom v. Phillips*, 1 Yeates (Pa.) 527; *Landry v. Thomas*, 3 Phila. (Pa.) 300; *Bowen v. Burk*, 13 Pa. St. 146; *Old Dominion Steamship Co. v. Burckhardt*, 31 Gratt. (Va.) 664.

Where the agreement is that goods are to

be paid for in cash on delivery, and the goods are delivered, the sale is complete whether the payment is made or not. *Warder v. Hoover*, 51 Iowa 491. See *infra*, this title, *Waiver of Conditions*.

2. No Waiver by Delivery in Expectation of Payment. — *Peabody v. Maguire*, 79 Me. 572; *Haskins v. Warren*, 115 Mass. 514; *Fishback v. Van Dusen*, 33 Minn. 111; *State v. Green Tree Brewery Co.*, 32 Mo. App. 276; *Ferguson v. Clifford*, 37 N. H. 103; *Leven v. Smith*, 1 Den. (N. Y.) 571; *Gibson v. Tobey*, 46 N. Y. 637, 7 Am. Rep. 397; *Empire State Type Founding Co. v. Grant*, 114 N. Y. 40; *Wabash Elevator Co. v. Toledo First Nat. Bank*, 23 Ohio St. 311; *Hodgson v. Barrett*, 33 Ohio St. 63, 31 Am. Rep. 527; *National Refining, etc., Co. v. Miller*, 7 Phila. (Pa.) 97; *Harding v. Metz*, 1 Tenn. Ch. 610; *Meeker v. Johnson*, 3 Wash. 247. See also *Hill v. McKenzie*, 3 Thomp. & C. (N. Y.) 122. Compare, as to third persons, *Comer v. Cunningham*, 77 N. Y. 391, 33 Am. Rep. 626.

The fact that goods sold for cash on delivery are actually forwarded to the purchaser before a compliance with the terms of sale is not necessarily a waiver of the conditions of the sale. *Stone v. Perry*, 60 Me. 48.

On a sale of corn for cash, leaving it at the place of delivery with a request for payment is not a waiver of the condition. *Seeds v. Simpson*, 16 Ohio St. 321.

"The general rule in the sale of goods and chattels, where no express stipulation to that effect is made, is that the price must be paid before the property will pass, although conditional delivery may occur. If delivery take place, where payment is expected or contracted for therewith, it is in law made upon the condition precedent that the price shall be forthwith paid. If this condition be not performed, the delivery is inoperative to pass the title to the property." *Per Fowler, J.*, in *Dudley v. Sawyer*, 41 N. H. 327; *Scudder v. Bradbury*, 106 Mass. 422.

Where Payment is Made by Check on delivery, the delivery is conditional upon the due payment of the check, and upon dishonor the vendor may retake the goods from the vendee or a *bona fide* purchaser from him. *National Bank of Commerce v. Chicago, etc., R. Co.*, 44 Minn. 224, 20 Am. St. Rep. 566. See also *Hide, etc., Nat. Bank v. West*, 20 Ill. App. 61. See the title PAYMENT.

3. Upon a cash sale of property, where it is not the intention of the vendor to part with the possession of the property until he is paid the price agreed upon, in money, he will not lose title to the property by inadvertently allowing the purchaser to get possession thereof without payment. *Miller v. Jones*, 66 Barb. (N. Y.) 148.

and the property in the goods does not pass until payment.¹

(4) *In Instalments.*² — Where personal property is sold and delivered to the vendee upon condition that it is to be paid for by him in instalments at specified times, and that the title is to remain in the vendor until all the purchase money is paid, the title to the property does not vest in the vendee until all the instalments are paid.³

Stipulation Against Removal. — A stipulation in such sales that the property shall be kept at a certain place, and shall not be removed therefrom without the written consent of the vendor, is valid and binding,⁴ and in such case consent to removal to a certain place will not authorize a second removal to still another place.⁵

Forfeiture of Instalments. — The decisions as to whether partial payments already made are forfeited on default of subsequent instalments have not been entirely harmonious. The prevailing doctrine, however, is that such payments are forfeited.⁶ But some courts acting upon equitable principles require the ven-

1. *Dows v. Dennistoun*, 28 Barb. (N. Y.) 393. But see *Sears v. Le Better*, 137 Mass. 374.

2. See *supra*, this title, *Conditional Sales Distinguished from Other Contracts—From Bailments and Leases*.

3. **In Instalment Sales No Title Passes until Full Payment.** — *McEntire v. Crossley*, (1895) App. 457, 11 Rep. 207; *Goldie v. Rascony*, 4 Montreal L. R. Super. Ct. 313; *Guilford v. McKinley*, 61 Ga. 230; *Smith v. Lozo*, 42 Mich. 6; *Ketchum v. Brennan*, 53 Miss. 596; *Singer Mfg. Co. v. Bullard*, 62 N. H. 129; *Redewill v. Gillen*, 4 N. Mex. 78; *Boon v. Moss*, 70 N. Y. 465; *Walters v. Wurlitzer*, 6 Cinc. Wkly. L. Bul. 139; *McGinnis v. Savage*, 29 W. Va. 362.

Where a sewing machine is delivered under a contract that a certain sum is to be paid monthly for the use of it until a specified amount has been paid, when the machine is to be returned or one cent is to be paid for it, whether the agreement be regarded as a lease or as a conditional sale title does not pass until the price is paid in full, and on default of payment in a reasonable time the owner may replevy the machine. *Singer Mfg. Co. v. Bullard*, 62 N. H. 129.

Where a machine is sold on instalments, the title to remain in the vendor until full payment of the price, though the contract was silent in respect to possession, the vendee's right thereto depends on his payments as provided, and on default the vendor may recover possession. *Wiggins v. Snow*, 89 Mich. 476. In case of a conditional sale where the title is to vest in the purchaser upon payment of the price, the purchaser may perfect his title to the property at any time by a tender of the price, although it is payable in instalments and they are not all due. If the debt was payable with interest, the purchaser must pay interest until the maturity of the debt. *Cushman v. Jewell*, 7 Hun (N. Y.) 525.

Where the owner of a machine agreed to sell it to another for a certain price to be paid in instalments, and leased to the vendee the mill in which the machine was, it was held that this did not pass title to the vendee. *Henry v. Patterson*, 57 Pa. St. 346.

Sale of Church Pew. — Where a church pew was sold for one third cash, and the balance in two annual instalments, and the purchaser made the first payment and took possession,

but failed to make the other payments, it was held that he acquired no title to the pew, but only a right to acquire title upon compliance with the conditions of sale. *Quincy v. Spear*, 15 Pick. (Mass.) 144.

Vendee Protected by Statute — Waiver — Louisiana. — In Louisiana, where a sewing machine was sold on the instalment plan with the understanding that the instalments were to be considered rent until payment should be made, and the instalments were not paid when due, and the seller demanded the article and the buyer voluntarily gave it up, it was held that the buyer had no cause of action against the seller under Louisiana Acts 1877, No. 62, which gives a right of action for removing sewing machines from the premises of purchasers who have not fully paid therefor. *Jenks v. Howe Sewing Mach. Co.*, 34 La. Ann. 1241.

Upon a Sale of Several Classes of Property, to be paid for in instalments, the title to which remains in the vendor until paid for, a certificate by him that payments have been applied on one of such classes, the surplus to apply on the residue of the indebtedness, does not show that the title has passed to such class, in the absence of any agreement to that effect. *Brewer v. Ford*, 59 Hun (N. Y.) 17.

In an Action for the Balance Due upon a chattel sold conditionally on instalments the vendor is not required to tender back the part already paid before he can recover, the payments made going in mitigation of damages. *Guilford v. McKinley*, 61 Ga. 230.

4. *Whitney v. McConnell*, 29 Mich. 12; *Gibbons v. Luke*, 37 Hun (N. Y.) 576. See *Dunlap v. Gleason*, 16 Mich. 158, 93 Am. Dec. 231.

5. *Gibbons v. Luke*, 37 Hun (N. Y.) 576.

6. **Forfeiture of Instalments.** — *Latham v. Sumner*, 89 Ill. 233, 31 Am. Rep. 79; *Singer Mfg. Co. v. Treadway*, 4 Ill. App. 57; *Fairbanks v. Malloy*, 16 Ill. App. 277; *Fleck v. Warner*, 25 Kan. 492; *Hairland v. Johnson*, 7 Daly (N. Y.) 297. See *Loomis v. Bragg*, 50 Conn. 228, 47 Am. Rep. 638; *Everett v. Hall*, 67 Me. 497.

Where under a contract for the sale of a commodity, to be delivered at a future day, at a fixed price payable at a specified time, the vendee receives a part of the commodity and pays the vendor a greater sum than that part would

dor who rescinds the contract for default after receiving partial payments of the price to refund the sum already paid, after deducting a reasonable compensation for the use of the property.¹

amount to at the agreed rate, but fails to pay the balance at the stipulated time, the vendor may on such failure rescind the contract as to the residue without liability to pay back any part of the amount received. *Dwinel v. Howard*, 30 Me. 258.

In case of a conditional sale of goods where the condition is not performed by the vendee, the vendor may establish his property in the goods without showing a rescission of the contract and without repaying a partial payment made by the vendee. *Marston v. Baldwin*, 17 Mass. 606.

Where a contract of sale provided that title was to remain in the vendor until payment, and that in case of the non-payment of any of the notes given for the price at maturity, the vendor might retake the property, but contained no stipulation that such act should operate as a rescission of the contract or as a forfeiture of payments already made, and on default being made in the payments the vendor replevied the property, it was held that such action did not entitle the vendee to rescind the contract, or to recover back the amount paid thereon, or to a delivery of the unpaid notes, nor did it give him any lien on the property for the amount of such payments; and that upon payment of the amount due the vendee would have a right to a return of the property. *Tufts v. D'Arcambal*, 85 Mich. 185, 24 Am. St. Rep. 79.

Payment for Use.—Where under the contract payments already made are to be regarded as payment for the use of the article in case of default, the vendee in default cannot recover such payments when they do not amount to an unreasonable compensation. *Wheeler, etc., Mfg. Co. v. Jacobs*, 2 Misc. Rep. (N. Y. C. Pl.) 236.

Action Against Third Person for Conversion after Vendee's Default — Measure of Damages.—Where the owner of a chattel who has transferred the possession to another with the agreement that it should become his property on the payment of a certain sum in monthly instalments, brings an action against a third person for a conversion of the chattel after payment of some of the instalments, and a failure to pay the remainder, the measure of damages is the whole value of the property with interest from the time of the conversion. *Angier v. Taunton Paper Mfg. Co.*, 1 Gray (Mass.) 621, 61 Am. Dec. 436; *Colcord v. McDonald*, 128 Mass. 470; *Brown v. Haynes*, 52 Me. 578.

In an action in trover for the value of personal property brought against a purchaser from the conditional vendee, it was held that the defendant was not entitled to any deduction for a partial payment made by his vendor. *Brown v. Haynes*, 52 Me. 578; *Hawkins v. Hersey*, 86 Me. 394; *Marston v. Baldwin*, 17 Mass. 606; *Duke v. Shackleford*, 56 Miss. 552; *Morgan v. Kidder*, 55 Vt. 367.

Duty of Vendor to Give Notice of Claim of Forfeiture.—In *Cushman v. Jewell*, 7 Hun (N. Y.) 525, it is said that where, in a case of conditional sale, the seller claims that the amount

already paid is forfeited by the failure of the buyer to pay one of the instalments when due, it is his duty to inform the buyer of such claim, in order that the latter may pay or tender such amount.

1. Equitable Relief Against Forfeiture.—*Benjamin on Sales*, § 429; *Hays v. Jordan*, 85 Ga. 741; *Snook v. Raglan*, 89 Ga. 251; *Preston v. Whitney*, 23 Mich. 267; *New Home Sewing Mach. Co. v. Bothane*, 70 Mich. 443; *A. D. Puffer, etc., Mfg. Co. v. Lucas*, 112 N. Car. 377. See also *Levan v. Wilten*, 135 Pa. St. 61.

A court of equity will not enforce a stipulation in a contract of instalment sale that on default in any payments the vendor may reclaim the property, and that all payments made shall be forfeited. *Lincoln v. Quynn*, 68 Md. 299, 6 Am. St. Rep. 446.

In *Ketchum v. Brennan*, 53 Miss. 596, it was held that the rescission of the contract by returning or offering to return the instalments already paid is a condition precedent to the vendor's right to sue for the property. In such case, if the action is against the original vendee, the money must be brought into court, but if the action is against a purchaser from the vendee tender to such purchaser is sufficient.

In several cases where the vendor on the vendee's default brought an action to recover the property, it has been held that the vendor could recover only an amount equal to the unpaid balance of the price. *Guilford v. McKinley*, 61 Ga. 230; *Johnston v. Whittemore*, 27 Mich. 463. See also *Hine v. Roberts*, 48 Conn. 267, 40 Am. Rep. 170; *Mott v. Havana Nat. Bank*, 22 Hun (N. Y.) 354. But see *Thirlby v. Rainbow*, 93 Mich. 164.

The buyer of personal property, title to which is retained by the seller, may, in case the seller takes possession of the property, on condition broken, recover an equitable proportion of such part of the purchase money as he may have paid. *Simon v. Edmundson*, 10 Pa. Co. Ct. Rep. 315.

Where the vendor retakes the property on default in the payment of the instalments, the vendee is entitled to a reasonable time in which to pay the balance due, and if not then paid, to have the property sold to pay off such balance, the residue if any to be paid to him. *A. D. Puffer, etc., Mfg. Co. v. Lucas*, 112 N. Car. 377, explaining *A. D. Puffer, etc., Mfg. Co. v. Baker*, 104 N. Car. 148.

Vendor May Recover for Use and Wear.—Even conceding that the vendee might recover the amount of payments already made, the vendor will have a right to set off against such payments any damage he may have sustained by the vendee's failure to perform the contract, and recoup the value of the use of the property and its depreciation in value. *Latham v. Sumner*, 89 Ill. 233, 31 Am. Rep. 79.

Vendee May Recover Instalments Paid on Breach of Contract by Vendor.—Where a sewing machine was sold to be paid for in instalments, but instead of the one selected a different one was sent to the vendee, which proved unsatisfactory,

Statutes. — In *Missouri* and *Ohio* the law is so declared by statute.¹

Waiver of Forfeiture. — The vendor, by his conduct after default by the vendee, may waive the forfeiture of instalments already paid.² So, also, he may waive his right to rescind the contract and retake the property.³

(5) *Partial Payments under Contracts of Construction* — **American Rule.** — It is well settled in the United States that a contract to build a vessel according to specifications, and to deliver it completed at a designated place by a specified time, for which payment is to be made in instalments as the work progresses, vests no title in the vendee until the completion and delivery of the vessel.⁴ In such case the fact that the work is to be done under the super-

and the vendor promised to replace it by another, which was never done, whereupon the vendee ceased making the payments and the vendor replevied the machine, it was held that the vendee was justified in rescinding the contract and might recover back the payments made. *Howe Mach. Co. v. Willie*, 85 Ill. 333.

1. **Forfeiture Prevented by Statute.** — *Missouri* Rev. Stat. 1889, § 5181; *Ohio* Rev. Stat. 1892, § 7881; *Caldwell v. Singer Mfg. Co.*, 7 Ohio Cir. Ct. Rep. 460.

A statute which makes it unlawful for one who has sold personal property to be paid for in instalments, or let, hired or delivered subject to a condition that the title shall remain in him until the amount agreed is paid, to retake possession of it without tending or refunding to the purchaser the sum paid by him, after deducting a reasonable amount for the use of the property, is not invalid on the ground that the amount of such compensation is uncertain, and no method is provided for determining it. *Weil v. State*, 46 Ohio St. 450, 21 Ohio L. J. 392.

Bringing suit to enforce the lien for the purchase money is not a taking possession under the statute. *National Cash Register Co. v. Farmers' Nat. Bank*, 31 Cinc. Wkly. L. Bul. 114.

The *Missouri* statute has no application to unconditional sales of chattels. *Daily v. Singer Mfg. Co.*, 14 Mo. App. 597, 88 Mo. 301.

Under the *Tennessee* Act of 1889, requiring the conditional vendor who retakes the property on default by the vendee to advertise the same for cash to the highest bidder, and after selling it to satisfy his own claim out of the proceeds, paying the residue, if any, to the vendee, a vendor who retakes possession of a chattel sold on instalments and fails to comply with the statute is liable to the vendor for all payments made without any allowance for use or otherwise. *Cowan v. Singer Mfg. Co.*, 92 Tenn. 376.

2. *Cushman v. Jewell*, 7 Hun (N. Y.) 525.

3. **Receiving Payments After Default of Vendee.** — *Crawford v. Spraggins*, 109 Ala. 353; *Gibbons v. Luke*, 37 Hun (N. Y.) 576. See also *Blair v. Hamilton*, 48 Ind. 32.

Where, upon a conditional sale of a boat, it was agreed that the purchaser should have possession, but in case of default in the payment of any of the notes given for the purchase money the seller might retake possession of the boat, and after the last note became due, although the purchaser had failed to make all the payments, he was allowed to retain possession, and the seller afterwards received a partial payment, it was held that this was an assent by the seller to delay in making pay-

ment and a waiver of his right to enforce for forfeiture and a recognition of the right of the purchaser to acquire title by payment of the residue of the purchase money, and a tender by the purchaser of the amount due, under the circumstances, discharged all lien or claim of title to the property by the seller. *Hutchings v. Munger*, 41 N. Y. 155.

A forfeiture in the sale of personally is waived where the seller, after default, makes a new contract with the buyer and others, and receives from them all the past due instalments. *Hill v. Townsend*, 69 Ala. 286.

The vendee does not forfeit his rights under the contract by a mere neglect to pay on the day named, for the vendor may waive his right to a forfeiture by seeking afterwards to collect the balance due. *Deyoe v. Jamison*, 33 Mich. 94.

But in *Hegler v. Eddy*, 53 Cal. 597, it was held that where goods are sold to be paid for in instalments, the vendor having the right to resume possession on default in making payment, such right is not lost or waived by the receipt of a part of an instalment after default in payment at the specified time. To the same effect, see *Quinn v. Parke*, etc., *Machinery Co.*, 5 Wash. 276.

Vendor's Laches. — If the vendor permits the vendee to remain in possession for a long time without any request for payments due, or the return of the property, this amounts to a waiver of the condition. *Gorham v. Holden*, 79 Me. 317.

Demand. — If the vendor receives payments and permits the vendee to retain possession after the whole price is due, he cannot seize the property and terminate the contract for non-payment until he has demanded payment. *O'Rourke v. Hadcock*, 114 N. Y. 541.

Vendor's Obligation to Accept Payment Ceases Only with Actual Retaking of Property. — Where in a conditional sale of chattels notes were given for the price providing for payment in instalments, and each containing an agreement that upon default of payment the vendor might take back the property, and in such case all payments made should be considered as payments for the use of the property, it was held that the vendor could not refuse to accept payment of the amount due, at any time before he had actually retaken the property. *Vaughn v. McFadyen*, (Mich. 1896) 68 N. W. Rep. 135.

4. **Partial Payments under Contract of Construction** — *Delaware*. — *Green v. Hall*, 1 Houst. (Del.) 506.

Massachusetts. — *Williams v. Jackman*, 16 Gray (Mass.) 514; *Briggs v. A Light Boat*, 7 Allen (Mass.) 287.

vision of an agent of the vendee does not change the rule.¹

English Rule. — In England a different doctrine obtains, and it is there uniformly held that, in the absence of an express understanding to the contrary, title to the vessel, so far as completed, vests in the purchaser upon the payment of each instalment, the decisions, however, being based upon the presumed intention of the parties.²

New Jersey. — *Edwards v. Elliott*, 36 N. J. L. 449, 13 Am. Rep. 463, *affirming* 35 N. J. L. 265; *Stevens v. Shippen*, 29 N. J. Eq. 602.

New York. — *Andrews v. Durant*, 11 N. Y. 35, 62 Am. Dec. 55; *Merritt v. Johnson*, 7 Johns. (N. Y.) 473, 5 Am. Dec. 289.

Pennsylvania. — *Forsyth v. Dickson*, 1 Grant's Cas. (Pa.) 26; *Scull v. Shakespear*, 75 Pa. St. 297; *The Poconoket*, 67 Fed. Rep. 262. *Compare In re Derbyshire's Estate*, 11 Phila. (Pa.) 627, *distinguishing* *Scull v. Shakespear*, 75 Pa. St. 297.

Compare in Indiana, in which state the English cases are followed, *Sandford v. Wiggins Ferry Co.*, 27 Ind. 522. Also in *Maine*, *Scudder v. Calais Steamboat Co.*, 1 Cliff. (U. S.) 370.

Where the plaintiff contracted to build three light vessels for the United States and to deliver them completed by a specified time, the work to be done under the supervision and to the satisfaction of an agent of the United States, and the price to be paid when the vessels were completed, the Government having the right to declare the contract void at any time, it was held that no title passed to the United States under this contract until the vessels were completed and delivered. *Briggs v. A Light Boat*, 7 Allen (Mass.) 287. In this case Bigelow, C. J., said: "Upon established principles of law, we think it clear that no property in the vessel, which is the subject of controversy in this action, vested in the United States until the vessel was completed and delivered, in pursuance of the contract with the builder. The general rule of law is well settled and familiar, that, under a contract for building a ship or making any other chattel, not subsisting *in specie* at the time of the contract, no property vests in the purchaser during the progress of the work, nor until the vessel or other chattel is finished and ready for delivery. To this rule there are exceptions, founded for the most part on express stipulations in contracts, by which the property is held to vest in the purchaser from time to time as the work goes on. It is doubtless true that a particular agreement in a contract concerning the mode or time of making payment of the purchase money, or providing for the appointment of a superintendent of the work, may have an important bearing in determining the question whether the property passes to the purchaser before the completion of the chattel. It is, however, erroneous to say, as is sometimes stated by text writers, that an agreement to pay the purchase money in instalments, as certain stages of the work are completed, or a stipulation for the employment of a superintendent by the purchaser to overlook the work, and see that it is done according to the tenor of the contract, will of itself operate to vest the title in the person for whom the chattel is intended. Such stipulations may be very significant, as indicating the

intention of the parties, but they are not in all cases decisive. Both of them may co-exist in a particular case, and yet the property may remain in the builder or manufacturer. Even in England, where the cases go the farthest in holding that property in a chattel in the course of construction under a contract passes to and vests in the purchaser, these stipulations are not always deemed to be conclusive of title in him. It is a question of intent, arising on the interpretation of the entire contract in each case. If, taking all the stipulations together, it is clear that the parties intended that the property should vest in the purchaser during the progress of the work and before its completion, effect will be given to such intention, and the property will be held to pass accordingly; but, on the other hand, it will not be deemed to have passed out of the builder, unless such intent is clearly manifested, but the general rule of law will prevail."

The Courts of This Country Have Not Adopted Any Arbitrary Rule of construction as controlling such agreements, but consider the question of intent open in every case, to be determined upon the terms of the contract and the circumstances attending the transaction. *Matthews, J.*, in *Clarkson v. Stevens*, 106 U. S. 505, *citing* 1 *Parsons on Shipping*, 63. See also *The Poconoket*, 67 Fed. Rep. 262.

1. *Clarkson v. Stevens*, 106 U. S. 505; *The Revenue Cutter No. 2*, 4 Sawy. (U. S.) 143; *Briggs v. A Light Boat*, 7 Allen (Mass.) 287; *Williams v. Jackman*, 16 Gray (Mass.) 514; *Stevens v. Shippen*, 29 N. J. Eq. 602; *Andrews v. Durant*, 11 N. Y. 35, 62 Am. Dec. 55.

In the case last cited A. agreed to build for B. a vessel of certain dimensions and to deliver it finished on a day designated, for five thousand dollars, of which the sum of three thousand dollars was to be paid at specified stages of the work, and two thousand dollars when it was completed and delivered, the workmanship and materials to be inspected as the work progressed and to be approved by the superintendent of B.; which was done. It was held that B. had no property in the vessel until it was completed. *Compare* *Scudder v. Calais Steamboat Co.*, 1 Cliff. (U. S.) 370, *reversed* on another point in 2 Black. (U. S.) 372; *Sandford v. Wiggins Ferry Co.*, 27 Ind. 522.

2. **English Doctrine.** — *Woods v. Russell*, 5 B. & Ald. 942, 7 E. C. L. 310; *Clarke v. Spence*, 4 Ad. & El. 448, 31 E. C. L. 107; *Wood v. Bell*, 5 El. & Bl. 772, 85 E. C. L. 772; *Laidler v. Burlinson*, 2 M. & W. 602.

In *Woods v. Russell*, 5 B. & Ald. 942, 7 E. C. L. 310, decided in 1822, a shipbuilder contracted with the defendant to build a ship for him and complete it by a certain time, payment to be made in four instalments as the work progressed. Before the ship was completed it was measured with the builder's privity in order that the defendant might get it registered

Effect of Special Agreement.—It is of course competent for the parties to expressly contract that title shall pass to the purchaser as the several instalments are paid, in which case the special agreement will control.¹

Rule Applicable Generally.—The principles just stated apply equally to the sale of any other chattel in course of construction.²

c. ELECTION — SALES ON APPROVAL.—A familiar instance of a sale dependent upon a condition precedent occurs in the case of a sale "on trial" or "on approval," in which the buyer receives the property with the understanding that he is to have the opportunity to try it, with the option to purchase if it proves satisfactory, or return the property if he is not satisfied therewith. In such case the sale is not consummated, and the title remains in the seller until the buyer signifies his approval, either expressly or by implication resulting from his conduct with reference to the property.³

in his own name, the builder signing the certificate necessary for registry, the ship being registered in the defendant's name, who on the same day paid the third instalment. The defendant had also previously appointed a master who superintended the building, and, with the privity of the builder, chartered the ship for a voyage. It was held that the general property vested in the defendant at the time the registry was completed; the decision, however, was based on the apparent intention of the parties, and did not depend merely on the effect of the payments. Abbott, C. J., said: "The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship. * * * But this case does not depend merely upon the payment of the instalments; so that we are not called upon to decide how far that payment vests the property in the defendant, because here [the builder] signed the certificate to enable the defendant to have the ship registered in his (the defendant's) name, and by that act consented, as it seems to us, that the general property in the ship should be considered from that time as being in the defendant."

In *Clarke v. Spence*, 4 Ad. & El. 448, 31 E. C. L. 107, the plaintiff contracted with a ship-builder to build him a ship for a certain sum, to be paid in instalments as the work proceeded. An agent of the plaintiff was to superintend the building. Before the ship was completed the builder became bankrupt, and the assignees afterwards completed the ship, and all the instalments were paid or tendered. In an action of trover by the plaintiff against the assignees for the ship it was held that upon the payment of the first instalment the property in the portion then completed became vested in the plaintiff subject to the right of the builder to retain such portion for the purpose of completing the work and earning the rest of the price, and that material subsequently added became, as it was added, the property of the general owner. In this case the court followed the decision in *Woods v. Russell*, 5 B. & Ald. 942, 7 E. C. L. 310, while seriously questioning its correctness.

The English Decisions Appear to Establish the Principle that where it appears to be the intention or agreement of the parties to a contract for building a ship, that at a particular stage of its construction the vessel, so far as then finished, shall be appropriated to the contract

of sale, the property of the vessel, as soon as it has reached that stage of completion, will pass to the purchaser, and subsequent additions made to the chattel thus vested in the purchaser will, *accessione*, become his property. It also appears to be the result of these decisions that such an intention or agreement ought (in the absence of any circumstances pointing to a different conclusion) to be inferred from a provision in the contract to the effect that an instalment of the price shall be paid at a particular stage, coupled with the fact that the instalment has been duly paid, and that until the vessel reached that stage the execution of the work was regularly inspected by the purchaser, or some one on his behalf. *Per* Lord Watson, in *Seath v. Moore*, L. R. 11 App. 350.

1. *Seath v. Moore*, L. R. 11 App. 350; *Edwards v. Elliott*, 36 N. J. L. 449, 13 Am. Rep. 463.

Where by the Terms of the Contract the Property is to Pass to the purchaser as the several instalments are paid, the purchaser, in order to defeat the lien of a person who furnished materials to the builder must show the time of such payments and that his title vested before the lien attached. *Edwards v. Elliott*, 36 N. J. L. 449, 13 Am. Rep. 463.

2. *Seath v. Moore*, L. R. 11 App. 350.

Under a contract to build and deliver machinery to be paid for in instalments while the machinery is being built, final payment to be made upon completion and acceptance, and if not satisfactory other machinery to be built that will be acceptable, no title passes until the machinery is completed and accepted. *Wolensak v. Briggs*, 119 Ill. 453.

3. **Sales on Approval.**—2 Benjamin on Sales, § 911; *Elphick v. Barnes*, 5 C. P. Div. 321; *Pitt's Sons Mfg. Co. v. Poor*, 7 Ill. App. 24; *Mowbray v. Cady*, 40 Iowa 604; *Hunt v. Wyman*, 100 Mass. 198; *Booraem v. Crane*, 103 Mass. 522; *Pierce v. Cooley*, 56 Mich. 552; *Bulkley v. Matthews*, 12 N. Y. Wkly. Dig. 229; *Kahn v. Klabunde*, 50 Wis. 235.

Where an article is delivered to an intended purchaser to be accepted and paid for if satisfactory after being tested by him, he has a right to make a reasonable test and to reject the article if unsatisfactory. *U. S. Electric Fire-Alarm Co. v. Big Rapids*, 78 Mich. 67; *Davis v. Sweeney*, 75 Iowa 45; *McCormick Harvesting Mach. Co. v. Chesrown*, 33 Minn. 32. See *Cole v. Homer*, 53 Mich. 438.

Sales on Approval Distinguished from Contracts of Sale or Return.¹ — The class of conditional sales now under consideration should not be confounded with a somewhat similar class of contracts known as contracts of sale or return, in which a present sale is made, the buyer merely reserving the right to defeat the sale by returning the property within a certain time. In either case the main object of the provision as to the return of the property is to give the buyer an opportunity to test the qualities of the thing sold and find it satisfactory before he shall be finally bound to the bargain.² But there is an important distinction between the two contracts as regards the passing of title. An option to purchase if the buyer likes is essentially different from an option to return a purchase if he should not like it. In one case the property will not pass until the option is determined; in the other, the property passes at once subject to the right to rescind and return.³ A discussion of the latter class of contracts will be found elsewhere in this article.⁴

Where machinery is sold to be delivered on the cars and paid for when accepted, the party for whom it is designed is not bound to pay for it until he sees fit after trial, and the delivery on the cars has nothing to do with such acceptance or payment. *Mansfield Mach. Works v. Lowell*, 62 Mich. 546.

In the case of a sale on approval, the contract is not complete until the vendee has made his election or had a reasonable opportunity to do so. *Wilson v. Stratton*, 47 Me. 120. But his acceptance after a fair trial is irrevocable. *McGill v. Hall*, (Tex. Civ. App. 1894) 26 S. W. Rep. 132.

Where a Tool Was Taken on Trial, under an agreement to pay a stated price therefor if it did not break while being used in a certain piece of work, it was held that the sale was conditional, but became absolute on the completion of the work without injury to the tool. *Norton v. Hummel*, 22 Ill. App. 194.

"Refusal" of Property — Consideration Necessary. — In *Vermont* it has been stated that what is termed giving a refusal to a party who may take the article or not within a certain time, unless upon some other consideration or under seal, is not a valid contract in law, for want of consideration. *Faulkner v. Hebard*, 26 Vt. 452.

Option to Return Limited to Particular Sale. — An option given to a purchaser to return goods sold on approval if not satisfactory does not extend to subsequent orders and invoices of similar goods, unless repeated with each order, or unless general language was used covering all orders or sales. *Childs v. O'Donnell*, 84 Mich. 533.

Option to Return Goods Distinguished from Warranty. — There is a wide difference between an option given to the buyer to return the goods if not satisfactory and a warranty of quality. The latter is continuous, and runs with the goods; but the former must be exercised within a reasonable time after the receipt of the goods, and the retention of the goods after the expiration of that time must be regarded as an acceptance, unless the option is extended in clear and unmistakable language. *Childs v. O'Donnell*, 84 Mich. 533.

No Formal Demand for Return of Goods Necessary. — Where a buyer has a right to acquire title to the goods by giving notice or refusing to return them on demand, the vendor is not

bound to make a formal demand for the goods on the refusal of the buyer to redeliver them; if he says enough to show the buyer that he wants the goods, and the latter refuses to surrender them, this is sufficient. *Jones v. Wright*, 71 Ill. 61.

That demand made at the time of instituting suit to recover the property is not sufficient, see *Witherby v. Sleeper*, 101 Mass. 138.

Conversion by Vendee. — If the buyer who has received intoxicating liquors on trial refuses on demand to pay for or return them, and conceals them, he is liable to an action for their conversion, and the fact that the sale of intoxicating liquors is illegal is immaterial. *Booraem v. Crane*, 103 Mass. 522.

Failure to Make Stipulated Trial. — Where an article is ordered, to be paid for if it proves satisfactory upon trial, the fact that the party ordering it fails or refuses to make the trial is no defense to an action against him for the price. *Thomson-Houston Electric Co. v. Brush-Swan Electric Light, etc., Co.*, 31 Fed. Rep. 535; *Waters Heater Co. v. Mansfield*, 48 Vt. 378.

The Vendee Cannot Sell any part of goods delivered to him on approval during the period allowed for trial. *Jochams v. Ong*, 45 La. Ann. 1289.

Vendee Cannot Maintain Trover Against Vendor for Conversion. — A contract of sale giving the vendee an option to return the property if by a certain time he does not like it, and pay a certain sum for the use, does not confer such complete title on him as will enable him to maintain trover against the vendor for taking the property away within the time. *Southern v. Cunningham*, 11 Rich. L. (S. Car.) 533.

1. The terms "sale on approval" and "sale or return" are not infrequently used as if synonymous, especially in cases where the question as to whether title has passed is not involved. As noted in the text, however, the terms denote essentially different contracts.

2. *Schouler's Pers. Prop.*, § 310.

3. *Per Wells, J.*, in *Hunt v. Wyman*, 100 Mass. 198; *Hotchkiss v. Higgins*, 52 Conn. 205, 52 Am. Rep. 582; *Jacob Strauss Saddlery Co. v. Kingman*, 42 Mo. App. 208.

4. See *infra*, this title, *Sales Dependent Upon Conditions Subsequent — Contracts of Sale or Return*.

Buyer Sole Judge where Article Sold Is to Be Satisfactory to Him. — Where a chattel is taken on trial, to be accepted and paid for if satisfactory to the buyer, the buyer is not liable for the price unless he is satisfied and accepts the article. In such case he is the sole judge as to whether the article is satisfactory or not, and if he is not satisfied he is not bound to accept the article, although as a matter of fact he ought to have been satisfied therewith.¹

A Distinction Has Been Made, however, in this connection, between that class of cases in which the right of deciding whether or not the article is satisfactory is completely reserved to the buyer, in which case his decision is final without reference to the grounds upon which it is made; and those cases in which the contract may be construed as binding the buyer to decide on fair and reasonable grounds, in which case it seems that the correctness of his decision and the adequacy of the grounds upon which it is based may be reviewed.²

Buyer Must Act Honestly. — But in any case the buyer is bound to act honestly and give the article a fair trial, exercising therein such judgment and capacity as he possesses; his dissatisfaction must be real and not feigned.³ But as it is

1. Buyer Sole Judge of Satisfaction. — *Goodrich v. Van Nortwick*, 43 Ill. 445; *Plano Mfg. Co. v. Ellis*, 68 Mich. 101; *Platt v. Broderick*, 70 Mich. 577; *Gray v. Central R. Co.*, 11 Hun (N. Y.) 70; *Seeley v. Welles*, 120 Pa. St. 69; *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528; *McClure v. Briggs*, 58 Vt. 82, 56 Am. Rep. 557; *Osborne v. Francis*, 38 W. Va. 312, 45 Am. St. Rep. 859; *Warder, etc., Co. v. Whitish*, 77 Wis. 430.

Where a fanning mill was bought with a reservation of the privilege of returning it within thirty days in case it did not suit and answer the purpose of purchase, it was held that if it did not suit, the buyer was not bound to prove that it did not answer the purpose; the contract, appointing no other arbiter, left him the sole judge. *Goodrich v. Van Nortwick*, 43 Ill. 445.

Under such a contract the buyer, if dissatisfied, is not bound to accept the article even though it does good work. *Plano Mfg. Co. v. Ellis*, 68 Mich. 101.

In *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528, where the defendant received an evaporator from the plaintiff upon trial, to be paid for if he liked it, *Wheeler, J.*, said: "The trial upon which the defendant took the evaporator was to be had for the purpose of ascertaining whether the defendant liked it or not, and not for the purpose of ascertaining whether it was equal to the plaintiff's recommendations of it or not. The trial was to be had solely with reference to the defendant's wishes in respect to the machine for such uses as he might find he could make of it, and not with any reference to any usefulness of it for other persons."

Articles to Be Manufactured. — The doctrine stated in the text, that the vendee is the sole judge as to whether the article taken on trial is satisfactory or not, applies also to the manufacture of articles to order, to be satisfactory to the person for whom they are made. In such case the buyer must in fact be satisfied; provided he acts in good faith, it is not enough that he ought to be satisfied. The principle has been applied to the case of the erection of a passenger elevator, *Singerly v. Thayer*, 108 Pa. St. 291; to the making of a suit of clothes, *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep.

463; to the making of a bookcase, *McCarren v. McNulty*, 7 Gray (Mass.) 139; to the painting of a portrait, *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351; *Hoffman v. Gallaher*, 6 Daly (N. Y.) 42; to the making of a plaster bust, *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446; to the manufacture of a set of teeth, *Hartman v. Blackburn*, 7 Pittsb. Leg. J. (Pa.) 140; to the sale of a steam engine, *Silsby Mfg. Co. v. Chico*, 24 Fed. Rep. 893.

2. See *Walter A. Wood Reaping, etc., Mach. Co. v. Smith*, 50 Mich. 565, 45 Am. Rep. 57.

The Cases of the First Class are generally "such as involve the feelings, taste, or sensibility of the promisor, and not those gross considerations of operative fitness or mechanical utility which are capable of being seen and appreciated by others. But this is not always so. It sometimes happens that the right is fully reserved where it is the chief ground, if not the only one, that the party is determined to preserve an unqualified option, and is not willing to leave his freedom of choice exposed to any contention or subject to any contingency. He is resolved to permit no right in any one else to judge for him or to pass on the wisdom or unwisdom, the justice or injustice, of his action. Such is his will. He will not enter into any bargain except upon the condition of reserving the power to do what others might regard as unreasonable." *Per Graves, C. J.*, in *Walter A. Wood Reaping, etc., Mach. Co. v. Smith*, 50 Mich. 565, 45 Am. Rep. 57. In this case, where the defendant gave an order for a harvesting machine with great reluctance, on the solicitation of the vendor's agent, with a warranty by the vendor and a stipulation by the defendant that unless the machine worked to his satisfaction the contract should be of no effect, it was held that the defendant had reserved the absolute right to reject the machine and that his reasons for doing so could not be investigated.

3. Buyer Must Act Honestly. — *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528; *Daggett v. Johnson*, 49 Vt. 345; *McClure v. Briggs*, 58 Vt. 82, 56 Am. Rep. 557.

Evidence of Dissatisfaction Held Sufficient. — Where the vendees of gas fixtures sold on approval testified without contradiction that they were unable to use the same on account of the

the buyer who is to be satisfied, and not some one else, it has been held that he is not bound to use the care and skill of ordinary persons in making the decision, but only such capacity and judgment as he himself possesses.¹

If the Contract Provides that the Trial Shall Be Made in a Particular Way, although the buyer may insist that the article shall be satisfactory to himself, and may determine whether it is so for himself, he must make that determination only upon and after the test and trial provided for in the agreement.²

Where the Trial Involves the Injury or Consumption of the Thing Sold it is a question of fact for the jury whether the buyer has conducted the trial properly; for example, whether he has used the article too much or improperly, or has consumed more of the goods sold than was necessary for making the trial, and if so, the sale becomes absolute by the approval implied by such conduct.³

A Continued Use of the article beyond what is necessary for trial, and not for that purpose, amounts to an acceptance and a waiver of the right to return.⁴

To Determine Whether Article Comes Up to Representations. — Where the object of the trial is to ascertain whether the article corresponds with the representations made of it by the seller, and not whether the buyer likes it, the buyer is bound to accept the article if it answers the representations, whether it is satisfactory to him in other respects or not.⁵ This branch of the subject will be fully discussed elsewhere in this work.⁶

Buyer Must Give Notice of Dissatisfaction. — If the article taken on trial proves unsatisfactory the buyer must notify the seller of this fact, or return the property within a reasonable time or within the time limited by the contract, or the sale becomes absolute and the buyer becomes liable for the price.⁷ But

great heat produced thereby, it was held that a verdict in their favor would not be disturbed. *Crane v. Schloss* (City Ct.) 13 N. Y. Supp. 581.

1. *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528.

2. *Exhaust Ventilator Co. v. Chicago, etc.*, R. Co., 66 Wis. 218, 57 Am. Rep. 257. See also *Daggett v. Johnson*, 49 Vt. 345.

3. *Benjamin on Sales*, § 912; 2 *Schouler's Pers. Prop.*, § 311. See *Elliott v. Thomas*, 3 M. & W. 170; *Lucy v. Mouffet*, 5 H. & N. 229.

Where copper pans sold on trial proved unsatisfactory after being used five or six times in trials, it was held to be a question for the jury whether the buyer had used the pans oftener than necessary. *Okell v. Smith*, 1 Stark. 107, 2 E. C. L. 49.

Where a harvesting machine was taken on trial, to be returned if not satisfactory, it was held that the vendee was not liable for the price of twine necessarily used with the machine in testing it, where he did not accept the machine. *Radell v. Sharlan*, 66 Wis. 138.

4. *Palmer v. Banfield*, 86 Wis. 441.

Evidence of Election. — Where an intended purchaser took a horse home on trial with the understanding that he was to use it by way of trial until a specified time, and then to return it if not satisfied, or if too busy for this to let it stand unused until the owner came for it, and such person continued to use the horse after the time so fixed, and then refused to buy and offered to return it, it was held that this was evidence for the jury, though not conclusive on the question whether the person so receiving the horse had decided, at the time fixed, to keep the horse, so as to render him liable for the price. *Kahn v. Klabunde*, 50 Wis. 235.

5. *Clark v. Rice*, 46 Mich. 308. See the title WARRANTY.

Where a machine is taken on trial to be paid for unless it should fail to work as represented, the vendee is not required to make a trial of the machine if it has been ascertained, by actual trial, that machines exactly similar were incapable of working as represented. *Waters' Patent Heater Co. v. Smith*, 120 Mass. 444. But see *Waters Heater Co. v. Mansfield*, 48 Vt. 378.

6. See the titles SALES; WARRANTY.

7. Sale Absolute upon Failure to Return or Give Notice of Dissatisfaction. — *Benjamin on Sales*, § 911; *Humphries v. Carvalho*, 16 East 45; *Cash v. Giles*, 3 C. & P. 407, 14 E. C. L. 372; *Frederick v. Case*, 28 Ill. App. 215; *Delamater v. Chappell*, 48 Md. 244; *Singer Mfg. Co. v. Cullaton*, 90 Mich. 639; *Potter v. Lee*, 94 Mich. 140; *Rosenfield v. Swenson*, 45 Minn. 190; *Latham v. Bausman*, 39 Minn. 57; *Curtiss v. Driggs*, 25 Mo. App. 175; *Empire Steam Pump Co. v. Inman*, 59 Hun (N. Y.) 230; *Golden Gate Concentrator Co. v. Caplice*, 55 N. Y. Super. Ct. 439; *Harvester Co. v. Axtell*, 5 N. Dak. 317, citing 3 AM. AND ENG. ENCYC. OF L. (1st ed.) 434; *Palmer v. Banfield*, 86 Wis. 441; *Keeler v. Jacobs*, 87 Wis. 545. But see *Glasscock v. Hazell*, 109 N. Car. 145.

Where a reaping machine was sold with leave to test it by using it for a day, it was held that using it from two o'clock P. M. was not for a day, the rule that courts take no notice of fractions of a day having no application. *Fuller v. Schroeder*, 20 Neb. 631.

Where the test cannot be made within the time specified, as, for example, in the case of a furnace because there is no cold weather, the test is seasonably made if made after.

the buyer is entitled to the full time agreed on for trial.¹

Duty to Return Article. — It is not generally necessary, however, for the buyer to return the article to the seller, in the absence of an express agreement to that effect; it is sufficient for him to give due notice to the seller that he is dissatisfied with the article, and that he declines to accept it.²

Risk of Loss. — Since the title to chattels sold on trial remains in the seller until the acceptance of the articles by the buyer, any loss or damage to the property before acceptance falls on the seller.³

d. OTHER CONDITIONS PRECEDENT. — Besides payment and election other cases of conditions precedent to be performed by the vendee occasionally arise. Thus where, in a sale of goods, the price is to depend upon quantity or number to be determined by the vendee, measurement or counting by him is a condition precedent to the passing of title.⁴ Other examples are given in the note.⁵

5. Conditions Precedent to Be Performed by Vendor and Vendee Concurrently. — It frequently happens in the case of a sale of goods that the vendor and vendee are to do certain acts simultaneously as a prerequisite to the passing of title, in which case the sale is said to be upon mutual or concurrent conditions.⁶

The Most Important Instance of a sale of this kind is found in the sale of goods for cash on delivery, in which the delivery of the goods and payment therefor

wards. *Richardson, etc., Co. v. Hampton Independent Dist.*, 70 Iowa 573.

Where a machine is sold on a conditional warranty providing for testing within a certain time and for notice, if the purchaser would avail himself of the warranty he must render substantial compliance with the agreement. *Furneaux v. Esterly*, 36 Kan. 539.

See the title **WARRANTY**. See also *infra*, this title, *Sales Dependent upon Conditions Subsequent — Contracts of Sale or Return*.

An Assignment of the Property to a third person renders the sale absolute. *Delamater v. Chappel*, 48 Md. 244.

What is Reasonable Time, Question for Jury. — In an action for the price of a grubbing machine sold by the plaintiffs to the defendant on trial April 11, and not returned before the latter part of May, it was held error to take the question of reasonable time from the jury by instructing them that the length of time was unreasonable unless the defendant had some excuse for keeping the machine that long in the expectation that certain defects would be remedied. *Keeler v. Jacobs*, 87 Wis. 545. See also *Gurney v. Collins*, 64 Mich. 458.

An Extension of the Time of Trial operates as a waiver of a stipulation that if notice of dissatisfaction is not given by a certain time the sale is to be regarded as absolute. *Snody v. Shier*, 88 Mich. 304.

1. *Benjamin on Sales*, § 911; *Ellis v. Mortimer*, 1 B. & P. N. R. 257. See *Cole v. Homer*, 53 Mich. 438.

2. *McCormick Harvesting Mach. Co. v. Chesrown*, 33 Minn. 32; *Esterly v. Campbell*, 44 Mo. App. 621; *Exhaust Ventilator Co. v. Chicago, etc., R. Co.*, 69 Wis. 454.

In this last case, where the plaintiff agreed to furnish exhaust fans for the defendant, guaranteed to do certain work in a satisfactory manner and not to be paid for until satisfactory to the defendant, *Orton, J.* said: "[We think] the true rule in such a case is that if the fans are not honestly and in good faith satis-

factory to the defendant, and the defendant notified the plaintiff of that fact in a reasonable time, then and in that case there had been no sale, and the defendant is not liable for the price."

As to what is sufficient performance of the duty to return, see *Colles v. Swensberg*, 90 Mich. 223.

3. **Risk of Loss Falls on Seller.** — *Pierce v. Cooley*, 56 Mich. 552; *Jacob Strauss Saddlery Co. v. Kingman*, 42 Mo. App. 208; *Carter v. Wallace*, 35 Hun (N. Y.) 189.

Where a horse was sold upon condition that it should be taken away by the buyer and tried for eight days and returned at the end of that time if not satisfactory, and on the third day after being placed in the buyer's stable the horse died without the fault of either party, it was held that there was no sale, and an action for the price was not maintainable. *Elphick v. Barnes*, 5 C. P. Div. 321.

4. See the title **SALES**. And see *supra*, this title, *Conditions Precedent to Be Performed by the Vendee*; and *Lord Blackburn's Second Rule*.

5. **Bags to be Furnished on Sale of Seed.** — Where, under an executory contract for the sale of clover seed, the bags for the seed were to be furnished by the buyer, it was held that furnishing the bags was a condition precedent to the seller's obligation to deliver the seed. *Russell v. Witt*, 38 Ind. 9. See also *McKee v. Retter*, 10 Ill. 315; *Low v. Forbes*, 14 Ill. 423, 18 Ill. 568.

Payment of Freight. — Under a contract for the sale and delivery of oil stipulating that the vendee was to advance the freight on the oil and to deduct the amount thereof from the price, and that the oil was to be paid for on delivery, it was held that the vendee was bound, as a condition precedent, to advance the freight money before the oil was shipped if required to do so, and that on his refusal the vendor might treat the contract as rescinded. *Hartje v. Collins*, 46 Pa. St. 268.

6. *Benjamin on Sales*, § 897.

are simultaneous or concurrent acts to be performed by the vendor and vendee respectively.¹

General Rule. — But apart from the question of the passing of title, the general rule in all executory agreements for the sale of goods is that the obligation of the vendor to deliver the goods, and that of the vendee to pay for them, are concurrent conditions in the nature of mutual conditions precedent, and neither party can enforce the contract against the other without showing performance or tender on his part.²

6. Conditions Precedent to Be Performed by a Third Person. — It frequently happens that a contract of sale is made dependent upon the performance of some act by a third person, and in such cases the performance of such act is a condition precedent to the enforcement of rights arising out of the contract.³ Thus goods may be sold subject to the inspection and approval of a third person agreed upon by the parties,⁴ or to be valued by him,⁵ or to be measured or estimated by him where the price is to be determined by quantity or number.⁶

The Refusal of the Third Person to Perform the Designated Act, even though unreasonable, will not dispense with the necessity of performance.⁷

7. Sales to Arrive. — A contract of frequent occurrence among merchants is a sale of goods "to arrive" or "on arrival."⁸ It is not always easy to

1. 2 Schouler's Pers. Prop., § 292; Shines v. Steimer, 76 Ala. 458; Canadian Bank v. McCrea, 106 Ill. 281; Fishback v. Van Dusen, 33 Minn. 111; Hodgson v. Barrett, 33 Ohio St. 63, 31 Am. Rep. 527. See *supra*, this title, *Sales Dependent upon Conditions Precedent—Conditions Precedent to Be Performed by the Vendee—Payment—In Cash Sales.*

2. Benjamin on Sales, § 897; 2 Schouler's Pers. Prop., § 293; Cole v. Swanston, 1 Cal. 51, 52 Am. Dec. 288; Dana v. King, 2 Pick. (Mass.) 155; Kelley v. Upton, 5 Duer (N. Y.) 336.

Where, in an action for the nondelivery of corn, there was an agreement by which the defendant, in consideration that the plaintiff had bought of him a certain quantity of corn at a fixed price, undertook to deliver it to the plaintiff at a certain place within one month from the time of the sale, it was held that the plaintiff must aver the tender of the price, since the delivery of the corn and the payment of the price were concurrent acts to be done by the parties respectively at the same time, and each must aver performance or an offer to perform his part before he could maintain an action against the other. Morton v. Lamb, 7 T. R. 125.

For a Full Treatment of this branch of the law of sales, see the title SALES.

3. 2 Schouler's Pers. Prop., § 286; Benjamin on Sales, § 869.

4. Crane v. Roberts, 5 Me. 419; Nofsinger v. Ring, 71 Mo. 149, 36 Am. Rep. 456; Dustan v. McAndrew, 44 N. Y. 72. See the title SALES.

5. Thurnell v. Balbirnie, 2 M. & W. 786.

6. **Measurement to Be Made by Third Person.** — On a sale of all the logs that shall be cut during the season, at a certain sum per thousand, to be scaled by the surveyor-general, title does not pass until the logs are scaled. Martin v. Hurlbut, 9 Minn. 142.

Under a contract for the purchase of cord wood before it was all cut, the wood to be measured and delivered to the vendee by

the choppers when cut, it was held that the measurement was requisite to passing the title, and before it the wood was subject to seizure and sale on an execution against the vendor. Frost v. Woodruff, 54 Ill. 155.

Where lumber lying in a canal was sold, to be taken out and paid for by the vendee at so much per thousand, according to a measurement to be made by a third person, part payment being made at the time of the contract, but before removal the lumber was attached for a debt of the vendee, it was held in an action of trover by the vendor that it was a question for the jury whether title had passed, and that a verdict for the defendant was authorized. Riddle v. Varnum, 20 Pick. (Mass.) 280. See the title SALES.

7. Benjamin on Sales, § 869; Brogden v. Marriott, 2 Bing. N. Cas. 473, 29 E. C. L. 397.

Thus where, in a contract of sale of personal property, the title to the property was to pass to the purchaser upon his deposit of the purchase money in a particular bank by a certain day, it was held that the refusal of the bank to receive the deposit was no excuse for non-performance of the condition. Thompson v. Ray, 46 Ala. 224.

8. Benjamin on Sales, §§ 407, 873.

Mr. Benjamin Classifies Sales to Arrive as Follows: 1. Where the language is that goods are sold "on arrival per ship A" or "ex ship A," or "to arrive per ship A" or "ex ship A" (the expressions meaning the same thing), it imports a *double condition precedent*, viz., that the ship named shall arrive, and that the goods sold shall be on board on her arrival. 2. Where the language asserts the goods to be on board of the vessel named, as "1170 bales now on passage, and expected to arrive per ship A," or other terms of like import, there is a warranty that the goods are on board, and a *single condition precedent*, to wit, the arrival of the vessel. 3. The condition precedent that the goods shall arrive by the vessel will not be fulfilled by the arrival of goods answering the description of those sold

determine whether the language used in such cases implies a condition or not, or what the condition is.¹ So, also, whether such a contract is to be regarded as a present sale of the goods, subject to be defeated by their nonarrival, or only an executory contract of sale, to take effect upon the arrival of the goods, is a question upon which there has been much discussion.²

Sales to Arrive Held to Be Conditional. — It seems to be now well settled, however, that contracts of this description are conditional, the words "to arrive," or other equivalent words,³ not importing a warranty that the goods will arrive but a condition, and that the contract does not pass the property in the goods but is merely an agreement for their sale and delivery when they shall arrive, and if they do not arrive, either from the vessel being lost or other accident, and without the fraud or fault of the seller, the contract is at an end.⁴

but not consigned to the vendor, and with which he did not affect to deal; but *semble* the condition will be fulfilled if the goods which arrive are the same that the vendor intended to sell, in the expectation, which turns out to be unfounded, that they would be consigned to him. 4. Where the sale describes the expected cargo to be of a particular description, as "400 tons Aracan Necrensie rice," and the cargo turns out on arrival to be rice of a different description, the condition precedent is not fulfilled, and neither party is bound by the bargain. Benjamin on Sales (4th Am. ed.), § 586.

1. Benjamin on Sales, § 873.

Sales to Arrive — Effect of Different Terms. —

"A vendor may bind himself absolutely to deliver goods 'on arrival' of a particular ship by a contract to that effect. Whether delivery is conditioned on the goods being on the ship is to be determined by the construction of the particular contract. If I say that the goods 'are now on passage' by a particular ship, and engage to deliver the goods on arrival of the ship, this is a warranty that the goods are on board, and makes me liable for the goods when the ship arrives. *Gorissen v. Perrin*, 2 C. B. N. S. 681, 89 E. C. L. 681. And a contract to deliver goods 'on arrival' of a particular ship is an absolute engagement to deliver the goods when the ship arrives, so that the vendor is liable in case of the goods not coming in the ship. *Hale v. Rawson*, 4 C. B. N. S. 85, 93 E. C. L. 85. On the other hand, a vendor may avoid a warranty by using the terms 'expected to arrive by,' or even 'to arrive by,' or 'on arrival by' a particular ship; and in such case the delivery will be dependent not only on the arrival of the ship, but on the arrival of the ship with the goods on board. *Boyd v. Siffkin*, 2 Campb. 326; *Idle v. Thornton*, 3 Campb. 274; *Lovatt v. Hamilton*, 5 M. & W. 639. The vendor is not liable, on such a contract, where the goods intended to have been sold were not shipped, though others of a similar character, consigned to the same vendor, but sold to other parties, were on the same ship. *Smith v. Myers*, L. R. 5 Q. B. 429. Nor where goods of the same class were shipped, but consigned to another person. *Gorissen v. Perrin*, 2 C. B. N. S. 681, 89 E. C. L. 681. Nor where goods were on the ship, belonging to the same vendor and unsold, but substantially different. *Vernede v. Weber*, 1 H. & N. 311." 1 Wharton on Contr., § 563.

2. 1 Parsons on Contracts 552.

3. The expressions "to arrive" and "on arrival" mean precisely the same thing. *Johnson v. Macdonald*, 9 M. & W. 600.

4. Sales to Arrive Held to Be Conditional. — *England.* — *Boyd v. Siffkin*, 2 Campb. 326; *Hawes v. Humble*, 2 Campb. 327, note a; *Idle v. Thornton*, 3 Campb. 274; *Vernede v. Weber*, 1 H. & N. 311, 25 L. J. Exch. 326; *Hale v. Rawson*, 4 C. B. N. S. 85, 93 E. C. L. 85, 27 L. J. C. P. 189; *Lovatt v. Hamilton*, 5 M. & W. 639; *Johnson v. Macdonald*, 9 M. & W. 600.

New Jersey. — *Neldon v. Smith*, 36 N. J. L. 148.

New York. — *Russell v. Nicoll*, 3 Wend. (N. Y.) 112, 20 Am. Dec. 670; *Shields v. Pettee*, 2 Sandf. (N. Y.) 262, 4 N. Y. 122; *Benedict v. Field*, 16 N. Y. 595, 4 Duer (N. Y.) 154.

Ohio. — *Rogers v. Woodruff*, 23 Ohio St. 632, 13 Am. Rep. 276.

Wisconsin. — *Hooper v. Chicago, etc., R. Co.*, 27 Wis. 81, 9 Am. Rep. 439.

In *Neldon v. Smith*, 36 N. J. L. 148, with reference to cases relating to goods sold on condition to arrive, *Scudder, J.* said: "The conclusion to which we must come after a careful examination of these cases is that a sale to arrive is conditional, and that if the article contracted for does not arrive, either from the vessel being lost or other cause, by accident, and without any fraud or fault of the vendor, the contract is at an end. The contract is executory, and does not pass the property in the goods to arrive. It is merely an agreement for the sale and delivery of the articles named, at a future period when they shall arrive. It is in the nature of a condition and not a warranty." And in *Rogers v. Woodruff*, 23 Ohio St. 632, 13 Am. Rep. 276, *Stone, J.*, said: "It has uniformly been held that contracts * * * for the sale of goods to arrive are conditional, the words 'to arrive,' or other equivalent words, not importing a warranty that the goods will arrive, and the obligation to perform the contract by an actual transfer of the property being, therefore, in the absence of other words showing a contrary intent, contingent upon its arrival."

The Words "to Arrive" Import a Condition that if the goods do not arrive the vendors shall not be bound by the contract. *Dike v. Reitlinger*, 23 Hun (N. Y.) 241.

In an action on a contract for the sale of three thousand sacks of salt "to arrive by the 15th November," it was held that the words quoted were words of condition and descrip-

Intention of Parties Will Control. — It seems, however, that in contracts of this kind the intention of the parties, as gathered from the terms of the contract and the circumstances of the case, will control, and if it appears that the intention is for the title to the property to pass at once, the contract will be so construed.¹

Sale Conditioned upon Arrival of Goods and Not of Ship. — In the case of a contract for the sale of goods by a particular ship "on arrival," the sale is conditional on the arrival of the goods and not of the ship,² and hence, if the ship arrives without the goods, without the fault of the seller, the contract is at an end, and the seller is not liable to the purchaser for the nondelivery of the goods.³ So, also, the parties are not bound if the goods on arrival prove to be of inferior quality,⁴ or deficient in quantity.⁵

Sale upon Double Condition Precedent. — In some cases, however, the sale is made to depend both upon the arrival of the ship and upon the goods being on board the ship on arrival; that is, upon a double condition precedent.⁶

tion only, and did not import a warranty that the salt would arrive on the day named. *Rogers v. Woodruff*, 23 Ohio St. 632, 13 Am. Rep. 276.

A sale of coal as soon as delivered to the seller from the mines, upon a stipulation that it is not to be binding if the coal company do not deliver the coal according to a certain contract, is conditional, and if the coal is received by the seller from the mines after the time named in the contract of sale the seller is not bound to deliver it, nor the buyer to receive it. *Neldon v. Smith*, 36 N. J. L. 148.

1. *Parsons on Contracts* 553. See also 2 *Schouler's Pers. Prop.*, § 314.

2. **Variance in Name of Ship** — **Substantial Performance.** — Where the defendants contracted to purchase one hundred and seventy tons, more or less, of scrap iron, one hundred tons to arrive by ship "Christopher;" and one hundred and three tons arrived by ship "St. Christopher," about eight tons of which were of a different quality from that bargained for; and the defendants refused to accept the iron on the ground that they had bought no iron on the "St. Christopher," making no objection to the quality, it was held that the objection was untenable, and even if the objection to receive the iron had been placed on the ground of defect in quality, it could not be sustained, there having been substantial performance of the agreement. *Smith v. Pettie*, 70 N. Y. 13.

3. *Boyd v. Siffkin*, 2 Campb. 326; *Hawes v. Humble*, 2 Campb. 327, note a.

4. **Contract Terminated by Arrival of Goods of Inferior Quality.** — Where goods are sold "to arrive" by a particular ship the contract is conditional, and if the goods do not arrive the contract is at an end. Thus where iron of a certain grade was so sold, and the ship arrived, but the iron on board was of a different quality, it was held that the contract was at an end and bound neither party. *Shields v. Pettie*, 2 Sandf. (N. Y.) 262, 4 N. Y. 122.

Rule of Caveat Emptor Does Not Apply. — Where goods are sold "to arrive," which the vendor has not on hand, and which neither party can inspect, it would be contrary to sound morality and public policy to enforce the doctrine of *caveat emptor* and compel the purchaser to pay for goods of an unmerchant-

able quality. The just principle of the civil law, *caveat venditor*, should be applied in such cases. *Newbery v. Wall*, 35 N. Y. Super. Ct. 106, 65 N. Y. 484.

Sale to Arrive with Warranty of Quality. — Where goods to arrive were sold by sample, "to be equal to sample," it was held that the stipulation that the goods should be equal to the sample was not a substantive part of the agreement to sell, but a collateral undertaking amounting to an express warranty of the quality of the goods, for breach of which, the goods upon arrival proving to be of inferior quality, an action would lie against the vendor. *Dike v. Reitlinger*, 23 Hun (N. Y.) 241.

5. **Arrival of Portion of Goods.** — Where goods are sold to arrive, until the whole quantity arrives the vendor is not obliged to deliver, nor the vendee to accept, any portion thereof. *Matthews v. Hobby*, 48 Barb. (N. Y.) 167; *Russell v. Nicoll*, 3 Wend. (N. Y.) 112, 20 Am. Dec. 670.

But if the Vendee Does Receive Less than the Whole Quantity he is bound to pay for it on delivery, unless the vendor waives the condition of the contract. *Matthews v. Hobby*, 48 Barb. (N. Y.) 167.

6. **Sale upon Double Condition.** — Thus where the defendant, by a bought and sold note, agreed to sell the plaintiffs "100 tons of nitrate of soda, at eighteen s. per cwt. to arrive ex Daniel Grant, to be taken from the quay at landing weights," etc., and below the signature of the brokers there was the following memorandum: "Should the vessel be lost, this contract to be void," it was held that the contract did not amount to a warranty on the part of the seller that the nitrate of soda should arrive if the vessel arrived, but was a contract for the sale of goods at a future period, subject to the double condition of the arrival of the vessel, with the specified cargo on board. *Johnson v. Macdonald*, 9 M. & W. 600.

Similarly where the defendants contracted with the plaintiffs for the sale of "50 tons of palm oil, to arrive per Mansfield," etc. "In case of nonarrival, or the vessel's not having so much in after delivery of former contracts this contract to be void," and during the voyage a portion of the Mansfield's cargo was transhipped by an agent of the defendants in good faith, but without the knowledge of the de-

Effect of Designation of Time of Arrival. — There are two classes of cases in which the designation of the time of arrival in contracts of sales to arrive has been held to be a condition precedent to the obligation to perform. One of these classes is where the contract is to take effect on arrival; the other is where the article sold is not known to be on board of any vessel, but is expected by some vessel to arrive at a particular time. In both classes the contract is held to be conditional, depending on the arrival of the goods at the time stated.¹ But it has been held that an executory contract for the sale of a cargo of goods already shipped on board a particular ship is an absolute sale, and the addition of the words "to arrive on or before a specified time" does not make the sale conditional.²

Duty of Seller to Give Notice of Arrival. — A common condition in the case of sales to arrive is that the seller shall give notice of the name of the ship in which the goods are expected to arrive as soon as it becomes known to him, and this condition must be strictly complied with to entitle the seller to enforce the contract.³

VIII. SALES DEPENDENT UPON CONDITIONS SUBSEQUENT — 1. **Generally.** — The parties to a contract of sale may agree that title to the property sold shall pass at once to the vendee, subject to be divested by the performance of some condition, in which case the sale is said to be upon condition subsequent.⁴

feudants, and both vessels and cargoes arrived safely, the *Mansfield* not having enough oil to satisfy the contract, it was held in an action for the nondelivery of the oil that its arrival in the *Mansfield* was a condition precedent, and the plaintiffs were not entitled to the oil brought in the other vessel. *Lovatt v. Hamilton*, 5 M. & W. 639.

1. *Per Ingraham, J.*, in *Havemeyer v. Cunningham*, 35 Barb. (N. Y.) 515.

In *Russell v. Nicoll*, 3 Wend. (N. Y.) 112, 20 Am. Dec. 670, under a contract for the sale of cotton to be delivered on its arrival at any time between the date of the contract and a day named, it was held that the specification of the time was only a limitation fixing the period beyond which neither party should be bound by the contract, and not an agreement that the cotton should be delivered at all events by the specified day.

2. *Havemeyer v. Cunningham*, 35 Barb. (N. Y.) 515.

3. *Benjamin on Sales*, § 882; *Busk v. Spence*, 4 Campb. 329; *Graves v. Legg*, 9 Exch. 709, 23 L. J. Exch. 228. In this last case notice to the buyer's broker was held sufficient, this being according to the usage of the market.

4. **Sales on Condition Subsequent.** — *Knox v. Perkins*, 15 Gray (Mass.) 529. See the sections immediately following.

In an action for the price of hops, where it appeared that the vendee agreed to sign a memorandum of sale on condition that if he discovered that the price stated by the vendor was incorrect there was to be no sale, and he signed an unqualified memorandum, and afterwards, on discovering the price to be incorrect, refused to accept the hops, it was held that the condition was a condition subsequent, and it appearing that the vendee had not relied on the vendor's statement of the price, he was liable therefor. *Lilienthal v. Suffolk Brewing Co.*, 154 Mass. 185, 26 Am. St. Rep. 234.

Where chattels are sold and delivered on condition that the purchaser shall pay over to

the vendor the first money received on their resale, and if he fails to do so they shall be subject to his order, the condition is subsequent. *Chamberlain v. Dickey*, 31 Wis. 68.

Where the owner of goods executed an instrument purporting to "bargain, sell, and confirm" the property to another, who paid therefor a certain amount in cash and executed a note for the balance, and the instrument recited that it should remain in full force and effect if the balance of the price was paid, and if not then the vendor might retake the goods and dispose of them, and "the above conveyances shall be from that time and henceforth null and void," it was held that title passed, to be divested by the vendor by sale in case the note was not paid. *Key v. Brown*, 67 Tex. 300.

Where the purchaser of a mare, being unable to pay the price, borrowed the amount in consideration of an agreement that unless the money thus loaned should be refunded within twelve months the mare should be the property of the lender, to be delivered to him on demand, it was held that at the expiration of the twelve months, the money not having been refunded, the mare became the absolute property of the lender. *Buffington v. Ulen*, 7 Bush (Ky.) 232.

Building to Be Removed. — The ownership of a building sold as personal property, to be removed within a reasonable time, reverts to the owner of the land if the building is not removed, and the purchaser cannot recover back the money paid for such building, as the sale was a sufficient consideration for the purchase money, and the right to remove was lost by the purchaser's own neglect. *Shaw v. Carbrej*, 13 Allen (Mass.) 462; *Woodward v. Boston*, 115 Mass. 81.

Lost Chattel to Be Recovered. — Where the owner of runaway slaves bargained for their sale, and received the price from the vendee, with an agreement that the money should be repaid if the vendee did not get possession of the slaves, it was held that the sale was con-

2. Contracts of Sale or Return. — The delivery of personal property by the owner to another under a contract by which the latter may either return it or pay a certain sum of money therefor, constitutes a sale on condition subsequent; that is, on condition that the vendee, in case he does not elect to keep the property, shall return it according to the terms of the contract.¹

Title Passes. — By such delivery the title to the property passes at once to the vendee, subject only to be defeated by the performance of the condition.²

Return of Property to Vendor. — If the property is returned or tendered to the vendor in due time, the sale is annulled and the vendee is not liable for the purchase money;³ but if the option to return is not duly exercised, and the

ditional, and that if the vendee failed to get the slaves there was no sale, and the vendor held the money for the use of the vendee who might recover it. *Kimbrough v. Worrill*, 38 Ga. 119.

1. 2 Addison on Contracts (8th ed.) 532; *Reese v. Beck*, 24 Ala. 651; *Ray v. Thompson*, 12 Cush. (Mass.) 281, 59 Am. Dec. 187; *Bladsworth v. Rosenblatt*, 20 Misc. Rep. (N. Y.) 358, citing 3 AM. & ENG. ENCYC. OF L. (1st ed.) 433; and cases cited in note immediately following.

2. **Title Passes to Vendee under Contract of Sale or Return.** — 2 Addison on Contracts (8th ed.) 533; 2 Schouler's Pers. Prop., § 312; *Moss v. Sweet*, 3 Eng. L. & Eq. 311, 16 Q. B. 493, 71 E. C. L. 493; *Hotchkiss v. Higgins*, 52 Conn. 205, 52 Am. Rep. 582; *Newburger v. Hoyt*, 86 Ga. 508, citing 3 Am. & Eng. Encyc. of L. (1st ed.) p. 433; *Jameson v. Gregory*, 4 Metc. (Ky.) 363; *Dearborn v. Turner*, 16 Me. 17, 33 Am. Dec. 630; *Buswell v. Bicknell*, 17 Me. 344, 35 Am. Dec. 262; *Perkins v. Douglass*, 20 Me. 317; *Southwick v. Smith*, 29 Me. 228; *Walker v. Blake*, 37 Me. 373; *Ammidown v. Powell*, 14 Mo. App. 578; *Ray v. Thompson*, 12 Cush. (Mass.) 281, 59 Am. Dec. 187; *Martin v. Adams*, 104 Mass. 262; *McKinney v. Bradlee*, 117 Mass. 321; *Hurd v. West*, 7 Cow. (N. Y.) 752; *Schlesinger v. Stratton*, 9 R. I. 578.

Where an engine was sold with an agreement that it might be returned if it did not develop a certain power, which it failed to do, and the seller refused to take it back, but afterwards agreed to take it and pay for the use of it, and after receiving it under this arrangement, mortgaged it, it was held that the title remained in the purchaser and the mortgagee acquired no title. *Stevens v. Cunningham*, 3 Allen (Mass.) 491.

Goods to Be Sold or Returned. — Where an innkeeper sent an order for liquors to a wholesale liquor dealer, stating, "What is used will account for and ship rest back to you; I want it for the commercial travelers who will be here Friday to dinner," it was held that the title passed on delivery, so that the liquors could be attached by his creditors as his property. *Hotchkiss v. Higgins*, 52 Conn. 205, 52 Am. Rep. 582. In this case Loomis, J., said: "In stating that the doctrine above mentioned [the doctrine of the text] is sustained by the uniform current of authorities, it may be thought we have overlooked a class of cases apparently very similar in which a different result was reached. In some of those cases the relation of the parties to the contract has been considered like that of consignor and consignee, or principal and agent; in others the controlling fact was the existence of a general custom

which by implication became a part of the contract, whereby it was understood that the title was to remain in the original owner. Such was the case of *Meldrum v. Snow*, 9 Pick. (Mass.) 441, 20 Am. Dec. 489. * * * In the case at bar there was no pretense of any custom or any peculiar circumstances that might require a modification of the doctrine as to sale or return."

3. **Contract Annulled by Return of Property.** — 2 Addison on Contracts (8th ed.) 533.

Where an article is sold with a condition that it may be returned if it does not correspond with a warranty, a return of the article to the vendor and an unconditional acceptance of it by him terminate the contract, and the vendee is not liable for the price, although there be in fact no breach of the warranty, though it might be otherwise if the acceptance were conditional or induced by fraud. *Manny v. Glandinning*, 15 Wis. 50.

In a conditional sale of a chattel a compliance with the condition upon which the sale is to be void or the property returned within the time agreed upon revests the title. *Tease v. Boyd*, 29 Mo. 131.

Partial Return. — Where the vendee returns a part of the property and the vendor accepts it, the vendor cannot recover the price of the whole. *Smith v. Minnesota Transfer Packing Co.*, 38 Minn. 450.

Notice of Dissatisfaction — Opportunity to Remedy Defects. — One who buys a machine with election to return it and receive back the price in case it does not "prove to be suited" to his purpose and "entirely satisfactory in all respects," is not bound to give notice of dissatisfaction or opportunity to remedy the difficulty, and after return and demand may maintain an action for the repayment of the price, although the seller manages to make the machine work well without alteration. *Aiken v. Hyde*, 99 Mass. 183.

Place of Return — Notice. — Where a harvester was purchased through the vendor's agent, to be delivered at a certain warehouse, and to be immediately returned to the agent at his place of business if it could not be made to do good work, and the machine was so delivered and proved unsatisfactory, whereupon the vendee returned it to the warehouse, the agent having no place of business, but being engaged in traveling from place to place, it was held that the machine was returned to the proper place, but that the vendee should have also given prompt notice to the vendor. *Paulson v. Osborne*, 35 Minn. 90.

Where a reaping machine was sold on condition that if it failed to work as warranted the

property is retained by the vendee, the sale becomes absolute and the vendor may maintain an action against the vendee for the price.¹

buyer might return it and receive back the price, and the buyer on finding that it failed to work as represented tendered the machine to the seller and demanded the repayment of the consideration, but the seller refused either to take back the machine or surrender the consideration, but agreed to make a further test of the machine, which was done, but the machine still failed to work, whereupon the buyer took it into his yard and notified the seller to come and take it away, it was held that he had done all that was required of him by the contract, and was entitled to recover the consideration. *Hall v. Aetna Mfg. Co.*, 30 Iowa 215.

Where a heater was sold and delivered to be paid for in six months, with the privilege of return in sixty days if unsatisfactory, and there was evidence tending to show that a certain person was an agent of the seller, and that the purchaser had been directed to go to him in any matter pertaining to the heater, and the purchaser gave to such person notice within sixty days that the heater was unsatisfactory and pointed out its defects and offered to return it, but was told that he had better keep the heater and that the defects could be remedied, but nothing further was done in the matter, it was held, in an action for the price, that a verdict for the plaintiff was error, and that the case should either have been submitted with instructions that if such person had the authority claimed, the defendant's offer to return discharged him from liability, or else the court should have held that he had such authority and directed a verdict for the defendant. *Waters's Patent Heater Co. v. Tompkins*, 14 Hun (N. Y.) 219.

Damages for Breach of Warranty — Offer to Return Necessary. — Where a threshing machine was sold upon a written contract, one of the conditions contained therein being that if the machine did not do good work the purchaser should return it to the place where received, it was held that before the purchaser could recover damages for breach of warranty he must show an offer to return the machine, or a waiver of such requirement by the seller. *Davis v. Gosser*, 41 Kan. 414.

Breach a Question for Jury. — Where horses were sold conditionally with the privilege of returning them within a certain time if they proved unsound, it was held in a suit to recover the unpaid purchase money that an instruction that if the defendant offered to return the horses because they were unsound, and the offer was refused, then he was discharged from any further performance of the contract, was properly refused as being incomplete without further submitting as a fact the question of the unsoundness of the horses. *Driscoll v. Dur-yeec*, 66 Ill. 35.

Right to Return Not Lost by Resale. — Where bonds were sold with certain representations as to their value and with an agreement that if the purchaser became dissatisfied he might return them and receive back the purchase money, and the purchaser sold the bonds on the same terms, and his vendee becoming dissatisfied after two years returned them to the

first purchaser, and was reimbursed by his vendor, who thereupon tendered the bonds to the original seller and demanded a return of the purchase money, which was refused, it was held that the agreement to refund was not affected by the statute of frauds, the contract being taken out of the statute by having been consummated by the delivery and receipt of the property and payment therefor, and also that the original agreement was not affected by the resale. *Wooster v. Sage*, 6 Hun (N. Y.) 285.

1. Sale Becomes Absolute on Failure to Return Property. — *Moss v. Sweet*, 3 Eng. L. & Eq. 311, 16 Q. B. 493, 71 E. C. L. 493, *overruling* *Iley v. Frankenstein*, 8 Scott N. R. 839; *Beverley v. Lincoln Gas Light, etc., Co.*, 6 Ad. & El. 829, 33 E. C. L. 222; *Prairie Farmer Co. v. Taylor*, 69 Ill. 440, 18 Am. Rep. 621; *Jones v. Wright*, 71 Ill. 61; *Quinn v. Stout*, 31 Mo. 160; *Moore v. Piercy*, 1 Jones L. (N. Car.) 131; *Schlesinger v. Stratton*, 9 R. I. 578; *Waters Heater Co. v. Mansfield*, 48 Vt. 378. See also *Ex p. White*, L. R. 6 Ch. 397; *Towle v. White*, 21 W. R. 465; *Bianchi v. Nash*, 1 M. & W. 545.

In contracts called "contracts of sale, or return," the property in the goods passes to the purchaser, subject to his option to return them within a fixed time, or in a reasonable time, and if he fails to return them within such time the sale becomes absolute, and the price may be recovered in an action for goods sold and delivered. *Jameson v. Gregory*, 4 Metc. (Ky.) 363. See also *supra*, this title, *Sales on Approval*.

Where A delivered to B certain cows, under an agreement that they were to be returned at the end of two years, or their value in money paid, unless B should be dissatisfied with a certain trade of farms then made between them, in which case they were to remain the property of B, and at the end of two years B expressed himself satisfied with the trade, but refused to redeliver the cows or pay their value, it was held that the transaction was not technically a bailment, but that it amounted to a sale, and A might recover in assumption of the value of the cows. *Holbrook v. Armstrong*, 10 Me. 31.

Where A purchased a horse, to be returned at the end of two days if he did not answer the description given of him, and the two days elapsed without the horse being returned, it was held that the contract was absolute, and that A could not discharge himself of the liability by showing that the horse was not as good as was represented. *Moore v. Piercy*, 1 Jones L. (N. Car.) 131.

Exchange of Chattels. — Where an exchange of horses is made, with the privilege to one of the parties to return the horse received by him within a time given, a failure to return the horse so received within the time limited renders the exchange absolute. *Johnson v. Mc-Lane*, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102.

Duty to Return — Construction of Contract. — Under a written contract for the sale of two horses, stating that the purchaser "has this day bought a pair of bay horses, conditionally, for

Time of Making Election. — The vendee may exercise his option of taking or returning the property at any time within the time limited by the contract.¹

If No Time Is Specified the election must be made within a reasonable time.²

What Is a Reasonable Time³ is generally a question of fact for the jury.⁴

Effect of Misuser. — If the vendee disables himself from performing the condition, as by so misusing the property as to materially impair its value, the sale becomes absolute and the vendee is unconditionally liable for the price, although he tenders the property, which the vendor declines to accept.⁵

But if the Injury Is Occasioned Without the Fault of the Vendee it has been held that he may return the property, notwithstanding a serious injury thereto while in his possession.⁶

Right of Vendee to Sell. — It follows necessarily from the principles just stated that a person to whom property has been delivered under a contract of sale or return may sell the property to a third person at any time before the expiration of the time for its return so as to convey a good title as against the former owner.⁷ And it follows also that the property may be attached

the sum of \$500 — \$300 to be paid down in cash, and the other \$200 when the purchaser is satisfied the horses are sound," it was held that the purchaser was not bound, in case of the unsoundness of one of the horses at the time of the sale, to pay the two hundred dollars or notify the vendor of the unsoundness, or offer to return the horses, or to rescind the contract. *Thompson v. Russey*, 50 Ala. 329.

Notice of Dissatisfaction Held Sufficient. — Where a contract for the sale or return of horses was made on the premises of the purchaser, and the horses were left there, and the seller was to come there to receive a colt that was to be given in part payment if the horses proved satisfactory, it was held that the purchaser, on the horses proving unsatisfactory, was not required to return them; notice of dissatisfaction and that the seller should take the horses away was sufficient. *Rohn v. Dennis*, 109 Pa. St. 504.

No Formal Demand for the return of the goods is necessary; it is sufficient that the seller manifests a desire for the property and the buyer refuses to return it. *Jones v. Wright*, 71 Ill. 61.

But upon a promise to account for goods received or to return them on demand, no action can be maintained for the price without proof of demand. *Bolles v. Stearns*, 11 Cush. (Mass.) 320.

1. Where the vendee is allowed until the end of the year to determine whether a conditional sale shall become absolute, he may make his election at any time before the expiration of the year, and is not confined to the last day of the year. *Reese v. Beck*, 24 Ala. 651. See also *Newburger v. Hoyt*, 86 Ga. 508, citing 3 AM. AND ENG. ENCYCL. OF L. (1st ed.) 433.

2. **Return in Reasonable Time.** — Where a sale is made conditioned on the article sold being satisfactory to the buyer, and no time is fixed within which the buyer is to manifest his approval or disapproval, he must do so within a reasonable time or the sale becomes absolute. *Moss v. Sweet*, 3 Eng. L. & Eq. 311, 16 Q. B. 493, 71 E. C. L. 493; *Ray v. Barker*, 4 Exch. Div. 279; *Newburger v. Hoyt*, 86 Ga. 508, citing 3 AM. AND ENG. ENCYCL. OF L. (1st ed.) 433; *Spickler v. Marsh*, 36 Md. 222; *Childs v. O'Donnell*, 84 Mich. 533; *Quinn v. Stout*, 31

Mo. 160; *Dewey v. Erie*, 14 Pa. St. 211, 53 Am. Dec. 533; *Rohn v. Dennis*, 109 Pa. St. 504; *Hickman v. Shimp*, 109 Pa. St. 16; *Washington v. Johnson*, 7 Humph. (Tenn.) 468. See also *Wooster v. Sage*, 6 Hun (N. Y.) 285. See also *supra*, this title, *Sales on Approval*.

3. **What Is Reasonable Time** — **Illustrations.** — Six days was held to be a reasonable time for a conditional buyer of two horses to determine whether they suited him. *Rohn v. Dennis*, 109 Pa. St. 504.

Where a cotton-gin was taken upon trial in the spring of the year, with an agreement to purchase if it answered the purpose, and notice was sent in October following by the party who took it that he would not keep it, it was held that he had made his election seasonably. *Hall v. Meriwether*, 19 Tex. 224.

Fifteen years is held to far exceed the reasonable time allowed a purchaser to accept an optional contract. *Cooper v. Carlisle*, 17 N. J. Eq. 525.

4. *Washington v. Johnson*, 7 Humph. (Tenn.) 468.

5. **Injury to the Property.** — *Ray v. Thompson*, 12 Cush. (Mass.) 281, 59 Am. Dec. 187.

6. *Head v. Tattersall*, L. R. 7 Exch. 7. In this case an action was brought to recover back the price of a horse sold to the plaintiff with a warranty and a condition that it might be returned within a certain date if it did not answer the description, and the horse was seriously injured while being taken to the plaintiff's premises by his servant, without the fault of the latter, and the plaintiff returned the horse within the time limited on its being found not to correspond with the warranty; it was held that he might return the horse and recover back the price, notwithstanding the injury.

7. **Vendee's Right to Sell.** — *Dearborn v. Turner*, 16 Me. 17, 33 Am. Dec. 630; *McKinney v. Bradlee*, 117 Mass. 321.

Effect of Express Agreement that Title Shall Remain in Vendor. — Where personal property is delivered to be paid for or returned at the option of the party receiving it, the alternative agreement constitutes a sale; but it is otherwise if such person, at the time of receiving the property, agrees that the title is to remain in the vendor until fully paid for, and in such

by the vendee's creditors.¹

Risk of Loss. — Under contracts of sale or return, any loss sustained by the property while in his possession falls on the vendee.²

3. Sale with Privilege of Repurchase. — A common instance of a sale on condition subsequent is found in the case of a sale of property absolutely, with a reservation of a right to the vendor to repurchase upon certain agreed terms. In such case the vendor, in order to entitle himself to a reconveyance, must comply strictly with the conditions.³

IX. WAIVER OF CONDITIONS. — A condition in a contract of sale, that the title to the property is not to vest in the vendee until the performance of some act by him as a condition precedent to the passing of title, may be waived by the vendor, and when so waived the property will vest in the vendee, notwithstanding he has not performed the condition.⁴

case the vendee can convey no title to a third person. *Crocker v. Gullifer*, 44 Me. 491, 69 Am. Dec. 118.

1. Vendee's Creditors — Attachment. — *Hotchkiss v. Higgins*, 52 Conn. 205, 52 Am. Rep. 582; *Southwick v. Smith*, 29 Me. 228; *Martin v. Adams*, 104 Mass. 262.

2. Loss Falls on Vendee. — *Jacob Strauss Saddlery Co. v. Kingman*, 42 Mo. App. 208.

Where a horse was delivered by the owner to another under an agreement whereby the former was to sell, and the latter to take and use the horse, and if it suited him he was to pay one hundred and thirty dollars for it, and if it did not suit he was to return it, and the horse died while in his possession, it was held that under the contract the title had passed and the original owner might recover the agreed price. *Carter v. Wallace*, 32 Hun (N. Y.) 384.

3. Sales with Agreement for Repurchase. — See *supra*, this title, *Conditional Sales Distinguished from Other Contracts* — *From Chattel Mortgages*.

Under a conditional sale with a reservation to the vendor of the right to repurchase on certain specified terms, the law requires promptness and precision on his part in the assertion of his reserved right, especially when the purchaser pays a fair price for the property. If no time is specified in the contract within which the right must be exercised, the law requires the vendor to exercise it within a reasonable time. *Beck v. Blue*, 42 Ala. 32, 94 Am. Dec. 630.

Liability for Loss. — Where an undivided half of real and personal estate was sold, the vendor retaining the right to repurchase after a certain time, and before this time part of the property was stolen while in the part possession of the vendee, against whom suit was brought to recover the half value thereof, it was held that the defendant, who had been guilty of no negligence or fault, was not liable. *Sykes v. Parks*, 1 Baxt. (Tenn.) 460.

4. Waiver of Condition. — *Smith v. Dennie*, 6 Pick. (Mass.) 262, 17 Am. Dec. 368; *Farlow v. Ellis*, 15 Gray (Mass.) 229; *Green v. Bennett*, 23 Mich. 464; *Oester v. Sitlington*, 115 Mo. 247; *Bissell v. Bissell*, 4 N. Y. Wkly. Dig. 338. See cases cited in notes immediately following.

A condition in a sale may be waived by the party imposing it. *Gowen v. Kehoe*, 71 Ill. 66. The waiver may be express or implied from the acts of the parties. *State v. Green Tree Brewery Co.*, 32 Mo. App. 276.

One who has contracted to purchase per-

sonal property on credit, the title to remain in the vendor till payment, does not forfeit his rights by mere neglect to pay by the day named, as the vendor may waive his right to a forfeiture for a prior neglect to pay by seeking afterwards to collect the balance due. *Deyoe v. Jamison*, 33 Mich. 94.

The parties may waive the exact performance of the condition. Thus where six thousand cross-ties were sold, to be paid for on delivery in parcels, and a third person was chosen to count them, and three hundred and ninety-one were delivered and paid for, but not so counted, it was held that the counting was waived. *Moffat v. Green*, 9 Ind. 198.

Illustrations — Conditions Waived. — Where a sale is conditioned upon full payment on delivery of the property, an acceptance of a partial payment with no express agreement as to credit is a waiver of the condition. *Freeport Stone Co. v. Carey*, 42 W. Va. 276. See also *Fairbank v. Phelps*, 22 Pick. (Mass.) 535.

Conditions Not Waived. — An understanding or agreement entered into when the seller and buyer of goods commenced to take an inventory, that the inventoried goods should belong to the latter to do with as he pleased in respect to selling to customers, does not clearly imply a waiver of a stipulation in the written contract of sale that the title shall remain in the seller until the goods are paid for. *Stone v. Waite*, 88 Ala. 599.

A mere mental determination to rest satisfied with the nonperformance of the condition, not procured by the vendee nor brought to his knowledge, will not operate as a waiver of the condition, so as to vest title to the thing sold in the vendee. *Manwell v. Briggs*, 17 Vt. 176.

Where goods are sold on condition that the buyer shall give his note therefor, satisfactorily indorsed by a third person, the making of the note by the seller without the indorsement, upon the buyer's promise to secure the indorsement, and the failure to subsequently demand the indorsement or return the note, do not as a matter of law amount to a waiver of the condition. *Kenney v. Ingalls*, 126 Mass. 488.

A vendor of personal property who reserves title until payment does not waive his right to retake the property upon default by advising a creditor of the vendee with knowledge of the reservation to take a mortgage of the property. *Ames Iron Works v. Richardson*, 55 Ark. 642.

The Question of Such Waiver Most Frequently Arises in the case of a sale of personal property on condition of payment therefor on delivery, or of furnishing security for payment.

Conditions Waived by Absolute Delivery. — In such case an absolute and unconditional delivery of the property by the vendor, without exacting at the time of delivery a performance of the condition, or attaching any other condition to the delivery, is presumed to be a waiver of the condition, and a complete title passes to the vendee.¹ By such delivery the vendor is presumed to have abandoned the security he had provided for the payment of the purchase money, and to have elected to trust to the personal security of the vendee.² But this presumption may be rebutted by the acts and declaration of the parties, or by the circumstances of the case.³

If the Delivery Is Itself Conditional, it does not amount to a waiver, and the title to the property is not thereby vested in the vendee.⁴

1. Condition Presumed Waived by Absolute Delivery of Property. — Benjamin on Sales, § 351.

Florida. — *Young v. Kansas Mfg. Co.*, 23 Fla. 394.

Illinois. — *Michigan Cent. R. Co. v. Phillips*, 60 Ill. 191. See also *Brundage v. Camp*, 21 Ill. 330; *Wabash, etc., R. Co. v. Shryock*, 9 Ill. App. 323.

Maine. — *Peabody v. Maguire*, 79 Me. 572; *Pinkham v. Appleton*, 82 Me. 574.

Massachusetts. — *Marston v. Baldwin*, 17 Mass. 606; *Thaxter v. Foster*, 153 Mass. 151; *Carleton v. Sumner*, 4 Pick. (Mass.) 516.

Missouri. — *Oester v. Sidlington*, 115 Mo. 247; *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 558.

Nebraska. — *Sutro v. Hoile*, 2 Neb. 186; *Albright v. Brown*, 23 Neb. 136.

New York. — *Nash v. Weaver*, 23 Hun (N. Y.) 513; *Caldwell v. Bartlett*, 3 Duer (N. Y.) 341; *Furniss v. Hone*, 8 Wend. (N. Y.) 247; *Hennequin v. Sands*, 25 Wend. (N. Y.) 640; *Smith v. Lynes*, 5 N. Y. 41; *Hammett v. Linneman*, 48 N. Y. 399; *Osborn v. Gantz*, 60 N. Y. 540; *Husted v. Ingraham*, 75 N. Y. 251; *Parker v. Baxter*, 86 N. Y. 586; *Chapman v. Lathrop*, 6 Cow. (N. Y.) 110, 16 Am. Dec. 433; *Lupin v. Marie*, 6 Wend. (N. Y.) 77, 21 Am. Dec. 256, 2 Paige (N. Y.) 169; *Russell v. Minor*, 22 Wend. (N. Y.) 659; *Ives v. Humphreys*, 1 E. D. Smith (N. Y.) 196.

Wisconsin. — *Pitts v. Owen*, 9 Wis. 152.

See also *Sage v. Sleutz*, 23 Ohio St. 1; *Edwards v. Glancy*, 1 Ohio Cir. Ct. Rep. 453. As to the effect of delivery of goods sold for cash on delivery without exacting payment, see also *supra*, this title, *Conditions Precedent to Be Performed by the Vendee—Payment—In Cash Sales*.

A voluntary delivery of goods sold upon condition, nothing being said respecting the condition, and no demand for performance being made until after the attachment of the goods by the vendee's creditors, amounts to a waiver of the condition as to such creditors. *Smith v. Dennie*, 6 Pick. (Mass.) 262, 17 Am. Dec. 368. See also *Euwer v. Van Giesen*, 6 W. N. C. (Pa.) 363.

That a chattel to be delivered on payment, part in cash and part in notes, was delivered without asking for any payment, is presumptive evidence of a waiver of the condition and of an immediate vesting of title in the vendee. *Pitts v. Owen*, 9 Wis. 152.

Where goods are sold for which a note is to be given payable in six months, if the goods are delivered and the note not demanded until two months after the sale the condition will be deemed to have been waived. *Hennequin v. Sands*, 25 Wend. (N. Y.) 640.

2. *Martin v. Wirts*, 11 Ill. App. 567; *Smith v. Dennie*, 6 Pick. (Mass.) 262, 17 Am. Dec. 368; *Smith v. Lynes*, 5 N. Y. 41; *Furniss v. Hone*, 8 Wend. (N. Y.) 247; *Osborn v. Gantz*, 60 N. Y. 540.

If the vendor relies on the promise of the vendee to perform the conditions of the sale, and deliver the goods absolutely, the right of property will be changed, although the conditions are never performed. *Gibson, J.*, in *Harris v. Smith*, 3 S. & R. (Pa.) 22.

3. Presumption of Waiver Rebuttable. — *Young v. Kansas Mfg. Co.*, 23 Fla. 394; *Peabody v. Maguire*, 79 Me. 572; *Hammett v. Linneman*, 48 N. Y. 399; *Osborn v. Gantz*, 60 N. Y. 540; *Parker v. Baxter*, 86 N. Y. 586; *Pitts v. Owen*, 9 Wis. 152. See also *Nash v. Weaver*, 23 Hun (N. Y.) 513.

The absolute delivery of personal property sold conditionally is not necessarily a waiver of the condition, but such delivery may be controlled by other evidence. *Seed v. Lord*, 66 Me. 580; *Farlow v. Ellis*, 15 Gray (Mass.) 229.

Vendor May Explain Delivery. — Where the vendor sues to recover possession of goods sold and delivered for cash on delivery, on the ground of nonpayment, he may explain the delivery, and if satisfactorily explained such delivery will not amount to a waiver of the condition as to payment. *Fleeman v. McKean*, 25 Barb. (N. Y.) 474.

4. No Waiver by Conditional Delivery. — *Mars-ton v. Baldwin*, 17 Mass. 606; *Dresser Mfg. Co. v. Waterston*, 3 Met. (Mass.) 9; *Manchester Locomotive Works v. Truesdale*, 44 Minn. 115; *Dannefelser v. Weigel*, 27 Mo. 45; *Fuller v. Bean*, 34 N. H. 290; *Corlies v. Gardner*, 2 Hall (N. Y.) 345; *Nash v. Weaver*, 23 Hun (N. Y.) 513; *Empire State Type Founding Co. v. Grant*, 114 N. Y. 40. See *Armour v. Pecker*, 123 Mass. 143.

A conditional contract of sale does not lose its executory character by a mere delivery of the property. *Sage v. Sleutz*, 23 Ohio St. 1.

In *Smith v. Dennie*, 6 Pick. (Mass.) 262, 17 Am. Dec. 368, *Parker, C. J.*, said: "We do not think, after a conditional bargain has been

Character of Delivery a Question of Intent. — Whether the delivery is absolute or conditional depends upon the intent of the parties.¹

Condition in Delivery Need Not Be in Express Terms. — It is not necessary, to constitute a qualified or conditional delivery, that the qualification or condition intended to be annexed thereto should be declared by the vendor at the time in express terms; it is sufficient if the intent of the parties that the delivery shall be conditional can be inferred from their acts and the circumstances of the case.² The question is a matter of fact for the consideration of the jury.³

made and a delivery immediately taken place, upon the expectation that the contemplated security shall be produced, without an express declaration that the delivery is also conditional, that the sale *ipso facto* becomes absolute, because there is an implied understanding that the vendee will act honestly, and he takes the goods subject to the contract, which is that he shall furnish the security which was the condition of the sale as soon as he shall have opportunity to procure it.

* * * If they [the goods] are sold by the vendee, he having the possession delivered to him by the vendor, the purchaser not knowing of the condition, the case would be different, as the vendor would be considered as having delivered them for the very purpose of enabling the vendee to use them in trade and merchandise, trusting to the performance of the condition by the vendee. But there seems to be no good reason why an antecedent creditor, watching the transactions of his debtor, should have a right to seize upon goods which came into his possession when he has not paid for them, or given that security without the promise of which he could not have obtained the goods. Such creditor has not trusted on the faith of the goods, and is, therefore, not prejudiced by being restrained from attaching them."

If the property is delivered to the purchasers, without a compliance with the condition being insisted on at the time, yet if it is insisted upon immediately afterwards, where a bill of sale is rendered, and the buyers fully recognize and acknowledge the condition as still subsisting and binding upon them, this is sufficient to uphold the condition. *Draper v. Jones* 11 Barb. (N. Y.) 263.

Where property is sold to a purchaser in another state, for which he is to give notes, the delivery of the property on the cars before receipt of the notes is not necessarily a waiver. *Pond Mach. Tool Co. v. Robinson*, 38 Minn. 272. See also *Ullman v. Barnard*, 7 Gray (Mass.) 554.

Where a chattel was sold with the understanding that title was not to pass until a check given in payment was honored, and the property was delivered, it appearing that the delivery was upon the same condition, title does not pass on delivery. *Gould v. Howell*, 32 Ill. App. 349.

The Symbolical Delivery of the thing sold, by delivering to the vendee the title papers thereto, is not a waiver of a condition that the title to the property shall not pass until payment of the price, where such delivery was also subject to this condition. *Dows v. Kidder*, 84 N. Y. 121.

Partial Delivery.—Where under a contract

for the sale of chattels a portion of the property was delivered to the vendee under an agreement that a note for the whole should be given upon the delivery of the rest at a future day, it was held that such delivery was conditional, and that on the delivery of the rest and the refusal of the vendee to give the notes or deliver up the first portion on demand, an action of replevin for the unlawful detainer might be sustained. *Russell v. Minor*, 22 Wend. (N. Y.) 659.

1. Character of Delivery a Question of Intent. — *Stone v. Perry*, 65 Me. 50; *Fuller v. Bean*, 34 N. H. 290; *Smith v. Lynes*, 5 N. Y. 41; *Furniss v. Hone*, 8 Wend. (N. Y.) 247; *Hammett v. Linneman*, 48 N. Y. 399; *Empire State Type Founding Co. v. Grant*, 114 N. Y. 40.

To Constitute a Waiver there must be not only an act of delivery, but an intent not to insist on immediate payment as a condition of the title passing. *Globe Milling Co. v. Minneapolis Elevator Co.*, 44 Minn. 153. See this case for evidence held not sufficient to show a waiver.

The conditional delivery of property sold upon a condition does not vest the property in the vendee. Such condition may be waived by the parties. But a delivery without anything being said as to the condition is not necessarily absolute. It is evidence of a waiver, and, in connection with other circumstances, may be sufficient to authorize a jury to find a waiver of the condition. But if under all the circumstances it is apparent that the parties did not intend to dispense with the condition, the property does not pass. *Luey v. Bundy*, 9 N. H. 298, 32 Am. Dec. 359.

2. Condition in Delivery Need Not Be Express. — *Stone v. Perry*, 60 Me. 48; *Whitewell v. Vincent*, 4 Pick. (Mass.) 449, 16 Am. Dec. 355; *Fishback v. Van Dusen*, 33 Minn. 111; *Fuller v. Bean*, 34 N. H. 290; *Smith v. Lynes*, 5 N. Y. 41; *Buck v. Grimshaw*, 1 Edw. Ch. (N. Y.) 140; *Hammett v. Linneman*, 48 N. Y. 399; *Osborn v. Gantz*, 60 N. Y. 540. See also *Hussey v. Thornton*, 4 Mass. 405, 3 Am. Dec. 224.

Waiver may be proved by express declaration; or by acts and declarations manifesting an intent and purpose not to claim the advantage; or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief of an intention and purpose to waive. *Farlow v. Ellis*, 15 Gray (Mass.) 229.

3. Question of Fact. — *Young v. Kansas Mfg. Co.*, 23 Fla. 304; *Peabody v. Maguire*, 79 Me. 572; *Merrill Furniture Co. v. Hill*, 87 Me. 17; *Smith v. Dennie*, 6 Pick. (Mass.) 262, 17 Am. Dec. 368; *Hill v. Freeman*, 3 Cush. (Mass.) 257; *Farlow v. Ellis*, 15 Gray (Mass.) 229; *Fleeman v. McKean*, 25 Barb. (N. Y.) 474; *Miller v. Jones*, 66 Barb. (N. Y.) 148; *Nash v.*

Burden of Proof. — Where the delivery is made without any contemporaneous declaration qualifying it, the burden of proving the condition rests upon the vendor. If no such proof be given, the delivery will be deemed absolute, and the title to the goods sold will pass to the vendee.¹

Delivery Induced by Fraud. — An unconditional delivery of the property procured by fraud does not constitute a waiver of the condition.²

Delivery According to Custom of Trade. — Where according to the usage of trade goods sold on condition are delivered to the vendee without exacting the performance of the condition, such delivery is not ordinarily to be regarded as a waiver of the condition, and the property does not pass thereby.³

The Mere Extension of the Time of Payment of a note given in payment for the property does not of itself affect the vendor's right to retake the property under an agreement that title is to remain in him until payment.⁴

Additional Security. — So, also, the taking of additional security has been held not to constitute a waiver.⁵

Notes of Third Person. — Nor does the acceptance of the notes of a third person in exchange for those of the vendee, with a stipulation that the vendee is not to be released from liability, deprive the vendor of his reserved title to the property.⁶

Weaver, 23 Hun (N. Y.) 513; Osborn v. Gantz, 60 N. Y. 540; Empire State Type Founding Co. v. Grant, 114 N. Y. 40; Lang v. Rickmers, 70 Tex. 108.

In any given case the question whether the conditions of the contract have been waived, or whether the vendor shall be estopped from asserting that they have not been waived or performed, is a question of fact for the jury, to be determined under the instruction of the court in view of all the circumstances. Goodell v. Fairbrother, 12 R. I. 233, 34 Am. Rep. 631.

Function of Court and Jury. — What acts or class of acts will amount to a waiver of the condition is a question of law for the court; whether these acts have been proven is a question of fact for the jury. Henkins v. Miller, 45 Ill. App. 34.

1. Burden of Proof. — Caldwell v. Bartlett, 3 Duer (N. Y.) 341; Smith v. Lynes, 5 N. Y. 41.

The condition must be made to appear as matter of evidence; otherwise the legal presumption will follow, from the fact of the purchaser's being in actual possession of the goods, that the delivery was absolute. Buck v. Grimshaw, 1 Edw. Ch. (N. Y.) 140.

2. Fraud. — Thaxter v. Foster, 153 Mass. 151.

In cash sales of property the vendor will not lose title to the property before payment by the vendee's obtaining possession by trick or artifice. Hicks v. Campbell, 19 N. J. Eq. 183; Harris v. Smith, 3 S. & R. (Pa.) 20; Carson v. Shantz, 3 Phila. (Pa.) 47.

3. Custom. — Bauendahl v. Horr, 7 Blatchf. (U. S.) 548; Powell v. Bradlee, 9 Gill & J. (Md.) 220; Hill v. Freeman, 3 Cush. (Mass.) 257; Tyler v. Freeman, 3 Cush. (Mass.) 261; Scudder v. Bradbury, 106 Mass. 422; Fleeman v. McKean, 25 Barb. (N. Y.) 474; Haggerty v. Palmer, 6 Johns. Ch. (N. Y.) 437; Haggerty v. Duane, 1 Paige (N. Y.) 321; Furniss v. Hone, 8 Wend. (N. Y.) 247. See also State v. Green Tree Brewery Co., 32 Mo. App. 276.

Proof is admissible of a custom among merchants, where merchandise is sold on condition, to deliver it to the buyer before compliance with the condition, and that such change of

custody is not *de facto* a waiver of the condition, and the property does not pass thereby. Farlow v. Ellis, 15 Gray (Mass.) 229.

If goods are sold conditionally, and delivery made according to the custom of trade before the conditions are complied with, in expectation of compliance, the delivery is also conditional, and no title vests in the vendee until performance of the condition. Stone v. Perry, 60 Me. 48.

The usage, to be binding, must be universal. Scudder v. Bradbury, 106 Mass. 422.

It Is a Question for the Jury to find the fact of the usage, whether the delivery was made with reference thereto. Powell v. Bradlee, 9 Gill & J. (Md.) 220. See generally, as to the admissibility of evidence of usage in such cases, Foley v. Mason, 6 Md. 37; Haskins v. Warren, 115 Mass. 514.

4. Extension of Time of Payment. — Bunker v. McKenney, 63 Me. 529; Meeker v. Johnson, 3 Wash. 247. But see, under special contract, Cole v. Hines, 81 Md. 476.

Taking New Notes in renewal and in lieu of former notes given for the price is no waiver. Barrington v. Skinner, 117 N. Car. 47.

5. Taking Additional Security No Waiver of Lien. — Cherry v. Arthur, 5 Wash. 787.

The conditional vendor does not waive his lien by taking a mortgage of the same or other property as further security, nor is the foreclosure of a mortgage which secured that and other indebtedness a satisfaction of the lien where it appears that the proceeds of the foreclosure did not liquidate the entire indebtedness. Page v. Edwards, 64 Vt. 124.

The vendor does not waive the conditions by afterwards asking for additional security for payment, which is promised but never given. Sargent v. Metcalf, 5 Gray (Mass.) 306, 66 Am. Dec. 368.

The sale may still be conditional upon payment, although the vendor takes other collateral security for the price. Pettyplace v. Groton Bridge, etc., Co., 103 Mich. 155.

6. Hollenburg Music Co. v. Morris, (Tex. Civ. App. 1896) 35 S. W. Rep. 396.

Lien Waived by Action for Price. — If the vendor who has delivered the property to the vendee on condition that the title is not to pass until payment, instead of asserting his right to retake the property upon default, proceeds to enforce the payment of the price by the ordinary legal remedies, he thereby waives the condition, and the delivery becomes absolute.¹

Unsatisfied Judgment. — But it has been held that the recovery of a judgment which remains unsatisfied does not affect the right of the vendor.²

Foreclosure of Mortgage. — So, also, the foreclosure of a mortgage given on other property to secure notes given in payment for property sold conditionally will not preclude the vendor from retaking the property where the proceeds of the foreclosure are insufficient to discharge the notes.³

The Recovery of Damages from the vendee for breach of the condition of sale amounts to a waiver, and the property vests in the vendee.⁴

The Assignment of Notes given for the price of the property has been held to constitute a waiver of a reservation of title until payment.⁵

Effect of Vendor's Laches. — An unreasonable delay by the vendor in exacting a performance of the conditions of sale amounts to a waiver of such conditions,⁶ but the mere lapse of time before asserting his right to the property

1. **Action for Price — Waiver of Lien.** — *Manchester Locomotive Works v. Truesdale*, 44 Minn. 115.

Where goods are sold on condition that the vendee furnish security for the price, title does not pass until the security is given, notwithstanding the consent of the vendor to the removal of the goods; and if in such case the vendee sells the goods and takes the purchaser's note, and transfers it as security to a creditor having full knowledge of the facts, the first vendor cannot maintain assumption against such creditor on the note, it being unpaid, for such action is an affirmation of the first sale. *Whitwell v. Vincent*, 4 Pick. (Mass.) 449, 16 Am. Dec. 355.

Effect of Attachment. — Where on the sale and delivery of goods for cash the vendee failed to pay on demand, whereupon the vendor took out an attachment on the article for the price, it was held that this was an affirmation of the sale and a waiver of the condition of payment before the vesting of title. *Heller v. Elliott*, 44 N. J. L. 467. But an attachment of the property by the vendor to secure the unpaid purchase money is not necessarily a waiver of his rights under the conditional sale. *Matthews v. Lucia*, 55 Vt. 308; *Clark v. Hayward*, 51 Vt. 14; *Hill v. Larro*, 53 Vt. 629.

Vendor Not Estopped from Denying Vendee's Title by Attaching Property. — Where A sold a wagon to B on condition that it was to remain A's property till paid for, and B, without paying the price, after repairing and greatly increasing the value of the wagon, sold it for value to the plaintiffs, whereupon the defendant, as sheriff, under A's direction, attached the wagon and sold it on execution, in favor of A against B, the latter being indebted to A independently of the wagon trade, it was held that A's right to the wagon was superior to that of the plaintiffs, and was not affected by his attachment of it upon B's indebtedness to him, that such attachment did not estop him from denying that the wagon belonged to B, and that the plaintiffs could not recover of the defendant for taking the wagon. *Child v. Allen*, 33 Vt. 476. See also *Matthews v. Lucia*, 55 Vt. 308.

2. *Vaughn v. Hopson*, 10 Bush (Ky.) 337; *Fuller v. Byrne*, 102 Mich. 461; *Root v. Lord*, 23 Vt. 568. See also *Thomason v. Lewis*, 103 Ala. 426.

3. *Montgomery Iron Works v. Smith*, 98 Ala. 644.

4. **Recovery of Damages for Breach of Condition Constitutes Waiver.** — Where a sale is made on condition that the property be removed within a specified time, which is not done, the vendor, by claiming and receiving from the vendee damages for the failure to remove the property, waives the condition, and the property vests in the purchaser, to be removed within a reasonable time. *Green v. Bennett*, 23 Mich. 464.

5. *Merchants', etc., Bank v. Thomas*, 69 Tex. 237.

The assignment of the note in such case amounts to a rescission of the contract, and the vendor cannot bring trover to recover the property, and is bound to return the note. *Tidwell v. Burkett*, 81 Ga. 84.

6. **Condition Waived by Vendor's Laches.** — *Gorham v. Holden*, 79 Me. 317; *Lees v. Richardson*, 2 Hilt. (N. Y.) 164; *Mills v. Hallock*, 2 Edw. Ch. (N. Y.) 652; *Furniss v. Hone*, 8 Wend. (N. Y.) 247; *Bowen v. Burk*, 13 Pa. St. 146; *Backentoss v. Speicher*, 31 Pa. St. 324. See also *Edwards v. Glancy*, 1 Ohio Cir. Ct. Rep. 453.

The delivery of goods sold upon condition that they shall be paid for on delivery raises a presumption that the sale is absolute, and if the payment is not made as agreed the vendor must pursue his right to recover possession with all reasonable diligence under the circumstances; and a failure to do so, the property having meanwhile been bought by others, constitutes a waiver of the vendor's right to the goods. *Leatherbury v. Connor*, 54 N. J. L. 172.

Where goods are sold for which a note is to be given at six months, if the goods are delivered and the note not demanded until two months after the sale, the condition will be deemed to have been waived. *Hennequin v. Sands*, 25 Wend. (N. Y.) 640.

Where personal property was sold to be paid for in six and nine months, in default of such

does not constitute a waiver by the vendor.¹

X. RIGHTS OF PARTIES — 1. Of the Vendor — a. AGAINST THE VENDEE —
May Retake Property on Nonperformance of Condition Precedent. — Where personal property is sold on condition that title is to remain in the vendor until the performance of some act by the vendee, the vendor, upon the nonperformance of such condition, may retake the property from the vendee.²

Right of Entry. — Where the vendor has reserved the right to retake the property on the nonperformance of the condition, and to enter upon the premises of the vendee for that purpose, he is not liable in trespass for retaking the goods upon default where the entry is made by himself or his agents in a reasonable manner.³ But such a right does not authorize him to enter upon

payment the vendor having the option to retake the property, and ten months elapsed without any payment being made, and the vendee died insolvent, it was held that the vendor had now no right to retake the property, the delay amounting to a waiver of his right. *Patten v. Smith*, 5 Conn. 196.

1. *Quinn v. Parke, etc.*, *Machinery Co.*, 5 Wash. 276.

2. **Vendor May Retake Property on Nonperformance of Condition.** — *Sere v. McGovern*, 65 Cal. 244; *Canadian Bank v. McCrea*, 106 Ill. 281; *Fairbanks v. Malloy*, 16 Ill. App. 277; *Blanchard v. Cooke*, 147 Mass. 215; *Smith v. Lozo*, 42 Mich. 6; *Ryan v. Wayson*, (Mich. 1896) 66 N. W. Rep. 370; *Proctor v. Tilton*, 65 N. H. 3; *Pate v. Oliver*, 104 N. Car. 458; *White v. Singer Mfg. Co.*, 1 Clev. (Ohio) 43; *Summerson v. Hicks*, 134 Pa. St. 566; *Keitt v. Counts*, 15 S. Car. 493; *McGinnis v. Savage*, 29 W. Va. 362. See also *Jones v. Pullen*, 66 Ala. 306; *Adams v. Wood*, 51 Mich. 411; *Levan v. Wilten*, 135 Pa. St. 64. See *supra*, this title, *Sales Dependent upon Conditions Precedent — To be Performed by the Vendee*.

The vendor may recover the goods from the vendee in replevin without previous demand, where it appears that the goods were sold on condition that the vendee should give a note for the price, and that, though requested, he neglected for three days to do so, and that the vendor had not waived the condition. *Salomon v. Hathaway*, 126 Mass. 482.

Where the vendee of personal property to whom it had been sold and delivered on credit, upon condition that title should not pass until payment, and that he should not sell the property, sold part of it before payment and attempted to sell the rest, it was held that the vendor might peaceably retake possession of the remainder, the condition of the sale being broken. *Shireman v. Jackson*, 14 Ind. 459.

Where on a sale of property with a reservation of title until payment, a note for the price and a renewal note are both unpaid, the question whether a peaceable resumption of possession is a reasonable exercise of the right of rescission is for the jury. *Levan v. Wilten*, 135 Pa. St. 61.

Right to Remove Fixtures. — Where, after a sale of machinery upon condition that the same should remain the property of the seller until paid for, the same was so affixed to the buyer's mill that it could not be removed without material injury to the realty, it was held that the seller might enforce a lien on the buildings for the amount remaining due under

the contract. *Cooper v. Cleghorn*, 50 Wis. 113. See *Watertown Steam Engine Co. v. Davis*, 5 Houst. (Del.) 192, stated in note immediately following.

Where Several Distinct Chattels Are Sold upon Condition that title shall not pass until payment, and the vendor retakes the property for the purpose of selling it and collecting the amount due, he has no right to seize and sell or retain more than enough to satisfy his demand and expenses. *O'Rourke v. Hadcock*, 114 N. Y. 541.

Effect of New Agreement. — Where upon a sale of a chattel, title being reserved until full payment, the vendor after part payment demanded the balance, which the vendee refused to pay, but offered to return the property on condition that the vendor pay back the amount already paid, to which the vendor agreed, but instead fraudulently brought replevin as he had intended to do all along, it was held that the action could not be maintained, as the agreement so made was a rescission of the original contract. *Carpenter v. Chase*, 64 N. H. 438.

Under the Vermont Act of 1884, giving the conditional vendor the right, after thirty days from the time of condition broken, to cause the property to be sold at public auction, the vendee is entitled to the possession of the property until the expiration of the thirty days, and may maintain an action against the vendor who sells at private sale. In selling the property the vendor must proceed under the act. *Roberts v. Hunt*, 61 Vt. 612; *Smith v. Wood*, 63 Vt. 534.

The Statute of Limitations does not run against a conditional vendor until there is adverse possession by the vendee. *Page v. Edwards*, 64 Vt. 124.

Sale with Right to Redeem — Transfer by Vendee — Vendor's Remedy. — Where property is sold with a reservation by the vendor of the right to redeem it on the repayment of the price by a certain time, the relationship of debtor and creditor does not exist between the parties; the title passes to the vendee at once, subject to be divested on performance of the condition; and if the vendee parts with the property before the expiration of the time allowed for redemption, the vendor's only remedy is by an action for damages for breach of the contract, and not for the recovery of the property. *Carnall v. Clark*, 27 Ark. 500.

3. **Vendor May Enter Vendee's Premises to Retake Property.** — *Boyd v. Lofton*, 34 Ga. 494; *Walsh v. Taylor*, 39 Md. 592; *Drury v.*

the vendee's premises in an unreasonable manner, with force and violence, nor surreptitiously in the absence of the vendee.¹

Right to Sue for Purchase Money — Election of Remedies. — Where, on the sale and delivery of personal property on credit, the title is to remain in the vendor until payment, the vendor, upon the noncompliance with the conditions of sale by the vendee, may either retake the property or may treat the sale as absolute and bring an action for the price,² but the assertion of either right is an abandonment of the other.³

Hervey, 126 Mass. 519; McClelland v. Nichols, 24 Minn. 176; North v. Williams, 120 Pa. St. 109, 6 Am. St. Rep. 695.

Where goods are sold and delivered under an agreement that until payment the title shall remain in the vendor, who in the meanwhile shall have the right to take them away whenever he pleases, the vendor has an implied irrevocable right to enter upon the buyer's land and take the goods without a previous demand at any time before the whole of the price is paid. Heath v. Randall, 4 Cush. (Mass.) 195.

Where machinery, sold on condition that title shall not pass until payment, is placed by the purchaser permanently on his land, if its identity can be shown to be that of the property bargained for, the conditional vendor on failure of payment can enter on the premises and remove it and repossess himself of it, if such be the bargain between the parties, and may also recover a reasonable compensation for the use where this is the agreement. Watertown Steam Engine Co. v. Davis, 5 Houst. (Del.) 192.

1. Manner of Exercising the Right. — Van Wren v. Flynn, 34 La. Ann. 1158; Drury v. Hervey, 126 Mass. 519.

Where the conditional vendee took the chattel sold to a room hired by him in the house of a third person, who had no knowledge that the vendee's title was conditional, and the vendor, upon the vendee's default, went to the house in the absence of the latter to get the chattel, and although requested by the wife of the owner of the house, her husband being absent, to wait two hours, until the return of the vendee, refused to do so, and pushed the wife aside and entered, it was held that such entry was not reasonable, and the vendor was liable for an assault. Drury v. Hervey, 126 Mass. 519.

2. Vendor May Elect to Reclaim Possession or Enforce Payment. — McRea v. Merrifield, 48 Ark. 160; Holt Mfg. Co. v. Ewing, 109 Cal. 353; Crompton v. Beach, 62 Conn. 25, 36 Am. St. Rep. 323; Fleury v. Tufts, 25 Ill. App. 101; George v. Swafford, 75 Iowa 491; Corlies v. Gardner, 2 Hall (N. Y.) 345; Munroe v. Williams, 35 S. Car. 572; Bensinger Self-acting Cash Register Co. v. Cain, (Tex. App. 1892) 18 S. W. Rep. 136.

The vendor may waive the security of the reservation of title until payment, and treat his claim against the vendee as a debt. Tanner, etc., Engine Co. v. Hall, 89 Ala. 628.

3. Vendor Cannot Both Sue for Price and Retake Property. — Hewison v. Ricketts, 10 Rep. 558; Thomason v. Lewis, 103 Ala. 426; McRea v. Merrifield, 48 Ark. 160; Parke, etc., Co. v. White River Lumber Co., 101 Cal. 37; Holt Mfg. Co. v. Ewing, 109 Cal. 353; Crompton v. Beach, 62

Conn. 25, 36 Am. St. Rep. 323; Truax v. Parvis, 7 Houst. (Del.) 330; Bailey v. Hervey, 135 Mass. 172; Button v. Trader, 75 Mich. 295; Johnson-Brinkman Commission Co. v. Missouri Pac. R. Co., 52 Mo. App. 408; Heller v. Elliott, 44 N. J. L. 467, 45 N. J. L. 564; Morris v. Rexford, 18 N. Y. 552; Earle v. Robinson, 12 Misc. Rep. (N. Y. Supreme Ct.) 536; Seanor v. McLaughlin, 165 Pa. St. 150; Parlin, etc., Co. v. Harrell, 8 Tex. Civ. App. 368; Hinchman v. Point Defiance R. Co., 14 Wash. 349. See also Munroe v. Williams, 35 S. Car. 572. And see *supra*, this title, *Waiver of Conditions*.

The law will not permit a vendor who retains the legal title of property to have it sold as the property of the debtor, and get the benefit of such sale, and then claim it as his own. Thomason v. Lewis, 103 Ala. 426.

Where personal property is sold on condition that title is not to pass until the notes given therefor are paid, the vendor having the right to retake the property if the price is not paid at the stipulated time, the vendor may elect either to enforce payment of the notes or to retake the property; but the assertion of either right is the abandonment of the other, and if the vendor transfers the notes to another, the right to enforce payment of the notes passes to the latter, and the vendor is deprived of his right to retake the property; nor can this right be restored without the consent of the holder of the notes by an agreement between the original parties. Merchants', etc., Bank v. Thomas, 69 Tex. 237; Parlin, etc., Co. v. Harrell, 8 Tex. Civ. App. 368.

That the vendor must make his election within a reasonable time, see Hunt v. Kellum, 59 Tex. 535.

Effect of Special Contract. — A vendor of a hay press who has retained title until the payment of notes given for the purchase price may recover any balance remaining unpaid upon the notes after applying the proceeds of a resale of the press made by him upon the nonpayment of one of the notes, where the contract of sale provides that nothing shall constitute a defense or offset to, or delay prompt payment of, the note in full at maturity. Dederick v. Wolfe, 68 Miss. 500, 24 Am. St. Rep. 283.

In Brewer v. Ford, 54 Hun (N. Y.) 116, it was held under the contract of the parties that the right of the vendor to retain possession was not inconsistent with his right to enforce a promise to pay the price.

In Mississippi the conditional vendor, where title is reserved until payment of notes given for the price, may sue in assumpsit on the notes and at the same time institute replevin for the property, and this rule applies

Before Breach of Condition. — The vendor is not required to make his election before breach of the condition, and hence it has been held that the attachment of the property by him before the time for payment does not constitute an election by him to treat the sale as absolute and sue for the price.¹ Moreover, it seems that the attachment of the property at any time is not necessarily an election.²

Duty to Return Unpaid Notes for Price. — Unless the contract so provides, the vendor who retakes the property upon default by the vendee is not generally bound to return unpaid notes given by the vendee to secure the purchase money.³ But the vendor cannot maintain an action on such unpaid notes.⁴

b. AGAINST THIRD PERSONS — (1) *Generally* — The Vendor of Property Sold upon Condition Precedent may recover it from a third person who has acquired possession from the vendee before the performance of the condition, although such person may have been ignorant of the vendor's claim.⁵

Recording of Contract of Sale. — In several states, however, the contract of sale is required to be recorded in order to enable the vendor to enforce his claim against third persons without notice.⁶

The Burden of Proving that the sale was conditional and that the conditions have not been performed rests upon the vendor in an action brought by him against third persons for the recovery of the property.⁷

although he has assigned the notes to third parties who are suing thereon, but upon a recovery against the property he must apply the money realized to the payment of the debt. *McPherson v. Acme Lumber Co.*, 70 Miss. 649. See *Dederick v. Wolfe*, 68 Miss. 500, 24 Am. St. Rep. 283.

The Recovery of a Judgment on notes given to secure the price of a chattel sold conditionally was held to be no bar to the vendor's right to reclaim the property by replevin, under the contract of the parties. *Campbell Printing Press, etc., Co. v. Rockaway Pub. Co.*, 56 N. J. L. 676, *distinguishing* *Heller v. Elliott*, 44 N. J. L. 467, 45 N. J. L. 564, and *Leatherbury v. Connor*, 54 N. J. L. 172.

It was so held in *Thomason v. Lewis*, 103 Ala. 426.

Where the Vendor Retakes the Property on Default and Sells It, he cannot credit the vendee with the proceeds of the sale and recover from him the balance of the price. *Sawyer v. Pringle*, 18 Ont. App. 218.

1. *Edgewood Distilling Co. v. Shannon*, 60 Ark. 133.

2. See *supra*, this title, *Waiver of Conditions*.

But where machinery was sold and delivered with a reservation of title in the vendor until the payment of the notes given for the price, and the vendor sued out an attachment on the property, it was held that this was an election to treat the property as belonging to the vendee, and the vendor acquired a new title and was entitled to any increase of price realized on a resale. *Tanner, etc., Engine Co. v. Hall*, 89 Ala. 628.

3. **Duty to Return Unpaid Notes for Purchase Money.** — Where a chattel is sold on condition that title is not to pass until payment of the notes given therefor, the vendor, upon default of the vendee and refusal to return the property, may maintain replevin for the property without returning the notes, unless a return of them upon failure of the sale is provided for in the contract. *Kirby v. Tompkins*, 48 Ark. 273. To the same effect see *Tufts v. D'Arcam-*

bal, 85 Mich. 185, 24 Am. St. Rep. 79. But see *Segrist v. Crabtree*, 131 U. S. 287, 3 N. Mex. 278.

Where a sale of goods was made on condition that payment should be made in a certain manner, which was not done, it was held that the vendor might recover the goods from the vendee to whom they had been delivered, and that it was not necessary to his right of recovery that he should return to the vendee a note sent by him in payment, but which the vendor did not accept. *Bauendahl v. Horr*, 7 Blatchf. (U. S.) 548.

4. *Campbell Printing Press, etc., Co. v. Henkle*, 19 D. C. 95; *Aultman v. Olson*, 43 Minn. 409.

Where upon the sale of a chattel a note is given for the price, title being reserved until the note is paid, the vendor cannot enforce payment of the note and at the same time retain his right to retake the property if the note is not paid. *Crompton v. Beach*, 62 Conn. 25, 36 Am. St. Rep. 323.

5. See *infra*, this title, *Rights of Parties — Of Third Persons*.

Effect of Tender by Third Person. — Where a third person who claimed under the conditional vendee tendered the unpaid purchase money to the vendor, who refused it, it was held that the vendor's right to the property was terminated by the tender. *Le Flore v. Miller*, 64 Miss. 204. But see *Chase v. Pike*, 125 Mass. 117. See *infra*, this title, *Rights of Parties — Of Third Persons*.

6. See *infra*, this title, *Recording Acts*.

7. *Forbes v. Martin*, 7 Houst. (Del.) 375; *Leighton v. Stevens*, 19 Me. 154; *Ketchum v. Brennan*, 53 Miss. 596; *Goodell v. Fairbrother*, 12 R. I. 233, 34 Am. Rep. 631.

Presumption as to Performance of Condition. — Where the vendor brought an action against a purchaser from his vendee for the recovery of a chattel sold conditionally upon payment, and it did not appear whether the second sale had been made within the time prescribed for payment or not, and the vendor failed to allege

The Measure of Damages in such action is the value of the property converted at the time and place of conversion, with interest from that date.¹

The Vendor May Recover for an Injury to the Property while in the possession of the vendee, though not entitled to the possession of the property at the time of the injury.²

Where the Sale Is upon Condition Subsequent the vendor cannot recover the property from third persons who have received it from the vendee before the performance of the condition subsequent.³

(2) *Estoppel — Sale of Goods to Be Resold.* — The vendor, by clothing the vendee with the indicia of title, may, in some cases, estop himself from asserting his claim to the property sold conditionally against a third person without notice.⁴ Thus where the vendor has expressly or impliedly authorized a resale of the property, he cannot recover it from a *bona fide* purchaser from the vendee, notwithstanding the nonperformance of the condition.⁵

or prove noncompliance with the conditions, it was held that compliance by the vendee would be presumed and the defendant was entitled to the property. *J. M. Brunswick, etc., Co. v. Tacoma Mill Co.*, 3 Wash. Ter. 164.

1. *Brown v. Haynes*, 52 Me. 578; *Angier v. Taunton Paper Mfg. Co.*, 1 Gray (Mass.) 621, 61 Am. Dec. 436; *Colcord v. McDonald*, 128 Mass. 470. See *supra*, this title, *Conditions Precedent to be Performed by the Vendee — Payment — In Installments.*

The Measure of Damages of the conditional vendor for the unlawful detention by the vendee's assignee of property sold conditionally is the legal interest on its value for the time of its detention, and compensation for any depreciation in value. *Wadleigh v. Buckingham*, 80 Wis. 230.

2. *Kent v. Buck*, 45 Vt. 18.

The Vermont Act of 1884, giving the conditional vendor the right to sell the property at public auction after thirty days after condition broken, does not alter the nature of his title to the property, and he may maintain an action on the case against the vendee's bailee for an injury to the property after thirty days from condition broken; and the fact that the bailee had settled with the vendee for such damage is immaterial. *French v. Osmer*, 67 Vt. 427.

3. See *supra*, this title, *Sales Dependent upon Conditions Subsequent — Contracts of Sale or Return.*

4. *Estoppel of Vendor.* — *Davis v. Bradley*, 24 Vt. 55.

Where the attorney of A sold one half of a printing establishment and newspaper to B, who, at the time of the sale, owned the other half, and B placed his name at the head of the paper as sole owner, and assumed exclusive possession and control thereof, the sale being made on condition that a part of the purchase money should be paid in cash and the balance in instalments, but before these instalments were all paid the property was sold at sheriff's sale, and bought by C, a creditor of B, no claim to the property being made by A at the time of the sale, and there was some evidence that B had agreed to rescind the contract of sale, which B denied, and B also, at the time of the sale, informed C that he owned the property, and A filed a bill in equity to compel C to account, it was held that under these

circumstances creditors of B would be led to believe that his title was absolute and unconditional, and A was estopped from setting up the conditions of the sale to defeat that title in a contest with *bona fide* creditors. *Wylie's Appeal*, 90 Pa. St. 210.

Where the plaintiff, who carried on a retail confectionery business, disposed of his entire stock and interest therein, put the purchaser in full possession, giving him a written absolute conveyance, and received and retained the consideration, a small part of which was in two notes of the purchaser payable on time, it was held, as against creditors of the purchaser, that the plaintiff would not be allowed to show that by an agreement with the purchaser at the time the sale was to be conditional upon the payment of the notes. *Ryder v. Cooley*, 58 Conn. 367.

A vendor who has given his vendee an absolute bill of sale to the property cannot, in an action against a purchaser from the vendee, introduce evidence of a contemporaneous parol reservation of title until payment. *Scarborough v. Alcorn*, 74 Tex. 358.

Where A sold a piano to B, reserving title until payment, and gave B a receipted bill therefor, omitting, at B's request, any statement of the condition, and afterwards, on inquiry by C, told him of the sale, and C, having seen the bill from A, loaned B a sum of money and received from him the piano, it was held that A was not estopped to claim the piano from C, there being no evidence of fraud. *Zuchtmann v. Roberts*, 109 Mass. 53, 12 Am. Rep. 663.

The Failure of the Vendor's Agent to Give Notice of his principal's claim at a sale of the property on the foreclosure of a mortgage given by the conditional vendee will not estop the vendor from asserting his rights as against a *bona fide* purchaser at such sale. *Thirby v. Rainbow*, 93 Mich. 164.

5. *Spooner v. Cummings*, 151 Mass. 313; *Fitzgerald v. Fuller*, 19 Hun (N. Y.) 180.

Where the conditional vendor gives the vendee authority to resell the property as belonging to the vendee, on such sale the property ceases to be security to the vendor for the price, and he has no priority over other creditors as to the proceeds of the sale when mingled with the vendee's funds. *Baring v. Galpin*, (Conn. 1888) 13 Atl. Rep. 266.

Sale of Goods to Be Resold. — A common instance of such estoppel occurs where goods are sold to a retail dealer upon condition that the property shall not vest in him until the full payment of the purchase money, but with the understanding that the goods are to be resold by him in the regular course of his business. In such case the reservation of title is fraudulent and void as to purchasers from the retailer in the course of trade, and the original vendor cannot assert his claim against them, notwithstanding the goods have not been paid for by the retailer.¹ But it has been held that a purchaser of the entire stock will not be so protected,² nor will a purchaser not in the regular course of trade.³

As to Creditors of the Vendee the decisions are not entirely harmonious. In some cases it has been held that, as in the case of purchasers, the reservation of title is void as to creditors,⁴ but in other cases such reservation has been sustained as against creditors.⁵ So, also, it has been held that the goods will not pass

1. Sale of Goods to Be Resold — Illinois. — *Barbour v. Perry*, 41 Ill. App. 613.

Indiana. — *Winchester Wagon Works, etc., Co. v. Carman*, 109 Ind. 31, 58 Am. Rep. 382.

Maine. — *Rogers v. Whitehouse*, 71 Me. 222.

Massachusetts. — *Burbank v. Crooker*, 7 Gray (Mass.) 158, 66 Am. Dec. 470.

Michigan. — *Pratt v. Burhans*, 84 Mich. 487, 22 Am. St. Rep. 703.

Mississippi. — *Columbus Buggy Co. v. Turley*, 73 Miss. 529.

Missouri. — *Lawrence v. Owens*, 39 Mo. App. 318.

Ohio. — *Carmack v. Gordon*, 2 Cinc. Super. Ct. Rep. 408.

Tennessee. — *Wilder v. Wilson*, 16 Lea (Tenn.) 548.

See also *New Haven Wire Co. Cases*, 57 Conn. 352.

In *Winchester Wagon Works, etc., Co. v. Carman*, 109 Ind. 31, 58 Am. Rep. 382, Howk, J., said: "Where, as here, it appears that a manufacturer and wholesale vendor of articles of personal property sells upon credit, and delivers a lot of such articles to a retail dealer therein, for the apparent or implied purpose of resale by such vendee, it is clear, we think, that the doctrine in relation to conditional sales cannot apply to or govern such a sale in a controversy as to such articles between the original vendor and the purchasers thereof from the original vendee. For in such case the purposes for which the possession of the property was delivered to the original vendee are inconsistent with the continued ownership thereof by the original vendor, and for this reason the condition upon which the sale and delivery were made must be deemed fraudulent and void as against purchasers from the original vendee of the property."

2. Purchase of Entire Stock. — Where a stock of goods was sold and delivered to a shopkeeper to be put into his store for sale, but upon condition that the title should not vest in him until the price was paid, it was held that the title did not pass before payment, and that the condition was operative as against a purchaser of the entire stock of goods, although had a sale been made of individual articles in the ordinary course of business the original vendor might have been estopped to assert any right adverse to such purchaser, the goods having been delivered to be sold in this man-

ner. *Burbank v. Crooker*, 7 Gray (Mass.) 158, 66 Am. Dec. 470.

3. Pratt v. Burhans, 84 Mich. 489, 22 Am. St. Rep. 703.

4. Reservation of Title Void as to Creditors. — *Devlin v. O'Neill*, 6 Daly (N. Y.) 305, affirmed in 68 N. Y. 622; *Loving Pub. Co. v. Johnson*, 68 Tex. 273. See also *Cole v. Mann*, 3 Thomp. & C. (N. Y.) 380, affirmed in 62 N. Y. 1.

Liquor to Be Retailed. — Where liquors are delivered by liquor merchants to a tavern keeper, to be by him retailed at his bar, the title to remain in the liquor merchants until sold, the liquors are liable to be levied on and sold under execution against the tavern keeper. *Bonesteel v. Flack*, 41 Barb. (N. Y.) 435; *Ludden v. Hazen*, 31 Barb. (N. Y.) 650. See the note immediately following.

Vendee Acting as Agent for Vendor. — Where goods are sold on credit to be resold by the vendee, title being reserved until payment even after a sale by the vendee, the latter acts as the agent of the vendor, who can recover the property from an execution creditor of the consignee's vendee who bought for credit, but it would be otherwise as to such goods as the first vendee sold for cash. *Cole v. Mann*, 3 Thomp. & C. (N. Y.) 380, affirmed in 62 N. Y. 1.

5. Blanchard v. Cooke, 144 Mass. 207; *Hirsch v. Steele*, 10 Utah 18.

Where personal property was delivered by the owner to another under a written contract by which the latter was to hold the property in trust and for the benefit of and subject to the order of the former until fully paid for, and to hold the proceeds of any sales made by him of the property for the benefit of the owner and subject to his order, and subsequently the party so receiving the property mortgaged it to a creditor to secure a prior indebtedness, and such creditor did not pay or loan any money on account of such property, nor give any credit to the mortgagor on account of his possession thereof, it was held that the owner might recover the property from such mortgagee in possession. *Standard Implement Co. v. Parlin, etc., Co.*, 51 Kan. 544.

Where Liquor Was Sold to a Retailer on condition that title should not pass until payment, but with the understanding between the parties that the liquor was to be used in the vendee's business, it was held that the vendor might recover the property from an officer who

to the vendee's assignee for the benefit of creditors.¹

(3) *Effect of Vendor's Laches — Waiver.* — A conditional vendor entitled to retake the property on breach of condition loses this right as against a third person acquiring possession from the vendee without notice of the condition if he is guilty of laches in the assertion of his right,² or if he has otherwise waived the performance of the condition.³

c. **PROPERTY RIGHTS IN THING SOLD CONDITIONALLY.** — The vendor of property sold on condition precedent may sell the same to a third person, subject to the contingent rights of the vendee.⁴

Mortgage. — So, also, he may mortgage the property.⁵

Resale — Possession. — And upon breach of the condition by the vendee the vendor may resell the property to a new purchaser without first taking actual possession.⁶

Levy and Sale. — The vendor retains an interest in the property subject to levy and sale.⁷

Right to Insurance Money. — Where property sold conditionally upon payment is insured for the benefit of the vendor, and he pays the premium, the insurance money paid upon loss of the property belongs to him.⁸

Increase of Animals Sold Conditionally. — Where an animal is sold on condition that it is to remain the property of the vendor until the payment of the price, its natural increase accruing before the performance of the condition

attached it before payment in a suit by the vendee's creditors. *Lewis v. McCabe*, 21 Am. L. Reg. N. S. 217; *Mack v. Story*, 57 Conn. 407. See also *McGirr v. Sell*, 60 Ind. 249.

Where beer was delivered by a brewer to a retailer to be sold by him and paid for at a stipulated price, all loss by deterioration or otherwise to be borne by the brewer, and all profits and losses in retailing to be made and borne by the retailer, who also had the right to return any beer remaining unsold at the end of the season, but the brewer not having any right to retake it without his consent, it was held that the beer so delivered was not liable to attachment as the property of the retailer. *Meldrum v. Snow*, 9 Pick. (Mass.) 441, 20 Am. Dec. 489. In this case the court said: "The contract is very similar to that of sale or return in England * * * and it is uniformly considered that in such contracts the property continues in the original owner."

Where in a Contract of Agency for the sale of agricultural implements it was provided that the agent was to purchase all implements remaining unsold at the termination of the agency, title being reserved in the principal until payment, it was held that implements so remaining unsold and the proceeds of implements sold to third persons were not subject to garnishment in the hands of a subagent by the agent's creditors. *South Bend Iron Works v. Cottrell*, 31 Fed. Rep. 254.

1. *Rogers v. Whitehouse*, 71 Me. 222.

2. *In re Binford*, 3 Hughes (U. S.) 295; *Robbins v. Phillips*, 68 Mo. 100; *Leatherbury v. Connor*, 54 N. J. L. 172.

Where the Vendor Waited Nine Months after default in payment he could not claim the property as against a *bona fide* purchaser. *Mathews v. Smith*, 8 Houst. (Del.) 22. See *supra*, this title, *Waiver of Conditions*.

3. *Brundage v. Camp*, 21 Ill. 330; *Smith v.*

Dennie, 6 Pick. (Mass.) 262, 17 Am. Dec. 368. See also *Marston v. Baldwin*, 17 Mass. 606. See *supra*, this title, *Waiver of Conditions*.

Where a chattel is sold for cash on delivery and the vendor delivers it without exacting payment, he cannot recover the property from an innocent purchaser from the vendee before payment. *Old Dominion Steamship Co. v. Burckhardt*, 31 Gratt. (Va.) 664.

4. **Vendor May Sell to Third Person.** — The vendor of a chattel sold and delivered to another on condition that it shall remain his property until paid for is the entire owner, with the absolute right of possession upon the vendee's default, and may sell to a third person all his right in the property subject to the contingent rights of the vendee. *Burnell v. Marvin*, 44 Vt. 277.

But where the vendee has substantially performed the conditions the vendor cannot transfer separate from the contract any such title or interest in the property in the vendee's possession to a third person, so as to enable him to bring replevin therefor. *Blaisdell v. Todd*, 33 Mich. 176.

If the vendor takes the property sold conditionally from the possession of the vendee and sells it, he cannot maintain an action on a note given to secure the price, there being a total failure of the consideration for which the note was given. *Minneapolis Harvester Works v. Hally*, 27 Minn. 495.

5. **Vendor May Mortgage Property.** — Where personal property has been sold and delivered on condition that title is not to pass until full payment, the vendor may mortgage the property to a third person at any time before the payment of the price, and the mortgagee acquires a title superior to that of the vendee. *Everett v. Hall*, 67 Me. 497.

6. *Hubbard v. Bliss*, 12 Allen (Mass.) 590.

7. *McMillan v. Larned*, 41 Mich. 521.

8. *Kortlander v. Elston*, 52 Fed. Rep. 180.

also belongs to the vendor.¹

Right to Property Taken in Exchange. — It has been held that where the vendee of property sold upon condition that the title shall remain in the vendor until payment exchanges the property for other property, the vendor acquires the same rights in the latter as he had in the original property;² but in some cases it is held that such exchange does not affect the vendor's title to the property received from him, and confers on him no right to the property for which it is exchanged.³

d. ASSIGNMENT BY VENDOR. — The vendor may assign his claim to the property sold conditionally, and his assignee acquires the same rights therein as the vendor had,⁴ and the vendor in such case loses all his interest in the property. Thus it has been held that the assignment by the vendor of a note given for the price of a chattel, title to which is reserved until the payment of the note, passes all the vendor's interest, so that he cannot maintain an action for the recovery of the property against a third person to whom it has been sold by the vendee.⁵

1. Increase of Animals. — *Bunker v. McKenney*, 63 Me. 529; *Allen v. Delano*, 55 Me. 113, 92 Am. Dec. 573; *Kellogg v. Lovely*, 46 Mich. 131, 41 Am. Rep. 151; *Buckmaster v. Smith*, 22 Vt. 203; *Kent v. Buck*, 45 Vt. 18; *Clark v. Hayward*, 51 Vt. 14. See the title **ANIMALS**, vol. 2, pp. 348-350.

Where the dam of an unborn foal was sold, title to the foal being reserved, and the vendee resold the dam to a third person without notice of the reservation, it was held that the property in the foal remained in the original vendor, who might recover it, after birth, from the last vendee. *Andrews v. Cox*, 42 Ark. 473, 43 Am. Rep. 68.

2. Exchange of Property. — If, before the property is paid for, the seller agrees that the buyer may exchange it for other property belonging to some third person on condition that the title to the property exchanged shall vest in the seller, the transaction is good and the title will remain in the seller, even as against a *bona fide* purchaser. *Perry v. Young*, 105 N. Car. 463.

Where the vendor of personal property reserves a lien upon it at the time of sale, and the property is subsequently exchanged for other property, by the vendor's consent, with an agreement between him and the vendee that his original lien shall attach to the property exchanged for, such lien can be enforced. *Kelsey v. Kendall*, 48 Vt. 24. *Paris v. Vail*, 18 Vt. 277; *White v. Langdon*, 30 Vt. 599.

3. In Dedman v. Earle, 52 Ark. 164, it was held that the vendee of property sold with a reservation of title until payment might exchange it before payment for other property, and that such exchange would not affect the vendor's title to the original property nor confer on him any rights in the property taken in exchange. So also in *Nattin v. Riley*, 54 Ark. 30.

So, also, where the conditional vendee of a horse recovered damages from a third person for killing the horse, and purchased another horse therewith, it was held that the vendor acquired no interest in the new horse. *Smith v. Gufford*, 36 Fla. 481.

4. Assignment by Vendor. — *Ross-Meehan Brake Shoe Foundry Co. v. Pascagoula Ice Co.*, 72 Miss. 608; *W. W. Kimball Co. v. Mellon*, 80 Wis. 133.

The vendor's assignee may recover the property from a purchaser on execution against the vendee with notice of the vendor's claim. *Rodgers v. Bachman*, 109 Cal. 552.

The equities of a surety on a conditional sale, to whom the contract has been assigned, are superior to those of a subsequent vendee of the property with notice. *Myres v. Yapple*, 60 Mich. 339.

Assignment of Contract and Notes for Purchase Money—Priorities. — Where the agent of the owner of a chattel sold it under a written contract that title was to remain in him until payment, and took the vendee's negotiable notes for the price, and afterwards assigned the contract, which was not negotiable, to his principal, and transferred the notes to a person without notice of the existence of the contract, it was held that the right of the holder of the notes to resort to the property for payment was superior to that of the holder of the contract. *W. W. Kimball Co. v. Mellon*, 80 Wis. 133.

As to the rights of the assignee of notes given for the purchase money of property sold conditionally under the *Georgia* statutes, see *Cade v. Jenkins*, 88 Ga. 791.

Assignment Held Insufficient. — The assignment by indorsement in blank of a promissory note stipulating that a certain therein-described chattel shall remain the property of the payee until the payment of the note does not of itself vest in the indorsee title to the chattel so as to enable him to replevy it on demand upon nonpayment of the note. *Domestic Sewing Mach. Co. v. Arthurhultz*, 63 Ind. 322.

Equitable Assignment. — One who signs a contract of conditional sale as surety for the vendee, and who, on being compelled to pay the purchase money, receives the contract of sale, succeeds to the rights of the vendor, such payment and the delivery of the contract operating as an equitable assignment of the vendor's rights and title under the contract. *Myres v. Yapple*, 60 Mich. 339.

5. Esty v. Graham, 46 N. H. 169. But in *McPherson v. Acme Lumber Co.*, 70 Miss. 649, it was held that the vendor who had assigned the notes might replevin the property, but upon recovery must apply the money realized to the payment of the debt.

2. Of the Vendee — Conditions Precedent. — Where personal property is sold and delivered to the vendee under a contract whereby the title to the property is to remain in the vendor until the payment of the price, or until the performance of some other condition precedent, the vendee acquires only such rights in the property as are consistent with the reservation of title in the vendor. He cannot sell, mortgage, or otherwise dispose of the property to a third person so as to pass a good title as against the vendor, nor is the property liable to attachment at the suit of the vendee's creditors.¹ But the vendee has sufficient title to the property to enable him to maintain an action against a stranger for the conversion of the property.²

Right to Return Property. — As has already been stated, the vendee of property sold on condition that title shall remain in the vendor until payment has ordinarily no right to return the property instead of making payment.³

Conditions Subsequent. — If the sale is upon condition subsequent, so that title vests immediately in the vendee, he may convey a good title to third persons.⁴

Certain Miscellaneous Rights of the vendee will be found set out in the note below.⁵

3. Of Third Persons — a. Bona Fide Purchasers — Subpurchaser of Property Sold on Condition Precedent Acquires No Title Against Vendor. — Except where the case is

1. *Piedmont Land, etc., Co. v. Thomson-Houston Motor Co.*, (Ala.) 12 So. Rep. 770, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 424-436. See *supra*, this title, *Sales Dependent Upon Conditions Precedent — To Be Performed by the Vendee*; and *infra*, *Rights of Parties — Of Third Parties*.

As to the vendee's rights as against the vendor, see *supra*, this title, *Rights of Parties — Against the Vendee*.

Vendee May Sell After Acquiring Title. — Where, on the sale of a horse and wagon, the vendor reserved title until payment, and after part payment took back the horse and the vendee sold the wagon to a third person against whom the vendor brought an action for conversion, it was held that evidence was admissible that the partial payment exceeded the value of the wagon, and that the vendee claimed to have become the owner of it thereby. *Swallow v. Emery*, 111 Mass. 355. See also *Currier v. Knapp*, 117 Mass. 324.

The lessee of chattels under a lease providing that he is to pay for the property in instalments, and that title is to vest in him upon full payment, and that the lessor may retake the property on default of payment, after default in the payment of an instalment, but before repossession by the lessor, has such a right of property in the chattels as will enable him to pass a good title to a mortgagee as against an officer attaching the chattels as the lessee's property. *Chase v. Ingalls*, 122 Mass. 381.

2. *Harrington v. King*, 121 Mass. 269.

3. See *supra*, this title, *Sales Dependent upon Conditions Precedent — To Be Performed by the Vendee — Payment*. See also *Robinson's Appeal*, 63 Conn. 290.

4. See *supra*, this title, *Sales Dependent upon Conditions Subsequent — Contracts of Sale or Return*.

5. **Miscellaneous Rights of Vendee.** — Where a party bargained for a horse, but was to perform a condition precedent to the vesting of his title and right of possession, and failed to perform such condition, it was held that he

could not maintain case or trover for the value of the horse against a bailee who was to deliver him on the performance of such precedent condition. *Ferrier v. Wood*, 9 Ark. 85.

Payment in Services — Right to Recover for Services Where Property Is Reclaimed. — Where property is sold conditionally and payments are made for it in services, the services may be charged on book to await their subsequent application, and if the property so sold be received back by the vendor, the vendee may recover for his services if no application has been made thereof. *Martin v. Eames*, 26 Vt. 477; *Stone v. Pulsipher*, 16 Vt. 428.

Right to Make Payment After Maturity. — Where on the sale of a cow a note was given for the price with the condition that the cow was to remain the property of the vendor until the note was paid, it was held that the mere omission of the vendee to pay the note at maturity would not operate as a forfeiture of his rights under the contract, without a demand of payment or of the cow for nonpayment, and that on such demand, even after the note was overdue, the vendee would have the right to pay the note and reclaim the cow. *Taylor v. Finley*, 48 Vt. 78.

Vendee in Default Cannot Sue for Breach of Warranty of Title. — If the conditional vendee fails to pay according to the terms of the sale, he cannot maintain an action for deceit and breach of warranty of title, although the property was encumbered with a chattel mortgage and has been taken under the statute by the owner of the mortgage, where the mortgagee was present and acquiesced in the sale, for if the vendee had complied with the terms of the contract the mortgagee would have been estopped from enforcing his claim. *Reynolds v. Roberts*, 57 Vt. 392.

Amount of Recovery from Vendor for Conversion. — The vendee of property sold conditionally upon payment can recover from the vendor for conversion of the property no more than the amount paid by him at the time the vendor took the property. *Levan v. Wilten*, 135 Pa. St. 61.

controlled by statutes providing otherwise, the general rule is that where personal property is sold and delivered to the vendee on condition that the title is to remain in the vendor until the purchase price is paid or secured, the vendee who has not yet acquired title by the performance of the condition can convey no title even to a *bona fide* purchaser that can be enforced against the original vendor; and that the latter, if guilty of no laches, may recover the property from such purchaser from his vendee.¹

1. Purchaser from Conditional Vendee Acquires No Title Against Vendor. — Story on Sales, § 313; 2 Kent's Com. 497.

United States. — Copland v. Bosquet, 4 Wash. (U. S.) 588; Homans v. Newton, 4 Fed. Rep. 880; *In re* Binford, 3 Hughes (U. S.) 205.

Alabama. — Holman v. Lock, 51 Ala. 287; Fairbanks v. Eureka Co., 67 Ala. 109; Sumner v. Woods, 67 Ala. 139, 42 Am. Rep. 104. (The two cases last cited *overruling* Sumner v. Woods, 52 Ala. 94; Dudley v. Abner, 52 Ala. 572; Harmon v. Goetter, 87 Ala. 325; Piedmont Land, etc., Co. v. Thomson-Houston Motor Co. (Ala.) 12 So. Rep. 770, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 424-436.

Arkansas. — Carroll v. Wiggins, 30 Ark. 402; Andrews v. Cox, 42 Ark. 473, 48 Am. Rep. 68; McIntosh v. Hill, 47 Ark. 363; McRea v. Merrifield, 48 Ark. 160; Simpson v. Shackelford, 49 Ark. 63.

California. — Kohler v. Hayes, 41 Cal. 455.

Connecticut. — Brown v. Fitch, 43 Conn. 513. So also in the case of a hiring of chattels, Tomlinson v. Roberts, 25 Conn. 477, 68 Am. Dec. 367.

Delaware. — Watertown Steam Engine Co. v. Davis, 5 Houst. (Del.) 192. But see Mears v. Waples, 3 Houst. (Del.) 581, 4 Houst. (Del.) 62.

Florida. — Roof v. Chattanooga Wood Split Pulley Co., 36 Fla. 284.

Georgia. — Flanders v. Maynard, 58 Ga. 56; Sims v. James, 62 Ga. 260.

Indiana. — Thomas v. Winters, 12 Ind. 322; Dunbar v. Rawles, 28 Ind. 225, 92 Am. Dec. 311; Hodson v. Warner, 60 Ind. 214; Payne v. June, 92 Ind. 252; Lanman v. McGregor, 94 Ind. 301.

Iowa. — Baker v. Hall, 15 Iowa 277; Moseley v. Shattuck, 43 Iowa 540.

Since the Act of 1873 (Code, § 1922), the contract must be recorded to be valid against purchasers. See *infra*, this title, *Recording Acts*.

Kansas. — Sumner v. McFarlan, 15 Kan. 600; Hallowell v. Milne, 16 Kan. 65; Hall v. Draper, 20 Kan. 139; Lynds v. Winkler, 23 Kan. 697.

Maine. — Sawyer v. Shaw, 9 Me. 47; Tibbetts v. Towle, 12 Me. 341; Whipple v. Gilpatrick, 19 Me. 427; Crocker v. Gullifer, 44 Me. 491, 69 Am. Dec. 118; Rawson v. Tuel, 47 Me. 506; Brown v. Haynes, 52 Me. 578.

Massachusetts. — Angier v. Taunton Paper Mfg. Co., 1 Gray (Mass.) 621; 61 Am. Dec. 436; Coghill v. Hartford, etc., R. Co., 3 Gray (Mass.) 545; Gilbert v. Thompson, 3 Gray (Mass.) 550, note; Sargent v. Metcalf, 5 Gray (Mass.) 306, 66 Am. Dec. 368; Deshon v. Bigelow, 8 Gray (Mass.) 159; Carter v. Kingman, 103 Mass. 517; Armour v. Pecker, 123 Mass. 143.

Michigan. — Couse v. Tregent, 11 Mich. 65; Dunlap v. Gleason, 16 Mich. 158, 93 Am. Dec. 231; Thirlby v. Rainbow, 93 Mich. 164; Petty-

place v. Groton Bridge, etc., Co., 103 Mich. 155. See also Fifield v. Elmer, 25 Mich. 48.

Minnesota. — National Bank of Commerce v. Chicago, etc., R. Co., 44 Minn. 224, 20 Am. St. Rep. 566.

Mississippi. — Ketchum v. Brennan, 53 Miss. 596; Journey v. Priestly, 70 Miss. 584.

Missouri. — Parmlee v. Catherwood, 36 Mo. 479; Little v. Page, 44 Mo. 412; Sumner v. Cottey, 71 Mo. 121. But see, as to present law in this state, *infra*, this title, *Recording Acts*.

Montana. — Heinbockle v. Zugbaum, 5 Mont. 344, 51 Am. Rep. 59.

New Hampshire. — Sargent v. Gile, 8 N. H. 325; Fisk v. Ewen, 46 N. H. 173; Kimball v. Jackman, 42 N. H. 242; King v. Bates, 57 N. H. 446; Weeks v. Pike, 60 N. H. 447; Stone v. Sleeper, 62 N. H. 3.

New Jersey. — Marvin Safe Co. v. Norton, 48 N. J. L. 410, 57 Am. Rep. 566.

New Mexico. — Redewill v. Gillen, 4 N. Mex. 78.

New York. — Kenny v. Planer, 3 Daly (N. Y.) 131; Walker v. Mitchell, 25 Hun (N. Y.) 527; Puffer v. Reeve, 35 Hun (N. Y.) 480, 15 Abb. N. Cas. (N. Y.) 388; Ballard v. Burgett, 40 N. Y. 314; Austin v. Dye, 46 N. Y. 500; New York Guaranty, etc., Co. v. Flynn, 55 N. Y. 653, *affirming* 65 Barb. (N. Y.) 365; Wood v. Barr, 9 N. Y. Wkly. Dig. 411; Payne v. Batterson, 22 N. Y. Wkly. Dig. 109. *Compare* Smith v. Lyles, 5 N. Y. 41; Wait v. Green, 36 N. Y. 556, 35 Barb. (N. Y.) 585; Steelyards v. Singer, 2 Hilt. (N. Y.) 96; Fleeman v. McKean, 25 Barb. (N. Y.) 475; Western Transp. Co. v. Marshall, 37 Barb. (N. Y.) 509; Hintermister v. Lane, 27 Hun (N. Y.) 497; Comer v. Cunningham, 77 N. Y. 391, 33 Am. Rep. 626. See also Parker v. Baxter, 86 N. Y. 586.

In Comer v. Cunningham, 77 N. Y. 391, 33 Am. Rep. 626, an attempt is made to reconcile the conflict between the decisions in this state. As to the present law, see *infra*, this title, *Recording Acts*.

North Carolina. — Harris v. Woodard, 96 N. Car. 232.

Ohio. — Sanders v. Keber, 28 Ohio St. 630; Carmack v. Gordon, 2 Cinc. Super. Ct. Rep. 408.

Oregon. — Singer Mfg. Co. v. Graham, 8 Oregon 17, 34 Am. Rep. 572.

Tennessee. — Houston v. Dyche, Meigs (Tenn.) 76, 33 Am. Dec. 130; Price v. Jones, 3 Head (Tenn.) 84; McCombs v. Guild, 9 Lea (Tenn.) 81.

Texas. — Sinker v. Comparet, 62 Tex. 470; Leath v. Uttley, 66 Tex. 82.

Virginia. — McComb v. Donald, 82 Va. 903.

Washington. — De Saint Germain v. Wind, 3 Wash. Ter. 189.

Wyoming. — Warner v. Roth, 2 Wyoming 63; Bunce v. McMahon, (Wyoming, 1895) 42 Pac. Rep. 23.

Canada. — Walker v. Hyman, 1 Ont. App. 345, followed in Mason v. Bickle, 2 Ont. App. 291; Nordheimer v. Robinson, 2 Ont. App. 305.

Where A bought a wagon of B on condition that it should remain B's property until paid for, and C repaired it for A by supplying new wheels and axles, and A, without paying for the repairs, wrongfully took it from the possession of C, who afterwards took A's note for the repairs, with an agreement that the "running part" of the wagon should remain C's until the payment of the note; and B, who knew the wagon had been repaired, but not by whom, upon A's failure to pay the purchase money took the wagon back from A and sold it to D; it was held that C, who knew nothing of B's claim, could maintain trover against D for the wheels and axles. Clark v. Wells, 45 Vt. 4, 12 Am. Rep. 187.

Where the conditional vendee of personal property, without the knowledge or consent of the vendor, sells the property to third persons who convert it to their own use, such persons acquire no title to the property as against the original vendor, and are liable to him for its value, or for the balance due him from the vendee on the agreed price. Lanman v. McGregor, 94 Ind. 301; Baals v. Stewart, 109 Ind. 371.

Grounds of the Doctrine — Bona Fide Purchasers and Creditors on Same Footing. — In Cogill v. Hartford, etc., R. Co., 3 Gray (Mass.) 545, Bigelow, J., said: "It is difficult to see any good and satisfactory reason for the distinction which is attempted to be made between the rights of the vendee and his creditors to goods sold and delivered on condition, and those of bona fide purchasers. All the cases turn on the principle that the compliance with the conditions of sale and delivery is, by the terms of the contract, precedent to the transfer of the property from the vendor to the vendee. The vendee, in such cases, acquires no property in the goods. He is only a bailee for a specific purpose. The delivery, which in ordinary cases passes the title to the vendee, must take effect according to the agreement of the parties, and can operate to vest the property only when the contingency contemplated by the contract arises. The vendee, therefore, in such cases, having no title to the property, can pass none to others. He has only a bare right of possession; and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such is the necessary result of carrying into effect the intention of the parties to a conditional sale and delivery. Any other rule would be equivalent to the denial of the validity of such contracts. But they certainly violate no rule of law, nor are they contrary to sound policy. The cases above cited expressly recognize them as legal and valid contracts between the vendor on the one hand and the vendee and his creditors on the other. If valid to this extent, it necessarily follows that they are so for all purposes. If the property does not pass out of the vendor for one purpose, it certainly does not for another. If it remains in him at all, it is because such is the agreement of the parties, and it cannot be divested by any act of the vendee until the contract is fulfilled. A bona fide purchaser, as well as an attaching creditor, must

acquire his title through the vendee. If the latter has no title, he can communicate none. The purchaser and the attaching creditor are in this respect upon the same footing. No equities can intervene to give the former a better right as against the original vendor than the latter; they are *in aequali jure*. Neither of them has a legal title to hold the property."

A Purchaser from the Vendee in an Instalment Sale acquires only the title of the vendee, and none against the original owner. Singer Mfg. Co. v. Graham, 8 Oregon 17, 34 Am. Rep. 572.

A Purchaser under a Deed of Trust of property sold conditionally acquires no title as against the vendor. Christian v. Bunker, 38 Tex. 234.

Sale Conditional upon Delivery. — The sale of a horse to be kept by the vendor until a future day, to be paid for if the vendor delivers it at that time, accompanied by no change of possession nor payment, is conditional only and not good as against subsequent purchasers from the vendor. Connor v. Giles, 76 Me. 132.

Removal in Violation of Contract. — Where a chattel sold with a reservation of title until payment, and with a stipulation that it shall not be removed from a certain place, is sold by the vendee to a third person, who removes it, the vendor can recover it from the latter before the expiration of the time of credit. Hall v. Draper, 20 Kan. 137.

Vendee Liable in Damages to Purchaser from Him. — If the conditional vendee, before perfecting his title, sells the property to a third person, the latter may, upon application of the original owner, deliver up the property and sue his vendor and recover damages for the injury done him. Price v. Jones, 3 Head (Tenn.) 84.

Resale by Purchaser from Vendee. — Where personal property was delivered by the owner to another who was to have the right to use it, and to become the owner upon the performance of certain conditions, but the property was not to be removed or sold without the owner's consent, and the party receiving it sold it to a third person who removed and resold it to another, it was held that such third person was liable to the owner for the conversion, although he had acted *bona fide*, and resold the property before demand. Carter v. Kingman, 103 Mass. 517. But see Vincent v. Cornell, 13 Pick. (Mass.) 294, 23 Am. Dec. 683.

Purchaser with Notice. — One who purchases personal property with notice that his vendor's title is conditional acquires no title as against the owner, who may maintain trespass against such purchaser for taking and carrying away the property. Waterston v. Getchell, 5 Me. 435, 17 Am. Dec. 251; Gerow v. Castello, 11 Colo. 560, 7 Am. St. Rep. 260; Jones v. Clark, 20 Colo. 353; Duke v. Shackelford, 56 Miss. 552. See, also, as to the effect of notice, Central Trust Co. v. Arctic Ice Mach. Mfg. Co., 77 Md. 202.

In New Mexico a transfer of personal property by an instrument called a lease, by which it is to be paid for in instalments and remain the property of the seller until paid for, gives the purchaser no title before payment which he can convey to a subsequent purchaser with full knowledge of the contract. Redewill v. Gillen, 4 N. Mex. 78.

Fixtures. — Where machinery sold condition,

without any previous demand.¹

The Question of Good Faith. — The fact that the purchaser bought in good faith is entirely immaterial; it is his duty to inquire and see that his vendor has a good title to the property which he undertakes to sell.²

A Mere Possession by the Vendee carries with it no right or authority to transfer the title.³

Contrary Doctrine. — The rule above stated, although supported by the great weight of authority, has not been universally accepted, and in several states it has been held that a *bona fide* purchaser from the vendee in possession under a contract of conditional sale acquires a good title.⁴

ally is placed upon the vendee's land with the vendor's permission, it does not become a part of the realty, and a purchaser of the land with notice of the vendor's rights acquires no title to the machinery, and the vendor may recover it from him in replevin. *Duke v. Shackleford*, 56 Miss. 552.

Purchaser's Title Perfected by Tender of Price. — Where a chattel sold on condition that title should remain in the vendor until payment was sold by the vendee before full payment to a third person, who afterwards tendered the balance due to the vendor without demand therefor, it was held that upon the tender, although the vendor refused it, title passed to the second purchaser. *Day v. Bassett*, 102 Mass. 445. Compare *New York Guaranty, etc., Co. v. Flynn*, 55 N. Y. 653, affirming 65 Barb. (N. Y.) 365.

Sale upon Collateral Conditions. — Where the sale and delivery of chattels are complete, a *bona fide* purchaser from the vendee acquires a good title as against the vendor, notwithstanding collateral conditions made by him. *Patchin v. Biggerstaff*, 25 Mo. App. 534.

1. *Brown v. Fitch*, 43 Conn. 513; *Whipple v. Gilpatrick*, 19 Me. 427; *Fisk v. Ewen*, 46 N. H. 173.

2. *Coggill v. Hartford, etc., R. Co.*, 3 Gray (Mass.) 545; *Deshon v. Bigelow*, 8 Gray (Mass.) 159.

The purchaser from a conditional vendee is in the same legal condition as a *bona fide* purchaser of stolen goods. *Deshon v. Bigelow*, 8 Gray (Mass.) 159.

3. *Leigh v. Mobile, etc., R. Co.*, 58 Ala. 165; *Fairbanks v. Eureka Co.*, 67 Ala. 109; *Coggill v. Hartford, etc., R. Co.*, 3 Gray (Mass.) 545.

4. **The Law in Illinois** is different from that of most of the other states. As stated by Bradley, J., in *Harkness v. Russell*, 118 U. S. 663, "the doctrine of the Supreme Court of that state is that if a person agrees to sell to another a chattel, on condition that the price shall be paid within a certain time, retaining the title in himself in the meantime, and delivers the chattel to the vendee so as to clothe him with the apparent ownership, a *bona fide* purchaser or an execution creditor of the latter is entitled to protection as against the claim of the original vendor. * * * Perhaps the statute of Illinois on the subject of chattel mortgages has influenced some of these decisions. * * * It has been supposed that this statute indicates a rule of public policy condemning secret liens and reservations of title on the part of vendors, and making void all agreements for such liens or reservations unless registered in the manner required for

chattel mortgages. At all events, the doctrine above referred to has become a rule of property in Illinois."

A *bona fide* purchaser from the conditional vendee gets a good title. *Young v. Bradley*, 68 Ill. 553. See also *Morris v. Grover*, 3 Ill. 528.

Where personal property was sold upon condition of giving a note with security for the price, with permission to the vendee to take the property on condition that the note should be given by a certain day, it was held that a *bona fide* purchaser from the vendee before the note was given acquired a good title. *Brunnage v. Camp*, 21 Ill. 330.

Kentucky. — It is held in Kentucky that a *bona fide* purchaser of property from the vendee in possession under a conditional sale acquires a good title. *Vaughn v. Hopson*, 10 Bush (Ky.) 337, overruling *Patton v. McCane*, 15 B. Mon. (Ky.) 556, on this point; *Greer v. Church*, 13 Bush (Ky.) 430.

Maryland. — A *bona fide* purchaser from the conditional vendee without notice of the condition will be protected against the claim of the original vendor. *Hall v. Hinks*, 21 Md. 406; *Lincoln v. Guynn*, 68 Md. 299, 6 Am. St. Rep. 446. See, also, *Butler v. Gannon*, 53 Md. 333; *Dias v. Chickering*, 64 Md. 348, 54 Am. Rep. 770.

In *Hall v. Hinks*, 21 Md. 406, it is said that the supposed distinction between a sale and delivery of goods on condition where the condition is not performed, and a sale and delivery procured by fraud, does not in reality exist as between the parties to the original contract; the vendee no more acquires the title in the latter case than in the former. But to these cases the principle that "a party having no title to property can pass none to others" does not apply.

Pennsylvania Doctrine. — In Pennsylvania, in determining the rights of parties, a distinction is made between the bailment of a chattel with power in the bailee to become the owner on payment of the price agreed upon, and the sale of a chattel with a stipulation that the title shall not pass to the purchaser until the contract price shall be paid. On this distinction the courts of this state hold that a bailment of chattels with an option in the bailee to become the owner on payment of the price agreed upon is valid, and that the right of the bailor to resume possession on nonpayment is secure against creditors of the bailee and *bona fide* purchasers from him; but that upon the delivery of personal property under a contract of sale, the reservation of title in the vendor until payment is void as against creditors of the

Subpurchasers of Property Sold on Condition Subsequent Acquire Good Title. — As has been already stated, purchasers from a vendee to whom property has been sold upon condition subsequent acquire a good title, even as against the original vendor.¹

b. CREDITORS. — **The General Rule** is that a sale and delivery of personal property upon condition that title shall remain in the vendor until payment of the price, or upon some other condition,² vests no such title in the vendee before payment as to render the property subject to levy and sale upon an execution against the vendee, in favor of his creditors, and if so taken the vendor can recover the property.³

vendee and *bona fide* purchasers from him. See *Marvin Safe Co. v. Norton*, 48 N. J. L. 410, 57 Am. Rep. 566; *Forrest v. Nelson*, 108 Pa. St. 481; *Ott v. Sweatman*, 166 Pa. St. 217. See the case last cited for an elaborate review of the authorities.

Thus in *Chamberlain v. Smith*, 44 Pa. St. 431, the contract under consideration was held to be of the former class, and a *bona fide* purchaser from the bailee acquired no title as against the bailor.

In the following cases the contract was held to be a conditional sale, and a *bona fide* purchaser from the vendee got a good title. *Stadtfeld v. Huntsman*, 92 Pa. St. 53, 37 Am. Rep. 661; *Dearborn v. Raysor*, 132 Pa. St. 231.

Where furniture was sold upon the written agreement of the purchaser to pay not less than five dollars a week until the price was paid, the goods to remain the property of the seller, subject to removal upon failure to make any or all of such payments, and the furniture was delivered to the purchaser, who failed to make any payment and sold it to a third person who had no knowledge of the agreement, it was held that the latter obtained a valid title. *Stadtfeld v. Huntsman*, 92 Pa. St. 53, 37 Am. Rep. 661.

A pledgee of the conditional vendee acquires a good title. *Farrell v. Nathans*, 1 Phila. (Pa.) 557.

But where the property is delivered to a third person to be retained until the purchase money is paid, the vendee cannot pass a good title as against the vendor. *Stewart v. Welch*, 2 Luz. L. Reg. (Pa.) 121.

Where property sold to be paid for in instalments, title being reserved until payment, is put by the vendee with the property of a firm of which he is a partner as his share of the capital, the vendor cannot assert his claim to the property as against the other partner. *Boynton v. Isaacs*, 10 W. N. C. (Pa.) 190.

1. See *supra*, this title, *Sales Dependent upon Conditions Subsequent — Contracts of Sale or Return*.

Where, upon a sale of horses, the owner delivers them to the buyer on condition that he shall pay over to the owner the first money received on their resale, or if he does not do so, that they shall be subject to the vendor's order at any time, a valid title passes to the buyer and can be transferred to a purchaser. *Chamberlain v. Dickey*, 31 Wis. 68.

On a conditional sale the relationship of debtor and creditor does not exist between the parties — the property in the thing sold passes to the vendee, subject to be divested on performance of the condition as stipulated; and if the vendee parts with the property before

the time to redeem expires, the vendor's only remedy is by an action for damages for breach of contract, and not for the recovery of the property. *Carnall v. Clark*, 27 Ark. 500.

2. Where the owner of ties along the line of a railroad made a contract with the railroad company by which the latter was authorized to take as many of the ties as it needed for the repair of the track, said ties to be counted and accounted for after they were placed under the track, and that title should not pass to the company until the ties were so placed, it was held that the stipulation as to the time of passing title was valid, and that no creditor of the company with notice of the contract could acquire any title to the ties as against the owner by a levy and sale on an execution against the company, although the employees of the company had taken possession of the ties and distributed them along the line of the road. *Owens v. Hastings*, 18 Kan. 446.

3. **Property Sold Conditionally Not Subject to Attachment and Sale upon Execution.** — Story on Sales, § 213; 2 Kent's Com. 497.

United States. — *Gaylor v. Dyer*, 5 Cranch (C. C.) 461; *Thompson v. Walker*, 2 McCrary (U. S.) 33; *Blackwell v. Walker*, 5 Fed. Rep. 419; *The Marina*, 19 Fed. Rep. 760; *Harkness v. Russell*, 118 U. S. 663.

Alabama. — *Fields v. Williams*, 91 Ala. 502; *Thornton v. Cook*, 97 Ala. 630; *Manning v. Wells*, (Ala. 1894) 16 So. Rep. 23.

California. — *Stokes v. Balaam*, 73 Cal. 154; *Rodgers v. Bachman*, 109 Cal. 552.

Connecticut. — *Forbes v. Marsh*, 15 Conn. 384; *Lucas v. Birdsey*, 41 Conn. 357; *Cooley v. Gillan*, 54 Conn. 80; *Mack v. Story*, 57 Conn. 407. So, also, in the case of a hiring of chattels, *Hughes v. Kelly*, 40 Conn. 148.

District of Columbia. — *Sanders v. Wilson*, 19 D. C. 555.

Indiana. — *King v. Wilkins*, 11 Ind. 347; *Hamway v. Wallace*, 18 Ind. 377; *Keck v. State*, 12 Ind. App. 119.

Iowa. — *Bailey v. Harris*, 8 Iowa 331, 74 Am. Dec. 312; *Robinson v. Chapline*, 9 Iowa 91; *Knoulton v. Redenbaugh*, 40 Iowa 114.

Maine. — *Leighton v. Stevens*, 22 Me. 252; *Stone v. Perry*, 60 Me. 48; *Seed v. Lord*, 66 Me. 580; *Peabody v. Maguire*, 79 Me. 572.

Massachusetts. — *Blanchard v. Child*, 7 Gray (Mass.) 155; *Barrett v. Pritchard*, 2 Pick. (Mass.) 512, 13 Am. Dec. 449; *Reed v. Upton*, 10 Pick. (Mass.) 522, 20 Am. Dec. 545; *Hill v. Freeman*, 3 Cush. (Mass.) 257; *Tyler v. Freeman*, 3 Cush. (Mass.) 261; *Hussey v. Thornton*, 4 Mass. 405, 3 Am. Dec. 224; *Marston v. Baldwin*, 17 Mass. 606; *Thaxter v. Foster*, 153 Mass. 151; *Nichols v. Ashton*, 155 Mass. 205.

Michigan. — *Marquette Mfg. Co. v. Jeffery*,

Contrary Doctrine.—On the other hand, in some jurisdictions, as in the

49 Mich. 283; *F. J. Dewes Brewery Co. v. Merritt*, 82 Mich. 198.

Mississippi.—*Mount v. Harris*, 1 Smed. & M. (Miss.) 185, 40 Am. Dec. 89.

Missouri.—*Ridgeway v. Kennedy*, 52 Mo. 24; *Wangler v. Franklin*, 70 Mo. 659; *State v. Green Tree Brewery Co.*, 32 Mo. App. 276.

Montana.—*Silver Bow Min., etc., Co. v. Lowry*, 6 Mont. 288.

Nebraska.—*Aultman v. Mallory*, 5 Neb. 178, 25 Am. Rep. 478.

Nevada.—*Cardinal v. Edwards*, 5 Nev. 36.

New Hampshire.—*Porter v. Pettengill*, 12 N. H. 299; *McFarland v. Farmer*, 42 N. H. 386; *Holt v. Holt*, 58 N. H. 276; *Cleveland Mach. Works v. Lang*, (N. H. 1893) 31 Atl. Rep. 20.

New Jersey.—*Cole v. Berry*, 42 N. J. L. 308, 36 Am. Rep. 511.

New York.—*Piser v. Stearns*, 1 Hilt. (N. Y.) 86; *Van Hoozer v. Cory*, 34 Barb. (N. Y.) 9; *Strong v. Taylor*, 2 Hill (N. Y.) 326; *Nash v. Weaver*, 23 Hun (N. Y.) 513; *Herring v. Hop-pock*, 15 N. Y. 409; *Cole v. Mann*, 62 N. Y. 1; *Frank v. Batten*, 49 Hun (N. Y.) 91; *Brown v. Thurber*, 1 N. Y. City Ct. 322, 10 Daly (N. Y.) 188.

North Carolina.—*Parris v. Roberts*, 12 Ired. L. (N. Car.) 268, 55 Am. Dec. 415.

Ohio.—*Sage v. Sleutz*, 23 Ohio St. 1; *Call v. Seymour*, 40 Ohio St. 670.

Rhode Island.—*Goodell v. Fairbrother*, 12 R. I. 233, 34 Am. Rep. 631.

Tennessee.—*Bradshaw v. Thomas*, 7 Yerg. (Tenn.) 497; *Hawthorne v. Bowman*, 3 Sneed (Tenn.) 524; *Gambling v. Read*, Meigs (Tenn.) 281.

Texas.—*Tufts v. Cleveland*, (Tex. 1887) 3 S. W. Rep. 288; *City Nat. Bank v. Tufts*, 63 Tex. 113.

Utah.—*Russell v. Harkness*, 4 Utah 197, affirmed in 118 U. S. 663.

Vermont.—*Bigelow v. Huntley*, 8 Vt. 151; *Smith v. Foster*, 18 Vt. 182; *Buckmaster v. Smith*, 22 Vt. 203; *Martin v. Eames*, 26 Vt. 476; *Armington v. Houston*, 38 Vt. 448, 91 Am. Dec. 366; *Duncan v. Stone*, 45 Vt. 118.

Washington.—*Dodd v. Bowles*, 3 Wash. Ter. 383.

Statement of the Rule.—In *Cole v. Berry*, 42 N. J. L. 308, 36 Am. Rep. 511, Depue, J., after stating the general principle that on a conditional sale the title remains in the vendor until the performance of the condition, said: "As between the immediate parties to the contract, the principle above mentioned is inflexibly adhered to. There is some diversity of views with respect to its application as against creditors of the vendee and *bona fide* purchasers from him for full value. In some of the courts it has been held that conditions in contracts of sale that title shall not pass until payment of the purchase money are not good as against those claiming under the vendee as creditors or purchasers, when possession is delivered to the vendee. Another class of cases hold that while conditions of this character are valid as against the creditors of the vendee, they are invalid as against *bona fide* purchasers from him. These decisions are the outcome of the doctrine that, upon a sale of

chattels, possession inconsistent with the actual title is *per se* fraudulent and void as against creditors and *bona fide* purchasers. This doctrine is not in force in this state.

* * * A vendor who delivers possession of chattels to his vendee, under an executory contract that the title shall pass on payment of the contract price, may forfeit his property by conduct which the law regards as fraudulent, as where, in addition to possession, he clothes the vendee with an apparent title on the faith of which third persons are induced to act in giving credit or in becoming purchasers, or where he knowingly permits the vendee to exercise acts of ownership over the property inconsistent with only a qualified right of possession, to the injury of others. In such cases the question of fraud becomes one of fact, to be decided by a jury upon the circumstances of the particular case. But where the case presents no other features than that the vendor has entered into a contract of sale on credit, and has delivered the goods to the vendee upon an agreement that they shall remain the property of the vendor until payment of the purchase money, the property in the goods remains in the vendor until payment be made, without being subject to execution at the suit of the creditors of the vendee, and the title of the vendor is preferred to that of purchasers from the vendee. Possession by the vendee under a contract of sale containing a stipulation, whether verbal or in writing, that the property shall not pass until payment of the contract price, is not fraudulent, and creditors of the vendee cannot seize the property under execution until the condition be performed."

Illustrations.—Where wool was delivered to be manufactured into cloth on condition that before, during, and after manufacture it was to remain the property of the person by whom it was delivered until the payment of an agreed price therefor, it was held that this was a conditional sale, and the title remained in the vendor as against attaching creditors of the vendee before payment. *Barrett v. Pritchard*, 2 Pick. (Mass.) 512, 13 Am. Dec. 449.

Where, upon a contract for the sale of a steamboat, the purchaser was to make a cash payment and give notes for the balance of the price, whereupon the vendor was to give a bill of sale to the purchaser, the performance of these stipulations was a condition precedent to the passing of title, and until performance the property was not subject to execution of the creditors of the purchaser. *Hawthorne v. Bowman*, 3 Sneed (Tenn.) 524.

Where A delivered a watch to B to be sold by the latter upon condition that title was to remain in A until the watch was sold or an agreed price was paid for it, it was held that no title passed until one of these contingencies occurred, and the watch was not subject to attachment as the property of B. *Holt v. Holt*, 58 N. H. 276.

Where chattels are sold on credit, title being reserved by the vendor until payment, but the goods are delivered to the vendee, the latter, upon failure to pay at the time appointed, holds merely as bailee of the vendor and has no interest in the property subject to levy and

case of *bona fide* purchasers, the general rule above stated does not obtain, and creditors of the conditional vendee in possession are protected against

sale under execution, and if an execution against him be levied on the property the vendor may maintain trespass. *Fields v. Williams*, 91 Ala. 502; *Manning v. Wells*, (Ala. 1894) 16 So. Rep. 23.

Where property is sold at public sale, with the conditions thereof duly advertised and posted at the place of sale, the vendor's title will not be divested without a compliance with the conditions of sale, or of a subsequent agreement between vendor and vendee, who knew the conditions of the sale, by a seizure of the property while in the vendee's possession under an execution against him. *Williams v. Connaway*, 3 Houst. (Del.) 63.

Goods to Be Consumed.—Where provisions were sold on condition that they were to remain the property of the vendor until paid for, but with the understanding that the vendee might consume them in his family, it was held that the condition was valid and the title to the goods remained in the vendor until they were paid for or consumed, and they were not subject to attachment in behalf of a creditor of the vendee. *Armington v. Houston*, 38 Vt. 448, 91 Am. Dec. 366.

Property Sold Conditionally Not Liable to Distress.—Where the lessee of a hotel who owned the furniture therein leased the hotel and furniture to another for the unexpired term, for a specified sum in addition to the rent as it accrued under the original lease, the sub-lessee agreeing to keep the furniture insured, and not to sell, remove, or permit it to be removed, his immediate lessor agreeing, upon payment of the rent and the performance of the above covenants, to sell the furniture to the sub-lessee at the expiration of the term, and in case of the default of the sub-lessee his lessor was authorized to re-enter and take possession of the furniture and sell the same at auction, paying over the surplus, after retaining the amount of the unpaid rent, to the sub-lessee, it was held that as between the parties the transaction was a conditional sale, and no title vested in the sub-lessee until the performance of the conditions, and the property was not liable to distress for rent due from him. *Bean v. Edge*, 84 N. Y. 510. See also, that property sold conditionally is not subject to distress, *Tufts v. Stone*, 70 Miss. 54.

Attachment by Statute—Vermont—Tender of Payment.—It is provided by statute in Vermont that in sales of personal property where payment of the purchase money is by the contract of sale made a condition precedent to the transfer of title, and where the property has in pursuance of the contract passed into the possession of the vendee, and where the purchase money or a part thereof remains unpaid, a creditor of the vendee may attach or levy his execution upon the property, and upon payment or tender of payment of the unpaid purchase money to the vendor, his agent or attorney, within ten days after notice of the amount remaining unpaid, may hold the property discharged from the claim of such vendor. Rev. L., § 1186; *Towner v. Bliss*, 51 Vt. 59. Compare, as to the right to perfect title by pay-

ment or tender, prior to this statute, *Buckmaster v. Smith*, 22 Vt. 203; *Duncan v. Stone*, 45 Vt. 118; *Rowan v. State Bank*, 45 Vt. 160.

In *Alabama* it is held that a creditor of the purchaser of property, the title to which remains in the vendor until the price is paid, can subject such property to his debt only by paying the balance due thereon, or keeping good a tender thereof, or by applying to the courts for specific performance. *Bingham v. Vandegrift*, 93 Ala. 283.

In *Ohio* it is held that an officer attaching the property as the property of the conditional vendee does not acquire any interest therein or become entitled to the possession thereof by tendering to the vendor the amount of the purchase money remaining unpaid. *Sage v. Sleutz*, 23 Ohio St. 1.

Vendor Taking Possession—Demand.—In case of an unrecorded vendor's lien, a vendor who takes possession of the property thereby acquires good title as against a subsequent attaching creditor of the vendee, although he did not demand the amount due, nor the property, and although he did not notify the vendee that he had taken possession under his lien, and the vendee did not know that he had. *Moses v. Rogers*, 62 Vt. 84.

Abandonment of Contract by Vendee.—Where a sale of goods was made, to be paid for "cash on arrival," and the vendee after receiving the property notified the vendor that he was unable to pay the price and that he had placed the property in the hands of a reliable party, subject to the vendor's order, it was held that the vendor might replevy the goods from a creditor of the vendee who had subsequently attached the property. *Daugherty v. Fowler*, 44 Kan. 628.

Action Before Time for Payment Held Premature.—It has been held that the vendor of property sold with a reservation of title until payment could not maintain an action for the recovery of the property against an attaching creditor or officer before the time for payment. *Newhall v. Kingsbury*, 131 Mass. 445; *Hurd v. Fleming*, 34 Vt. 169.

Demand.—Where the vendee has the right of possession until demand for the property, the vendor cannot before such demand maintain trover against an officer who has attached and sold the property as the property of the vendee. *Fairbank v. Phelps*, 22 Pick. (Mass.) 535.

Estoppel of Vendor.—Where property was sold with a reservation of title until payment, and the vendor at the same time took a mortgage on the property from the vendee to secure the payment, and the horses were attached as the vendee's property, and the vendor claimed title under the mortgage, it was held that title passed to the vendee by the sale and reverted in the vendor by virtue of the mortgage, and by taking the mortgage and claiming the property thereunder the vendor was estopped to deny the acquisition of title thereby, or to set up his original title. *Sprague v. Branch*, 3 Cush. (Mass.) 575.

the claims of the vendor.¹

c. MORTGAGEES. — Where property sold conditionally is mortgaged by the vendee to a third person, the mortgagee stands on the same footing as a *bona fide* purchaser, and acquires no title as against the vendor.²

1. In Colorado it has been held that a provision in a contract of sale that title shall remain in the vendor until payment is void as against creditors of the vendee without notice when the property is delivered to the vendee. *George v. Tufts*, 5 Colo. 162; *Weber v. Diebold Safe, etc., Co.*, 2 Colo. App. 68.

But such reservation of title is valid as to creditors with notice when no false credit has been induced by the ostensible ownership and possession of the vendee. *Jones v. Clark*, 20 Colo. 353, *overruling* on this point *George v. Tufts*, 5 Colo. 162.

Illinois. — Liens which treat the seller of personal property, who has delivered possession of it to a purchaser, as the owner until the payment or securing of the purchase money are constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the purchaser holding the possession. *Hewey v. Rhode Island Locomotive Works*, 93 U. S. 664; *Ketchum v. Watson*, 24 Ill. 591; *McCormick v. Hadden*, 37 Ill. 370; *Murch v. Wright*, 46 Ill. 487, 95 Am. Dec. 455; *Lucas v. Campbell*, 88 Ill. 447; *Van Duzor v. Allen*, 90 Ill. 499.

Where a Rhode Island company leased to certain Illinois railroad contractors a locomotive and tender at a specified rent, payable at stated times, with an agreement that if the rent was duly paid the locomotive and tender should become the property of the lessees, to whom possession was delivered, it was held that the transaction was a conditional sale, and the reservation of title by the lessor was void as against third persons unless recorded in compliance with the Chattel Mortgage Act, and this not having been done, the lessor could not recover the property as against an execution creditor of the lessee. *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, *following* *Murch v. Wright*, 46 Ill. 487, 95 Am. Dec. 455.

A *bona fide* creditor, under a judgment and execution, who acquires a lien on property sold conditionally, occupies the same position in all respects as a *bona fide* purchaser; the two stand on the same footing and will be equally protected. *Van Duzor v. Allen*, 90 Ill. 499.

In Pennsylvania creditors are placed upon the same footing as *bona fide* purchasers (see doctrine for this state, *supra*, this title, *Bona Fide Purchasers*), and where the contract is a bailment with an option to purchase, the right of the bailor is superior to that of creditors of the bailee. *Myers v. Harvey*, 2 P. & W. (Pa.) 478, 23 Am. Dec. 60; *Clark v. Jack*, 7 Watts (Pa.) 375; *M'Cullough v. Porter*, 4 W. & S. (Pa.) 177, 39 Am. Dec. 68; *Lehigh Coal, etc., Co. v. Field*, 8 W. & S. (Pa.) 232; *King v. Humphreys*, 10 Pa. St. 217; *Rowe v. Sharp*, 51 Pa. St. 26; *Henry v. Patterson*, 57 Pa. St. 346; *Becker v. Smith*, 59 Pa. St. 469; *Crist v. Kleber*, 79 Pa. St. 290; *Enlow v. Klein*, 79 Pa. St. 488; *Christie's Appeal*, 85 Pa. St. 463; *Dando v. Foulds*, 105 Pa. St. 74; *Edwards's Appeal*, 105 Pa. St. 103; *Ditman v. Cottrell*, 125 Pa. St. 606; *Wert*

v. H. M. Collender Co., (Pa. 1887) 9 Atl. Rep. 331; *Hamilton v. Billington*, 163 Pa. St. 76; *Durr v. Replogle*, 167 Pa. St. 347; *Goss Printing Press Co. v. Jordan*, 171 Pa. St. 474; *Jones v. Wands*, 1 Pa. Super. Ct. Rep. 269; *Wieder v. Roeschman*, 13 Pa. Co. Ct. Rep. 94; *Sterling v. Goodrich*, 23 Pittsb. Leg. J. (Pa.) 174.

But where the transaction is a conditional sale, creditors of the vendee are preferred to the vendor. *Martin v. Mathiot*, 14 S. & R. (Pa.) 214, 16 Am. Dec. 491; *Price v. McCallister*, 3 Grant's Cas. (Pa.) 248; *Rose v. Story*, 1 Pa. St. 190, 44 Am. Dec. 121; *Haak v. Linderman*, 64 Pa. St. 499, 3 Am. Rep. 612; *Wylie's Appeal*, 90 Pa. St. 210; *Brunswick, etc., Co. v. Hoover*, 95 Pa. St. 508; *Forrest v. Nelson*, 108 Pa. St. 481; *Peek v. Heim*, 127 Pa. St. 500, 14 Am. St. Rep. 865; *Ott v. Sweatman*, 166 Pa. St. 217; *Stiles v. Whittaker*, 1 Phila. (Pa.) 271; *Henkels v. Brown*, 4 Phila. (Pa.) 299; *Heppel v. Speakman*, 7 Phila. (Pa.) 117; *Kestner v. Keiser Cigar Co.*, 4 Pa. Dist. Rep. 479.

Whatever be the form of the contract, if it is in fact a conditional sale the reservation of title is void as to creditors. In such case calling the contract a "consignment" is no better than any other device. *Thompson v. Paret*, 94 Pa. St. 278; *Peek v. Heim*, 127 Pa. St. 500, 14 Am. St. Rep. 865.

But in the case of an actual consignment the property is not liable to execution. *M'Cullough v. Porter*, 4 W. & S. (Pa.) 177, 39 Am. Dec. 68; *King v. Humphreys*, 10 Pa. St. 217.

Where the contract is essentially a sale and not a bailment the court will so construe it, notwithstanding an express stipulation that the agreement "is not a contract of sale, conditional or otherwise." *Ott v. Sweatman*, 166 Pa. St. 217.

2. Mortgagees. — *Cragin v. Coe*, 29 Conn. 51; *Goodwin v. May*, 23 Ga. 205; *Standard Implement Co. v. Parlin, etc., Co.*, 51 Kan. 544; *Ullman v. Barnard*, 7 Gray (Mass.) 554; *Hood v. Olin*, 68 Mich. 165; *Herring v. Willard*, 2 Sandf. (N. Y.) 418; *Knowlson v. Sprong*, 10 N. Y. Wkly. Dig. 81; *Shoshonetz v. Campbell*, 7 Utah 46. See also *Begole v. Stone*, 72 Mich. 71.

Vendor May Recover from Purchaser under Mortgage. — Where upon a conditional sale of personal property the vendor reserved title until payment of the notes given for the price, and transferred these notes, retaining title to the property for the benefit of his transferees, who recovered judgment thereon, which judgment was not paid, it was held that the vendor might maintain an action of trover for the use of his transferees against the purchaser of the property at a sale under a mortgage executed by the vendee, such purchaser being aware of the condition. *Thomason v. Lewis*, 103 Ala. 426; *Piedmont Land, etc., Co. v. Thomson-Houston Motor Co.*, (Ala. 1892) 12 So. Rep. 768; *Harbison v. Tufts*, 1 Colo. App. 140.

The Assignee of the Mortgagee of the conditional vendee acquires no title as against the

d. ASSIGNEE FOR THE BENEFIT OF CREDITORS. — Since the assignee for the benefit of creditors succeeds to such rights only as the assignor had at the time of the assignment, he can acquire no title to property held by the assignor under a contract of conditional sale, where the title to such property has not yet become vested in the assignor by the performance of the condition.¹

XI. RECORDING ACTS. — In many of the states the rule that no title good as against the conditional vendor can be acquired by third persons from the vendee in possession has been changed by statutes providing that conditional sales or other agreements in which the transfer of title to personal property is made to depend upon the payment of the price or upon some other condition, where possession is delivered under the contract, must be in writing and properly filed or recorded in order to be valid against subsequent creditors and purchasers without notice.²

vendor. *Harbison v. Tufts*, 1 Colo. App. 140; *Benner v. Puffer*, 114 Mass. 376.

Right to Remove Fixtures. — The vendor of personal property sold on condition that title is not to pass to the vendee until payment does not lose his reserved right by the vendee's placing it in a building for the service and improvement thereof, and he may enforce his right to retake the property against a creditor of the vendee with a mortgage on the building. *Baldwin v. Young*, 47 La. Ann. 1466; *Case Mfg. Co. v. Garven*, 45 Ohio St. 289.

A conditional sale of a machine, under the terms of which the title does not pass to the vendee until the payments provided for are made, will not enable the mortgagee of the house in which the machine is placed to sell the same at a foreclosure sale under a mortgage of the house and all the machinery therein, or to be thereafter placed therein, although he had no notice of the terms of the sale of the machine. *Defiance Mach. Works v. Trisler*, 21 Mo. App. 69.

1. Assignee for Creditors — *United States*. — *Truman v. Hardin*, 5 Sawy. (U. S.) 115.

Florida. — *Campbell Printing Press, etc., Co. v. Walker*, 22 Fla. 412.

Illinois. — *Hercules Iron Works v. Hummer*, 49 Ill. App. 598.

Maine. — *Ballantyne v. Appleton*, 82 Me. 570; *Pinkham v. Appleton*, 82 Me. 574.

Michigan. — *Edwards v. Symons*, 65 Mich. 348.

Mississippi. — *Gayden v. Tufts*, 68 Miss. 691.

New Hampshire. — *Adams v. Lee*, 64 N. H. 421.

New York. — *Haggerty v. Palmer*, 6 Johns. Ch. (N. Y.) 437; *Keeler v. Field*, 1 Paige (N. Y.) 312; *Dutton v. Gale Mfg. Co.*, 43 Hun (N. Y.) 198; *Brewer v. Ford*, 54 Hun (N. Y.) 116; *Campbell Printing Press Co. v. Walker*, 114 N. Y. 7.

Pennsylvania. — *Collins v. Houston*, 138 Pa. St. 481.

Wisconsin. — *Wadleigh v. Buckingham*, 80 Wis. 230.

See also *National Cash Register Co. v. Farmers' Nat. Bank*, 31 Cinc. Wkly. L. Bul. 114.

Compare in *Vermont* and *Wisconsin*, where the contract is not recorded, *Collender Co. v. Marshall*, 57 Vt. 232; *S. L. Sheldon Co. v. Mayers*, 81 Wis. 627.

See the title **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**, vol. 3, p. 47.

2. Recording Acts. — 1 *Stimson's Amer. Stat. Law*, § 4553.

Connecticut. — All contracts for the sale of personal property, conditioned that the title thereto shall remain in the vendor after delivery, shall be in writing and acknowledged and recorded, or they shall be regarded as absolute sales except as against the vendor and his heirs. Public Acts, 1893, c. 147.

This act does not prevent a recovery of the property by the original vendor from a *bona fide* purchaser from the vendee before payment. *Lee Brothers Furniture Co. v. Cram*, 63 Conn. 433.

Georgia. — Conditional sales are invalid as against third persons unless in writing, executed, attested, and recorded as in the case of chattel mortgages. Code, § 1955a; *Rhode Island Locomotive Works v. Empire Lumber Co.*, 91 Ga. 639; *Merchants', etc., Bank v. Cottrell*, 96 Ga. 168; *Bond v. Brewer*, 96 Ga. 443.

A contract of conditional sale not in writing is void as to third persons. Code, § 1955; *Mann v. Thompson*, 86 Ga. 347.

As to subsequent creditors of the purchaser, a conditional sale of chattels, not duly recorded, is the same as an absolute sale. *Steen v. Harris*, 81 Ga. 681. See also *Gartrell v. Clay*, 81 Ga. 327.

But as to a prior judgment creditor of the vendee, the failure to record is immaterial. *Conder v. Holleman*, 71 Ga. 93.

The conditional vendor is under no duty to the vendee to record the contract of sale, or take other precaution against loss from a wrongful sale by the latter. *Chambers v. State*, 85 Ga. 220.

The written contract of a conditional sale must be recorded in the county where the vendee resides; and the record in another county will not suffice. *Cohen v. Chandler*, 79 Ga. 427. See also *Bond v. Brewer*, 96 Ga. 443.

The vendor's title, where the contract is not recorded, will prevail over that of a mortgagee without notice, where the mortgage is also not recorded. *Cottrell v. Merchants', etc., Bank*, 89 Ga. 508.

Iowa. — No sale, contract, or lease wherein the transfer of title or ownership of personal property is made to depend upon any condition shall be valid against any creditor or purchaser of the vendee or lessee in actual possession obtained in pursuance thereof, unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded the same as chattel mortgages. McClain's Anno. Stat., § 1922; statute construed, *Myer*

Chattel Mortgage Acts. — In some jurisdictions conditional sales have been

v. Western Car Co., 102 U. S. 1; *South Bend Iron Works v. Cottrell*, 31 Fed. Rep. 254; *Manhattan Trust Co. v. Sioux City Cable R. Co.*, 76 Fed. Rep. 658; *Pash v. Weston*, 52 Iowa 675; *Budlong v. Cottrell*, 64 Iowa 234; *Warner v. Johnson*, 65 Iowa 126; *Moline Plow Co. v. Braden*, 71 Iowa 141; *Vorse v. Loomis*, 86 Iowa 522; *Wright v. Barnard*, 89 Iowa 166.

A bill of sale executed and recorded by the seller two months after the actual sale and delivery of possession of the property was, under this statute, held not to impart constructive notice to a purchaser, from the person having possession, of the conditions upon which the sale was made. *Pash v. Weston*, 52 Iowa 675.

As to what is actual possession within the statute, see *Vorse v. Loomis*, 86 Iowa 522.

The delivery of a watch on trial, with an agreement that the party receiving it may purchase it if after a certain time it proves to be satisfactory, does not constitute a conditional sale within this section until the expiration of the time limited, and before that time the watch is not subject to levy in the hands of the intended purchaser, although the contract be not recorded. *Mowbray v. Cady*, 40 Iowa 604.

For other examples, see *Crooker v. Brown*, 40 Iowa 144; *Conable v. Lynch*, 45 Iowa 84; *Dorsey v. Banks*, 88 Iowa 595.

Mortgagees are creditors within the meaning of the statute. *Taylor v. Burlington, etc.*, R. Co., 4 Dill. (U. S.) 570.

Maine. — No agreement that personal property bargained and delivered to another, for which a note is given, shall remain the property of the payee till the note is paid is valid unless it is made and signed as a part of the note; nor when it is made and signed in a note for more than thirty dollars, unless it is recorded like mortgages or personal property. *Rev. Stat.*, c. 111, § 5; *Field v. Gellerson*, 80 Me. 270; *Boynton v. Libby*, 62 Me. 253; *Holt v. Knowlton*, 86 Me. 456.

The statute does not apply to an agreement for the sale of goods by an agent for his principal, where title is reserved in the latter until payment. *Thomas v. Parsons*, 87 Me. 203.

An order for personal property, describing it, and specifying terms of payment, and that the property shall remain the property of the vendor, is not a note for the payment of the property within the meaning of the statute. *Morris v. Lynde*, 73 Me. 88.

For instrument held to be within the meaning of the statute, see *Nichols v. Ruggles*, 76 Me. 25; *Hill v. Nutter*, 82 Me. 199; *Cunningham v. Trevitt*, 82 Me. 145.

Minnesota. — Every note or other evidence of indebtedness, or contract, the conditions of which are that the title to the property for which the said note, etc., is given remains in the vendor, is void as against creditors of the vendee, and subsequent purchasers and mortgagees in good faith, unless the note, etc., or true copies thereof, or if the contract be oral a memorandum thereof, be recorded. *Stat.* 1891, §§ 4216-4221. See *Morse v. Chicago, etc.*, R. Co., 73 Iowa 226.

The statute applies to an oral exchange of horses, in which one party reserves the right to

return the one delivered to him and retake his own in case the former should be diseased. *Kinney v. Cay*, 39 Minn. 210.

A sale for cash on delivery is not within the statute. *National Bank of Commerce v. Chicago, etc.*, R. Co., 44 Minn. 224, 20 Am. St. Rep. 566.

Mississippi. — Conditional sales of goods or chattels are void as to creditors or purchasers of one remaining in possession for three years, unless in writing, acknowledged and recorded. *Code*, § 4227; *Jennings v. Wilson*, 71 Miss. 42; *Mask v. Allen*, (Miss. 1894) 17 So. Rep. 82; *Lewis v. Gilmer*, 3 Smed. & M. (Miss.) 560. See also *Roach v. Anderson*, 28 Miss. 234.

When recorded, a contract of conditional sale is valid as against the vendee's creditors, such contracts not being within the *Code*, § 1300. *Tufts v. Stone*, 70 Miss. 54.

A sale of an undivided interest in a partnership business, for part cash and the balance of the price in a note reciting that title is not to pass until payment, is a conditional sale, and good as to purchasers without notice, though not recorded. *Journey v. Priestly*, 70 Miss. 584.

Missouri. — Conditional sales of personal property must be evidenced by writing, executed, acknowledged, and recorded as in case of chattel mortgages; otherwise a condition is void as to subsequent purchasers in good faith, and creditors. *Rev. Stat.*, § 5178; *Weslein Land, etc.*, *Co. v. Plumb*, 27 Fed. Rep. 598; *Eidson v. Hedger*, 38 Mo. App. 52; *Michigan Buggy Co. v. Woodson*, 59 Mo. App. 550; *Peters v. Featherstun*, 61 Mo. App. 466; *Oester v. Sitlington*, 115 Mo. 247.

So also in the case of personal property sold to be paid for in instalments, or leased, rented, hired, or delivered to another on condition that the same shall belong to the person to whom it is delivered whenever paid for, the title to remain in the original owner until the performance of the condition. *Rev. Stat.*, § 5180; *Gentry v. Templeton*, 47 Mo. App. 55; *F. B. Hauck Cloth Co. v. Brothers*, 61 Mo. App. 381; *Columbus Buggy Co. v. Hord*, 2 Mo. App. Rep. 1134.

The statutes apply to sales between partners. *Redenbaugh v. Kelton*, 130 Mo. 558.

Prior as well as subsequent creditors are protected by the statute. *Collins v. Wilhoit*, 35 Mo. App. 585.

A sale for cash on delivery is not a conditional sale within the meaning of section 5178. *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 558.

A creditor who takes a conveyance of the property sold conditionally merely in payment of a precedent debt is not within the protection of the statute. *Western Land, etc.*, *Co. v. Plumb*, 27 Fed. Rep. 598.

Nebraska. — Contracts of conditional sales are invalid as to purchasers or judgment creditors of the vendee in possession without notice, unless in writing and recorded. *Consol. Stat.* 1891, § 1808; *Romberg v. Hughes*, 18 Neb. 581; *Peterson v. Tufts*, 34 Neb. 8.

A mortgagee is not a purchaser within the statute. *McCormick Harvesting Mach. Co. v. Callen*, 48 Neb. 849; *Campbell Printing Press, etc.*, *Co. v. Dyer*, 46 Neb. 830.

held to be within the provisions of the statutes requiring chattel mortgages to

New Hampshire. — In New Hampshire a contract with a stipulation that when the purchase price of goods is fully paid in instalments they shall become the property of the buyer, amounts to a conditional sale, and is invalid against creditors without a written memorandum recorded as required by New Hampshire Laws of 1885, c. 30, § 1. *Gerrish v. Clark*, 64 N. H. 492.

New Jersey. — Gen. Stat. 1896, p. 891; *Knowles Loom Works v. Vacher*, 57 N. J. L. 490.

The Act of 1895 requiring the recording of instruments attesting the conditional sale of chattels does not invalidate such sales in favor of creditors if the instrument be unrecorded; in such case they are avoided only in favor of subsequent purchasers and mortgagees. Nor does the statute apply when the vendor is not a resident of the state and the articles sold are not in it. *Wooley v. Geneva Wagon Co.*, (N. J. 1896) 35 Atl. Rep. 789.

New York. — Under the Act of 1884 contracts for the conditional sale of goods and chattels where the things sold are delivered to the vendee are void as to subsequent purchasers and mortgagees in good faith unless a true copy thereof shall be filed in the proper place. *Banks' Rev. Stat.* (4th ed.), p. 2522; *Laws 1884*, c. 315; *Moyer v. McIntyre*, 43 Hun (N. Y.) 58.

A furnace placed in a dwelling house, under a contract of sale with a reservation of title until payment, passes to a mortgagee of the premises, where the contract is not filed as required by the statute. *Duffus v. Howard Furnace Co.*, 15 Misc. Rep. (Onondaga County Ct.) 169.

A mortgagee taking a mortgage for a pre-existing debt without any new consideration is not a mortgagee within the meaning of the statute. *Duffus v. Howard Furnace Co.*, 15 Misc. Rep. (Onondaga County Ct.) 169.

A pledgee of property held under a contract of conditional sale is not within the protection of the statute. *Canton Surgical, etc., Co. v. Webb*, (C. Pl.) 16 N. Y. Supp. 932; *La Fetra v. Glover*, 10 Misc. Rep. (N. Y. Super. Ct.) 70; *Kauffman v. Klang*, 16 Misc. Rep. (N. Y. Supreme Ct.) 379.

Creditors are not included in the statute. *Frank v. Batten*, 49 Hun (N. Y.) 91.

North Carolina. — All conditional sales of personal property in which the title is retained by the bargainor shall be reduced to writing and registered, like chattel mortgages. Code 1883, § 1275; *Laws of 1891*, c. 240, p. 195; *Brem v. Lockhart*, 93 N. Car. 191; *Foreman v. Drake*, 98 N. Car. 311; *Glasscock v. Hazell*, 109 N. Car. 145; *Clark v. Hill*, 117 N. Car. 11.

A contract of hiring is not within the statute. *Foreman v. Drake*, 98 N. Car. 311.

The statute does not apply to a case where goods are shipped to be paid for by notes executed and delivered by the vendee concurrently with delivery, for in that case there is no sale, conditional or otherwise, until the notes are executed and delivered. *Millhiser v. Erdman*, 98 N. Car. 292, 2 Am. St. Rep. 334.

Registration in the county in which the vendee resides is sufficient, without registration in the county to which he afterwards removes. *Barrington v. Skinner*, 117 N. Car. 47.

Ohio. — 2 Rev. Stat. 1892, § 7880. This statute is not in conflict with either § 16 or § 19 of art. 1, or § 16 or § 28 of art. 2 of the Ohio constitution. *Weil v. State*, 46 Ohio St. 450.

It is not necessary, in order to preserve the rights of the vendor, to refile the contract of conditional sale as a chattel mortgage. *National Cash Register Co. v. Farmers' Nat. Bank*, 31 Cinc. Wkly. L. Bul. 114.

As to what is not a sufficient compliance with the statute, see *Remington v. Central Press Assoc. Co.*, 3 Ohio N. P. 258, 4 Ohio Dec. 337.

South Carolina. — Where an iron safe was sold and delivered to a merchant, with his name painted thereon by the vendor, and the notes given in payment contained a stipulation that title was to remain in the vendor until payment, but the contract was not recorded, and the safe was attached at the suit of subsequent creditors without notice, and sold to a purchaser with notice of the vendor's claim, it was held that the notes were instruments "of writing in the nature of a mortgage," requiring recording under the Act of 1843 (Gen. Stat., § 2346), to be valid against subsequent creditors or purchasers for value without notice, and that the purchaser got a good title. *Herring v. Cannon*, 21 S. Car. 212, 53 Am. Rep. 661.

For a similar case, see *McKnight v. Gordon*, 13 Rich. Eq. (S. Car.) 222, 94 Am. Dec. 164.

A reservation of title to personal property sold on condition that title shall remain in the vendor until payment is valid; but since the Act of 1843 (Gen. Stat., c. 98, § 6), such reservation is void as to subsequent creditors and purchasers without notice, unless in writing. *Talmadge v. Oliver*, 14 S. Car. 522.

As to the validity of such reservation when verbal, prior to the Act of 1843, see *Dupree v. Harrington*, Harp. L. (S. Car.) 391; *Reeves v. Harris*, 1 Bailey L. (S. Car.) 563; *Bennett v. Sims*, Rice L. (S. Car.) 421; *Cochran v. Roundtree*, 3 Strobb. L. (S. Car.) 217.

Texas. — All reservations of the title to or property in chattels as security for the purchase money thereof shall be held to be chattel mortgages, and shall, when possession is delivered to the vendee, be void as to creditors and *bona fide* purchasers, unless such reservations be in writing and registered as required of chattel mortgages. 2 Sayles' Civil Stat., art. 3190a; *Sinker v. Comparet*, 62 Tex. 470; *Key v. Brown*, 67 Tex. 300; *Loving Pub. Co. v. Johnson*, 68 Tex. 273; *Brady v. Nagle*, (Tex. Civ. App. 1895) 29 S. W. Rep. 943.

The creditors protected must be lien creditors. *Parlin, etc., Co. v. Harrell*, 8 Tex. Civ. App. 368.

Where on receipt of seventy-five dollars a piano was delivered by A to B, under a writing reciting a hiring, and promising quarterly payments of fifty dollars each in addition so long as it should be kept, to return it on demand, not to remove it without A's consent, and to keep it insured; also stipulating that on further payment of three hundred and fifty dollars in equal monthly instalments the piano was to become B's; and B sold the piano to a purchaser in good faith; it was held that title passed to the latter, the agreement not having

be recorded,¹ though it is generally held otherwise.² But in doubtful cases, where it is not clear whether the written contract evidences a conditional sale or a chattel mortgage, it seems that the preference will be given to the latter construction so as to bring the contract within the provisions of the Chattel Mortgage Acts.³

been recorded. *Knittel v. Cushing*, 57 Tex. 354, 44 Am. Rep. 598.

Vermont.—No lien reserved on personal property sold conditionally and passing into the hands of the conditional purchaser shall be valid against attaching creditors or subsequent purchasers without notice, unless the vendor takes a written memorandum signed by the purchaser, witnessing such lien, and causes it to be recorded in the proper office within thirty days after delivery, Rev. L. 1880, § 1992; *McPhail v. Gerry*, 55 Vt. 174; *Church v. McLeod*, 58 Vt. 541.

In *Dickerman v. Ray*, 55 Vt. 65, the statute was held not to apply.

A conditional sale should be recorded to prevent an attachment of the property sold by the vendee's creditor. *Whitcomb v. Woodworth*, 54 Vt. 544; *Cole v. Howe*, 50 Vt. 35; *Fairbanks v. Davis*, 50 Vt. 251; *Phelps v. Bemis*, 51 Vt. 487; *Collender Co. v. Marshall*, 57 Vt. 232.

The record must be made within thirty days after the property is delivered. Rev. L., § 1992; *Bugbee v. Stevens*, 53 Vt. 389; *Cole v. Howe*, 50 Vt. 35.

It is not necessary, to protect the vendor of animals sold conditionally, that their increase accruing before the performance of the condition should be specified in the memorandum. *Clark v. Hayward*, 51 Vt. 14.

A reservation in a deed of real estate of crops to be grown thereon, as security for the purchase money of the land, is not a conditional sale within the meaning of the statute. *Batchelder v. Jenness*, 59 Vt. 104.

Virginia.—A conditional sale must be recorded to be good against creditors and *bona fide* purchasers. Code 1887, § 2462; Pub. Acts 1889-90, c. 135, p. 108. See *Hash v. Lore*, 88 Va. 716.

A mandamus will not lie to compel the clerk of the court to record such a contract, under these acts, unless it be acknowledged or proved as required by § 2500, Code 1887. *Callahan v. Young*, 90 Va. 574.

Washington.—A conditional sale of personal property, followed by possession of the vendee, shall be absolute as to creditors unless a memorandum of such sale executed by the parties be filed. Laws 1893, p. 253.

For a contract held not to be a conditional sale within the statute, see *Peterson v. Woolery*, 9 Wash. 390.

West Virginia.—In order that a conditional sale may be good as against third parties, notice thereof must be recorded in the office of the clerk of the county court of the county where the property is. Code 1887, c. 74, § 3; *Baldwin v. Van Wagner*, 33 W. Va. 293.

Wisconsin.—A contract for the conditional sale of property must be in writing, subscribed by the parties, and a copy thereof filed in the office of the clerk of the town, city, or village where the property may be at the time of making the sale. Rev. Stat., §§ 2317, 2319b;

Rawson Mfg. Co. v. Richards, 69 Wis. 643; *Kellogg v. Costello*, 93 Wis. 232.

The object of the statute is to place such contracts on the footing of chattel mortgages, and if not reduced to writing and filed in the proper office they are void as to third persons. *Williams v. Porter*, 41 Wis. 422; *Kimball v. Post*, 44 Wis. 471.

The conditions of such a contract signed only by the purchaser are void as against the creditors of the purchaser, and the property may be subjected to their claim. *S. L. Sheldon Co. v. Mayers*, 81 Wis. 627.

It will be conclusively presumed in favor of attaching creditors that chattels in the possession of the conditional vendee at the time of attachment belong to him, if the contract of sale is not properly filed, and they have no actual notice of his conditional title. *Rawson Mfg. Co. v. Richards*, 69 Wis. 643; *Thomas v. Richards*, 69 Wis. 671.

A mere trespasser is not within the protection afforded by the statute. *Kimball v. Post*, 44 Wis. 471.

A Contract for the Sale of an Interest in Lands is not, as standing timber, within the provisions of Rev. Stat., § 2317. *Lillie v. Dunbar*, 62 Wis. 198. See also *Wing v. Thompson*, 78 Wis. 256; *W. W. Kimball Co. v. Mellon*, 80 Wis. 133; *Bent v. Hoxie*, 90 Wis. 625.

Where the goods of a nonresident conditional purchaser were in transit from a foreign country when the contract was signed, and the contract was a foreign contract, valid where made, it will be enforced though it was never filed as required by Rev. Stat., § 2317. *Mershon v. Moore*, 76 Wis. 502.

Contract Must Be in Writing—Massachusetts.—Under Massachusetts Stat. 1884, c. 313, contracts of conditional sales of furniture or other household effects must be in writing, and a copy thereof furnished to the vendee.

This statute applies to a sale of a piano. *Lee v. Gorham*, 165 Mass. 130.

1. *Benjamin on Sales*, § 461.

Illinois.—*Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664; *Daniels v. Thompson*, 48 Ill. App. 393.

Kentucky.—*Hart v. Barney, etc., Mfg. Co.*, 7 Fed. Rep. 543.

Missouri.—*Heryford v. Davis*, 102 U. S. 235.

2. **Conditional Sales Not Within Chattel Mortgage Acts.**—*Webb on Record of Title*, § 249; *Rogers Locomotive Works v. Lewis*, 4 Dill. (U. S.) 158; *The Marina*, 19 Fed. Rep. 760; *Campbell Printing Press, etc., Co. v. Walker*, 22 Fla. 412; *Grant v. Skinner*, 21 Barb. (N. Y.) 581; *National Cash Register Co. v. Farmers' Nat. Bank*, 31 Cinc. Wkly. L. Bul. 114; *Lima Mach. Works v. Parsons*, 10 Utah 105; *McComb v. Donald*, 82 Va. 903; *W. W. Kimball Co. v. Mellon*, 80 Wis. 133.

3. *Benjamin on Sales*, §§ 452-460. See *supra*, this title, *Conditional Sales Distinguished from Other Contracts—From Chattel Mortgages*.

In the Absence of Statutes so providing contracts of conditional sale need not be recorded.¹

An Unauthorized Record of such contracts is not notice to third persons of the vendor's claim,² nor is the record of a contract not executed as required by statute such notice.³

As Between the Parties registration is unnecessary,⁴ and hence it has been held that an assignee of the vendee for the benefit of creditors, since he takes only the title of his assignor, is not protected by the statutes,⁵ especially when he has actual notice.⁶

Effect of Actual Notice. — Third persons with actual notice of the reservation of title are not within the protection afforded by the statutes, and actual notice has the same effect as a record regularly made as required by law.⁷

Statutes Not Retroactive. — It has been held that the statutes requiring the registration of contracts of conditional sale do not apply to such contracts entered into before the statutes went into effect.⁸

1. *Tennessee*. — Such contracts need not be recorded in Tennessee. *Bradshaw v. Thomas*, 7 Yerg. (Tenn.) 497; *Buson v. Dougherty*, 11 Humph. (Tenn.) 50; *McCombs v. Guild*, 9 Lea (Tenn.) 81.

Wyoming. — Nor in Wyoming. *Warner v. Roth*, 2 Wyoming 63.

2. *Fairbanks v. Eureka Co.*, 67 Ala. 109.

3. Thus, where the statute requires the contract to be "subscribed by the parties," the record of a contract signed by the vendee only is not constructive notice. *W. W. Kimball Co. v. Mellon*, 80 Wis. 133; *S. L. Sheldon Co. v. Mayers*, 81 Wis. 627.

So also where the instrument is not acknowledged or attested when this is required. *Derrick v. Pierce*, 94 Ga. 466; *Cunningham v. Cureton*, 96 Ga. 489.

4. *Registry Unnecessary as Between Parties*. — *McCormick v. Stevenson*, 13 Neb. 70; *Butts v. Screws*, 95 N. Car. 215; *Kornegay v. Kornegay*, 109 N. Car. 188; *Parlin, etc., Co. v. Harrell*, 8 Tex. Civ. App. 368; *San Antonio Brewing Assoc. v. Arctic Ice Mach. Mfg. Co.*, 81 Tex. 99; *Avery v. Mansur, etc., Implement Co.*, (Tex. Civ. App. 1896) 37 S. W. Rep. 466.

Where the sale of a chattel is conditional, the vendor reserving title, he is under no duty to the vendee to record the contract of sale, or take other precautions against loss from any wrongful sale of the property which may be made by the latter. *Chambers v. State*, 85 Ga. 220.

5. *Assignee Not Protected*. — *Warner v. Jameson*, 52 Iowa 70; *Peet v. Spencer*, 90 Mo. 384; *Tufts v. Thompson*, 22 Mo. App. 564; *Thomas Mfg. Co. v. Huff*, 62 Mo. App. 124; *Adams v. Lee*, 64 N. H. 421; *San Antonio Brewing Assoc. v. Arctic Ice Mach. Mfg. Co.*, 81 Tex. 99. Compare, in *Vermont*, *Collender Co. v. Marshall*, 57 Vt. 232.

6. *Warner v. Jameson*, 52 Iowa 70.

7. *Actual Notice Equivalent to Registration*. — *Larned First Nat. Bank v. Tufts*, 53 Kan. 710; *Dyer v. Thorstad*, 35 Minn. 534; *Coover v. Johnson*, 86 Mo. 533; *McCormick v. Stevenson*, 13 Neb. 70; *Norton v. Pilger*, 30 Neb. 860; *Batchelder v. Sanborn*, 66 N. H. 192; *Kelsey v. Kendall*, 48 Vt. 24; *McPhail v. Gerry*, 55 Vt. 174.

The fact that the registration of a contract of conditional sale is defective is immaterial as to persons with actual notice. *Morton v. Frick Co.*, 87 Ga. 230.

But there must be notice actual or constructive; the fact that knowledge of the condition might have been obtained by ordinary diligence is not sufficient. *Moline Plow Co. v. Braden*, 71 Iowa 141.

What Is Sufficient Notice. — The fact that the sheriff, when executing the attachment, found the conditional contract of sale among the vendee's papers, is not sufficient to charge him with actual notice thereof, so as to defeat the attachment; nor is notice to the sheriff alone sufficient; it must be brought home to the creditor; and where the evidence as to whether the creditor, his agent, or the sheriff had actual notice or reasonable cause to believe that the vendee's title was conditional, is not conclusive, the question must be submitted to the jury. *Thomas v. Richards*, 69 Wis. 671.

Notice to Intermediate Purchaser. — Where a chattel sold under a contract of conditional sale not recorded as required by Iowa Code, § 1922, is sold by the vendee to a third person with notice of the claim of the original vendor, and the second vendee resells to another without notice, the latter gets a good title as against the original vendor. *National Cash Register Co. v. Maloney*, (Iowa 1895) 64 N. W. Rep. 618.

8. *Statutes Requiring Registration Not Retroactive*. — *Bowen v. Frick*, 75 Ga. 786; *Knoulton v. Redenbaugh*, 40 Iowa 114; *Moseley v. Shattuck*, 43 Iowa 540; *Standard Implement Co. v. Parlin, etc., Co.*, 51 Kan. 544; *Kingsland Ferguson Mfg. Co. v. Culp*, 85 Mo. 548; *Blunk v. Kelley*, 9 Neb. 442; *Payne v. Batterson*, 22 N. Y. Wkly. Dig. 109; *Harrell v. Godwin*, 102 N. Car. 330; *Perry v. Young*, 105 N. Car. 463; *Case Mfg. Co. v. Garven*, 45 Ohio St. 289; *Campbell Printing Press, etc., Co. v. Powell*, 78 Tex. 53.

The *Georgia* Act of 1881 (Code, § 1955a), making "the existing statutes and laws of this state in relation to the registration and record of mortgages on personal property" applicable to conditional sales of chattels, refers only to the statutes and laws existing at the time of its passage. *Bond v. Brewer*, 96 Ga. 443.

CONDITIONS.

BY ROBERT CLOWRY CHAPMAN.

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CROSS-REFERENCES.

For matters of PROCEDURE, see ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 4, p. 627.

As to Conditions in Bonds, see the titles BONDS, vol. 4, p. 618; *OFFICIAL BONDS*.

As to Conditional Contracts, see the title CONTRACTS.

As to Conditional Sales, see the title CONDITIONAL SALES.

As to other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles: ACT OF GOD, vol. 1, p. 584; *BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS*, vol. 5, p. 2; *COVENANTS; DEEDS; IMPOSSIBLE CONTRACTS; LANDLORD AND TENANT; LEASES; LEGACIES AND DEVISES; MARRIAGE; MINES AND MINING; PAROL EVIDENCE; PERPETUITIES; REMAINDERS AND EXECUTORY INTERESTS; RESTRAINTS ON ALIENATION; SEPARATION; SPENDTHRIFTS AND SPENDTHRIFT TRUSTS; WATERS AND WATERCOURSES; WILLS*.

I. DEFINITIONS AND ORIGIN — 1. In General. — As comprehended by this treatise, a condition is a qualification or restriction annexed to a deed or devise, by virtue of which an estate is made to vest, to be enlarged or defeated, upon the happening or not happening of a particular event, or the performance or nonperformance of a particular act.¹ A condition may be express or implied, precedent or subsequent.

2. Express Condition. — An express condition, otherwise called a condition in deed, is one declared in terms in the deed or instrument by which the estate is created.²

3. Implied Condition. — An implied condition, or condition in law, is one which the law implies either from its being always understood to be annexed to certain estates, or as annexed to estates held under certain circumstances.³

4. Condition Precedent. — A condition precedent is, as the term implies, such as must happen or be performed before the estate dependent upon it can arise or be enlarged.⁴

5. Condition Subsequent. — A condition subsequent is one that, when it does or does not happen, is or is not performed, as the case may be, defeats the estate.⁵

1. The Term Defined. — The elements of this definition combine those in *Laberee v. Carleton*, 53 Me. 213, and in *Raley v. Umatilla County*, 15 Oregon 179, 3 Am. St. Rep. 142. "A condition is a qualification or restriction annexed to a conveyance." *Laberee v. Carleton*, 53 Me. 211. "An estate upon condition is 'one which is made to vest, to be enlarged or defeated, upon the happening or not happening of some event.'" *Raley v. Umatilla County*, 15 Oregon 179, 3 Am. St. Rep. 142.

2. Express Condition. — *Raley v. Umatilla*

County, 15 Oregon 179, 3 Am. St. Rep. 142.

3. Implied Condition. — *Raley v. Umatilla County*, 15 Oregon 179, 3 Am. St. Rep. 142.

4. Condition Precedent. — *Vanhorne v. Dorrance*, 2 Dall. (Pa.) 317; *Winthrop v. McKim*, 51 How. Pr. (N. Y. Supreme Ct.) 327; *Raley v. Umatilla County*, 15 Oregon 179, 3 Am. St. Rep. 142.

5. Condition Subsequent. — *Winthrop v. McKim*, 51 How. Pr. (N. Y. Supreme Ct.) 327; *Raley v. Umatilla County*, 15 Oregon 179, 3 Am. St. Rep. 142.

6. Origin. — Estates upon condition are of feudal origin.¹

II. FORM AND CONSTRUCTION — 1. Form — No Particular Form of Words Necessary. — To create a condition no particular form of words is necessary.²

Apt and Customary Phrases. — Yet certain words, namely, "upon condition," "so that," and "provided," or their Latin equivalents, are recognized as apt and customary.³

Neither Is Their Connection Material, though they usually follow the *habendum*; ⁴ however, they must qualify and restrain it.⁵

Clause of Re-entry or Provision for Forfeiture. — If a condition is not created by one of the recognized terms it should be followed by a clause of re-entry or a provision for forfeiture.⁶

Condition Precedent — No Ulterior Limitation of Estate. — A condition precedent may be valid notwithstanding there is no ulterior limitation of the estate to which it is annexed.⁷

Words Declaratory of the Consideration or Purpose. — Words declaratory of the consideration⁸ for and the purpose⁹ of the conveyance and the limitation of the

1. Origin. — *Adams v. Ore Knob Copper Co.*, 4 Hughes (U. S.) 593, 7 Fed. Rep. 638; *Hammond v. Port Royal, etc.*, R. Co., 15 S. Car. 32.

In *Adams v. Ore Knob Copper Co.*, 4 Hughes (U. S.) 593, 7 Fed. Rep. 638, it is said: "The doctrines of estates upon condition seem to have been originally derived from the feudal law. A tenant was under obligation to render continuous service, and if he neglected to perform his service the lord could, by a writ of cessavit, obtain possession of the fief, as such continuous service was the consideration for the grant of the estate."

2. Creation — No Particular Words Required — *Alabama*. — *Elyton Land Co. v. South, etc.*, *Alabama R. Co.*, 100 Ala. 405.

Indiana. — *Sumner v. Darnell*, 128 Ind. 38; *Wilson v. Wilson*, 86 Ind. 474.

Massachusetts. — *Rawson v. School Dist. No. 5*, 7 Allen (Mass.) 128.

Minnesota. — *Farnham v. Thompson*, 34 Minn. 337.

Nevada. — *Hamilton v. Kneeland*, 1 Nev. 40.

New Hampshire. — *Chapin v. School Dist. No. 2*, 35 N. H. 450.

New York. — *Underhill v. Saratoga, etc.*, R. Co., 20 Barb. (N. Y.) 459; *Parmelee v. Oswego, etc.*, R. Co., 6 N. Y. 80.

Ohio. — *Worman v. Teagarden*, 2 Ohio St. 386.

Pennsylvania. — *First M. E. Church v. Old Columbia Public Ground Co.*, 103 Pa. St. 613.

Tennessee. — *Cannon v. Apperson*, 14 Lea (Tenn.) 566.

Texas. — *Jeffery v. Graham*, 61 Tex. 482.

Wisconsin. — *Horner v. Chicago, etc.*, R. Co., 38 Wis. 173.

3. Apt Words. — *Mahoning County v. Young*, 16 U. S. App. 266; *Farnham v. Thompson*, 34 Minn. 337; *Chapin v. School Dist. No. 2*, 35 N. H. 450; *Paschall v. Passmore*, 15 Pa. St. 307; *Schaeffer v. Messersmith*, 10 Pa. Co. Ct. Rep. 366; *Brown v. Caldwell*, 23 W. Va. 190, 48 Am. Rep. 376; *Hartung v. Witte*, 59 Wis. 292. "Subject, nevertheless, to the condition." *Xander's Estate*, 7 Pa. Co. Ct. Rep. 482. See the third note following.

4. Connection Immaterial. — *Parmelee v. Oswego, etc.*, R. Co., 6 N. Y. 80; *Jeffery v. Graham*, 61 Tex. 482; *Lawe v. Hyde*, 39 Wis. 355; *Horner v. Chicago, etc.*, R. Co., 38 Wis. 165; *Cromwel's Case*, 2 Coke 706.

5. Qualification or Restraint Necessary. — *Laberee v. Carleton*, 53 Me. 213; *First M. E. Church v. Old Columbia Public Ground Co.*, 103 Pa. St. 614.

6. Clause of Re-entry or Provision for Forfeiture. — "Upon condition," "so that," and "provided," or their Latin equivalents, need not be followed by a clause of re-entry to make a condition valid. *Paschall v. Passmore*, 15 Pa. St. 307; *Gray v. Blanchard*, 8 Pick. (Mass.) 291. But other words, namely, "if," "if it shall happen," etc., or their Latin equivalents, should be followed by a clause of re-entry or a provision for forfeiture. *Mahoning County v. Young*, 16 U. S. App. 266; *Rawson v. School Dist. No. 5*, 7 Allen (Mass.) 128; *Gray v. Blanchard*, 8 Pick. (Mass.) 291; *Brown v. Caldwell*, 23 W. Va. 190, 48 Am. Rep. 376.

7. Condition Precedent May Be Valid Without Ulterior Limitation of the Estate. — *Tilley v. King*, 109 N. Car. 461.

8. Words Declaratory of the Consideration for the Conveyance. — *Berkley v. Union Pac. R. Co.*, 33 Fed. Rep. 795; *Adams v. Logan County*, 11 Ill. 339; *Laberee v. Carleton*, 53 Me. 211; *Martin v. Martin*, 131 Mass. 548; *Portland v. Terwilliger*, 16 Oregon 474; *Raley v. Umatilla County*, 15 Oregon 179, 3 Am. St. Rep. 142; *First M. E. Church v. Old Columbia Public Ground Co.*, 103 Pa. St. 613; *Perry v. Scott*, 51 Pa. St. 124.

9. Words Declaratory of the Purpose of the Conveyance — *United States*. — *Stanley v. Colt*, 5 Wall. (U. S.) 164; *Mahoning County v. Young*, 16 U. S. App. 269; *Ward v. New England Screw Co.*, 1 Cliff. (U. S.) 578.

Indiana. — *Newpoint Lodge No. 255 v. Newpoint School Town*, 138 Ind. 145; *Higbee v. Rodeman*, 129 Ind. 247; *Sumner v. Darnell*, 128 Ind. 42.

Massachusetts. — *Sohier v. Trinity Church*, 109 Mass. 19; *Packard v. Ames*, 16 Gray (Mass.) 329; *Rawson v. School Dist. No. 5*, 7 Allen (Mass.) 129.

Minnesota. — *Soukup v. Topka*, 54 Minn. 70; *Farnham v. Thompson*, 34 Minn. 337.

Ohio. — *Methodist Protestant Church v. Laws*, 7 Ohio Cir. Ct. Rep. 211; *Watterson v. Ury*, 5 Ohio Cir. Ct. Rep. 347.

Texas. — *Olcott v. Gabert*, 86 Tex. 125.

Wisconsin. — *Horner v. Chicago, etc.*, R. Co., 38 Wis. 175; *Strong v. Doty*, 32 Wis. 385.

use¹ of the property, or which direct or prohibit the performance of a particular act,² do not, of themselves, render an estate conditional.

Parol Evidence. — The general rule is that it is incompetent to engraft a condition upon the conveyance, by parol evidence,³ save in case of fraud or mistake.⁴

2. Construction. — **Intention.** — In the construction of a particular provision, the intention of the grantor or deviser governs.⁵

How Manifested. — This intention must be manifested in express terms, or by clear implication,⁶ and is to be gathered from the whole instrument and the existing facts.⁷

Covenants — Where Intention Doubtful. — The same words may be employed to create a covenant as to create a condition,⁸ and if there is any doubt regarding the intention of the grantor or deviser, courts will incline toward the former construction, for conditions which tend to destroy estates are not favored, and are strictly construed.⁹

When the declared purpose for which the property shall be used is a matter that will inure to the special benefit of the grantor, the courts are more inclined to treat the conveyance as conditional than when the use is for the benefit of a special class of persons or of the public at large. *Olcott v. Gabert*, 86 Tex. 125.

1. Words Declaratory of the Limitations of the Use of the Property. — *Thornton v. Trammell*, 39 Ga. 202; *Eckhart v. Irons*, 128 Ill. 579; *Curtis v. Board of Education*, 43 Kan. 143; *Coffin v. Portland*, 16 Oregon 77; *Brown v. Caldwell*, 23 W. Va. 191, 48 Am. Rep. 376.

2. Words Directing or Prohibiting the Performance of a Particular Act. — *Studdard v. Wells*, 120 Mo. 30; *Cunningham v. Parker*, 146 N. Y. 33, 48 Am. St. Rep. 765; *Fox v. Phelps*, 17 Wend. (N. Y.) 406; *Armstrong v. Armstrong*, 4 Baxt. (Tenn.) 360.

3. Parol Evidence. — *Marshall County High School Co. v. Iowa Evangelical Synod*, 28 Iowa 361; *Galveston, etc., R. Co. v. Pfeuffer*, 56 Tex. 72; *Wallace v. Baker*, Binn. (Pa.) 610. See the title PAROL EVIDENCE.

4. Fraud — Mistake. — *Sumner v. Darnell*, 128 Ind. 43; *Galveston, etc., R. Co. v. Pfeuffer*, 56 Tex. 72; *East Line, etc., R. Co. v. Garrett*, 52 Tex. 139. See the title FRAUD.

5. Construction — Intention Governs — *United States*. — *Stanley v. Colt*, 5 Wall. (U. S.) 166.

Alabama. — *Elyton Land Co. v. South, etc.*, *Alabama R. Co.*, 100 Ala. 405.

Missouri. — *St. Louis v. Wiggins Ferry Co.*, 88 Mo. 619.

New York. — *Post v. Weil*, 115 N. Y. 370, 12 Am. St. Rep. 809; *Parmelee v. Oswego, etc., R. Co.*, 6 N. Y. 80; *Underhill v. Saratoga, etc., R. Co.*, 20 Barb. (N. Y.) 459.

Ohio. — *Worman v. Teagarden*, 2 Ohio St. 386.

Pennsylvania. — *Schaeffer v. Messersmith*, 10 Pa. Co. Ct. Rep. 366.

Tennessee. — *Cannon v. Apperson*, 14 Lea (Tenn.) 566.

Texas. — *Jeffery v. Graham*, 61 Tex. 482.

Wisconsin. — *Hartung v. Witte*, 59 Wis. 292; *Horner v. Chicago, etc., R. Co.*, 38 Wis. 174.

6. Intention Manifested Expressly or by Implication. — *Mahoning County v. Young*, 16 U. S. App. 265; *Scovill v. McMahon*, 62 Conn. 388, 36 Am. St. Rep. 350; *Gadberry v. Sheppard*,

27 Miss. 207; *Studdard v. Wells*, 120 Mo. 29; *Woodruff v. Woodruff*, 44 N. J. Eq. 353; *First M. E. Church v. Old Columbia Public Ground Co.*, 103 Pa. St. 613; *Brown v. Caldwell*, 23 W. Va. 189, 48 Am. Rep. 376.

7. Intention Should Be Ascertained from the Instrument and the Existing Facts. — *Stanley v. Colt*, 5 Wall. (U. S.) 166; *Mahoning County v. Young*, 16 U. S. App. 265; *Brannan v. Mesick*, 10 Cal. 106; *Scovill v. McMahon*, 62 Conn. 388, 36 Am. St. Rep. 350; *Studdard v. Wells*, 120 Mo. 29; *Cannon v. Apperson*, 14 Lea (Tenn.) 553; *Horner v. Chicago, etc., R. Co.*, 38 Wis. 174.

8. Condition and Covenant May Be Created by the Same Words. — *Elyton Land Co. v. South, etc.*, *Alabama R. Co.*, 100 Ala. 405; *Parmelee v. Oswego, etc., R. Co.*, 6 N. Y. 80; *Countrymen v. Deck*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 111; *Paschall v. Passmore*, 15 Pa. St. 307; *Hartung v. Witte*, 59 Wis. 292.

In a Voluntary Conveyance, words may be held to be a condition which, if used in a conveyance made for a valuable consideration, would be held a covenant only. *Horner v. Chicago, etc., R. Co.*, 38 Wis. 174.

9. Conditions Are Not Favored and Are Strictly Construed — *United States*. — *Mahoning County v. Young*, 16 U. S. App. 265; *Ward v. New England Screw Co.*, 1 Cliff. (U. S.) 577.

Alabama. — *Elyton Land Co. v. South, etc.*, *Alabama R. Co.*, 100 Ala. 406.

Georgia. — *Taylor v. Sutton*, 15 Ga. 109.

Illinois. — *Boone v. Clark*, 129 Ill. 501; *Galagher v. Herbert*, 117 Ill. 169; *Board of Education v. First Baptist Church*, 63 Ill. 205; *Voris v. Renshaw*, 49 Ill. 430; *Wilson v. Galt*, 18 Ill. 434.

Indiana. — *Sumner v. Darnell*, 128 Ind. 43; *Jeffersonville, etc., R. Co. v. Barbour*, 89 Ind. 378; *Hunt v. Beeson*, 18 Ind. 382; *Thompson v. Thompson*, 9 Ind. 330, 68 Am. Dec. 638.

Iowa. — *Peden v. Chicago, etc., R. Co.*, 73 Iowa 330, 5 Am. St. Rep. 680.

Kansas. — *Ruggles v. Clare*, 45 Kan. 672; *Curtis v. Board of Education*, 43 Kan. 144.

Maryland. — *Kilpatrick v. Baltimore*, 81 Md. 193.

Massachusetts. — *Merrifield v. Cobleigh*, 4 Cush. (Mass.) 184; *Rawson v. School Dist. No. 5*, 7 Allen (Mass.) 128.

Michigan. — *Barrie v. Smith*, 47 Mich. 131.

Conditions Precedent and Subsequent. — Likewise, no technical words distinguish a condition precedent from a condition subsequent;¹ the intention of the parties governs,² and if it is ascertained from the whole instrument and the existing facts³ that the event or act must precede the vesting of the estate the condition is precedent,⁴ but if either may accompany or follow it the condition is subsequent.⁵

III. DISTINCTIONS — 1. Condition Subsequent and Covenant. — The chief point of distinction between a condition subsequent and a covenant is, that a breach of the former subjects the estate to forfeiture; a breach of the latter is ground for damages.⁶ Moreover, a condition is always the creation of a grantor or

Mississippi. — *Gadberry v. Sheppard*, 27 Miss. 207.

Missouri. — *Studdard v. Wells*, 120 Mo. 29; *Roanoke Invest. Co. v. Kansas City, etc.*, R. Co., 108 Mo. 63; *Morrill v. Wabash, etc.*, R. Co., 96 Mo. 179; *Weinreich v. Weinreich*, 18 Mo. App. 370.

New Hampshire. — *Hoyt v. Kimball*, 49 N. H. 326; *Page v. Palmer*, 48 N. H. 387; *Chapin v. School Dist. No. 2*, 35 N. H. 450.

New Jersey. — *Woodruff v. Woodruff*, 44 N. J. Eq. 353; *McKelway v. Seymour*, 29 N. J. L. 328; *Southard v. Central R. Co.*, 26 N. J. L. 20; *Den v. Presbyterian Church*, 20 N. J. L. 555.

New York. — *Graves v. Deterling*, 120 N. Y. 455; *Avery v. New York Cent., etc.*, R. Co., 106 N. Y. 155; *Ludlow v. New York, etc.*, R. Co., 12 Barb. (N. Y.) 444.

Ohio. — *Watterson v. Ury*, 5 Ohio Cir. Ct. Rep. 347.

Pennsylvania. — *First M. E. Church v. Old Columbia Public Ground Co.*, 103 Pa. St. 613. *Texas.* — *Ryan v. Porter*, 61 Tex. 109.

Virginia. — *Lewis v. Henry*, 28 Gratt. (Va.) 203; *Alexandria, etc.*, R. Co. v. *Chew*, 27 Gratt. (Va.) 557.

West Virginia. — *Brown v. Caldwell*, 23 W. Va. 189, 48 Am. Rep. 376.

Wisconsin. — *Hartung v. Witte*, 59 Wis. 292; *Mills v. Evansville Seminary*, 58 Wis. 140; *Wier v. Simmons*, 55 Wis. 643; *Drew v. Baldwin*, 48 Wis. 532; *Lawe v. Hyde*, 39 Wis. 360; *Horne v. Chicago, etc.*, R. Co., 38 Wis. 174.

However, it must be understood that rules of construction can apply only in cases of doubt or of the interference of legal principles with the plain import of language. *Cornelius v. Ivins*, 26 N. J. L. 376.

1. Condition Precedent and Condition Subsequent May Be Created by the Same Words. — *Finlay v. King*, 3 Pet. (U. S.) 374; *Ward v. New England Screw Co.*, 1 Cliff. (U. S.) 577; *Green v. Thomas*, 11 Me. 320; *Howard v. Turner*, 6 Me. 108; *Burnett v. Strong*, 26 Miss. 123; *Martin v. Ballou*, 13 Barb. (N. Y.) 134; *Henderson v. Beaton*, 1 Tex. Unrep. Cas. 28; *Jones v. Chesapeake, etc.*, R. Co., 14 W. Va. 522; *Rogan v. Walker*, 1 Wis. 555.

2. Intention Governs Construction. — *Finlay v. King*, 3 Pet. (U. S.) 374; *Robbins v. Gleason*, 47 Me. 273; *Green v. Thomas*, 11 Me. 320; *Howard v. Turner*, 6 Me. 108; *Burnett v. Strong*, 26 Miss. 123; *Martin v. Ballou*, 13 Barb. (N. Y.) 134; *Den v. Messenger*, 33 N. J. L. 501; *Henderson v. Beaton*, 1 Tex. Unrep. Cas. 28; *Jones v. Chesapeake, etc.*, R. Co., 14 W. Va. 522; *Rogan v. Walker*, 1 Wis. 557.

3. Intention Should Be Ascertained from the Instrument and Existing Facts. — *Finlay v.*

King, 3 Pet. (U. S.) 374; *Henderson v. Beaton*, 1 Tex. Unrep. Cas. 28; *Jones v. Chesapeake, etc.*, R. Co., 14 W. Va. 522; *Rogan v. Walker*, 1 Wis. 557.

4. If the Act or the Event Must Precede the Vesting of the Estate, the Condition Is Precedent. — *Finlay v. King*, 3 Pet. (U. S.) 374; *Brannan v. Mesick*, 10 Cal. 108; *Martin v. Ballou*, 13 Barb. (N. Y.) 133; *Jones v. Chesapeake, etc.*, R. Co., 14 W. Va. 514; *Rogan v. Walker*, 1 Wis. 556.

Illustrations. — A devise to the children of the testator's daughter upon condition that the daughter release the estate of the testator from all liability to pay a note which she holds is one upon a condition precedent. *Howard v. Wheatley*, 15 Lea (Tenn.) 607.

A provision that a devisee should live with and care for the testator and his wife until after their death was held to be a condition precedent. *Tilley v. King*, 109 N. Car. 461.

A requirement that a devisee should within a specified time pay certain legacies and settle the estate, he being executor, before the vesting of a devise to him, is a condition precedent. *Nevius v. Gourley*, 95 Ill. 206.

5. Otherwise the Condition Is Subsequent. — *Finlay v. King*, 3 Pet. (U. S.) 374; *Martin v. Ballou*, 13 Barb. (N. Y.) 133; *Bell County v. Alexander*, 22 Tex. 364, 73 Am. Dec. 268; *Henderson v. Beaton*, 1 Tex. Unrep. Cas. 28; *Jones v. Chesapeake, etc.*, R. Co., 14 W. Va. 522; *Rogan v. Walker*, 1 Wis. 556.

Illustrations. — Conditions for the support of or payment of money to the grantor or some other person or persons named are generally construed to be conditions subsequent. *Weinreich v. Weinreich*, 18 Mo. App. 370. And see *Jennings v. Jennings*, 27 Ill. 518; *Drew v. Baldwin*, 48 Wis. 529. In a devise the provision that the name of the one who might become entitled to the property be changed was held to be a condition subsequent. *Taylor v. Mason*, 9 Wheat. (U. S.) 325. A grant of a township of land upon condition that the grantee settle thereon a specific number of families, within a specified time, was held to be upon a condition subsequent. *Chapman v. Pingree*, 67 Me. 108. And see *Mead v. Ballard*, 7 Wall. (U. S.) 290; *O'Brien v. Wagner*, 94 Mo. 93, 4 Am. St. Rep. 362. A provision that the grantee should build and maintain a dam over a certain brook crossing the land conveyed was held to be a condition subsequent. *Underhill v. Saratoga, etc.*, R. Co., 20 Barb. (N. Y.) 455.

6. Distinctions — Condition Subsequent and Covenant. — *Woodruff v. Trenton Water Power Co.*, 10 N. J. Eq. 508.

devisor; a covenant may be made by either a grantor or a grantee.

2. Condition Subsequent and Conditional Limitation. — A condition determines an estate after breach, upon entry or claim by the grantor or his heirs, or the heirs of the devisor. A limitation marks the period which determines the estate without any act on the part of him who has the next expectant interest. Upon the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises. Furthermore, where an estate in fee is created upon condition, there arises immediately and continues in the grantor or devisor, or passes to his heirs, a right of entry or possibility of reverter, as it is termed, but when it is upon a conditional limitation the entire estate passes from the grantor or devisor.¹

3. Condition Precedent and Contingency. — A condition precedent should be distinguished from a contingency. A contingency is some specified time, thing, or event, in the future, which may or may not occur. A condition precedent implies an existing fact or state of facts, which must be so changed as to bring it into a condition desired.²

4. Condition and Limitation in Trust. — A condition should be distinguished from a limitation in trust, which is a regulation of the management and disposition of the estate. Upon a noncompliance therewith equity will interpose and enforce specific performance, but, as has been seen, a breach subjects an estate upon condition to forfeiture.³

5. Condition and Restriction, and Condition and Stipulation. — A condition should also be distinguished from a restriction and from a stipulation.⁴

IV. GENERAL NATURE OF CONDITIONS SUBSEQUENT. — A condition subsequent must not only be express or implied,⁵ but legal,⁶ definite or certain,⁷ reasonable,⁸ possible of performance,⁹ and not repugnant to the nature of the estate to which it is annexed.¹⁰

V. PERFORMANCE OF CONDITIONS — 1. Manner of Performance. — A Condition Precedent must be strictly, literally performed.¹¹

1. Condition Subsequent and Conditional Limitation. — *Brattle Square Church v. Grant*, 3 Gray (Mass.) 146, 63 Am. Dec. 725. And see *Summit v. Yount*, 109 Ind. 508; *Ludlow v. New York, etc., R. Co.*, 12 Barb. (N. Y.) 443; *Wiederanders v. State*, 64 Tex. 140; *Smith v. Smith*, 23 Wis. 180, 99 Am. Dec. 153.

2. Condition Precedent and Contingency. — *Spencer v. See*, 5 Redf. (N. Y.) 447.

3. Condition and Limitation in Trust. — *Stanley v. Colt*, 5 Wall. (U. S.) 165. See *supra*, this section, *Condition Subsequent and Covenant*.

4. Condition and Restriction, and Condition and Stipulation. — See *infra*, this title, *Restrictions and Stipulations*.

5. Express or Implied. — See *supra*, this title, *Form and Construction*.

6. Must Be Legal. — See *infra*, this title, *Particular Conditions*.

7. Definite or Certain. — *Duddy v. Gresham*, 2 L. R. Ir. Rep. 442; *Re Fox*, 8 Ont. Rep. 492.

Illustrations. — The requirement in a will that, before the title to property devised shall pass in any event, the devisee shall appear before the county judge and satisfy him that he is a reformed man, or that he is over forty years of age, is not void for uncertainty nor is there anything illegal or unreasonable in it. *Cassem v. Kennedy*, 147 Ill. 660. And see *West v. Moore*, 37 Miss. 114; *Hartman v. Herbine*, 7 Pa. Co. Ct. Rep. 630.

8. Must Be Reasonable. — A devise upon the condition that the devisee shall confine his residence to a particular town or locality is un-

reasonable. *Newkerk v. Newkerk*, 2 Cai. (N. Y.) 352. And see *Cassem v. Kennedy*, 147 Ill. 660. See also *infra*, this title, *Particular Conditions*.

9. Possible of Performance. — See *infra*, this title, *Performance of Conditions*.

10. Not Repugnant. — *Stansbury v. Hubner*, 73 Md. 229, 25 Am. St. Rep. 584; *Smith v. Clark*, 10 Md. 186; *Brown v. Stuart*, 12 U. C. Q. B. 510. And see *infra*, this title, *Particular Conditions*.

A reservation of the right to use, manage, and control property during the life of the grantor is not one of title or estate, but of power. *Varner v. Rice*, 44 Ark. 250.

A condition in a grant of property to a particular sect for church purposes that the building, when not in use by said sect, shall be open "to all evangelical orders of Christians" is not repugnant to the grant. *Tomlin v. Blunt*, 31 Ill. App. 237.

11. Performance — Condition Precedent Must Be Strictly Performed. — *Vanhorne v. Dorrance*, 2 Dall. (Pa.) 317; *Brannan v. Mesick*, 10 Cal. 108; *Shockley v. Parvis*, 4 Houst. (Del.) 569; *Nevius v. Gourley*, 95 Ill. 213; *Martin v. Bal-lou*, 13 Barb. (N. Y.) 132.

Illustration. — A condition that "this conveyance shall not take effect until the plat of this town * * * shall be recorded" requires more than the mere spreading of the plat on the record; it is only satisfied when the plat is made, acknowledged, and recorded in the manner required by statute, so as to become valid

And Where Such Condition Is Copulative the whole must be performed before the estate can arise;¹ likewise if an act consists of several particulars.²

Condition Subsequent. — A substantial performance is sufficient if the condition be subsequent.³

2. Time of Performance — Conditions Precedent must be punctually performed,⁴ and until they are performed no estate vests.⁵

Condition Subsequent. — Where a condition subsequent is to be performed within a specified time it may be performed at any time before the expiration of the period.⁶

In the Absence of an Express Limitation a condition subsequent must be performed within a reasonable time.⁷

Extension — Parol. — The time for the performance of a condition in a deed cannot be extended by parol agreement so that an action can be maintained on the deed.⁸

Precedency of Conditions. — The order of time required for their performance determines the precedency of the conditions.⁹

3. Who May Perform. — Any One Interested in a condition or in the land to which it relates may perform the condition.¹⁰

A Stranger cannot, in general, intrude himself into the matter, and an offer of performance by such an one may be denied and disregarded as not being a performance of the condition.¹¹

4. Who Must Perform. — One who accepts a conditional estate is bound personally to the performance of the condition, although it may be accompanied by loss; he takes the estate *cum onere*.¹²

and binding as a town plat. *Thomas v. Eckard*, 88 Ill. 593.

1. Copulative Condition Precedent Must Be Performed in Toto. — *Vanhorne v. Dorrance*, 2 Dall. (Pa.) 317; *Brannan v. Mesick*, 10 Cal. 108; *Doe v. McGillivray*, 9 U. C. Q. B. 17.

2. If Act Consists of Several Particulars Each Must Be Performed. — *Vanhorne v. Dorrance*, 2 Dall. (Pa.) 317; *Brannan v. Mesick*, 10 Cal. 108; *Nevus v. Gourley*, 95 Ill. 214.

3. Substantial Performance of a Condition Subsequent Is Sufficient. — *Brundage v. Domestic, etc.*, *Missionary Soc.*, 60 Barb. (N. Y.) 213; *Livingston v. Livingston*, 15 Wend. (N. Y.) 294.

4. Condition Precedent Must Be Punctually Performed. — *Vanhorne v. Dorrance*, 2 Dall. (Pa.) 317; *Brannan v. Mesick*, 10 Cal. 108.

5. No Estate Vests until Condition Precedent Is Performed. — *Page v. Frazer*, 14 Bush (Ky.) 208; *Rogan v. Walker*, 1 Wis. 559. And see *Johnson v. Warren*, 74 Mich. 497.

6. Condition Subsequent May Be Performed at Any Time Before the Limitation Specified. — *Thompson v. Lyon*, 40 W. Va. 87.

7. In the Absence of an Express Limitation, a Condition Subsequent Must Be Performed in a Reasonable Time. — *Adams v. Ore Knob Copper Co.*, 4 Hughes (U. S.) 592, 7 Fed. Rep. 638; *Ross v. Tremain*, 2 Met. (Mass.) 495; *Hayden v. Stoughton*, 5 Pick. (Mass.) 534; *Ellis v. Kyger*, 90 Mo. 605; *Murdock v. Memphis*, 7 Coldw. (Tenn.) 499. Compare *Finlay v. King*, 3 Pet. (U. S.) 376.

In *Adams v. Ore Knob Copper Co.*, 4 Hughes (U. S.) 592, 7 Fed. Rep. 638, it is held that when the performance of a condition subsequent is the consideration for the grant of a conditional estate, and is to be performed by the grantees "at their own convenience and time," the performance must be within a reasonable time.

A delay of twenty-nine years in commencing to build a church was held unreasonable. *Upington v. Corrigan*, 69 Hun (N. Y.) 320.

8. Time for Performance Cannot Be Extended by Parol. — *Porter v. Stewart*, 2 Aik. (Vt.) 426.

9. Precedency of Conditions. — *Parmelee v. Oswego, etc.*, R. Co., 6 N. Y. 80.

10. Any One Interested in the Condition or the Estate May Perform. — *People v. Society for Propagation of Gospel*, 2 Paine (U. S.) 563; *Wilson v. Wilson*, 38 Me. 18, 61 Am. Dec. 227; *Simonds v. Simonds*, 3 Met. (Mass.) 558; *Joslyn v. Parlin*, 54 Vt. 675; *Marks v. Marks*, 10 Mod. 422.

Where the condition of a grant of land is that the grantee shall maintain and support in a comfortable manner the persons therein named, no personal trust is charged upon him, and the support may be furnished by others. *Wilson v. Wilson*, 38 Me. 18, 61 Am. Dec. 227.

11. Strangers. — 2 Co. Litt. 43; 2 Minor's Institutes (3d ed.) 273.

12. Person Accepting Estate Must Perform Condition. — 2 Minor's Institutes (3d ed.) 272; *Vanmeter v. Vanmeter*, 3 Gratt. (Va.) 148; *Crawford v. Patterson*, 11 Gratt. (Va.) 364; *Rowell v. Jewett*, 71 Me. 408; *Atty.-Gen. v. Andrews*, 3 Ves. 633.

In *Hogeboom v. Hall*, 24 Wend. (N. Y.) 148, it is said: "The condition was annexed to the estate as a part of the tenure, and would, of course, affect the land into whatever hands it might pass. It would be strange indeed if one holding lands by such a tenure could defeat the condition by granting to another. If a requisition for that purpose is made upon the present tenants, they must, as far as the nature of the case will permit, perform the condition. If they refuse, it will be at the peril of losing the estate." See also *Taylor v. Sutton*, 15 Ga. 103.

Infancy — Coverture. — Performance of a condition is not dispensed with because of infancy or coverture.¹

5. Impossible Conditions — Conditions Precedent. — If for any reason a condition precedent is or becomes impossible of performance, no estate vests.²

Conditions Subsequent. — But if the condition is subsequent, and performance is, at the time it is created, impossible,³ or is rendered impossible by the act of God,⁴ war or the act of the public enemy,⁵ the law,⁶ the grantor or his legal representative,⁷ the condition is void, performance is dispensed with, and the estate vests absolutely. Where, however, the impossibility of performance is due to the act of the grantee, the condition is regarded as performed, and the grantee's estate is defeated.⁸

6. Illegal, Indefinite, Unreasonable, or Repugnant Conditions. — Where the condition is illegal,⁹ indefinite or uncertain, unreasonable, or repugnant to the nature of the estate to which it is annexed,¹⁰ it is void, rendering the grantee's estate absolute.

VI. BREACH — WHO MAY TAKE ADVANTAGE OF. — If a grantee neglects or refuses to perform the conditions a breach occurs,¹¹ and the grantor or his

1. Infancy or Coverture Is No Bar. — *Cross v. Carson*, 8 Blackf. (Ind.) 139, 44 Am. Dec. 742; *Barker v. Cobb*, 36 N. H. 347; *Garrett v. Scouten*, 3 Den. (N. Y.) 340; *Partridge v. Partridge*, (1894) 1 Ch. 351.

2. Performance of Condition Precedent. — *Van-horne v. Dorrance*, 2 Dall. (Pa.) 317; *Stockton v. Weber*, 93 Cal. 441; *Shockley v. Parvis*, 4 Houst. (Del.) 569; *Cassem v. Kennedy*, 147 Ill. 664; *Den v. Hance*, 11 N. J. L. 257; *Martin v. Ballou*, 13 Barb. (N. Y.) 132; *Winthrop v. McKim*, 51 How. Pr. (N. Y. Supreme Ct.) 327; *Harvey v. Aston*, 1 Atk. 376.

3. 2 Minor's Institutes (3d ed.) 275. See also *supra*, this title, *General Nature of Conditions Subsequent*.

4. Performance of Condition Subsequent Rendered Impossible by Act of God. — *Hoss v. Hoss*, 140 Ind. 551; *Morse v. Hayden*, 82 Me. 230; *Parker v. Parker*, 123 Mass. 586; *Den v. Hance*, 11 N. J. L. 257; *McLachlan v. McLachlan*, 9 Paige (N. Y.) 537; *Burnham v. Burnham*, 79 Wis. 566; *Cromwell's Case*, 2 Coke 79b. See the title ACT OF GOD, vol. I, p. 584.

5. Performance Made Impossible by War or the Act of the Public Enemy. — *Huidekoper v. Douglass*, 3 Cranch (U. S.) 73.

6. Performance Made Impossible by the Law. — *Mahoning County v. Young*, 16 U. S. App. 277; *Burnham v. Burnham*, 79 Wis. 566.

7. Act of the Grantor or His Legal Representatives. — *Davis v. Gray*, 16 Wall. (U. S.) 230; *U. S. v. Arredondo*, 6 Pet. (U. S.) 745; *Vanderslice v. Hanks*, 3 Cal. 40; *Jones v. Bramblet*, 2 Ill. 280; *Elkhart Car Works Co. v. Ellis*, 113 Ind. 218; *Jones v. Chesapeake, etc., R. Co.*, 14 W. Va. 523; *Burnham v. Burnham*, 79 Wis. 566.

8. 2 Minor's Institutes (3d ed.) 276.

9. See *infra*, this title, *Particular Conditions*.

10. See *supra*, this title, *General Nature of Conditions Subsequent*.

11. Breach. — Where land is conveyed to be used for a certain purpose, with a provision for forfeiture if it ceases to be so used, it is no ground for forfeiture if the land is used for other purposes, provided it is also used for that for which it was conveyed. *McKelway v. Sevmour*, 29 N. J. L. 321.

Grant for Court-house Purposes. — Where a

town lot adjoining that on which the court house was located was conveyed to the county as a corporation, "to have and to hold so long as the party of the second part shall use the said lot * * * for court-house purposes," and with a condition that it shall revert to the grantor "whenever the party of the second part ceases to use said lot * * * for court-house purposes," the condition was held not to be broken by any incidental or collateral use to which the lot might be temporarily devoted, which did not conflict with its continued use for court-house purposes, as by the failure to inclose it entirely with a fence, allowing hitching posts for public use to be erected on the uninclosed portion, or a temporary structure for posting bills. *Henry v. Etowah County*, 77 Ala. 538.

Land at a county seat was conveyed to the county in August, 1871, upon the express condition that the county erect thereon within five years a court house for the use of said county, and keep and maintain the same thereon for the space of ten years. A court house was thereupon erected upon such land, which was completed in March, 1874, and was used as such by the county until December, 1881, when the county seat was removed to another village. The building was then used merely to store some articles belonging to the county, until January, 1883, when the district attorney, under the direction of the county board, but against the protest of the grantor, who claimed a forfeiture, took possession of the building and occupied one room therein as his office until August, 1883, when the grantor re-entered and took possession of the premises. It was held that the removal of the county seat necessarily operated as a breach of the condition. *Pepin County v. Prindle*, 61 Wis. 301.

Grant for a Highway. — A condition in a deed provided that a certain portion of the land granted should be used for a highway and no buildings or other erections, except a public monument, be put upon it. An area afterwards built encroached about six feet upon said premises, but was covered by a sidewalk. This was held not to be a violation of the purpose of the condition. *Rose v. Hawley*, 118 N. Y. 502.

A Deed of Land for Church Purposes contained a condition that if the seats of any church thereon should be rented or sold, the land should revert. The land, with the church erected thereon, was sold under judicial proceedings to pay debts of the church. There was held to be no breach of the condition, if the object of the grantor, *i. e.*, that the land be used for church purposes, be not perverted. *Woodworth v. Payne*, 74 N. Y. 196, 30 Am. Rep. 298.

A deed conveying a town lot to a church located in a small town, and mainly supported by farmers, contained the provision that the lot should be used "as a parsonage lot or church purpose, and no other," and if not so used should revert to the grantor. The lot adjoined the church, and was used by the congregation for the purpose of hitching their teams thereon during services in the church. It was held that the use made of the lot was for a "church purpose," within the meaning of the above condition. *Bailey v. Wells*, 82 Iowa 131.

Real Estate Was Conveyed to Trustees for a Schoolhouse and place of religious meetings, with a condition that if it should be used for any other purpose it should revert to the grantor or his heirs. It was held that the mere occasional use of it as a dwelling house was not sufficient to work a forfeiture, but the continued use of it as a dwelling house for seven years, with the knowledge and consent of the trustees and persons interested, was not occasional, and was sufficient to work a forfeiture. *Pickle v. McKissick*, 21 Pa. St. 232.

A person conveyed to trustees a piece of ground for the purpose of having a public schoolhouse erected thereon, and the house was accordingly built. It was held that the grant was not forfeited merely because the trustees had permitted religious, political, and temperance meetings to be held in the house at times when such meetings did not materially interfere with any school taught there. *Broadway v. State*, 8 Blackf. (Ind.) 290.

A conveyance to a corporation was upon condition that the land should be used as a site for a seminary building and should revert to the grantor when it should cease to be used for such purpose. The land was so used for several years, but in 1874, owing to a lack of funds and patronage, the seminary ceased to be maintained. In 1876, at a meeting attended by only a minority of the voters of the corporation, a resolution was adopted reciting that the seminary had been abandoned as an institution of learning, and empowering the trustees to convey the land to a manufacturing corporation. The original grantors thereupon demanded the surrender of the land to them as reversionary owners. This demand was not complied with, and the land was conveyed in accordance with the resolution, but the grantees in such conveyance never took possession or assumed control of the land, and in 1879 reconveyed to the seminary corporation. In 1880 the buildings were repaired, against the objection of the original grantors, who claimed that a forfeiture had occurred, and the seminary was reopened. In an action to recover the land, brought by the original grantors about the time of the reopening of the

seminary, it was held that there was no breach of the condition which worked a forfeiture. *Mills v. Evansville Seminary*, 58 Wis. 135.

Condition Against the Sale of Liquors.—A manufacturing corporation granted land upon condition "that no building or part of any building thereon shall ever be occupied or used for the sale of spirituous liquors." A grantee of its grantee leased portions of the land with buildings thereon to different persons, one of whom sold spirituous liquors in his tenement, without the participation, knowledge, or assent of his lessor. It was held that this did not entitle the corporation to enter for breach of the condition. *Indian Orchard Canal Co. v. Sikes*, 8 Gray (Mass.) 562.

A condition in a deed provided that the grantee, his heirs and assigns, should not at any time manufacture or sell, to be used as a beverage, any intoxicating liquor, or permit the same to be done, on the premises conveyed, unless the grantor, his heirs or assigns, should sell other land in the same village whereon there might be manufactured or sold such liquor to be used as a beverage. It was held that a conveyance by a grantee of the plaintiff of another lot in the same village, without any such restriction, did not prevent forfeiture by the defendant, where the grant by the plaintiff to such other grantee contained such restriction; and this although the restriction in the deed to the defendant was conditioned upon either the plaintiff or his assigns conveying other premises without such restriction. It was held also that the mere sale of a glass of liquor upon another lot in the village, conveyed by the plaintiff, in his presence and without his objection, was not such a permission by him as came within the meaning of that expression in the defendant's deed. *Plumb v. Tubbs*, 41 N. Y. 442.

Maintenance and Support.—Where a testator, after giving a life estate in certain real property to his wife, devised it to a nephew, "provided he shall board, care for, and treat my wife as a son should treat a mother, caring for her comfort and doing for her as she shall reasonably desire," it was held that such a condition did not require the nephew to pay for the services of a trained nurse to attend the testator's wife in sickness, at least in the absence of proof showing that she was unable to furnish such services herself, and had expressed a desire for the nephew to do so. *Matter of Wyatt's Estate*, 9 N. Y. Misc. Rep. (Orange County Surrogate Ct.) 285.

Under a proviso for the grantor's support, if the grantee is obliged to furnish the support elsewhere than at his own house, there will be no forfeiture on his part until he is requested to do so, or is at least notified of the grantor's need of assistance. *Lamb v. Clark*, 29 Vt. 273.

A devise of a farm to the testator's son, conditioned that "said son shall support and maintain my daughter Alice out of said property * * * during her natural life," does not require the daughter to live upon the farm in order to entitle her to such support. Such condition does not require the son to pay a cash annuity to the daughter, but to deliver to her, upon the farm, specific articles neces-

heirs, and they only, may take advantage of it,¹ without regard to the outlay which the conditional grantee may have made.² Election to do so may be signified by re-entry or some equivalent act.³

Land of a Municipal Corporation is subject to forfeiture the same as that of any other grantee.⁴

VII. RELEASE OR WAIVER.—A condition, or a breach thereof, may be released or waived, and the estate thus rendered absolute, by one who has a right to enforce it.⁵

Express or Implied.—This may be done by acts as well as by express agreement,⁶ but not by mere silent acquiescence or parol assent.⁷

When a Condition Is Separable, a release or a waiver of a part discharges the whole.⁸

sary for her maintenance. *Dickson v. Field*, 77 Wis. 439.

Condition for Annual Payment of Money.—Where a father conveyed to his son, by deed, one-third of his farm, upon which the grantor and grantee both then resided, with the condition thereto annexed that the deed should be void in case the grantee should refuse to pay to the grantor thirty dollars each year if the grantor should call for the same, it was held that the condition should not be so construed as to permit the annual payments to be consolidated and demanded together, after the lapse of several years, but that each sum must have been demanded by itself, and at or about the close of the year for which it was claimed, and that any sum not so demanded was waived or relinquished; and it not appearing that any such demand as the case required was ever in fact made, it was held that there had been no forfeiture of the estate by the grantee by reason of the nonpayment. *Buckmaster v. Needham*, 22 Vt. 617.

Under a Name and Arms Proviso requiring a devisee to take the testator's surname, it was held that adding the testator's surname before his own was not a compliance by the devisee, but that adding the testator's surname after his own was so. *D'Eyncourt v. Gregory*, 1 Ch. Div. 441.

And see *infra*, this title, *Particular Conditions*.

1. Grantor or His Heirs Only May Take Advantage of a Breach—*United States*.—*Schulenberg v. Harriman*, 21 Wall. (U. S.) 63.

California.—*Smith v. Brannan*, 13 Cal. 115; *Buckelew v. Estell*, 5 Cal. 108.

Georgia.—*Norris v. Milner*, 20 Ga. 566.

Illinois.—*Boone v. Clark*, 129 Ill. 466.

Indiana.—*Cross v. Carson*, 8 Blackf. (Ind.) 140, 44 Am. Dec. 742.

Maine.—*Bangor v. Warren*, 34 Me. 329, 56 Am. Dec. 657; *Marwick v. Andrews*, 25 Me. 530.

Massachusetts.—*Hopkins v. Smith*, 162 Mass. 447; *Guild v. Richards*, 16 Gray (Mass.) 309.

New York.—*Craig v. Wells*, 11 N. Y. 323; *Fonda v. Sage*, 46 Barb. (N. Y.) 122; *Nicoll v. New York*, etc., R. Co., 12 Barb. (N. Y.) 461.

Canada.—*Pennyman v. McGrogan*, 18 U. C. C. P. 132; *In re Melville*, 11 Ont. Rep. 631. Compare *Hamilton v. Kneeland*, 1 Nev. 54.

2. Outlay Made by the Conditional Grantee.—*Rowell v. Jewett*, 71 Me. 410.

3. Election May be Signified by Re-entry or an Equivalent Act—*Illinois*.—*Mott v. Danville Seminary*, 129 Ill. 415.

Indiana.—*Cory v. Cory*, 86 Ind. 573; *Clark v. Holton*, 57 Ind. 567; *Lindsey v. Lindsey*, 45 Ind. 552.

Kentucky.—*Kenner v. American Contract Co.*, 9 Bush (Ky.) 207.

Maine.—*Spofford v. True*, 33 Me. 283, 54 Am. Dec. 621.

Mississippi.—*Memphis*, etc., R. Co. v. *Neighbors*, 51 Miss. 417.

New Hampshire.—*Willard v. Henry*, 2 N. H. 122.

New York.—*Nicoll v. New York*, etc., R. Co., 12 N. Y. 131; *Ludlow v. New York*, etc., R. Co., 12 Barb. (N. Y.) 442.

4. Land of a Municipal Corporation Is Not Exempt from Forfeiture.—*Clarke v. Brookfield*, 81 Mo. 514, 51 Am. Dec. 243.

5. Release or Waiver.—*Chalker v. Chalker*, 1 Conn. 87, 6 Am. Dec. 206; *Carbon Block Coal Co. v. Murphy*, 101 Ind. 117; *Hubbard v. Hubbard*, 97 Mass. 192, 93 Am. Dec. 75; *Barrie v. Smith*, 47 Mich. 132; *Wheeler v. Dunning*, 33 Hun (N. Y.) 206; *Sharon Iron Co. v. Erie*, 41 Pa. St. 351.

6. Release or Waiver May Be Express or Implied—*Connecticut*.—*Chalker v. Chalker*, 1 Conn. 87, 6 Am. Dec. 206.

Indiana.—*Carbon Block Coal Co. v. Murphy*, 101 Ind. 117; *Lindsey v. Lindsey*, 45 Ind. 567; *Boone v. Tipton*, 15 Ind. 270.

Kentucky.—*Kenner v. American Contract Co.*, 9 Bush (Ky.) 210.

Maine.—*Hooper v. Cummings*, 45 Me. 359.

Massachusetts.—*Hubbard v. Hubbard*, 97 Mass. 193, 93 Am. Dec. 75; *Guild v. Richards*, 16 Gray (Mass.) 326.

Michigan.—*Barrie v. Smith*, 47 Mich. 132.

New Hampshire.—*Willard v. Henry*, 2 N. H. 122.

New York.—*Ludlow v. New York*, etc., R. Co., 12 Barb. (N. Y.) 445.

Pennsylvania.—*Sharon Iron Co. v. Erie*, 41 Pa. St. 351.

Wisconsin.—*Dickson v. Field*, 77 Wis. 447.

7. Silent Acquiescence or Parol Assent Is Not Effective.—*Adams v. Ore Knob Copper Co.*, 4 Hughes (U. S.) 594, 7 Fed. Rep. 640; *Carbon Block Coal Co. v. Murphy*, 101 Ind. 118; *Lindsey v. Lindsey*, 45 Ind. 567; *Rowell v. Jewett*, 69 Me. 299; *Gray v. Blanchard*, 8 Pick. (Mass.) 291; *Plumb v. Tubbs*, 41 N. Y. 442; *Jackson v. Crvsler*, 1 Johns. Cas. (N. Y.) 126.

8. Separable Condition—Release or Waiver of Part.—*Jackson v. Crvsler*, 1 Johns. Cas. (N. Y.) 126; *Sharon Iron Co. v. Erie*, 41 Pa. St. 349.

VIII. PARTICULAR CONDITIONS — 1. Restraints on Alienation. — Unlimited Restraints on alienation in deeds and devises, in fee, are void,¹ save when imposed by a sovereign power,² or in conveyances to charity.³

Limited Restraints — Conflict of Opinion. — Upon the question of the legality of limited restraints⁴ of alienation in deeds and devises in fee, there is a conflict

1. Unlimited Restraints on Alienation in Conveyances in Fee — England. — Bradley *v.* Peixoto, 3 Ves. Jr. 324.

Canada. — Lario *v.* Walker, 28 Grant's Ch. (U. C.) 219; *Re* Watson and Woods, 14 Ont. Rep. 48.

California. — Norris *v.* Hensley, 27 Cal. 444.

Iowa. — McCleary *v.* Ellis, 54 Iowa 313, 37 Am. Rep. 205.

Kentucky. — Fristoe *v.* Latham, (Ky. 1896) 36 S. W. Rep. 920.

Massachusetts. — Cushing *v.* Spaulding, 164 Mass. 287; Gleason *v.* Fayerweather, 4 Gray Mass.) 348; Hawley *v.* Northampton, 8 Mass. 37, 5 Am. Dec. 66.

Michigan. — Mandlebaum *v.* McDonnell, 29 Mich. 78, 18 Am. Rep. 61.

New York. — Wieting *v.* Bellinger, 50 Hun (N. Y.) 328; De Peyster *v.* Michael, 6 N. Y. 467.

North Carolina. — Pritchard *v.* Bailey, 113 N. Car. 525.

Pennsylvania. — Doeblor's Appeal, 64 Pa. St. 9; Walker *v.* Vincent, 19 Pa. St. 371; Reifsnnyder *v.* Hunter, 19 Pa. St. 41.

Tennessee. — Turley *v.* Massengill, 7 Lea (Tenn.) 356.

See also Maynard *v.* Polhemus, 74 Cal. 143; Lane *v.* Lane, 8 Allen (Mass.) 353; Hunt *v.* Wright, 47 N. H. 396, 93 Am. Dec. 451; Woodworth *v.* Payne, 5 Hun (N. Y.) 551.

Without Consent of Grantor. — Murray *v.* Green, 64 Cal. 367.

Reserving Right to Repurchase. — Hardy *v.* Galloway, 111 N. Car. 519, 32 Am. St. Rep. 828.

So Long as a Particular Person or His Heirs Shall Be in Possession of Another Tract. — Hartman *v.* Herbine, 7 Pa. Co. Ct. Rep. 630.

2. Restraints of Alienation Imposed by Sovereign Power. — Smythe *v.* Henry, 41 Fed. Rep. 707; Farrington *v.* Wilson, 29 Wis. 383.

3. Restraints of Alienation in Conveyances to Charity. — Perin *v.* Carey, 24 How. (U. S.) 494; Jones *v.* Habersham, 3 Woods (U. S.) 472; Yard's Appeal, 64 Pa. St. 98. See the title CHARITIES, vol. 5, p. 902.

4. Limited Restraints on Alienation — English and Canadian Authorities. — In *In re Macleay*, L. R. 20 Eq. 187, which was a consideration of a devise "to my brother John, on the condition that he never sells it out of the family," Jessel, M. R., quotes the following from Coke upon Littleton: "If a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is enfeoffed of lands or tenements he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and, therefore, such a condition is void. But if the condition be such that the feoffee shall not alien to such a one, naming his name,

or to any of his heirs or of the issues of such a one, or the like, which conditions do not take away all power of alienation from the feoffee, then such condition is good." He then states that the test, according to the old books, is, does the condition in question take away the whole power of alienation substantially, and then proceeds to lay down the following rule: "Now, you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all those ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore, it is a mere limited restriction on alienation in that way. Then, again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to any one member of the family. It is not, therefore, limited in the sense of there being only one person to buy; the will shows there were a great many members of the family when she made her will; a great many are named in it; therefore, you have a class which probably was large, and was certainly not small. Then it is not, strictly speaking, limited as to time, except in this way, that it is limited to the life of the first tenant in tail; of course, if unlimited as to time, it would be void for remoteness under another rule. So that this is, strictly, a limited restraint on alienation, and unless Coke upon Littleton has been overruled or is not good law, this is a good condition." He then considers *Doe v. Pearson*, 6 East 173, a case elsewhere entitled *Gill v. Pearson*, which arose out of a gift in fee with this condition, "that in case my said daughters, Ann and Hannah Collett, or either of them, shall have no lawful issue, * * * they or she having no lawful issue as aforesaid shall have no power to dispose of her share in the said estates so above given to them, except to her sister or sisters, or to their children," pointing out that "it is to be observed that the number of alienees possible in that case was smaller than the number in this case; there it was limited to 'her sister or sisters, or their children.' Here it is 'family,' which is a larger term. In the next place, here it is 'sell' only, there it was 'dispose,' which is probably the largest term known to the law. So that the power of alienation was very much more restricted in *Doe v. Pearson*, 6 East 173, than it is in the case before me." After quoting with approval the remarks of the court in *Doe v. Pearson*, 6 East 173, regarding *Daniel v. Ubley*, W. Jones 137; Latch. 9, 39, 134, which decided that a condition in a will that a

of opinion, but the weight of authority disfavors them. There is also

grantee, in fee simple, could not convey to anybody but one of the sons of the deviser, was good, he turns to *Attwater v. Attwater*, 18 Beav. 330, with the comment that the foregoing being the state of the law, "the year 1853 is rather a modern time to alter the law of real property." He then quotes the condition in the case just mentioned, which, it will be remembered, enjoined the beneficiary who was to take the property on attaining the age of twenty-five years, from ever selling it out of the family, but if sold at all, it must be to one of his brothers, named, and tries to bring it within the rule in *Doe v. Pearson*, 6 East 173, by explaining that, when Lord Romilly concludes that "notwithstanding the case of *Doe v. Pearson*, 6 East 173, this appears to me to be a condition repugnant to the quality of the estate given," he does not attempt to say that *Doe v. Pearson*, 6 East 173, is not law, but he says, "notwithstanding" it. Therefore, as I consider, he means to distinguish it." Jessel then further quotes the opinion in *Attwater v. Attwater*, 18 Beav. 330, wherein is given the reason of the holding, *infra*, which concludes with, "it appears to me that this proviso is distinctly at variance with the rules laid down by Lord Coke, and which have always been considered and treated as good law," and observes: "Now, taking that altogether, seeing that he has no quarrel with *Doe v. Pearson*, 6 East 173, seeing that he takes it that Coke's assertion is good law, the key to that judgment must be found in the latter observations, where he says: 'It appears to me, also, that this is the true construction of the words used by the testator; it is, in truth, an injunction never to sell the hereditaments devised at all. The words "out of the family" are merely descriptive of the effect of the sale;' and, so read, it does not conflict with the older authorities to which I have had occasion to refer. I must consider that case, recognizing as it does those older authorities as being good law, to have proceeded on the particular wording of that will, and more especially on the latter clause. I do not say that the clause does have the same effect on my mind that it had upon the mind of my predecessor; but still it is useless to criticise a question of construction when you come to the conclusion that the judge is intending not to lay down a new rule of law, but is simply construing the particular instrument before him. Therefore, I consider that the case of *Attwater v. Attwater*, 18 Beav. 330, does not affect the law of the case, and that this being a limited restriction upon alienation, the condition is good." Jessel, it will be noted in passing, after having adverted to the old authorities, prefaced his remarks upon *Attwater v. Attwater*, 18 Beav. 330, with the comment that "the year 1853 is rather a modern time to alter the law of real property," and that the concluding remarks above quoted are based upon the presumption that, by his use of the term "notwithstanding," his predecessor, Lord Romilly, intended to distinguish, and not to overrule, the decision in *Doe v. Pearson*, 6 East 173.

In *Earls v. McAlpine*, 27 Grant's Ch. (U. C.)

161, 164, on the authority of the foregoing cases, the court held a condition not to alienate to a particular person or for a particular time reasonable, not repugnant, and valid.

Following the above holding and the decisions upon which it rests, it was held in *Smith v. Faught*, 45 U. C. Q. B. 484, that a direction, in a devise in fee simple, that the devisee should "not sell or cause to be sold, the above-named lot, or any part thereof, during her natural life, but she shall be at liberty to grant it to any of her children whom she shall think proper," was a valid restraint upon alienation, and that the giving of a mortgage by the devisee was not a violation of the restraint.

In *In re Winstanley*, 6 Ont. Rep. 315, a condition against alienation in any manner, except by a testamentary instrument, was upheld.

In *O'Sullivan v. Phelan*, 17 Ont. Rep. 732, this condition in a devise, "but neither of my said nephews is to be at liberty to sell his half of the said property to any one except to persons of the name of O'Sullivan in my own family," was distinguished from that in *Re Watson & Woods*, 14 Ont. Rep. 48, and held valid; the court pointing out that here the restraint is of the mode of alienation, *i. e.*, the sale of the property, and that according to the rule laid down in *In re Macleay*, L. R. 20 Eq. 186, all power of alienation is not taken away, for the property might be mortgaged.

In *In re Northcote*, 18 Ont. Rep. 107, a condition that the devisees should not sell or mortgage the land during their lives, but with power to each of them to devise the same to their respective children as they might think fit, in such way as they or either of them might respectively desire, was held valid as being within the rule in *In re Winstanley*, 6 Ont. Rep. 315.

In *Pennyman v. McGrogan*, 18 U. C. C. P. 135, the facts were, a testator devised certain land to his two sons in fee, which was not to be assigned to any person, except a son of his, for the term of twenty years from the day of his decease. It was held that the condition was not void as in general restraint of alienation. But this opinion was so poorly considered that it is really not entitled to rank as an authority.

In *Attwater v. Attwater*, 18 Beav. 337, the testator gave an estate to A., "to become his property on attaining the age of twenty-five years, with an injunction never to sell it out of the family; but, if sold at all, it must be to one of his brothers." The restraint was held void, for, as the Master of the Rolls said: "Notwithstanding the case of *Doe v. Pearson*, 6 East 173, this appears to me to be a condition repugnant to the quality of the estate given. It is obvious that if the introduction of one person's name, as the only person to whom the property may be sold, renders such a proviso valid, a restraint on alienation may be created, as complete and perfect as if no person whatever was named; inasmuch as the name of a person who alone is permitted to purchase, might be so selected,

inharmony of judgment regarding the validity of restraints of alienation in

as to render it reasonably certain that he would not buy the property, and that the property could not be alienated at all. * * * The words 'out of the family' are merely descriptive of the effect of the sale, and not of the person to whom it might be sold, as is shown by the two last clauses of a similar character, relating to the devises to William and Edward Attwater, which in referring to this clause state that the property is not to be sold out of the family as before specified."

This holding was followed in *Gallagher v. Farlinger*, 6 U. C. C. P. 513, which was a devise to the testator's sons, in fee, with the following restraint: "that my three sons, Michael, Henry, and George, shall not be at liberty to sell any part of my homestead farm herein willed, except to each other, and so descend to their heirs to the third generation."

In *In re Rosher*, 26 Ch. Div. 810, the facts were as follows: A testator devised an estate to his son, in fee, provided always that if the son, his heirs or devisees, or any person claiming through or under him or them, should desire to sell the estate, or any part or parts thereof, in the lifetime of the testator's wife, she should have the option to purchase the same at the price of £3,000 for the whole, and at a proportionate price for any part or parts thereof, and the same should accordingly be first offered to her at such price or proportionate price or prices; or if the testator's son, his heirs or devisees, or any person claiming through or under him or them, should desire to rent any part or parts of one portion of the estate for a period exceeding three years and any part or parts of another portion for a period exceeding seven years, at any one time, the testator's wife should have the option of renting the whole of either or both portions at a certain annual rental fixed for each. Pearson, J., begins his opinion with a consideration of the provision in regard to sale, *i. e.*, whether or not one may annex a condition that, during a limited period, the devisee shall not sell at all, and reviews the decisions in *Muschamp v. Bluet*, *Bridgm. Rep.* 137; *Daniel v. Ubley*, *W. Jones* 137; *Doe v. Pearson*, 6 *East* 173; *Large's Case*, 3 *Leon*. 182, the provisions in *Coke upon Littleton* and *Sheppard's Touchstone*, all of which influenced the opinions in the later case of *In re Macleay*, *L. R.* 20 *Eq.* 187, and *Attwater v. Attwater*, 18 *Beav.* 330, and says: "I ask myself, and with all respect I hope for the learned judges who decided these cases, what was the principle upon which they went, and how by any possibility that principle is to be applied to other cases in the future? In *Daniel v. Ubley*, *W. Jones* 137, the widow was to alienate to one of her sons; in *Doe v. Pearson*, 6 *East* 173, the discretionary power of alienation was limited 'to her sister or sisters, or their children.' What am I to say is the principle? Is it that there may be a condition that, if you alienate, you must alienate to a member of your own family, or that you must look to the number of the individuals to whom the alienation is permitted, or when there are a number of individuals (not knowing at the present moment what that number may be)

am I to inquire whether they are able or likely to be willing to purchase the property to which the condition is attached? If they are able and willing to purchase the property, am I to say that the condition is good, and if from their poverty they are unable, or from other circumstances are unwilling, am I to say that the condition is bad? It seems to me that the adoption of any such rule as that would produce the greatest uncertainty and confusion; in fact, it would be absolutely impossible for any judge to apply such a rule to any case which might come before him, unless the facts of the case were absolutely identical with those of some previously decided case." He then refers to and disapproves the rule laid down by *Jessel, M. R.*, in *In re Macleay*, *L. R.* 20 *Eq.* 186, regarding the ways in which alienation may be restricted, claiming that there is no decision, not even *Large's Case*, 3 *Leon*. 182, upon which such reliance is placed, which supports the doctrine that a condition absolutely restraining alienation is good if there is a limitation as to time; and cites *Mandlebaum v. McDonnell*, 29 *Mich.* 78, 18 *Am. Rep.* 61, in which, he says, "Mr. Justice Christiancy points out that [in *Large's Case*, 3 *Leon*. 182,] there was no devise of the fee simple of that kind. There was only a contingent remainder limited to the son, upon condition that before he came into possession, that is to say, before he attained twenty-two, he should not sell. That being so, the son having sold before that time, it was held that he could not qualify himself to take under the contingent remainder, that the contingent remainder therefore failed altogether, and the estate passed away from him. Now the first citation of this case which deals with it as if it had decided that a limitation as to time made a condition of this kind good, is in a note in the 7th edition of *Sheppard's Touchstone*, page 130 (it is not in *Sheppard's Touchstone* itself). The note originally ran thus: 'And the grantee may be also restrained from alienating for a particular time. *Large's Case*, 3 *Leon*. 182.' Then Mr. Preston adds in brackets: 'Being a reasonable time, not trenching on the law against perpetuities,' and the note thus inserted in *Sheppard's Touchstone* has no doubt been copied into a good many other text-books. But there has been no judicial decision to that effect; and it is a very curious thing that, although *Littleton's* book is more than four hundred years old, and although Lord Coke died two hundred and fifty years ago, there is not a single judicial decision to be found in the books showing that a limitation as to time added to such a condition makes it a valid condition." The condition in the present case against selling, and the other against leasing, the property, were accordingly held void.

In *Heddlestone v. Heddlestone*, 15 *Ont. Rep.* 281, a condition that a devisee shall not dispose of the land either by sale or by mortgage, or otherwise, except by will to his lawful heirs, was held void, for it in effect takes away the whole power of alienation.

American Cases. — *Mandlebaum v. McDonnell*, 29 *Mich.* 78, 18 *Am. Rep.* 61, which is

deeds or devises for life, yet the later and better rule upholds them.¹

2. Restraints of Marriage.—Conditions annexed to conveyances of realty restricting marriage are void,² unless imposed by a husband or wife,³ or limited to a particular nationality or class or for a reasonable time.⁴

3. Conditions Promotive of Domestic Infelicity.—Conditions promotive of domestic infelicity are void.⁵ The most usual of this class are those for separation and non-support.

4. Provisions Against Contesting Wills or Making Claims Against Estates.—Provisions against contesting the deviser's will or making claims against his estate are valid.⁶

5. Conditions Looking to the Avoidance of Obligations.—Conditions looking to the avoidance of obligations are void.⁷

cited with approval in *In re Rosher*, 26 Ch. Div. 806, contains an elaborate and able exposition of the doctrine of conditions in restraint of alienation, and particularly against selling for a specified time; and, regarding the American decisions which recognize their validity, points out that *Gray v. Blanchard*, 8 Pick. (Mass.) 284; *Blackstone Bank v. Davis*, 21 Pick. (Mass.) 43, 32 Am. Dec. 241; *Simonds v. Simonds*, 3 Met. (Mass.) 562; and *Jackson v. Schutz*, 18 Johns. (N. Y.) 184, 9 Am. Dec. 195, contain mere dicta; and that the last-named case, which cites *Large's Case*, 3 Leon. 182, in support of its dictum, so far as it bears upon the question here, was *overruled* by the well-considered case of *De Peyster v. Michael*, 6 N. Y. 467.

M'Williams v. Nisly, 2 S. & R. (Pa.) 507, 7 Am. Dec. 654, is really not decisive of this question, the holding being on that of estoppel.

In *Stewart v. Brady*, 3 Bush (Ky.) 623, the court was of opinion that a restraint upon alienation for a particular time is good, but cited no authorities to substantiate this doctrine. *Bennett v. Chapin*, 77 Mich. 538; *Potter v. Couch*, 141 U. S. 314, *following* *Mandlebaum v. McDonnell*, 29 Mich. 78, 18 Am. Rep. 61; and *Anderson v. Cary*, 36 Ohio St. 517, 38 Am. Rep. 602, are to the same effect.

In *Schermerhorn v. Negus*, 1 Den. (N. Y.) 448, a condition restricting alienation to devisees and their heirs among themselves was held void.

Robinson v. Randolph, 21 Fla. 629, 58 Am. Rep. 692, and *Munroe v. Hall*, 97 N. Car. 206, contain mere dicta; and in *Laval v. Staffel*, 64 Tex. 370, the court said that there is a conflict of opinion regarding the question of partial restraints of alienation, but that the determination of that question was not necessary in that case, and based its ruling on another ground.

1. Restraints of Alienation in Conveyances for Life.—*Nichols v. Eaton*, 91 U. S. 725; *Camp v. Cleary*, 76 Va. 144. *Contra*, *Tillinghast v. Bradford*, 5 R. I. 212; *Brandon v. Robinson*, 18 Ves. Jr. 433.

2. Unlimited Restraints of Marriage Generally.—*Rogers v. Sebastian County*, 21 Ark. 440, *Jenkins v. Merritt*, 17 Fla. 304; *Randall v. Marble*, 69 Me. 311, 31 Am. Rep. 281; *Otis v. Prince*, 10 Gray (Mass.) 581; *Barksdale v. Elam*, 30 Miss. 694; *Williams v. Cowden*, 13 Mo. 212, 53 Am. Dec. 143; *Smythe v. Smythe*, 90 Va. 638. *Compare* *Mann v. Jackson*, 84 Me.

400, 30 Am. St. Rep. 358; *Jones v. Jones*, 1 Q. B. Div. 279.

In *Mann v. Jackson*, 84 Me. 400, 30 Am. St. Rep. 358, the court, passing upon a devise to a daughter for life, held that the intention of the testator, as manifested by the whole instrument, was not to promote celibacy by imposing a condition in restraint of his daughter's marriage, but only to limit her estate until, by marriage, another home should be provided for her.

3. Restraint of Marriage of Husband or Wife.—*Com. v. Stauffer*, 10 Pa. St. 354, 51 Am. Dec. 489; *Duncan v. Philips*, 3 Head (Tenn.) 415; *Hughes v. Boyd*, 2 Sneed (Tenn.) 512.

There is no substantial distinction between a condition in restraint of a second marriage of a woman, and one in restraint of a second marriage of a man. *Bostick v. Blades*, 59 Md. 231, 43 Am. Rep. 548; *Greenhalgh v. Marggraf*, (Supreme Ct.) 7 N. Y. Supp. 728. And see *infra*, this title, *Conditional Limitations—Particular Limitations*.

4. Limited Restraints of Marriage—Nationality.—*Perrin v. Lyon*, 9 East 170.

Class.—*Jenner v. Turner*, 16 Ch. Div. 195; *Greene v. Kirkwood*, L. R. 1 Ir. Rep. 130.

Time.—*Shackelford v. Hall*, 19 Ill. 212.

5. Conditions Promotive of Domestic Infelicity.—*Conrad v. Long*, 33 Mich. 78; *Potter v. McAlpine*, 3 Dem. (N. Y.) 123; *O'Brien v. Barkley*, (Supreme Ct.) 28 N. Y. Supp. 1049; *Hawke v. Euyart*, 30 Neb. 149; *Whiton v. Snyder*, 54 Hun (N. Y.) 552; *Wilkinson v. Wilkinson*, 40 L. J. Ch. 242. *Compare* *Born v. Horstmann*, 80 Cal. 452. In this case, a condition that each of the daughters of the testator should receive a certain portion of his estate in the event of becoming a widow or otherwise becoming lawfully separated from her husband, was held valid.

6. Provisions Against Contesting Wills or Making Claims Against Estates.—*Donegan v. Wade*, 70 Ala. 505; *Sackett v. Mallory*, 1 Met. (Mass.) 356; *Thompson v. Gaut*, 14 Lea (Tenn.) 314; *Cooke v. Turner*, 15 M. & W. 735. *Compare* *Bryant v. Tracy*, 27 Abb. N. Cas. (N. Y. Supreme Ct.) 185; *Chew's Appeal*, 45 Pa. St. 230.

7. Conditions Looking to the Avoidance of Obligations.—*Warner v. Rice*, 66 Md. 440; *Blackstone Bank v. Davis*, 21 Pick. (Mass.) 43, 32 Am. Dec. 241; *Hobbs v. Smith*, 15 Ohio St. 424; *Turley v. Massengill*, 7 Lea (Tenn.) 357; *Van Osdel v. Champion*, 89 Wis. 666, 46 Am. St. Rep. 864.

6. Prohibitions of and Limitations to Particular Uses of Property. — Prohibitions of and limitations to particular uses of the property conveyed, when reasonable and within the policy of the law, are valid.¹

7. Building Restrictions in the Form and Nature of Conditions. — Building restrictions in the form and nature of conditions, though uncommon, are valid, if reasonable, legal, and clearly expressed.²

IX. RESTRICTIONS AND STIPULATIONS. — Restrictions and stipulations inserted in conveyances of realty, in furtherance of a general plan of improvement, are analogous to conditions, but really in the nature of covenants; and, when reasonable and within the policy of the law, are valid.³ Restriction

1. Prohibitions of Particular Uses of Property. — Chief among conditions prohibiting certain uses of the property conveyed are those against the manufacture or sale of intoxicating liquors. They are valid, however much they may affect the value or nature of the estate. *Cowell v. Colorado Springs Co.*, 100 U. S. 57; *Collins Mfg. Co. v. Marcy*, 25 Conn. 242; *O'Brien v. Wetherell*, 14 Kan. 616; *Indian Orchard Canal Co. v. Sikes*, 8 Gray (Mass.) 562; *Watrous v. Allen*, 57 Mich. 362, 58 Am. Rep. 363; *Smith v. Barrie*, 56 Mich. 314, 56 Am. Rep. 391; *Plumb v. Tubbs*, 41 N. Y. 445; *Post v. Bernheimer*, 31 Hun (N. Y.) 252; *Lehigh Coal, etc., Co. v. Gluck*, 5 Pa. Co. Ct. Rep. 662; *Odessa Imp., etc., Co. v. Dawson*, 5 Tex. Civ. App. 489; *Fly v. Guinn*, 2 Tex. Unrep. Cas. 300. But if made for a dishonest purpose, and to enable the grantor to obtain a monopoly of the prohibited business, such conditions are void. *Chippewa Lumber Co. v. Tremper*, 75 Mich. 41, 13 Am. St. Rep. 420. And see *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274, wherein it was held that a provision (not set forth, but denominated a covenant), limiting the sale of intoxicating liquors to a certain minimum measure was valid.

Limitations to the Use of Property — Court-house Purposes. — *Henry v. Etowah County*, 77 Ala. 538; *Pepin County v. Prindle*, 61 Wis. 301.

School-house. — *Warner v. Bennett*, 31 Conn. 475.

Saw-mill. — *Sperry v. Pond*, 5 Ohio 389, 24 Am. Dec. 296.

2. Building Restrictions in the Form and Nature of Conditions. — *Hoyt v. Ketcham*, 54 Conn. 60; *Gray v. Blanchard*, 8 Pick. (Mass.) 288. See the title BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS, vol. 5, p. 2.

3. Restrictions. — Restrictions upon the location, height and character of buildings are frequently inserted in conveyances in furtherance of a general plan of improvement in a particular locality by the original owner of the several lots therein. In such cases the owner of each lot has, as appurtenant to his lot, a right in the nature of an easement upon the other lots. *Tinker v. Forbes*, 136 Ill. 240; *Smith v. Bradley*, 154 Mass. 227; *Hamlen v. Werner*, 144 Mass. 399; *Bagnall v. Davies*, 140 Mass. 78; *Beals v. Case*, 138 Mass. 140; *Tobey v. Moore*, 130 Mass. 448; *Peck v. Conway*, 119 Mass. 548; *Linzee v. Mixer*, 101 Mass. 512.

A restriction that no building shall be placed upon a parcel of land within a certain distance of a street, refers to the street as existing at the time the restriction is imposed, and not to the street as subsequently altered by public authority. *Tobey v. Moore*, 130 Mass. 448.

Breach — Illustrations. — A deed of land contained the restriction that no building should be erected thereon within twenty feet of C. street. The grantee built a house upon the land, facing towards C. street, the front wall of which was twenty feet from that street. A part of the roof, which sloped towards the street, was extended to within less than fourteen feet of it, covering a piazza, and supported by posts six feet from the front wall of the house. In this part of the roof there was a dormer window, by which a room in the second story was extended to within seventeen feet of the street. It was held that so much of the roof and of the dormer window as was nearer the street than the front line of the building was an extension of the building and within the restriction. *Bagnall v. Davies*, 140 Mass. 76.

The erection of a brick wall six feet in height with a coping one foot in height, to be used as a fence or wall, on the line of the street, was not a violation of a restriction that no building should be erected within ten feet of the street. *Nowell v. Boston Academy*, 130 Mass. 209.

A deed contained the restriction that any building erected on the premises should be of a specified height, and should not be used for certain purposes; and that the front wall thereof on said street should be set back twenty feet from said street, provided that steps, windows, porticos and other usual projections appurtenant thereto were to be allowed in said reserved space of twenty feet. There was erected a structure three and one-half feet high, extending from the wall of the house to the line of the street, the top of which was covered by turf, and the interior used for coal bins. All the reserved space, in front of the other houses on the street, was filled to a height of three or four inches from the line of the sidewalk, and sloped upward to a line at the house of nine to twelve inches, to prevent water from running towards the building. It was held that the structure built upon the lot was a violation of the restriction. *Atty.-Gen. v. Gardiner*, 117 Mass. 492.

A porch built upon brick foundations, roofed, and permanently attached to the whole width of the front of a house, and projecting to within seven feet of the fence line, is an integral part of the building within the meaning of a building restriction in a deed providing that "all buildings upon the said lots shall be erected not less than fifteen feet back from the fence line." Such a structure is a violation of the building restriction, notwithstanding the fact that it is open at the sides and in front.

tions being regarded unfavorably, are strictly construed.¹

X. CONDITIONAL LIMITATIONS² — 1. **Definition.** — A condition, followed by a limitation over to a third person in case the condition be not fulfilled or there be a breach of it, is termed a conditional limitation.³

2. **Origin.** — Conditional limitations arose out of conveyances having operation under the statute of uses, the effect of which was to dispense with livery of seizin.⁴

3. **Creation.** — “While,” “so long as,” “until,” and “during,” or their Latin equivalents, are apt words to create a conditional limitation; however, it is not the form or connection of words, but the intention of the grantor, which determines the character of a particular provision.⁵

4. **Breach.** — Upon the non-fulfillment or breach of a conditional limitation, the first estate comes to an end and the subsequent estate vests in the remainderman, immediately, without entry.⁶

5. **Particular Limitations** — *a.* **LIMITATIONS TO WIDOWHOOD OR WIDOWERHOOD.** — The limitation of an estate to widowhood or widowerhood annexed to a deed or a devise is valid.⁷

Duration. — An estate so limited endures for life or until remarriage.⁸

Power of Sale Coupled with Conveyance. — A power of sale coupled with the con-

Ogontz Land, etc., *Co. v. Johnson*, 168 Pa. St. 178. And see *Smith v. Bradley*, 154 Mass. 227; *Sanborn v. Rice*, 129 Mass. 387; *Linzee v. Mixer*, 101 Mass. 512. See also the title **BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS**, vol. 5, p. 2.

Stipulations. — Stipulations inserted in conveyances in furtherance of a general plan of improvement are various; among them are those against the use of the property for hotels, *Winnepesaukee Camp-Meeting Assoc. v. Gordon*, 63 N. H. 505; *Stines v. Dorman*, 25 Ohio St. 583; *Stevens v. Pillsbury*, 57 Vt. 205, 52 Am. Rep. 121; stores, *Winnepesaukee Camp-Meeting Assoc. v. Gordon*, 63 N. H. 505; stables, *Winnepesaukee Camp-Meeting Assoc. v. Gordon*, 63 N. H. 505; or for any offensive business, *Tobey v. Moore*, 130 Mass. 451; *Whitney v. Union R. Co.*, 11 Gray (Mass.) 363, 71 Am. Dec. 715; or confining them to the purpose of dwelling houses, *Parker v. Nightingale*, 6 Allen (Mass.) 344, 83 Am. Dec. 632; *Dorr v. Harrahan*, 101 Mass. 531, 3 Am. Rep. 398; or of single dwelling houses, *Gillis v. Bailey*, 21 N. H. 155; *Fuller v. Arms*, 45 Vt. 400. And see *Tucker v. Allen*, 16 Kan. 312.

1. **Restrictions Are Strictly Construed.** — *Hutchinson v. Ulrich*, 145 Ill. 336; *Eckhart v. Irons*, 128 Ill. 581.

2. **Conditional Limitations — Scope of This Treatise.** — This part of the treatise, like that upon conditions, is confined to a consideration of conditional limitations in deeds and devises.

3. **Definition.** — *Stearns v. Godfrey*, 16 Me. 160; *Brattle Square Church v. Grant*, 3 Gray (Mass.) 146, 63 Am. Dec. 725. See *supra*, this title, **Definitions and Origin; Distinctions.**

4. **Origin.** — *Smith v. Brisson*, 90 N. Car. 290; *Smith v. Smith*, 23 Wis. 182, 99 Am. Dec. 153. See the title **USES, STATUTE OF.**

5. **Creation.** — *Schaeffer v. Messersmith*, 10 Pa. Co. Ct. Rep. 366; *Chapin v. School Dist. No. 2*, 35 N. H. 450.

6. **Breach.** — *Summit v. Yount*, 109 Ind. 508; *Brattle Square Church v. Grant*, 3 Gray (Mass.) 146, 63 Am. Dec. 725; *Aldrich v. Funk*, 48 Hun (N. Y.) 367; *Ludlow v. New York*, etc.,

R. Co., 12 Barb. (N. Y.) 443; *Martin v. Seigler*, 32 S. Car. 267; *Wiederanders v. State*, 64 Tex. 140; *Smith v. Smith*, 23 Wis. 180, 99 Am. Dec. 153; *In re Melville*, 11 Ont. Rep. 626.

7. **Particular Provisions — Limitations to Widowhood or Widowerhood — England.** — *Jordan v. Holkham*, Ambl. 209.

Canada. — *Livingston v. Corrie*, 3 Kerr. (Can.) 450.

United States. — *Giles v. Little*, 104 U. S. 293. *Alabama.* — *Vaughn v. Lovejoy*, 34 Ala. 438.

Georgia. — *Doyal v. Smith*, 28 Ga. 262; *Snider v. Newsom*, 24 Ga. 142.

Indiana. — *Levegood v. Hoople*, 124 Ind. 27; *Summit v. Yount*, 109 Ind. 506; *Wood v. Beasley*, 107 Ind. 37; *Hibbits v. Jack*, 97 Ind. 570, 49 Am. Rep. 478; *Harmon v. Brown*, 58 Ind. 207.

Kentucky. — *Coppage v. Alexander*, 2 B. Mon. (Ky.) 313, 38 Am. Dec. 153.

Maryland. — *Gough v. Manning*, 26 Md. 347.

Missouri. — *Dumey v. Schoeffler*, 24 Mo. 170, 69 Am. Dec. 422.

Tennessee. — *Wooten v. House*, (Tenn. Ch. 1895) 36 S. W. Rep. 932; *Hawkins v. Skeggs*, 10 Humph. (Tenn.) 31.

Explanation. — The provision, “during her widowhood,” was held in *Summit v. Yount*, 109 Ind. 506; *Hibbits v. Jack*, 97 Ind. 570, 49 Am. Rep. 478; and *Harmon v. Brown*, 58 Ind. 207, not to violate the Indiana statute.

And see *supra*, this title, **Particular Conditions.**

8. **Duration of Estates Limited to Widowhood or Widowerhood.** — *Jordan v. Holkham*, Ambl. 209; *Giles v. Little*, 104 U. S. 293; *Farmers' Bank v. Hooff*, 4 Cranch (C. C.) 323; *Green v. Hewitt*, 97 Ill. 113, 37 Am. Rep. 102; *Batterton v. Yoakum*, 17 Ill. 288; *Willis v. Watson*, 5 Ill. 67; *Nash v. Simpson*, 78 Me. 142; *Swope v. Swope*, 5 Gill (Md.) 225; *Miller v. Caragher*, 35 Hun (N. Y.) 486; *Rausch v. Rausch*, (Supreme Ct.) 31 N. Y. Supp. 786; *Long v. Paul*, 127 Pa. St. 462, 14 Am. St. Rep. 862; *Schaeffer v. Messersmith*, 10 Pa. Co. Ct. Rep. 366; *Lane v. Crutchfield*, 3 Head (Tenn.) 452.

veyance does not enlarge the estate to one in fee.¹

b. LIMITATIONS UPON INSOLVENCY, ETC.—The limitation of an estate upon the insolvency or bankruptcy of a grantee or devisee, or upon the recovery of a judgment by creditors to reach it, is valid.²

c. LIMITATIONS UPON DESERTION.—The limitation of his or her estate in the property conveyed, in the event of the unlawful desertion of the husband or the wife, is valid.³

d. LIMITATIONS UPON DEATH WITHOUT ISSUE.—The limitation of an estate upon the death of the grantee or devisee without issue is valid.⁴

XI. EXCEPTIONS AND RESERVATIONS—1. **Definitions.**—An Exception in a deed is a qualification, by virtue of which a portion of an estate is withheld from the operation of a grant.⁵

A Reservation in a deed is the creation in behalf of the grantor of a new right or interest in the property granted.⁶

2. Distinction.—An exception is corporeal; a reservation is incorporeal.⁷

3. Creation—Apt Terms.—“Excepting” and “reserving” are the apt words to create exceptions and reservations respectively, and though not synonymous are often so used; however, this is immaterial, for which is intended may be determined from the nature and effect of the provision in question.⁸

Parol.—Exceptions and reservations cannot be created,⁹ or if void cured,¹⁰ by parol.

For Whose Benefit Created.—Exceptions and reservations are created by and

1. Power of Sale Coupled with a Conveyance.—*Nash v. Simpson*, 78 Me. 142; *Long v. Paul*, 127 Pa. St. 456, 14 Am. St. Rep. 862.

2. Limitations upon Insolvency, etc.—*Nicols v. Eaton*, 91 U. S. 716; *Bramhall v. Ferris*, 14 N. Y. 41, 67 Am. Dec. 113; *Mebane v. Mebane*, 4 Ired. Eq. (N. Car.) 136, 44 Am. Dec. 102; *Van Osdel v. Champion*, 89 Wis. 665, 46 Am. St. Rep. 864; *Brandon v. Robinson*, 18 Ves. Jr. 429. As the court said in *Brandon v. Robinson*, 18 Ves. Jr. 429: “There is an obvious distinction between a disposition to a man until he becomes bankrupt, and then over, and an attempt to give him property and to prevent his creditors from obtaining any interest in it, though it is his.” See *supra*, this title, *Particular Conditions*. Compare *Brownson v. Gifford*, 8 How. Pr. (N. Y. Supreme Ct.) 392; *In re Machu*, 21 Ch. Div. 838.

3. Limitations upon Desertion.—*Smith v. Smith*, 23 Wis. 176, 99 Am. Dec. 153.

4. Limitations upon Death Without Issue.—*Bryan v. Spires*, 3 Brews. (Pa.) 580.

5. Exceptions and Reservations—Definitions—Exception.—“An exception is something reserved by the grantor out of that which he has before granted.” *Case v. Haight*, 3 Wend. (N. Y.) 635. “An exception is a clause in a deed which withdraws from its operation some part of the thing granted, and which would otherwise have passed to the grantee under the general description.” *Biles v. Tacoma*, etc., R. Co., 5 Wash. 511. And see *Gould v. Howe*, 131 Ill. 496.

6. Reservation.—“A reservation in a deed is the creation of some new right issuing out of the thing granted, and which did not exist before as an independent right, in behalf of the grantor and not of a stranger.” *Gould v. Howe*, 131 Ill. 497. “A reservation is a clause in a deed whereby the grantee reserves some new thing to himself out of the thing granted.” *Randall v. Randall*, 59 Me. 340;

Rich v. Zeilsdorff, 22 Wis. 547, 99 Am. Dec. 81. “A reservation is the creation in behalf of the grantor of a new right issuing out of the thing granted, something which did not exist as an independent right before the grant.” *Biles v. Tacoma*, etc., R. Co., 5 Wash. 512.

7. Distinction.—“Exception is always a part of a thing granted, and of a thing in being; and a reservation is of a thing not in being.” *State v. Wilson*, 42 Me. 21. “A reservation is never of any part of the estate itself, but of something issuing out of it. An exception must be of a part of the thing granted or described as granted, and can be of nothing else.” *Blackman v. Striker*, 142 N. Y. 561; *Craig v. Wells*, 11 N. Y. 321; *Rich v. Zeilsdorff*, 22 Wis. 547, 99 Am. Dec. 81; *Shep. Touch*, 77, 78; *Cunningham v. Knight*, 1 Barb. (N. Y.) 399; *Starr v. Child*, 5 Den. (N. Y.) 599.

8. Creation.—*Gould v. Howe*, 131 Ill. 496; *Martin v. Cook*, 102 Mich. 272; *Kister v. Reeser*, 98 Pa. St. 5, 42 Am. Rep. 608; *Biles v. Tacoma*, etc., R. Co., 5 Wash. 511; *Fischer v. Laack*, 76 Wis. 319; *Lapointe v. Lafleur*, 46 U. C. Q. B. 16. For illustrations the following cases may be consulted: *Noble v. Illinois Cent. R. Co.*, 111 Ill. 437; *Leavitt v. Towle*, 8 N. H. 96; *Capron v. Kingman*, 64 N. H. 571; *Munn v. Worrall*, 53 N. Y. 44, 13 Am. Rep. 470; *Bridge v. Pierson*, 66 Barb. (N. Y.) 514; *Blackman v. Striker*, 29 Abb. N. Cas. (N. Y. Supreme Ct.) 467; *Langdon v. New York*, 6 Abb. N. Cas. (N. Y. Supreme Ct.) 314; *Sloan v. Lawrence Furnace Co.*, 29 Ohio St. 568; *Whitaker v. Brown*, 46 Pa. St. 197; *Wright v. Jackson*, 10 Ont. Rep. 470.

9. Exceptions and Reservations Cannot Be Created by Parol.—*Leonard v. Clough*, 133 N. Y. 296; *Wintermute v. Light*, 46 Barb. (N. Y.) 284.

10. If Void, Exceptions and Reservations Cannot Be Cured by Parol.—*Andrews v. Todd*, 50 N. H. 568.

for the benefit of a grantor or his heirs, and not for a stranger.¹

4. Nature — Must Not Be Repugnant to Estate Granted. — Exceptions and reservations must not be repugnant to the estate granted.²

Description. — An exception must be described as fully and accurately as a grant.³

It Must Be Part of an Estate Granted and not of some other estate;⁴ it must be of part only and not of all the estate granted.⁵

Must Be Severable — Property of Grantor. — It must be severable from the estate granted,⁶ and it must be of an estate which properly belongs to the grantor.⁷

5. Construction — Strictly Construed. — Exceptions and reservations should be construed most strictly against the grantor and most favorably to the grantee;⁸ yet, while strictly construed, reservations include things appurtenant⁹ to the enjoyment of, and the use of such means¹⁰ as are indispensably necessary to the exercise of, the right reserved.

Construed in Same Manner as a Grant. — A reservation should be construed in the same manner as a grant.¹¹

Reference to Prior Deed. — Where a deed contains a clause by which it is made subject to a reservation contained in a prior deed of the same property, it is to be construed in the same manner as though the language of the reservation in the original deed were incorporated into and formed a part of the one in question.¹²

Change of Purpose. — Because property is subsequently devoted to a different

1. Created by and for the Benefit of the Grantor or His Heirs Only. — *Moulton v. Faught*, 41 Me. 298; *Eysaman v. Eysaman*, 24 Hun (N. Y.) 430; *Stevens v. Adams*, 1 Thomp. & C. (N. Y.) 589; *Craig v. Wells*, 11 N. Y. 315; *Ives v. Van Auken*, 34 Barb. (N. Y.) 567; *Hornbeck v. Sleight*, 12 Johns. (N. Y.) 201; *Hornbeck v. Westbrook*, 9 Johns. (N. Y.) 75; *Parsons v. Miller*, 15 Wend. (N. Y.) 564; *Young's Petition*, 11 R. I. 637; *Strasson v. Montgomery*, 32 Wis. 58.

2. Nature — Not Repugnant. — *Cornelius v. Ivins*, 26 N. J. L. 376; *Hay v. Storrs*, Wright (Ohio) 711; *Daugherty v. Marcum*, 3 Head (Tenn.) 323; *Watkins v. Tucker*, 84 Tex. 430.

3. Exception Must Be Fully and Accurately Described. — *Moore v. Lord*, 50 Miss. 234; *Coal Creek Min. Co. v. Heck*, 15 Lea (Tenn.) 504. For illustrations in this connection, see *Mooney v. Cooledge*, 30 Ark. 640; *Darling v. Crowell*, 6 N. H. 421; *Rockafeller v. Arlington*, 91 Ill. 375; *Stambugh v. Hollabaugh*, 10 S. & R. (Pa.) 357; *Terrel v. Easterling*, 2 McMull L. (S. Car.) 24; *Butcher v. Creel*, 9 Gratt. (Va.) 201; *Johnson v. Ashland Lumber Co.*, 47 Wis. 326. See also *Gill v. Grand Tower Min., etc., Co.*, 92 Ill. 249; *Corderoy v. Den*, 20 N. J. L. 320.

4. Exception Must Be Part of the Estate Granted. — *Moore v. Lord*, 50 Miss. 234; *Starr v. Child*, 5 Den. (N. Y.) 599; *Maynard v. Maynard*, 4 Edw. Ch. (N. Y.) 714; *et vide Low v. Settle*, 32 W. Va. 600.

5. Exception Must Be of Part of the Estate Only. — *Moore v. Lord*, 50 Miss. 234; *Shoenberger v. Lyon*, 7 W. & S. (Pa.) 194.

6. Exception Must Be Severable from the Estate Granted. — *Moore v. Lord*, 50 Miss. 234; *Maynard v. Maynard*, 4 Edw. Ch. (N. Y.) 714.

7. Exception Must Be of an Estate Which Belongs to the Grantor. — *Moore v. Lord*, 50 Miss. 234.

8. Construction — Exceptions and Reservations Are Strictly Construed — *California*. — *Muller v. Boggs*, 25 Cal. 182.

Maine. — *Wyman v. Farrar*, 35 Me. 71.

New Hampshire. — *Darling v. Crowell*, 6 N. H. 424.

New York. — *Blackman v. Striker*, 142 N. Y. 560; *Ives v. Van Auken*, 34 Barb. (N. Y.) 567; *Jackson v. Blodgett*, 16 Johns. (N. Y.) 178; *Jackson v. Gardner*, 8 Johns. (N. Y.) 394; *Jackson v. Hudson*, 3 Johns. (N. Y.) 387, 3 Am. Dec. 500; *Case v. Haight*, 3 Wend. (N. Y.) 636.

Pennsylvania. — *Klaer v. Ridgway*, 86 Pa. St. 529; *Ogontz Land, etc., Co. v. Johnson*, 3 Pa. Dist. Rep. 642.

Wisconsin. — *Green Bay, etc., Canal Co. v. Hewitt*, 66 Wis. 465.

The rule that exceptions and reservations are to be construed most favorably to the grantee applies only where the language is doubtful. *Richardson v. Clements*, 89 Pa. St. 503, 33 Am. Rep. 784.

9. Reservations Include Things Appurtenant to Their Enjoyment. — *Cocheco Mfg. Co. v. Whittier*, 10 N. H. 313. And see *Jackson v. Vermilyea*, 6 Cow. (N. Y.) 677.

10. Reservations Include the Use of the Means Necessary to the Exercise of the Right Reserved. — *St. Anthony Falls Water Power Co. v. Minneapolis*, 41 Minn. 270; *Wardell v. Watson*, 93 Mo. 107; *Central R. Co. v. Valentine*, 29 N. J. L. 60, 566; *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 538, 14 Am. Rep. 322; *State v. Suttle*, 115 N. Car. 784.

11. Reservation Should Be Construed in the Same Manner as a Grant. — *French v. Carhart*, 1 N. Y. 96; *Wardell v. Watson*, 93 Mo. 107.

12. A Deed Which Is Subject to a Reservation in Another Deed Is Construed as though That Reservation Were Incorporated in It. — *French v. Carhart*, 1 N. Y. 96.

purpose from that for which it was expressly excepted, it cannot be held to have been conveyed.¹

6. Particular Instances—*a. RESERVATIONS OF WATER POWER.*—A reservation of water power will generally be construed to be one of a measure of water, and not a limitation of the purpose of use.²

b. PROVISIONS IN REGARD TO TIMBER—Right to Cut Timber for Particular Time.—A reservation for a particular time of a right to cut and remove timber does not give an absolute right of property in the trees.³

Removal.—A stipulation that the timber excepted shall be removed within a specified time does not make the exception to which it is annexed conditional on such removal.⁴

Life Tenancy—Sales of Timber.—A reservation of the use and control, during his natural life, of the land conveyed, does not give a grantor a right to cut and remove timber therefrom for sale.⁵

c. PROVISIONS IN REFERENCE TO MINERALS—Right to Mine.—Unless expressly restricted, there passes as an incident of the grant or exception of minerals a right to mine them, and to do so in a manner convenient and advantageous to the owner of the right, provided the surface of the land is not wholly destroyed.⁶

Right of Support.—And even the right of support may be expressly withdrawn.⁷

d. RESERVATIONS OF THE RIGHT TO VACATE STREETS.—A reservation by the owner of a subdivision, of a right to vacate any of its streets, is one of all the title thereto.⁸

CONDONATION.—See the title DIVORCE. As to condonation of breach of contract by a servant, see the title MASTER AND SERVANT.

CONDUCE.—See note 9.

1. Change of Its Purpose Does Not Affect the Exception.—New York *v.* New York Cent., etc., R. Co., 69 Hun (N. Y.) 324.

2. Particular Provisions—Reservations of Water Power.—Blake *v.* Madigan, 65 Me. 522; Dewey *v.* Williams, 40 N. H. 222, 77 Am. Dec. 708; Hall *v.* Sterling Iron, etc., Co., 148 N. Y. 432; Merrill *v.* Calkins, 74 N. Y. 1; Comstock *v.* Johnson, 46 N. Y. 615; Wakely *v.* Davidson, 26 N. Y. 387; Olmsted *v.* Loomis, 9 N. Y. 423; Borst *v.* Empie, 5 N. Y. 33; Cromwell *v.* Selden, 3 N. Y. 253; Rood *v.* Johnson, 26 Vt. 64; Noyes *v.* Hemphill, 58 N. H. 536, wherein it was held that in a deed of lot A, a reservation of the right to draw water from a well on that lot for the family occupying lot B gave the occupant of lot B the right to draw water for the ordinary purposes of a family, but not for the additional use of a bakery.

By the Term "Mill Seat," a natural mill-seat is intended. Snider *v.* Lawrence, 11 Johns. (N. Y.) 191.

3. Limited Reservation of Right to Cut and Remove Timber.—Rich *v.* Zeilsdorff, 22 Wis. 544, 99 Am. Dec. 81.

4. Stipulation for Removal.—Irons *v.* Webb, 41 N. J. L. 203, 32 Am. Rep. 193.

5. Life Tenant—Right to Sell Timber.—Richardson *v.* York, 14 Me. 216; Webster *v.* Webster, 33 N. H. 18, 66 Am. Dec. 705.

Other Provisions Regarding Timber Construed.—Cronin *v.* Richardson, 8 Allen (Mass.) 423; Alcott *v.* Lakin, 33 N. H. 507, 66 Am. Dec. 739; Whitted *v.* Smith, 2 Jones L. (N. Car.) 36.

6. Unless Restricted, a Right to Mine Passes with an Exception of Minerals.—Marvin *v.*

Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322; Noble *v.* Illinois Cent. R. Co., 111 Ill. 437.

7. Right of Support May Be Expressly Withdrawn.—Scranton *v.* Phillips, 94 Pa. St. 15.

Substances Comprehended by the Term "Minerals," etc.—See Deer Lake Co. *v.* Michigan Land, etc., Co., 89 Mich. 180; Hartwell *v.* Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448; Foster *v.* Runk, 109 Pa. St. 291, 58 Am. Rep. 720; Dunham *v.* Kirkpatrick, 101 Pa. St. 36, 47 Am. Rep. 696; Gibson *v.* Tyson, 5 Watts (Pa.) 34; Bell *v.* Wilson, L. R. 1 Ch. 303.

8. Reservation of the Right to Vacate Streets.—St. John *v.* Quitzow, 72 Ill. 334.

9. Divorce. (See also the title DIVORCE.)—In St. Paul *v.* St. Paul, L. R. 1 P. & D. 739, it was held that the wilful neglect or misconduct which deprives a petitioner of his right to a decree, under the English Divorce Act (20 and 21 Vict., c. 85, § 31), must be wilful neglect and misconduct which has *conducted* to the respondent's first fall from virtue. In Stroud's Jud. Dict., p. 147, it is said: "According to the received meaning of the word *conduce*, I think that what has *conducted* an effect must in some sense have caused it, or contributed to it, and the *conducting* cause must be such as, if not directly, at least indirectly, might at the time be contemplated as likely somehow to contribute to' that effect. *Per* Campbell, C. J., Cummington *v.* Cummington, 28 L. J. P. & M. 102, 1 Sw. & Tr. 475. And accordingly it was held in that case that 'wilful neglect or misconduct' *conducting* to adultery (section 31, Matrimonial Causes Act 1857) means marital

CONDUCT.—Conduct means mode of action; behavior.¹ To conduct means to carry on, to manage, to regulate.²

neglect or misconduct, and not such compulsory absence as is occasioned by a term of imprisonment." See also upon the term in this connection, *Allen v. Allen*, 28 L. J. Mat. Cas. 81; *Badcock v. Badcock*, 31 L. T. 268; *Proctor v. Proctor*, 34 L. J. Mat. Cas. 99; *Dering v. Dering*, L. R. 1 P. & D. 531; *Davies v. Davies*, 32 L. J. Mat. Cas. 111; *Hawkins v. Hawkins*, 54 L. J. P. Div. 94, 10 Prob. Div. 177.

Demurrer to Evidence.—It has been said that upon a demurrer to evidence the demurrant must be considered as admitting every fact which the evidence may *conduce* to prove. In *Hansbrough v. Thom*, 3 Leigh (Va.) 159, Tucker, P. says: "The language of this court is more appropriate; 'that the demurrant must be considered as admitting all that could reasonably be inferred by a jury from the evidence given against him.' For evidence may *conduce*, that is, tend or contribute toward the proof of a fact, which it is very far from establishing, and which could not be fairly inferred from it." See also 6 ENCYC. OF PLEADING AND PRACTICE, p. 438.

1. Conduct Unbecoming an Officer.—See the titles MILITARY LAW; POLICE DEPARTMENT.

Good Conduct.—See GOOD CONDUCT.

Disorderly Conduct.—See DISORDERLY CONDUCT.

Illegal Conduct.—See ILLEGAL CONDUCT.

Improper Conduct.—See IMPROPER.

Vicious Conduct.—See VICIOUS.

Conduct and Character. (See the title CHARACTER IN EVIDENCE, vol. 5, p. 850.)—In *Zitzer v. Merkel*, 24 Pa. St. 410, it is said: "If there be a metaphysical distinction between character and *conduct*, we know of no authority in law for admitting evidence of *conduct* where evidence of character would be excluded. Character or reputation is generally regarded as the voice of the community, but that is just what the *conduct* of the individual makes it. 'The speech of the people,' as it is most descriptively called, is suggested by the general tenor of the *conduct*, so that to prove the one is in effect to prove the other, and the rule of law that would exclude character excludes *conduct*. The text writers and the adjudged cases generally speak of *conduct* and character as convertible terms, and such language is accurate enough for all practical purposes."

English Bankruptcy Act.—Where the main asset of a bankrupt was a reversionary interest under his father's will, contingent on his surviving his mother, and the trustee found that he could sell the bankrupt's interest if the purchaser could obtain a policy of insurance on the bankrupt's life, but the bankrupt refused to undergo a medical examination for the purpose of the insurance, it was held that such refusal, however unreasonable, is not *conduct* which the court can take into consideration on his application for his discharge; because, said Lord Esher, M. R., "the examination required would not be in relation to any property of the bankrupt as it is, but to add a new value to it. When that value is added the trustee desires to sell the property of the bankrupt as so increased in value. If we allowed this appeal we should be overruling *In re Garnett*, 55 L. J. Q.

B. Div. 77, because if it is misconduct not to do this act, an order might be made to do it; but in my opinion that case was rightly decided, and Mr. Justice Cave arrived at his decision on the same ground as I do." *In re Betts*, 56 L. J. Q. B. 370, 4 Times Rep. 770, 19 Q. B. Div. 39, affirmed L. R. 13 App. 570, 58 L. J. Q. B. 113. See also *In re Garnett*, 55 L. J. Q. B. Div. 77; and see, upon the construction of this statute, *In re Jones*, 24 Q. B. Div. 596; *Ex p. Burgess*, 57 L. T. 200.

2. Harvey v. Vandegrift, 89 Pa. St. 352. That case was upon the construction of a deed conveying the privilege of a fishery "as it has heretofore been *conducted*;" the court held that the words "as heretofore *conducted*" had no necessary relation to the extent of the fishery.

Conduct of an Election.—The *conduct* of an election does not literally include a declaration of the result, but it was held that the word *conducted* in the *South Carolina* local option law had a wider meaning, and in its application to the city of Spartanburg was intended to embrace also a declaration of the result. *Blake v. Walker*, 23 S. Car. 517.

In *State v. Adams*, 2 Stew. (Ala.) 242, it is said: "By 'the manner of *conducting* the election,' I understand the formal part of the election; viz., the mode of voting, the mode of receiving and registering the votes, of computing them, etc. The word 'manner' has never been considered as including substance, but form only, and the word *conducting* certainly cannot be synonymous with 'effecting.'"

Driving or Conducting Cattle—Sunday.—A statute provided that it should be unlawful for any drover or other person to *conduct* or drive through any of the streets of a certain parish, in which there was a large cattle market, any oxen, sheep, or other cattle, during Sunday. It was held that a person driving a van in which were calves being conveyed to market was not driving or *conducting* cattle within the meaning of the statute. *Triggs v. Lester*, L. R. 1 Q. B. 259.

Intoxicating Liquors. (See also CARRY; and see the title INTOXICATING LIQUORS.)—An indictment charged that the defendant did engage in and manage the business of a dealer of spirituous liquors, without paying a license tax. It was held that these words were substantially equivalent to the statutory words, "carry on or *conduct* any business or profession for which a license is required." The court said: "To engage in means 'to embark; to take a part; to employ one's self; to devote attention and effort; to enlist.' Webster's Dictionary. To manage is defined by Webster to be, 'to have under control and direction; to conduct; to guide; to administer; to treat; to handle.' These definitions of the words used in the indictment substantially mean the same thing as the words 'carry on' and *conduct*, used in the statute; and for this reason we think the indictment sufficiently sets forth the offense with which the defendant was charged, without charging a sale. *Jordan v. State*, 22 Fla. 528; *Dansey v. State*, 23 Fla. 316." *Roberts v. State*, 26 Fla. 362.

CONDUCTOR.— See the titles CARRIERS OF PASSENGERS, vol. 5, p. 474; CONTRIBUTORY NEGLIGENCE; DEATH BY WRONGFUL ACT; FELLOW SERVANTS; MASTER AND SERVANT; NEGLIGENCE; STREET RAILWAYS; TICKETS AND FARES.

CONDUIT. (See also the titles DRAINS AND SEWERS; EMINENT DOMAIN; WATER COMPANIES; WATER COURSES.)—"Conduit" is a general word which applies to any channel or structure by which flowing water can be conducted from one point to another. It includes a ditch, flume, pipe, or any kind of aqueduct.¹

CONFECTIONERY.— A "confectionery" is a place where sweetmeats and similar things are sold.²

CONFEDERACY. (See also the title CONSPIRACY, *post.*)— A "confederacy" is when two or more conspire together to do any damage or injury to another, or to do any unlawful act.³

CONFEDERATE MONEY.— See the titles AGENCY, vol. 1, p. 930; BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, pp. 64, 131; CONTRACTS; MONEY.

CONFEDERATION. (See also the titles CONSTITUTIONAL LAW; INTERNATIONAL LAW.)—"Confederation" is a compact or agreement between states and nations by which they unite for mutual welfare.⁴

CONFESSION AND AVOIDANCE.— See the title CONFESSION AND AVOIDANCE, 4 ENCYCLOPÆDIA OF PLEADING AND PRACTICE, p. 664.

CONFESSION OF ACTION.— A confession is an admission of a cause of action as alleged in the declaration to the extent of its terms, and no further.⁵

CONFESSION OF JUDGMENTS.— See the titles AGENCY, vol. 1, pp. 942, 999; ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 3, p. 17; ATTORNEY AND CLIENT, vol. 3, pp. 362, 368; JUDGMENTS.

Conducting a Sale.— An English statute provided for a fee for solicitors for *conducting* a sale by public auction. For a construction of the term *conducting*, as used in this statute, see *In re Wilson*, 29 Ch. Div. 790; *In re Faulkner*, 56 L. J. Ch. 1011; *Newbould v. Bailward*, 58 L. J. Q. B. 209; *Burd v. Burd*, 58 L. J. Ch. 170.

1. *Sefton v. Prentice*, 103 Cal. 673.

Open Canal.— A statute provided that a water company might condemn land and lay down pipes and *conduits* for water. It was held that this authorized the condemnation of land for the purpose of excavating an open *conduit*. The court said: "That this canal is a *conduit* cannot be denied, for a *conduit* is defined to be either a channel or a pipe; and a channel may be either an inclosed or an uninclosed conductor of water. It is true that the words, 'lay down a *conduit* or pipe,' seem to imply that in the minds of the legislature was the thought that the water would be conducted by some open or inclosed *conduit* laid down upon or beneath the surface of the ground; but a canal cut in the earth, and laid down in cement, would fill the exact statutory description." *State v. Atlantic City Water Works Co.*, 55 N. J. L. 237.

2. *New Orleans v. Jane*, 34 La. Ann. 667, in which case it was held that selling liquors by the drink is not part of the business of a *confectionery*, and is not covered by a *confectionery* license. See also the title INTOXICATING LIQUORS.

Adulteration. (See generally the title ADULTERATION, vol. 1, p. 738.)— An indictment which charged the defendant with adulterating one pound of *confectionery* was held not sufficiently to have described the substance alleged to have been adulterated. The court said: "The word *confectionery* is a generic

word, which includes a great variety of kinds of articles usually sold in a *confectioner's* shop, and does not describe the substance, which the defendant is charged with adulterating, with the precision and certainty that the constitution of the commonwealth and the rules of criminal pleading require." *Com. v. Chase*, 125 Mass. 203.

3. *State v. Crowley*, 41 Wis. 284; *Watson v. Harlem, etc.*, Nav. Co., 52 How. Pr. (N. Y. Supreme Ct.) 353.

Instruction — Confederates.— It appearing from the evidence that a murder had been committed pursuant to a conspiracy so to do by the parties indicted, though possibly by the hand of some one not a party to the conspiracy, it was held proper to instruct the jury that the defendant and his *confederates*, though not present at the murder, might yet be held guilty as conspirators. The court said: "We think the word *confederates*, as used in the charge, was used in the sense of 'those indicted with him,' words used in the former part of the charge, and that it must have been so understood by the jury. With this meaning attached to the word, the charge, in our opinion, was correct." *Jones v. State*, 64 Ind. 489.

4. *Anderson's Law Dict.* As to the Articles of Confederation, see the title CONSTITUTIONAL LAW. As to the confederation of the Southern States or Confederate States of America, see the titles DE FACTO OFFICERS; INTERNATIONAL LAW; MONEY; STATES; WAR; AGENCY, vol. 1, p. 930; BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, pp. 64, 131; CONTRACT.

5. *Hackett v. Boston, etc.*, R. Co., 35 N. H. 397. See also ENCYC. OF PL. AND PR., titles COGNOVIT, vol. 4, p. 560; JUDGMENTS.

CONFESSIONS.

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I. DEFINITION AND GENERAL CONSIDERATIONS. — A confession is a voluntary admission or declaration by a person of his agency or participation in a crime.¹

As Distinguished from Statements or Declarations. — The term "confessions" is not the mere equivalent of the words "statements" or "declarations." A statement or declaration to amount to a confession must be inculpatory and not exculpatory in its nature.² Thus statements made by persons indicted together for the same offense, by which each charges the other without inculpating himself, and makes no reference to anything done in common as charged, are not confessions.³

As Distinguished from Admissions. — Confessions as distinguished from admissions are acknowledgments of facts criminating in their nature, and not mere declarations against interest.⁴

Statements as to Facts Tending to Establish Guilt. — Moreover, a confession is limited in its precise scope and meaning to the criminal act itself. It does not

1. **Confession Defined.** — *People v. Strong*, 30 Cal. 157; *People v. Parton*, 49 Cal. 638; *People v. Velarde*, 59 Cal. 457; *People v. Le Roy*, 65 Cal. 613; *Mora v. People*, 19 Colo. 255, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 439; *State v. Jones*, 33 Iowa 9; *State v. Jackson*, 95 Mo. 651; *Hunter v. Eddy*, 11 Mont. 262; *Taylor v. State*, 37 Neb. 796; *People v. Mondon*, 38 Hun (N. Y.) 197; *State v. Mills* 91 N. Car. 597; *State v. Heidenreich*, 29 Oregon 381; *State v. Moran*, 15 Oregon 271; *State v. Carson*, 36 S. Car. 524, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 438.

Confessions Limited to Acknowledgments of Guilt to Persons in Authority. — In *U. S. v. Stone*, 8 Fed. Rep. 257, it was suggested that it would be a better rule to limit confessions to those acknowledgments of guilt made to any person in authority over the prosecution, and to call all others admissions.

2. **Confession Distinguished from Declaration.** — *People v. Parton*, 49 Cal. 638.

3. **Must Be Inculpatory.** — *State v. Carson*, 36 S. Car. 524.

Also, where a prisoner, in speaking of the testimony of a witness against him, said "that what C. said was true as far as he went, but that he did not say all or enough," it was held that this remark was not admissible as a confession. The court in this case said: "The objection to the evidence is that in reality the prisoner made no confession of guilt at all; the conversation was rather a declaration of his innocence than a confession of guilt." *Finn v. Com.*, 5 Rand. (Va.) 701.

4. **Confessions as Distinguished from Admissions.** — *Wilson v. State*, 84 Ala. 426. See also *Hornsby v. State*, 94 Ala. 56. And see the title ADMISSIONS, vol. 1, p. 670.

apply to acknowledgments of facts merely tending to establish guilt, since a damaging fact may be admitted without any intention to confess guilt. These are criminal admissions rather than confessions.¹

Statement as to Future Commission of Offense. — A statement with reference to the

1. Statement as to Facts Tending to Establish Guilt — *Alabama*. — *Pentecost v. State*, 107 Ala. 81.

California. — *People v. Hickman*, 113 Cal. 80; *People v. Parton*, 49 Cal. 637; *People v. Le Roy*, 65 Cal. 613.

Dakota. — *Territory v. Egan*, 3 Dakota 119. *Georgia*. — *Dumas v. State*, 63 Ga. 600; *Covington v. State*, 79 Ga. 691; *Fletcher v. State*, 90 Ga. 468; *Boston v. State*, 94 Ga. 590.

Iowa. — *State v. Knowles*, 48 Iowa 598; *State v. Glynden*, 51 Iowa 463; *State v. Red*, 53 Iowa 69.

Massachusetts. — *Com. v. Smith*, 162 Mass. 508.

Michigan. — *Hamilton v. People*, 29 Mich. 173.

Missouri. — *State v. Jackson*, 95 Mo. 651.

Oregon. — *State v. Heidenreich*, 29 Oregon 381.

See also *Maynard v. People*, 135 Ill. 416; *Rex v. Jones, R. & R.* 152; *Ettinger v. Com.*, 98 Pa. St. 338.

Thus, the Admission of a Person Charged with Murder, that he had in his possession certain property of the murdered person, is in no sense a confession of guilt. *State v. Red*, 53 Iowa 69.

Also, on a Trial for Arson, it was held that declarations of the accused designed to explain his possession of some of the goods which were in the burned building immediately preceding the fire, and his knowledge touching the whereabouts and possession of other parcels of the goods, were, in their inculpatory tendency, criminal admissions as distinguished from confessions, and it was error for the trial judge in charging the jury to denominate them confessions. *Fletcher v. State*, 90 Ga. 468.

Also It Has Been Held that on a Trial for Larceny of cattle, where there was testimony to the effect that the person charged told two others the circumstances connected with his possession of the animals, and testified in his own behalf that he bought the property from one who represented that he was the owner thereof and showed in detail the manner in which possession was obtained, an instruction that such declarations and such testimony constituted a confession was erroneous. *State v. Heidenreich*, 29 Oregon 381.

Homicide. — Also a statement by the defendant that he was casually present when a homicide was committed but that he took no part in it and did not know that it was contemplated until after it occurred, is not a confession, and to submit to the jury the question whether it was a confession or not was held to be reversible error. *Boston v. State*, 94 Ga. 590. See also *Dumas v. State*, 63 Ga. 600.

A Statement Made Several Months After the Burning of a Barn, that the respondent had a good insurance on his house and it might go to blazes with the barn, is not a confession that he burned the barn. *Hamilton v. People*, 29 Mich. 173.

Where a Prisoner Charged with Forgery admit-

ted that he wrote the name of another person to a note, without stating that he did so with a fraudulent intent, his statement does not amount to a confession, because he may have intended by such admission to imply that the act was done rightfully. *State v. Knowles*, 48 Iowa 598. The court in this case said: "A confession implies that the matter confessed is a crime."

The Distinction Stated. — In *Covington v. State*, 79 Ga. 691, the court, in delivering the opinion, said: "We think it is not improbable that the learned judge may have been misreported as to the language used in this charge, but we are bound to take it as we find it in the record; and so taking it, it is amenable to two objections. The first is, that it deals with mere admissions of inculpatory facts as if they were confessions of guilt. There is a broad distinction between the two. When a person only admits certain facts from which the jury may or may not infer guilt, there is no confession. We may use the word confessions for admissions, but to sum up mere inculpatory admissions and denominate them a confession, implies that they amount to a confession of guilt. The judge (as he is represented) did not classify this evidence properly. It is not direct, or, as he terms it, positive evidence of guilt, but it belongs to circumstantial evidence, the admitted facts being circumstances proved by the prisoner's admissions, instead of being proved by some witness who was present when these facts transpired. If the same facts had been testified to by a witness who saw them transpire, that would have been circumstantial evidence, because no witness saw this man participating in the burglary. He was not seen at the broken house or on the premises, and he does not admit that he was ever at the chicken-house, or saw the house, or knew there was such a house, or knew a burglary had been committed. He admitted facts which were very powerful evidence against him of complicity in the burglary, but all the facts he admitted could have existed consistently with his perfect innocence of the crime of burglary. And it seems to have been his design in all his statements not to inculcate himself but to exculpate himself. He made the admissions, not for the purpose of conceding that he was guilty, or with any view to confess his guilt, but in the line of a denial of guilt; not an express, but an implied denial."

Under Statute in Texas it has been held not to be necessary, in order to make the prisoner's statement a confession within the meaning of the statute, that it should be a direct acknowledgment of his guilt. A confession under that statute may be of collateral facts by which it is necessary to establish the main facts. *Austin v. State*, 15 Tex. App. 393.

In *Ferguson v. State*, 31 Tex. Crim. Rep. 93, it was said that "a confession is inculpatory evidence which connects or tends to connect the defendant either directly or indirectly as a guilty participant in the offense charged."

future commission of an offense does not amount to a confession. To have the effect of a confession it must relate to an offense which is being or has already been committed.¹

Judicial Confessions are those made in conformity to law before the committing magistrate or in court in the due course of legal proceedings.²

Extra-judicial Confessions are those which are made by a party elsewhere than before a magistrate or in court.³

Indirect or Implied Confessions.—Inferences of guilt from the language,⁴ acts,⁵ or silence⁶ of the prisoner are referred to by some of the authorities as indirect or implied confessions. But by a strict observance of definitions, a discussion of such evidence of guilt would, perhaps, more properly come under the title **ADMISSIONS**.⁷ For the sake of convenience, however, they will be discussed here in connection with the kindred subject of acknowledgments of guilt proper.

Instances of Confessions or Admissions Implied from Conduct.—The conduct⁸ of the

1. **Statement as to Future Commission of Offense.**—*Banks v. State*, 13 Tex. App. 182.

2. **Judicial Confessions Defined.**—1 Greenl. on Ev., § 216; *U. S. v. Williams*, 1 Cliff. (U. S.) 5; *White v. State*, 49 Ala. 348; *Matthews v. State*, 55 Ala. 187; *Com. v. Hanlon*, 3 Brews. (Pa.) 498; *Speer v. State*, 4 Tex. App. 479.

In *Matthews v. State*, 55 Ala. 187, the court said: "The first [judicial confessions] comprehends confessions made before a committing magistrate having authority to take and certify the examination of persons accused of a criminal offense when the preliminary inquiry is being made, whether such offense has been committed and whether there is probable cause to believe the accused was the guilty agent in its commission. It also comprehends the plea of guilty, deliberately interposed on the arraignment for final trial after admonition and advice from the court against its interposition."

In *Alabama* it has been said that there is no other judicial confession than the plea of guilty interposed on the arraignment for final trial. All other confessions, whether express, full, free, and voluntary, verbal or written, or mere admissions to be implied from conduct or words, are extra-judicial. *Matthews v. State*, 55 Ala. 187.

Texas Statute.—In *Rice v. State*, 22 Tex. App. 654, it was held that to constitute a judicial confession under the Texas statute, it must have been made in a voluntary statement of the accused taken before a magistrate in accordance with law, and that a mere oral statement by the prisoner of his guilt, not reduced to writing and signed by him in accordance with article 262 of the Code of Criminal Procedure, was an extra-judicial confession.

3. **Extra-judicial Confessions Defined.**—1 Greenl. on Ev., § 216; *U. S. v. Williams*, 1 Cliff. (U. S.) 24; *State v. Lamb*, 28 Mo. 230; *Com. v. Hanlon*, 3 Brews. (Pa.) 498; *Speer v. State*, 4 Tex. App. 478.

4. **"Confession Implied" from Language.**—*State v. Bruce*, 33 La. Ann. 186.

"Confession Implied" from Offer of Compromise.—A confession may be implied from an offer of compromise by the accused, and the proposition to compromise together with the reply of the party addressed may be admitted in evidence against the former. *State v. Bruce*, 33 La. Ann. 186; *Leslie v. State*, 35 Fla. 171.

5. **"Confession Implied" from Acts.**—1 Roscoe's Crim. Ev. 89; 1 Greenl. on Ev., § 215; *State v. Miller*, 9 Houst. (Del.) 576; *Nolen v. State*, 14 Tex. App. 474, 46 Am. Rep. 247.

6. **"Confession Implied" from Silence.**—1 Greenl. on Ev., § 215; *Ware v. State*, 96 Ga. 349; *State v. Smith*, 30 La. Ann. 459.

7. **Inferences from Acts, etc., More Properly Termed "Admissions."**—*Ford v. State*, 34 Ark. 654; *People v. Estrado*, 49 Cal. 171; *Puett v. Beard*, 86 Ind. 104; *State v. Johnson*, 35 La. Ann. 842; *Com. v. McDermott*, 123 Mass. 440, 25 Am. Rep. 120; *State v. Plym*, 43 Minn. 385; *State v. Swink*, 2 Dev. & B. L. (N. Car.) 9.

On Trial for Bigamy the fact that the defendant, when expostulated with by his brother and sister in regard to his second marriage, immediately before and after the time of its occurrence, on the ground that his former wife was still living, made no answer except to say that it was his own business, is competent evidence against him as being in the nature of an admission. *State v. Plym*, 43 Minn. 385.

Silence Construed to Be "in Nature of Admission."—At the trial of a criminal case the judge instructed the jury that, if a statement was made in the hearing and presence of a person which affected his rights or was criminating to him, and he remained silent, such silence was tantamount to an admission of the truth of the facts stated, provided the same was heard and understood by such person and he was not in custody or under restraint, but at liberty to reply or explain, and provided such statement was of such a nature, and made under such circumstances and by such persons, as naturally to call for a reply. It was held that if, instead of saying that silence was "tantamount" to an admission, the judge had said that it was in the nature of an admission, the instructions would have been strictly accurate, but that the inaccuracy, if any, was eliminated by the jury being told that if they found the facts as contended by the government, "they would give to the circumstance such weight and significance as they thought it entitled to." *Com. v. McCabe*, 163 Mass. 98.

8. **Instances of Confessions or Admissions Implied from Conduct—England.**—*Reg. v. Barber*, 1 C. & K. 442, 47 E. C. L. 442.

United States.—*U. S. v. Neverson*, 1 Mackey (D. C.) 152.

accused, after the commission of the offense, or after being charged therewith or arrested, such as flight, escape, or concealment or the attempting it,¹ the fabrication of false and contradictory statements,² bribing or attempting to bribe a witness³ or threatening him,⁴ is receivable in evidence as tending to show guilt.

Silence of Accused. — Moreover, where a statement is made in the presence of a party accusing him of the commission of or complicity in a crime, his silence or failure to meet the accusation with a prompt and explicit denial may, under certain circumstances, warrant the inference of his acquiescence in the truth of the charge.⁵

Alabama. — *Campbell v. State*, 23 Ala. 44; *Huggins v. State*, 41 Ala. 393; *Adams v. State*, 52 Ala. 379; *Rains v. State*, 88 Ala. 91; *Cooper v. State*, 86 Ala. 610, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 492.

California. — *People v. Fitzpatrick*, 80 Cal. 538.

Georgia. — *Betts v. State*, 66 Ga. 508; *Inman v. State*, 72 Ga. 269.

Iowa. — *State v. Nash*, 7 Iowa 347.

Kansas. — *State v. Grebe*, 17 Kan. 458.

Kentucky. — *Basham v. Com.*, 87 Ky. 440.

Louisiana. — *State v. Edwards*, 34 La. Ann. 1012.

Massachusetts. — *Com. v. McHugh*, 147 Mass. 401.

Mississippi. — *Heard v. State*, 59 Miss. 545.

Missouri. — *State v. Buchler*, 103 Mo. 203; *State v. Hill*, 134 Mo. 663; *State v. Moore*, 117 Mo. 395.

New York. — *Conkey v. People*, 1 Abb. App. Dec. (N. Y.) 418; *People v. O'Neil*, 49 Hun (N. Y.) 422, 17 N. Y. St. Rep. 956, 112 N. Y. 355; *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636.

North Carolina. — *State v. Vinson*, 63 N. Car. 335; *State v. James*, 90 N. Car. 702; *State v. Bishop*, 98 N. Car. 773; *State v. Jacobs*, 106 N. Car. 695; *State v. Brabham*, 108 N. Car. 793.

Ohio. — *Moore v. State*, 2 Ohio St. 500.

Texas. — *Cordova v. State*, 6 Tex. App. 207; *Handline v. State*, 6 Tex. App. 347; *Curry v. State*, 7 Tex. App. 267; *Noftsinger v. State*, 7 Tex. App. 301; *Post v. State*, 10 Tex. App. 598; *Rhodes v. State*, 11 Tex. App. 563; *Miller v. State*, 18 Tex. App. 232; *Weathersby v. State*, 29 Tex. App. 278.

Wisconsin. — *Sullivan v. State*, 75 Wis. 650.

Thus, in *State v. Hill*, 134 Mo. 663, where a person upon being charged with an offense interposed no denial but only "kinder laughed," it was held that his conduct was admissible in evidence.

1. Implication from Flight, Escape, or Concealment — *Alabama.* — *Murrell v. State*, 46 Ala. 89, 7 Am. Rep. 592; *Bowles v. State*, 58 Ala. 335; *Carden v. State*, 84 Ala. 417.

California. — *People v. Strong*, 46 Cal. 302; *People v. Collins*, 48 Cal. 277; *People v. Giancoli*, 74 Cal. 642; *People v. Fine*, 77 Cal. 147.

Georgia. — *Whaley v. State*, 11 Ga. 123; *Sewell v. State*, 76 Ga. 836.

Indiana. — *Hittner v. State*, 19 Ind. 48; *Anderson v. State*, 104 Ind. 467.

Iowa. — *State v. Arthur*, 23 Iowa 430; *State v. Rodman*, 62 Iowa 456.

Louisiana. — *State v. Dufour*, 31 La. Ann. 804.

Maine. — *State v. Frederic*, 69 Me. 400.

Massachusetts. — *Com. v. Brigham*, 147 Mass. 414.

Michigan. — *People v. Pitcher*, 15 Mich. 397; *Cummins v. People*, 42 Mich. 142.

Missouri. — *Fanning v. State*, 14 Mo. 386; *State v. Phillips*, 24 Mo. 475; *State v. Williams*, 54 Mo. 170; *State v. King*, 78 Mo. 555; *State v. Griffin*, 87 Mo. 608; *State v. Jackson*, 95 Mo. 623; *State v. Walker*, 98 Mo. 95.

North Carolina. — *State v. Nat*, 6 Jones L. (N. Car.) 114.

Oregon. — *State v. Lee*, 17 Oregon 488.

Pennsylvania. — *Com. v. McMahon*, 145 Pa. St. 413.

Texas. — *Aiken v. State*, 10 Tex. App. 610; *Waite v. State*, 13 Tex. App. 169; *Walters v. State*, 17 Tex. App. 226, 50 Am. Rep. 128; *Sheffield v. State*, 43 Tex. 378.

Virginia. — *Dean v. Com.*, 4 Gratt. (Va.) 541; *Williams v. Com.*, 85 Va. 607.

Forfeiture of Recognizance. — The fact that one accused of crime gave straw bail and forfeited his recognizance by voluntary absence, may be considered by the jury on the trial as evidence bearing upon the question of his guilt. *Barron v. People*, 73 Ill. 256; *Porter v. State*, 2 Ind. 435.

2. Implication from False and Contradictory Statements — *Alabama.* — *Walker v. State*, 49 Ala. 398; *Adams v. State*, 52 Ala. 379.

Georgia. — *Tompkins v. State*, 17 Ga. 356.

Kentucky. — *Cornelison v. Com.*, 84 Ky. 583.

Maine. — *State v. Benner*, 64 Me. 267.

Massachusetts. — *Com. v. Grose*, 99 Mass. 423.

New Hampshire. — *State v. Wentworth*, 37 N. H. 196.

North Carolina. — *State v. Gillis*, 4 Dev. L. (N. Car.) 606; *State v. Bishop*, 98 N. Car. 773.

Pennsylvania. — *Cathcart v. Com.*, 37 Pa. St. 108.

South Carolina. — *State v. Clark*, 4 Stroth. L. (S. Car.) 311.

Texas. — *Sheffield v. State*, 43 Tex. 378.

3. Implication from Bribing Witness. — *State v. Staples*, 47 N. H. 113, 50 Am. Dec. 565.

4. Implication from Threatening Witness. — *Adams v. People*, 9 Hun (N. Y.) 89.

5. Implication from Silence — *Arkansas.* — *Ford v. State*, 34 Ark. 654; *Williams v. State*, 42 Ark. 380.

California. — *People v. Estrado*, 49 Cal. 171; *People v. Ah Yute*, 54 Cal. 89.

Georgia. — *Drumright v. State*, 29 Ga. 430.

Iowa. — *State v. Pratt*, 20 Iowa 268.

Louisiana. — *State v. Johnson*, 35 La. Ann. 842.

Massachusetts. — *Com. v. Harvey*, 1 Gray (Mass.) 487; *Com. v. Call*, 21 Pick. (Mass.) 515.

Reason of Inference.—The implication of assent to a statement affecting the guilt or innocence of an individual, from an omission to controvert, qualify, or explain it, arises from the fact that a person knowing the truth or falsity of a statement affecting his rights, made by another in his presence, will naturally, under circumstances calling for a reply, deny it, if he is at liberty to do so, and if he does not intend to admit it.¹

II. ADMISSIBILITY—1. **Necessity of Voluntary Character**—*a. EXTRA-JUDICIAL CONFESSIONS*—(1) *Rule Stated.*—The rule is well settled that an extra-judicial confession is not admissible in evidence against the accused unless it has been freely and voluntarily made.²

32 Am. Dec. 284; *Com. v. Trefethen*, 157 Mass. 180.

Minnesota.—*State v. Plym*, 43 Minn. 385.

Missouri.—*State v. Hill*, 134 Mo. 663.

New Jersey.—*Donnelly v. State*, 26 N. J. L. 613; *Kelley v. People*, 55 N. Y. 571, 14 Am. Rep. 342.

North Carolina.—*State v. Swink*, 2 Dev. & B. L. (N. Car.) 9.

Pennsylvania.—*Ettinger v. Com.*, 98 Pa. St. 338.

Texas.—*Brown v. State*, 32 Tex. Crim. Rep. 119.

Statement of One Co-defendant in Presence of Other.—Thus it has been held that on a joint criminal trial of A. and B. a confession made by A. in B.'s presence, implicating B. and not denied by him, may go in as a tacit admission by B. *Sparf v. U. S.*, 156 U. S. 51; *State v. Johnson*, 35 La. Ann. 842.

Also, it has been held that if two are jointly indicted for murder, and on the separate trial of one there is evidence tending to show a conspiracy between them, evidence of declarations of the other made in the presence of the defendant are admissible on behalf of the prosecution. *People v. Estrado*, 49 Cal. 171; *Robins v. State*, 9 Tex. App. 671. See the title CONSPIRACY, *post*.

Also, where a defendant jointly indicted for murder with another who has pleaded guilty to the charge is appealed to by that other, who must know his guilt, if guilty, to confess the crime, and he simply refuses to confess, but does not deny his guilt, it has been held that the circumstances may be given in evidence to the jury. *Cobb v. State*, 27 Ga. 698.

Failure to Answer an Expression of Suspicion.—Where a suspicion of crime was conveyed to a prisoner in these terms: "Everybody suspects you, I suspect you," it was held that his silence in relation to the crime was evidence tending to show guilt. *State v. Reed*, 62 Me. 129.

An Act of a Third Person done in the presence of the prisoner is equally admissible as a declaration made in his presence. *Hochrieter v. People*, 2 Abb. App. Dec. (N. Y.) 363.

General Denial Sufficient to Avoid Application of Rule.—The principle that acquiescence or silence when circumstances require an answer or denial may amount to a confession, has no application where the person accused by another of the commission of an offense immediately denies all knowledge of his complicity in its commission, even though such denial be in general terms, and does not in detail extend to each of the minor incriminating circumstances against him. *Ware v. State*, 96 Ga. 349.

Principle of Admission.—In *People v. Estrado*, 49 Cal. 173, the court said: "The statement of C. was not offered to prove of itself the circumstances narrated by him. It was evidence against the defendant only to the extent it was admitted by the defendant to be correct, his acquiescence being indicated by his express assent by his silence, or by acts or conduct on his part which could be fairly construed as an assent." See also *People v. Ah Yute*, 54 Cal. 89.

In *South Carolina* it has been held that in a criminal trial it is error to charge "that if a party hears a criminal charge against himself made in his presence, and says nothing, it is an admission on his part, and in the eye of the law the party accepts that charge as his confession." *State v. Edwards*, 13 S. Car. 30.

1. **Reason of Implication.**—*Donnelly v. State*, 26 N. J. L. 601; *Kelley v. People*, 55 N. Y. 572, 14 Am. Rep. 342.

2. **Confessions Must Be Voluntary**—*England.*—*Rex v. Miles*, Car. Cr. L. (3d ed.) 61; *Rex v. Sexton*, 3 Russ. on Cr. (5th ed.) 445; *Reg. v. Baldry*, 2 Den. C. C. 430, 5 Cox C. C. 523; *Rex v. Thomas*, 6 C. & P. 353, 25 E. C. L. 435; *Rex v. Parratt*, 4 C. & P. 570, 19 E. C. L. 532; *Rex v. Enoch*, 5 C. & P. 539, 24 E. C. L. 446; *Rex v. Mills*, 6 C. & P. 146, 25 E. C. L. 324; *Rex v. Shepherd*, 7 C. & P. 579, 32 E. C. L. 639; *Rex v. Thompson*, 1 Leach C. C. 291; *Rex v. Cass*, 1 Leach C. C. 293, note; *Rex v. Jones*, R. & R. 152; *Rex v. Simpson*, 1 Moo. C. C. 410; *Reg. v. Luckhurst*, Dears. C. C. 245, 6 Cox C. C. 243, 22 Eng. L. & Eq. 604; *Reg. v. Hearn*, C. & M. 109, 41 E. C. L. 65; *Reg. v. Coley*, 10 Cox C. C. 536; *Reg. v. Gavin*, 16 Cox C. C. 656.

Canada.—*Reg. v. Berube*, 3 L. C. Rep. 212; *Reg. v. Field*, 16 U. C. C. P. 98; *Reg. v. Romp*, 17 Ont. Rep. 567; *Reg. v. McCafferty*, 25 New Bruns. 396.

United States.—*U. S. v. Nott*, 1 McLean (U. S.) 499; *U. S. v. Stone*, 8 Fed. Rep. 232; *Wilson v. U. S.*, 162 U. S. 622; *U. S. v. Negro Richard*, 2 Cranch (C. C.) 439; *U. S. v. Pocklington*, 2 Cranch (C. C.) 293; *U. S. v. Negro Charles*, 2 Cranch (C. C.) 76; *U. S. v. Hunter*, 1 Cranch (C. C.) 317; *U. S. v. Pumphreys*, 1 Cranch (C. C.) 74.

Alabama.—*Seaborn v. State*, 20 Ala. 15; *Wyatt v. State*, 25 Ala. 9; *Brister v. State*, 26 Ala. 107; *Franklin v. State*, 28 Ala. 9; *Aikin v. State*, 35 Ala. 399; *Mose v. State*, 36 Ala. 211; *Aaron v. State*, 37 Ala. 106; *Joe v. State*, 38 Ala. 422; *Dinah v. State*, 39 Ala. 359; *Miller v. State*, 40 Ala. 54; *King v. State*, 40 Ala. 314; *Newman v. State*, 49 Ala. 9; *Sullins v. State*

Reason of Rule. — The ground on which involuntary confessions are excluded is not because of any wrong done to the accused in using them or any impropriety in the manner of obtaining them, but because of their unreliability.

53 Ala. 474; *Levison v. State*, 54 Ala. 520; *Porter v. State*, 55 Ala. 95; *Bonner v. State*, 55 Ala. 242; *Grant v. State*, 55 Ala. 201; *Lacey v. State*, 58 Ala. 385; *Murphy v. State*, 63 Ala. 1; *Redd v. State*, 68 Ala. 498; *Murdock v. State*, 68 Ala. 567; *Young v. State*, 68 Ala. 569; *Redd v. State*, 69 Ala. 255; *DeArman v. State*, 71 Ala. 351; *Kelly v. State*, 72 Ala. 244; *Owen v. State*, 78 Ala. 425, 56 Am. Rep. 40; *Sands v. State*, 80 Ala. 201; *Steele v. State*, 83 Ala. 20; *Hornsby v. State*, 94 Ala. 56; *Calloway v. State*, 103 Ala. 27; *Bracken v. State*, 111 Ala. 68.

Arkansas. — *Austin v. State*, 14 Ark. 556; *Meyer v. State*, 19 Ark. 156; *Love v. State*, 22 Ark. 336; *Flanagin v. State*, 25 Ark. 92; *Runnels v. State*, 28 Ark. 121; *Butler v. State*, 34 Ark. 480; *Yates v. State*, 47 Ark. 172.

California. — *People v. Barric*, 49 Cal. 345; *People v. Smith*, 15 Cal. 408; *People v. Jim Ti*, 32 Cal. 60; *People v. Ah How*, 34 Cal. 218; *People v. Johnson*, 41 Cal. 452; *People v. Long*, 43 Cal. 445; *People v. Kelley*, 47 Cal. 125; *People v. Parton*, 49 Cal. 632; *People v. Taylor*, 59 Cal. 640; *People v. Martinez*, 66 Cal. 278; *People v. Thompson*, 84 Cal. 598.

Colorado. — *Beery v. U. S.*, 2 Colo. 186.

Connecticut. — *State v. Potter*, 18 Conn. 166.

Dakota. — *U. S. v. Beebe*, 2 Dakota 292; *Territory v. Egan*, 3 Dakota 119.

Delaware. — *State v. Harman*, 3 Harr. (Del.) 567; *State v. Bostick*, 4 Harr. (Del.) 563.

District of Columbia. — *U. S. v. Nardello*, 4 Mackey (D. C.) 503.

Florida. — *Simon v. State*, 5 Fla. 285; *Murray v. State*, 25 Fla. 528; *Metzger v. State*, 18 Fla. 491; *Dixon v. State*, 13 Fla. 636.

Georgia. — *Berry v. State*, 10 Ga. 511; *Stephen v. State*, 11 Ga. 225; *Jim v. State*, 15 Ga. 535; *Rafe v. State*, 20 Ga. 60; *Frain v. State*, 40 Ga. 529; *Earp v. State*, 55 Ga. 136; *Johnson v. State*, 61 Ga. 305; *Dumas v. State*, 63 Ga. 600; *Byrd v. State*, 68 Ga. 661; *Marable v. State*, 89 Ga. 425; *Matthews v. State*, 86 Ga. 782, 804.

Idaho. — *State v. Ellington*, (Idaho 1895) 43 Pac. Rep. 60; *State v. Mason*, (Idaho 1895) 43 Pac. Rep. 63.

Illinois. — *Miller v. People*, 39 Ill. 457; *Austine v. People*, 51 Ill. 236; *Brown v. People*, 91 Ill. 506; *Robinson v. People*, 159 Ill. 115; *Andrews v. People*, 117 Ill. 195; *Bartley v. People*, 156 Ill. 234.

Indiana. — *Hamilton v. State*, 3 Ind. 552; *Smith v. State*, 10 Ind. 106; *State v. Freeman*, 12 Ind. 100.

Iowa. — *State v. Ostrander*, 18 Iowa 435; *State v. Jones*, 33 Iowa 9; *State v. Chambers*, 39 Iowa 179; *State v. Fortner*, 43 Iowa 494; *State v. McLaughlin*, 44 Iowa 82; *State v. Sopher*, 70 Iowa 494.

Kansas. — *State v. Ingram*, 16 Kan. 14; *State v. White*, 17 Kan. 487.

Kentucky. — *Hudson v. Com.*, 2 Duv. (Ky.) 531; *Rutherford v. Com.*, 2 Metc. (Ky.) 387; *Young v. Com.*, 8 Bush (Ky.) 366.

Louisiana. — *State v. Nelson*, 3 La. Ann. 497; *State v. Havelin*, 6 La. Ann. 167; *State v. Kitty*, 12 La. Ann. 805; *State v. Mulholland*,

16 La. Ann. 376; *State v. Garvey*, 28 La. Ann. 927, 26 Am. Rep. 123; *State v. Johnson*, 30 La. Ann. 881; *State v. Von Sachs*, 30 La. Ann. 942; *State v. Alphonse*, 34 La. Ann. 9; *State v. Revells*, 34 La. Ann. 381, 44 Am. Rep. 436; *State v. Mims*, 43 La. Ann. 532.

Maine. — *State v. Grant*, 22 Me. 171.

Maryland. — *Nicholson v. State*, 38 Md. 140; *Ross v. State*, 67 Md. 286.

Massachusetts. — *Com. v. Morey*, 1 Gray (Mass.) 461; *Com. v. Chabcock*, 1 Mass. 144; *Com. v. Howe*, 2 Allen (Mass.) 153; *Com. v. Taylor*, 5 Cush. (Mass.) 610; *Com. v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; *Com. v. Tuckerman*, 10 Gray (Mass.) 173; *Com. v. Whittemore*, 11 Gray (Mass.) 201; *Com. v. Drake*, 15 Mass. 161; *Com. v. Curtis*, 97 Mass. 574; *Com. v. Cuffee*, 108 Mass. 285; *Com. v. Crocker*, 108 Mass. 464; *Com. v. Smith*, 119 Mass. 305; *Com. v. Cullen*, 111 Mass. 435; *Com. v. Mitchell*, 117 Mass. 431; *Com. v. Sego*, 125 Mass. 210; *Com. v. Nott*, 135 Mass. 269; *Com. v. Preece*, 140 Mass. 276; *Com. v. Myers*, 160 Mass. 530.

Michigan. — *Flagg v. People*, 40 Mich. 706; *People v. Wolcott*, 51 Mich. 612; *People v. Clarke*, 105 Mich. 169; *People v. Howes*, 81 Mich. 396.

Minnesota. — *State v. Staley*, 14 Minn. 105; *State v. Holden*, 42 Minn. 350.

Mississippi. — *Peter v. State*, 4 Smed. & M. (Miss.) 31; *Van Buren v. State*, 24 Miss. 512; *Dick v. State*, 30 Miss. 593; *Jordan v. State*, 32 Miss. 382; *Sam v. State*, 33 Miss. 347; *Frank v. State*, 39 Miss. 705; *Cady v. State*, 44 Miss. 332; *Garrard v. State*, 50 Miss. 147; *Simmons v. State*, 61 Miss. 243.

Missouri. — *Hector v. State*, 2 Mo. 166, 22 Am. Dec. 454; *Couley v. State*, 12 Mo. 462; *State v. Brockman*, 46 Mo. 566; *State v. Simon*, 50 Mo. 370; *State v. Hagan*, 54 Mo. 192; *State v. Patterson*, 73 Mo. 702; *State v. Phelps*, 74 Mo. 128; *State v. Hopkirk*, 84 Mo. 278; *State v. Elliott*, 90 Mo. 350.

Montana. — *Territory v. McClin*, 1 Mont. 394.

Nebraska. — *Ballard v. State*, 19 Neb. 609; *Anderson v. State*, 25 Neb. 550; *Furst v. State*, 31 Neb. 403; *Bubster v. State*, 33 Neb. 663.

Nevada. — *State v. Carrick*, 16 Nev. 120.

New Hampshire. — *State v. Howard*, 17 N. H. 171; *State v. York*, 37 N. H. 175; *State v. Wentworth*, 37 N. H. 196; *State v. Squires*, 48 N. H. 364.

New Jersey. — *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404; *Derby v. Derby*, 21 N. J. Eq. 36.

New York. — *People v. Burns*, 2 Park. Cr. Rep. (Oneida Oyer & T. Ct.) 34; *People v. Thoms*, 3 Park. Cr. Rep. (N. Y. Ct. App.) 256; *Hartung v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 319; *Ward v. People*, 3 Hill (N. Y.) 395; *People v. McMahon*, 15 N. Y. 384; *Fowler v. People*, 18 How. Pr. (N. Y. Supreme Ct.) 493; *People v. Wentz*, 37 N. Y. 303; *People v. Phillips*, 42 N. Y. 200; *O'Brien v. People*, 48 Barb. (N. Y.) 274; *Cox v. People*, 80 N. Y. 500; *People v. McGloin*, 91 N. Y. 242;

A prisoner may be induced by the pressure of hope or fear to admit facts unfavorable to him, without regard to their truth, in order to obtain the promise of relief or avoid the threatened danger, and therefore confessions so obtained have no just and legitimate tendency to prove the facts confessed.¹

(2) *Effect of Inducement of Benefit.* — Under the rule as above laid down, it may be stated generally that if a confession is made under an inducement of profit, benefit, or amelioration held out, it will be excluded from the evidence as being involuntary.²

People v. Mondon, 103 N. Y. 211, 57 Am. Rep. 709; *People v. Druse*, 103 N. Y. 655; *People v. McCallam*, 103 N. Y. 587.

North Carolina. — *State v. Wright*, Phil. L. (N. Car.) 486; *State v. Patrick*, 3 Jones L. (N. Car.) 443; *State v. Lowhorne*, 66 N. Car. 638; *State v. Whitfield*, 70 N. Car. 356; *State v. Rorie*, 74 N. Car. 148; *State v. Suggs*, 89 N. Car. 527; *State v. Mills*, 91 N. Car. 581.

Ohio. — *Spears v. State*, 2 Ohio St. 584; *Fouts v. State*, 8 Ohio St. 98; *Price v. State*, 18 Ohio St. 418.

Oregon. — *State v. Leonard*, 3 Oregon 157.

Pennsylvania. — *Com. v. Hanlon*, 3 Brews. (Pa.) 461; *Fife v. Com.*, 29 Pa. St. 429; *Laros v. Com.*, 84 Pa. St. 200; *McCabe v. Com.*, (Pa. 1886) 8 Atl. Rep. 45.

Rhode Island. — *State v. Littlefield*, 3 R. I. 124.

South Carolina. — *State v. Kirby*, 1 Strobb. L. (S. Car.) 155; *State v. Kirby*, 1 Strobb. L. (S. Car.) 378; *State v. Freeman*, 1 Spears L. (S. Car.) 57; *State v. Vaigneur*, 5 Rich. L. (S. Car.) 391; *State v. Gossett*, 9 Rich. L. (S. Car.) 428; *State v. Cook*, 15 Rich. L. (S. Car.) 29; *State v. Crank*, 2 Bailey L. (S. Car.) 66, 23 Am. Dec. 117; *State v. Carson*, 36 S. Car. 524.

Tennessee. — *McGlothlin v. State*, 2 Coldw. (Tenn.) 223; *Boyd v. State*, 2 Humph. (Tenn.) 39; *State v. Doherty*, 2 Overt. (Tenn.) 87; *Wilson v. State*, 3 Heisk. (Tenn.) 232; *White v. State*, 3 Heisk. (Tenn.) 338; *Wiley v. State*, 3 Coldw. (Tenn.) 362; *State v. Riggsby*, 6 Lea (Tenn.) 554; *Morehead v. State*, 9 Humph. (Tenn.) 635; *Honeycutt v. State*, 8 Baxt. (Tenn.) 372.

Texas. — *Cain v. State*, 18 Tex. 387; *Carr v. State*, 24 Tex. App. 562, 5 Am. St. Rep. 905; *Searcy v. State*, 28 Tex. App. 513, 19 Am. St. Rep. 851; *Lewis v. State*, 29 Tex. App. 201, 25 Am. St. Rep. 720; *Barnes v. State*, 36 Tex. 356; *Strait v. State*, 43 Tex. 486; *Craig v. State*, 30 Tex. App. 619; *Cook v. State*, 32 Tex. Crim. Rep. 27, 40 Am. St. Rep. 758; *Speer v. State*, 4 Tex. App. 474; *Massey v. State*, 10 Tex. App. 645; *Grosse v. State*, 11 Tex. App. 364; *Lopez v. State*, 12 Tex. App. 27; *Nolen v. State*, 14 Tex. App. 474, 46 Am. Rep. 247.

Utah. — *U. S. v. Kirkwood*, 5 Utah 123.

Vermont. — *State v. Phelps*, 11 Vt. 116; *State v. Walker*, 34 Vt. 296; *State v. Carr*, 37 Vt. 191; *State v. Day*, 55 Vt. 510.

Virginia. — *Smith v. Com.*, 10 Gratt. (Va.) 734; *Shifflet v. Com.*, 14 Gratt. (Va.) 652; *Vaughan v. Com.*, 17 Gratt. (Va.) 576; *Thompson v. Com.*, 20 Gratt. (Va.) 724; *Wolf v. Com.*, 30 Gratt. (Va.) 833; *Early v. Com.*, 86 Va. 921.

Washington. — *State v. Coella*, 3 Wash. 99.

West Virginia. — *Frederick v. State*, 3 W. Va. 695.

Wisconsin. — *Keenan v. State*, 8 Wis. 132;

Miller v. State, 25 Wis. 384; *Dickerson v. State*, 48 Wis. 288.

Hawaii. — *Rex v. McChesney*, 7 Hawaiian 104.

1. Reason of Rule Requiring Confessions to Be Voluntary — England. — *Reg. v. Morton*, 2 M. & Rob. 514; *Rex v. Thomas*, 7 C. & P. 345, 32 E. C. L. 536; *Reg. v. Baldry*, 2 Den. C. C. 430.

United States. — *Com. v. Dillon*, 4 Dall. (Pa.) 117.

California. — *People v. Ah Ki*, 20 Cal. 178.

District of Columbia. — *Hardy v. U. S.*, 3 App. Cas. (D. C.) 46.

Kentucky. — *Rutherford v. Com.*, 2 Metc. (Ky.) 387.

Massachusetts. — *Com. v. Morey*, 1 Gray (Mass.) 461; *Com. v. Knapp*, 9 Pick. (Mass.) 503, 20 Am. Dec. 491; *Com. v. Cuffee*, 108 Mass. 285.

New York. — *People v. McMahon*, 15 N. Y. 384; *People v. Wentz*, 37 N. Y. 303.

North Carolina. — *State v. George*, 5 Jones L. (N. Car.) 233.

Pennsylvania. — *Fife v. Com.*, 29 Pa. St. 429.

The Real Question Is, whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth from fear of the threat or hope of profit from the promise. *U. S. v. Stone*, 8 Fed. Rep. 232; *Rex v. Gibbons*, 1 C. & P. 97, 11 E. C. L. 327; *Reg. v. Reason*, 12 Cox C. C. 228; *Reg. v. Reeve*, 12 Cox C. C. 179; *Beckham v. State*, 100 Ala. 15, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 472.

2. Confessions Made Under Inducements of Benefit — Alabama. — *Ward v. State*, 50 Ala. 120; *Lacey v. State*, 58 Ala. 385; *Redd v. State*, 69 Ala. 255; *Kelly v. State*, 72 Ala. 244; *Anderson v. State*, 104 Ala. 83.

California. — *People v. Smith*, 15 Cal. 409; *People v. Johnson*, 41 Cal. 452.

Colorado. — *Beery v. U. S.*, 2 Colo. 186.

Georgia. — *Earp v. State*, 55 Ga. 136; *Johnson v. State*, 61 Ga. 305; *Green v. State*, 88 Ga. 516, 30 Am. St. Rep. 167; *Rusher v. State*, 94 Ga. 368, 47 Am. St. Rep. 175.

Illinois. — *Brown v. People*, 91 Ill. 506.

Massachusetts. — *Com. v. Chabbock*, 1 Mass. 144; *Com. v. Taylor*, 5 Cush. (Mass.) 610; *Com. v. Curtis*, 97 Mass. 574; *Com. v. Piper*, 120 Mass. 188; *Com. v. Kennedy*, 135 Mass. 543.

Michigan. — *People v. Clarke*, 105 Mich. 169.

Minnesota. — *State v. Staley*, 14 Minn. 105.

Mississippi. — *Simmons v. State*, 61 Miss. 243.

Missouri. — *Couley v. State*, 12 Mo. 462.

Montana. — *Territory v. McClin*, 1 Mont. 394.

(3) *Effect of Inducement by Duress or Fear.* — Or, if the confession has been extorted by duress or fear, as by a threat of violence, increased rigor of confinement, or by any other menace which can inspire dread or alarm, it will not be admitted in evidence.¹

New Hampshire. — *State v. Due*, 27 N. H. 259; *State v. Wentworth*, 37 N. H. 218.

Oregon. — *State v. Wintzingerode*, 9 Oregon 153.

Tennessee. — *McGlothlin v. State*, 2 Coldw. (Tenn.) 223.

Texas. — *Warren v. State*, 29 Tex. 369.

Vermont. — *State v. Phelps*, 11 Vt. 116; *State v. Walker*, 34 Vt. 296.

Offer of Assistance to Leave Country. — Where a witness (a private individual) for the state testified that, after the defendant's arrest, "witness told defendant he could not get out of the charge of bastardy, and that it would be better to tell witness all about it, and then he (the witness) would buy defendant's crop, and assist defendant in leaving the country; and that defendant then said, 'I have no way of proving myself clear, and am going to leave,'" it was held that the confession was involuntary and should be excluded. *Anderson v. State*, 104 Ala. 83.

Thus, in a prosecution for stealing three twenty-dollar gold pieces, it appeared that the defendant on his arrest was told that there was "no use in denying it, that the gold pieces had been found where he passed them, that he had better own up to it," and thereupon he confessed the larceny, it was held that this language was language of inducement but did not involve any threat, and, under the statute, was admissible in evidence. *State v. Freeman*, 12 Ind. 100.

Washington Statute. — A similar statutory provision exists in Washington. *State v. Hopkins*, 13 Wash. 5.

Oregon Statute. — In *State v. Wintzingerode*, 9 Oregon 153, it was held that section 169 of the Criminal Code, providing that a confession of a defendant, whether in the course of judicial proceedings or to a private person, cannot be given in evidence against him when made under the influence of fear produced by threats, has not altered the rule of the common law as to the admissibility of confessions induced by the influence of hope applied to the prisoner's mind by an officer of the law having him in custody on a charge of crime.

New York Code. — Under section 395 of the Code of Criminal Procedure, an extra-judicial confession will not be excluded from evidence on the ground of its having been induced by hope, except in cases where it is made upon a stipulation of the district attorney that the prisoner shall not be prosecuted therefor. *Rapallo, J.*, in *People v. Mondon*, 103 N. Y. 219, 57 Am. Rep. 709.

But an inducement held out by a detective acting under the district attorney has been held to vitiate a confession. *People v. Kurtz*, 42 Hun (N. Y.) 340.

1. Confessions Extorted by Duress or Fear — *England.* — *Rex v. Mills*, 6 C. & P. 146, 25 E. C. L. 324.

Alabama. — *Redd v. State*, 69 Ala. 255; *Beckham v. State*, 100 Ala. 15.

Florida. — *Simon v. State*, 5 Fla. 285.

Georgia. — *Johnson v. State*, 76 Ga. 76; *Rusher v. State*, 94 Ga. 368, 47 Am. St. Rep. 175.

Illinois. — *Miller v. People*, 39 Ill. 457; *Brown v. People*, 91 Ill. 506.

Iowa. — *State v. Chambers*, 39 Iowa 179.

Louisiana. — *State v. Revells*, 34 La. Ann. 381, 44 Am. Rep. 436.

Massachusetts. — *Com. v. Piper*, 120 Mass. 188.

Michigan. — *Flagg v. People*, 40 Mich. 708; *People v. Clarke*, 105 Mich. 169.

Mississippi. — *Simon v. State*, 37 Miss. 288.

New Hampshire. — *State v. Wentworth*, 37 N. H. 218.

North Carolina. — *State v. George*, 5 Jones L. (N. Car.) 233; *State v. Lawson*, Phil. L. (N. Car.) 47; *State v. Dildy*, 72 N. Car. 325.

Tennessee. — *McGlothlin v. State*, 2 Coldw. (Tenn.) 223.

Texas. — *Cain v. State*, 18 Tex. 387; *Warren v. State*, 29 Tex. 369; *Greer v. State*, 31 Tex. 129; *Brown v. State*, 26 Tex. App. 308.

Vermont. — *State v. Phelps*, 11 Vt. 116.

Actual Violence. — Where the confession is induced by the actual infliction of pain it will, of course, be inadmissible in evidence. *Hector v. State*, 2 Mo. 166, 22 Am. Dec. 454.

Where one was taken from home about midnight by a body of men armed and disguised, and hung on a tree in a neighboring wood, and, being taken down almost senseless, made a confession implicating himself and others in a robbery, it was held error to allow the confession to go to the jury on the trial of an indictment for the offense against those thereby implicated. The court in this case said: "The rule has long been settled in our law that while free and voluntary confession of guilt is of the highest order of evidence, one extorted is never received." *Miller v. People*, 39 Ill. 457.

Threats. — On the trial of an indictment for larceny a confession by the defendant to the owner of the property, under threat that he would put the defendant "where the dogs would not bother him," was inadmissible, where it appeared that the defendant had been taken into custody by the owner without warrant, was inferior in station and force to such owner, and was unresistingly dominated by the latter. *Beckham v. State*, 100 Ala. 15.

Presence of Fire-arms Not Exhibited for Intimidation of Prisoner. — The proof disclosing that the confession of an accused was freely and voluntarily made, it is of no consequence that fire-arms were, at the time, deposited in the room where the parties were, though not exhibited to the defendant, they having been procured for a purpose altogether different from that of the intimidation of the accused. *State v. Watt*, 47 La. Ann. 630.

Under a Statute in Indiana providing that the confession of the defendant made under inducements, with all the circumstances, may be given in evidence against him except when made under the influence of fear produced by

(4) *Character and Requisites of Inducement* — (a) **Express Promise of Immunity from Prosecution.** — Where a confession is evoked under the influence of an express promise of immunity from prosecution, it cannot be received in evidence.¹

threats, it has been held that where an attempt has been made by exciting the fears of a prisoner to procure him to make confessions, and there is reason to presume that the attempt had that effect, evidence of his confession is inadmissible. *Smith v. State*, 10 Ind. 106. See also *State v. Freeman*, 12 Ind. 100.

New York Code. — Section 395 of the Code of Criminal Procedure of New York provides that "a confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats."

In *People v. Mondon*, 103 N. Y. 219, 57 Am. Rep. 709, Rapallo, J., said: "The rule thus established is founded upon the common-law rule on the subject of confessions, but it is much more definite and stringent. * * * By the section of the code quoted, the fear which is required to exclude the confession must be a fear produced by threats."

Washington Code. — Under section 1070 of the Code of Washington, 1881, providing that the confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him except when made under the influence of fear produced by threats, it was held that where a defendant, after having been shot down by the officers sent to arrest him, but apparently ignorant of the fact that they were officers, and without any threats being made against him, made confession that he killed the decedent, the confession was a voluntary one and admissible in evidence. *State v. Coella*, 3 Wash. 99.

Threats by Acts and Surroundings. — In *Com. v. Smith*, 119 Mass. 311, the court said that "threats and inducements might be by acts as well as words."

And in the following cases the point was directly adjudicated: *Irwin v. State*, 54 Ga. 39; *State v. Dildy*, 72 N. Car. 325; *Self v. State*, 6 Baxt. (Tenn.) 244.

Two prisoners who had been committed to jail on a charge of murder, then recently perpetrated, were taken in a few days after their commitment, without legal authority, by a body of forty unarmed men, and handcuffed chained together and guarded, and carried seven miles into the country to a church near the scene of the murder; before arriving at the place, the crowd had increased to seventy-five. These men had obtained the keys of the jail from the sheriff on the assurance that they would restore to him the prisoners unharmed, accompanied with a threat that they would have the prisoners even if he did not let them have the keys, and their purpose in taking the prisoners, as stated by them to the sheriff, was to find some money alleged to have been taken at the time of the commission of the offense; but it was not shown that the prisoners were informed of the assurance given the sheriff, or of the crowd's avowed purpose in taking them from jail. About ten minutes after arriving at the church, one of the prisoners, without any solicitation, so far as shown, asked permission

to have a "friendly" talk with one of the crowd whom the prisoner designated by name, and the privilege having been granted by the leader, the prisoner, the party selected by him, and another of the original forty men went a short distance in the woods, and there the prisoner admitted that he assisted in killing the deceased; and afterwards the other prisoner "also confessed under similar circumstances." While going from the jail to the church, silence towards the prisoners was enjoined in their presence and afterwards observed. The prisoners at no time gave the slightest exhibition or evidence of apprehension or fright, and it was shown that no threats in words or otherwise than as above stated were made, or any inducement offered to the prisoners to obtain their confessions. It was held that the prisoners' confessions were not shown to have been uninfluenced by their surroundings, suspicious and menacing in their character as they were, and were therefore not shown to have been voluntary, and were not admissible in evidence. *Young v. State*, 68 Ala. 569. See also *State v. Ingram*, 16 Kan. 14. Compare *Rice v. State*, 47 Ala. 38.

But the fact that there was a great deal of excitement in the community at the time a confession was made has been held not to render inadmissible a confession otherwise appearing voluntary. *State v. Anderson*, 96 Mo. 241.

Torture to Extort Confession Indictable. — In *Vermont* it has been held that torture to extort a confession is contrary to the common law and the constitution of that state and is an indictable offense. *State v. Hobbs*, 2 Tyler (Vt.) 380.

1. Express Promise of Immunity from Prosecution. — *Ward v. State*, 50 Ala. 120; *People v. Smith*, 15 Cal. 403; *Robinson v. People*, 159 Ill. 115; *Simmons v. State*, 61 Miss. 243; *State v. Hagan*, 54 Mo. 192; *Clayton v. State*, 31 Tex. Crim. Rep. 489.

A confession made orally to a sheriff after a written statement had been made under a promise of immunity from prosecution, which had not been withdrawn, and which the accused relied upon, cannot be admitted in evidence against him. *Robinson v. People*, 159 Ill. 115.

The officers of the law went to A. and told him that all they wanted was to recover the goods stolen, and if he would tell them where they were, so that they could get them, that that would be the end of the matter, and nothing further would be done. A. informed them, whereupon he was arrested, and convicted upon this confession. It was held that this confession was involuntary, being induced by the flattery of hope and a promise of immunity from prosecution, and was inadmissible in evidence. *State v. Hagan*, 54 Mo. 192.

A prisoner's confessions made to the bailiff who had him in custody were held to have been improperly received as evidence against him, because on the previous day the bailiff had said to him while in his custody that if he

Amelioration of Punishment Expressly Held Out. — Moreover, where the confession is induced by the assurance or the advice explicitly given, and relied on by the prisoner, that it will secure a lighter punishment, it will be excluded from evidence.¹

Agreement to Allow Prisoner to Turn State's Evidence. — Where the prisoner has confessed under the hope held out of obtaining the privilege of being made a witness for the state, his confession will not be admitted in evidence against him.²

Subsequent Refusal to Testify. — If, however, an accomplice, upon a promise that he will not be prosecuted if he will become state's evidence and make a full disclosure, makes a confession but afterwards refuses to testify, his confession will be admissible in evidence against him upon his subsequent trial.³ But under statute in *Texas* a different rule prevails.⁴

(b) **Inducement by Implication.** — Also, if an inducement is held out by mere implication, as where the prisoner is advised that he had "better confess,"⁵ or that it would be better to "own up,"⁶ or "plead

would confess the offense and tell where the stolen property was, he should be turned loose, and it was not shown that anything had afterwards occurred to destroy the influence of the promise then made. *Ward v. State*, 50 Ala. 120.

Promise of Influence to Secure Acquittal. — Confessions of a defendant indicted for larceny, made to the prosecutor and owner of the property stolen, upon inducements held out by him that if the defendant would disclose his evidence, he would use his influence to get him acquitted, are not admissible in evidence against him. *People v. Smith*, 15 Cal. 409.

Confessions of a prisoner charged with murder, that he committed the crime, are incompetent, if fairly traceable, as the inciting cause, to a promise made by the chief prosecuting attorney, that if the prisoner would confess he would do all he could to save him. *Simmons v. State*, 61 Miss. 243.

1. Amelioration of Punishment Expressly Held Out. — *Anderson v. State*, 104 Ala. 83; *People v. Johnson*, 41 Cal. 452; *State v. Jordan*, 87 Iowa 86; *Com. v. Taylor*, 5 Cush. (Mass.) 605; *Com. v. Curtis*, 97 Mass. 574; *People v. Wolcott*, 51 Mich. 612; *State v. Smith*, 72 Miss. 420. Compare *People v. Eckman*, 72 Cal. 582.

The officer who made the arrest testified "that on his return with the prisoner, he (witness) told the prisoner that" the brothers of the prosecutrix "were going to force him to leave the country, and it would be lighter on him, as he could not deny the charge, if he would own up," and that the defendant replied: "I have no witness to prove myself out, and it may be that I had better own up." It was held that the confession was not voluntary. *Anderson v. State*, 104 Ala. 83.

Confessions made to the arresting officer while in his custody, and on being told by him that "as a general thing it is better for a man who is guilty to plead guilty, for he gets a lighter sentence," are inadmissible in evidence against the prisoner at the trial, although the officer had preceded the remark by a refusal of the prisoner's request for his advice. *Com. v. Curtis*, 97 Mass. 574.

2. Agreement to Allow Prisoner to Turn State's Evidence. — *Reg. v. Gillis*, 11 Cox C. C. 69; *Johnson v. State*, 61 Ga. 305; *Couley v. State*,

12 Mo. 462; *Womack v. State*, 16 Tex. App. 178.

Where there was testimony that the officer "may have said to him (the prisoner) that he might be used as a state's witness," a confession induced thereby was held to be inadmissible in evidence. *State v. Johnson*, 30 La. Ann. 881.

But in *Fife v. Com.*, 29 Pa. St. 429, it was held that a declaration made by a jailer to a prisoner after her arrest, that "if the commonwealth would use any of them as a witness, he supposed it would prefer her to either of the others," was not sufficient to exclude a confession made by the prisoner to a magistrate on the same day, especially after being cautioned that her confession might be used against her. See also *State v. Squires*, 48 N. H. 364.

Disclosures Made in Application to Become State's Evidence. — A prosecuting officer cannot be admitted to testify against a prisoner, upon the trial, as to what the latter has disclosed to him upon an application to be admitted as a witness for the state. *State v. Phelps, Kirby (Conn.)* 282. See also *State v. Thomson, Kirby (Conn.)* 345.

3. Subsequent Refusal of State's Witness to Testify as Affecting Admissibility of Confession. — *R. v. Burley*, 2 Stark. Ev. 13; *Com. v. Knapp*, 10 Pick. (Mass.) 477, 20 Am. Dec. 534; *State v. Moran*, 15 Oregon 262. See *Whiskey Cases*, 99 U. S. 594; *Hamilton v. People*, 29 Mich. 173.

Escape from Custody. — It was so held where the party escaped from custody and failed to perform his agreement to testify fully and freely in the case then pending. *State v. Moran*, 15 Oregon 262.

4. Texas Statute. — *Lopez v. State*, 12 Tex. App. 27; *Womack v. State*, 16 Tex. App. 178; *Lauderdale v. State*, 31 Tex. Crim. Rep. 46, 37 Am. St. Rep. 788.

5. Advice that Prisoner "Had Better Confess." — *Com. v. Nott*, 135 Mass. 269; *Territory v. McClin*, 1 Mont. 394; *Deathridge v. State*, 1 Sneed (Tenn.) 79. See also *Simon v. State*, 5 Fla. 285. See the succeeding subdivision.

6. Advice that Prisoner "Had Better Own Up." — *Com. v. Nott*, 135 Mass. 269; *State v. York*, 37 N. H. 175; *People v. Phillips*, 42 N. Y. 200;

guilty,"¹ and he makes a confession in reliance upon such statements, the confession will be inadmissible in evidence.

(c) *Adjurations to Speak the Truth.* — It seems to be well settled that the mere request, advice, or admonition to tell the truth will not vitiate a confession induced thereby.² But where the request or admonition is given in such language and under such circumstances that the prisoner must have understood it as recommending a confession of guilt, the confession induced thereby will be inadmissible in evidence.³ The words, "You had better speak the truth," have sometimes been held to render a subsequent confession

Flagg *v.* People, 40 Mich. 708. See also Smith *v.* State, 88 Ga. 627.

The confession of one under arrest for the commission of a crime, that he did it, is inadmissible as evidence against him upon the trial of an indictment for the offense, when it appears that the officer who had him under arrest said to him immediately before the confession, that if he was guilty he "had better own it." State *v.* York, 37 N. H. 175.

The words, "You had better own up," followed by, "I was in the place when you took it; we have got you down fine; this is not the first you have taken; we have got other things against you nearly as good as this," spoken by one police officer to another in a police station, and in the presence of the superior officer of the person addressed and of the speaker, who detected him in the act of stealing, were held to render a subsequent confession of guilt by the accused person inadmissible at the trial of an indictment against him for larceny, on the ground that the words were not simply an admonition to tell the truth, but they held out the inducement to make a confession of guilt. Com. *v.* Nott, 135 Mass. 269.

New York Statute. — But in New York it has been held that the words of a constable addressed to the prisoner, that "she might as well own up, as they had proof to convict her," will not render the confessions of the accused inadmissible under section 395 of the Code of Criminal Procedure, which declares that "a confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney that he shall not be prosecuted therefor." People *v.* McCallam, 103 N. Y. 587.

1. Advice that Prisoner Had Better "Plead Guilty." — Redd *v.* State, 69 Ala. 255.

2. Mere Adjuration to Speak the Truth — *England.* — Reg. *v.* Reason, 12 Cox C. C. 228; Reg. *v.* Parker, 8 Cox C. C. 465; Rex *v.* Court, 7 C. & P. 486, 32 E. C. L. 595; Reg. *v.* Holmes, 1 C. & K. 248, 47 E. C. L. 248; Reg. *v.* Sleeman, 6 Cox C. C. 245.

United States. — Sparf *v.* U. S., 156 U. S. 51. *Alabama.* — Aaron *v.* State, 37 Ala. 106; Maull *v.* State, 95 Ala. 1; Steele *v.* State, 83 Ala. 20.

District of Columbia. — Hardy *v.* U. S., 3 App. Cas. (D. C.) 35.

Maryland. — Nicholson *v.* State, 38 Md. 140.

Massachusetts. — Com. *v.* Preece, 140 Mass. 276.

Missouri. — State *v.* Patterson, 73 Mo. 702; State *v.* Anderson, 96 Mo. 241.

North Carolina. — State *v.* Harrison, 115 N. Car. 708, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 474.

See also Reg. *v.* Morton, 2 M. & Rob. 514; Reg. *v.* Drew, 8 C. & P. 140, 34 E. C. L. 327; State *v.* Rigsby, 6 Lea (Tenn.) 554. See the preceding subdivision.

In Rex *v.* Court, 7 C. & P. 486, 32 E. C. L. 595, Littledale, J., said that telling a man to be sure to tell the truth is not advising him to confess anything of which he is really not guilty, and consequently is not offering the prisoner an inducement to make a confession.

Where the Prisoner Manifested a Desire to Speak to the Witness on the subject of the killing charged, and the latter said to him he did not wish to hear it, but "to keep it until the right time came and then tell the truth," a confession elicited in response to this remark was admissible in evidence. Sparf *v.* U. S., 156 U. S. 56.

In Aaron *v.* State, 37 Ala. 106, the bailiff said to the prisoner, substantially, that truth was the best policy; that if he did the act it was best to confess it, but if he did not do the act, then there was no wish he should say so; it was held that the prisoner's confession in response to this exhortation was properly received in evidence. See also Meinaka *v.* State, 55 Ala. 47; Dotson *v.* State, 88 Ala. 208; Dodson *v.* State, 86 Ala. 60; Rafe *v.* State, 20 Ga. 62; Matthews *v.* State, 86 Ga. 782, 804.

3. Admonition So Worded as to Be Understood to Recommend Confession. — Rex *v.* Partridge, 7 C. & P. 551, 32 E. C. L. 627; Rex *v.* Kingston, 4 C. & P. 387, 19 E. C. L. 434; Rex *v.* Shepherd, 7 C. & P. 579, 32 E. C. L. 639; Hudson *v.* Com., 2 Duv. (Ky.) 531; Com. *v.* Myers, 160 Mass. 530; Com. *v.* Nott, 135 Mass. 269; Simon *v.* State, 37 Miss. 288; Searcy *v.* State, 28 Tex. App. 513, 19 Am. St. Rep. 851. See also Reg. *v.* Hearn, C. & M. 109, 41 E. C. L. 65; Com. *v.* Harman, 4 Pa. St. 269.

Illustrations. — Thus the remark, "You had better not add a lie to the crime of theft," has been held to vitiate a confession. Rex *v.* Shepherd, 7 C. & P. 579, 32 E. C. L. 639. Or the remark, "You had better tell all about it." Vaughan *v.* Com., 17 Gratt. (Va.) 580. See also Searcy *v.* State, 28 Tex. App. 513, 19 Am. St. Rep. 851. Compare State *v.* Harrison, 115 N. Car. 706. Or, "You are under suspicion of this, and you had better tell all you know." Rex *v.* Kingston, 4 C. & P. 387, 19 E. C. L. 434. Or, "It would be better for you, Harry, to tell the whole thing." State *v.* Wintzingerode, 9 Oregon 153. Or, "It would be better to make a full disclosure." People *v.* Barric, 49 Cal. 344.

inadmissible in evidence, because they would probably be understood to mean that it would be better to say something, and that the truth in the mind of the speaker implied a confession of guilt.¹ But similar words when construed as not implying that the speaker expected a confession, but only the truth, have been held not to render a subsequent confession inadmissible.²

1. The Words, "You Had Better Speak the Truth," Construed as Recommending Confession.—Reg. v. Bate, 11 Cox C. C. 686; Reg. v. Garner, 2 C. & K. 920, 61 E. C. L. 920; Reg. v. Fennell, 7 Q. B. Div. 147; Reg. v. Doherty, 13 Cox C. C. 23; Hudson v. Com., 2 Duv. (Ky.) 531; Biscoe v. State, 67 Md. 6; Com. v. Nott, 135 Mass. 269; Com. v. Kennedy, 135 Mass. 543; Com. v. Preece, 140 Mass. 276; Com. v. Myers, 160 Mass. 530.

In Reg. v. Jarvis, L. R. 1 C. C. 96, Kelly, C. B., said: "The words, 'You had better tell the truth,' seem to have acquired a sort of technical meaning, importing either a threat or a benefit."

Illustrations.—In Reg. v. Fennell, 7 Q. B. Div. 147, it was held that on a trial for larceny, evidence was not receivable of a confession made by the prisoner to the prosecutor in the presence of a police inspector, immediately after the prosecutor had said to the prisoner, "The inspector tells me you are making house-breaking implements; if that is so, you had better tell the truth, it may be better for you." See also Reg. v. Romp, 17 Ont. Rep. 567.

Also, in Reg. v. Doherty, 13 Cox C. C. 23, it was held that where a prisoner had been told by a constable at ten o'clock A. M. that it would be better for him to tell the truth and not to put people to the extremities he was doing, a confession by the prisoner to another constable, after six o'clock in the evening of the same day, was not admissible in evidence, although the second constable had previously cautioned the prisoner.

A confession by a person who had been arrested for larceny, to a police officer who had him in his custody in the lockup, and in response to a remark of the officer to him that he had better tell the truth, is inadmissible at the trial of an indictment against him for larceny. Com. v. Myers, 160 Mass. 530. In this case it appears that the officer had previously questioned the defendant, who had denied any knowledge of the crime charged.

Where the accused, being ignorant and confiding, was told by the officer who arrested him that the best thing for his safety would be to tell the truth, it was held that a confession induced thereby was inadmissible in evidence. Hudson v. Com., 2 Duv. (Ky.) 531.

Where a confession was made by a prisoner to the committing magistrate on the fifth visit of the latter to the prisoner in jail and after the magistrate had told the prisoner that "it would be better for him to tell the truth and have no more trouble about it," it was held to be inadmissible in evidence, and this though the magistrate had already told the prisoner he could make no promises. Biscoe v. State, 67 Md. 6. Compare State v. Squires, 48 N. H. 364.

Where a Person Assumes the Guilt of the Prisoner, as where he states to him, "You have got your foot in it, and somebody else was with

you; now, if you did break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and nothing but the truth," it was held that a confession in response to this statement had the effect to impress on the prisoner's mind that he would in some unknown manner fare better by confessing his guilt of the crime, and this inducement vitiates any confession evoked under its influence. Kelly v. State, 72 Ala. 244. The court in this case said: "The exhortation to the prisoner did not stop with adjuring him to tell the truth, or only with telling him that the best thing he could do was to tell all about it, in the event he was guilty of the breaking. It goes further, by assuming his guilt, and by assuming also that the prisoner was accompanied by one or more accomplices; and he is told, in effect, that it would be best for him to tell all about these assumed facts. The manifest impression produced on the prisoner's mind must have been, that he would, in some unknown manner, fare better by confessing his guilt of the crime of burglary; and this inducement vitiates any confession evoked under its influence."

Where a Prisoner Indicted for the Burning of a Factory made a confession to the person whose property was burned, in response to the following remarks by the latter: that he wanted him to tell the truth just as it was; that it would be better for him; that they had got Brierly (another person charged with the same crime), and probably they would both be tried that day, and that it would be better to tell the truth just as it was, "for if Brierly should get the start of you, it may go hard with you; you are a young man, and it would be better for you to tell it just as it is," etc., it was held that the confession was inadmissible. State v. Walker, 34 Vt. 297.

2. "You Had Better Speak the Truth," Not Construed as Recommending Confession.—State v. Harman, 3 Harr. (Del.) 567; State v. Meekins, 41 La. Ann. 543; Hawkins v. State, 7 Mo. 190; Heldt v. State, 20 Neb. 496, 57 Am. Rep. 835; Fouts v. State, 8 Ohio St. 98; State v. Habib, 18 R. I. 558; Jackson v. State, 29 Tex. App. 463; Canada v. State, 29 Tex. App. 537. See also State v. Gossett, 9 Rich. L. (S. Car.) 428.

Where a Detective, in the Guise of a Friend, induced a suspected party to make a confession of a crime without inducements of any kind except at his request, he said that he had consulted an attorney for the prisoner who said "he (the prisoner) had better tell the facts of the case, and that they would be likely to do him as much good as anything he could do; that there was no use lying about it, and he had better tell the truth," it was held that the alleged confession was admissible in evidence. Heldt v. State, 20 Neb. 492, 57 Am. Rep. 835.

In Hawkins v. State, 7 Mo. 190, where the sheriff observed to the prisoner that "it would

(d) **Appeal to Religious Sentiments.** — In order to exclude a confession, an inducement must be of a worldly or temporal nature.¹ An appeal to the prisoner's religious or moral sentiments, his spiritual hopes or fears, will not render a subsequent confession inadmissible.²

(e) **Collateral Inducement.** — If a confession is obtained by a promise of some collateral benefit, or boon, no hope or favor being held out in respect to the criminal charge against the prisoner, it will be competent.³

be better in the long run to tell the truth about the matter and not any lies," but gave no reason why it would be better, a confession made to a third person in the presence of the officer a few minutes thereafter was held admissible. See also *State v. Patterson*, 73 Mo. 703.

In *Fouts v. State*, 8 Ohio St. 98, where the accused being placed in custody was told by the custodian if he was guilty it would not put him in any worse condition, and he had better tell the truth at all times, this statement was held to be no ground for excluding the confession.

A Confession of One Accused of Receiving Stolen Goods, made while he was under arrest, and caused by the statement of the person who stole the goods, "It is no use trying to get out of it; they have got us dead, and we have all been arrested, and you might as well tell the truth," has been held admissible in evidence on the ground that the remark made to the prisoner practically amounted to a mere suggestion or direction to tell the truth, and that the person making it was not an officer having the prisoner in custody. *State v. Habib*, 18 R. I. 558.

A prisoner's confessions were held admissible, although they were made to the officer who had him in custody and was carrying him before an examining court and who had said to him, "If you know anything about the circumstances, it will be best to tell the truth about it." *King v. State*, 40 Ala. 314.

Words Construed as Advice on Moral Ground. — In *Reg. v. Jarvis*, L. R. 1 C. C. 96, it was held that where the prisoner was called by the master and told: "You are in the presence of two police officers, and I should advise you that to any question that may be put to you, you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue;" and the master afterwards added, "Take care; we know more than you think," whereupon the prisoner made a statement, such statement was admissible against him on his trial, the words addressed to the prisoner being construed to import only advice on moral grounds.

On the same principle, it was held in *Reg. v. Reeve*, L. R. 1 C. C. 362, that where two children, one age eight, and the other a little older, had been apprehended for attempting to obstruct a railway train, and the mother of one of them told them in the presence of a policeman, "You had better, as good boys, tell the truth," a confession made in response to this remark was admissible in evidence.

Under the Georgia Code it has been held that the fact that a fellow prisoner in jail with the accused was charged with murder asked him about the killing and told him he had "better tell the truth, the white folks were going to

break somebody's neck," did not, as matter of absolute law, render inadmissible confessions then and there made in the presence and hearing of fellow prisoners only; the trial court ruling them *prima facie* competent, and in its charge leaving the jury to determine whether they were in fact made, and instructing them properly upon their effect, on condition that they appeared to have been free and voluntary. *Miller v. State*, 94 Ga. 1.

1. Inducement Must Be of a Temporal Nature. — *Com. v. Flood*, 152 Mass. 529; *State v. Staley*, 14 Minn. 105; *Smith v. Com.*, 10 Gratt. (Va.) 734.

2. Appeal to Spiritual Hopes or Fears. — 1 *Bishop New Crim. Proc.*, § 1225; *Rex v. Gibney*, Jebb 15; *Rex v. Gilham*, 1 Mood. C. C. 186; *Rex v. Wild*, 1 Moo. C. C. 452; *Reg. v. Sleeman*, 6 Cox C. C. 245; *Rafe v. State*, 20 Ga. 60. See also *Com. v. Drake*, 15 Mass. 161. Thus, it has been held that the remark made to the prisoner, "Now kneel you down, I am going to ask you a very serious question, and I hope you will tell the truth in the presence of the Almighty," has been held not to render a confession inadmissible. *Rex v. Wild*, 1 Moo. C. C. 452.

Also the remark, "Don't run your soul into sin, but tell the truth," has been held not to make a confession inadmissible. *Reg. v. Sleeman*, 6 Cox C. C. 245.

Also, the remark to a prisoner, "An honest confession is good for the soul," has been held not to render a confession inadmissible in evidence. *Matthews v. State*, 9 Lea (Tenn.) 128, 42 Am. Rep. 667.

Appeal to Moral Sentiments. — Confessions of a prisoner who has concealed a murder are admissible if not induced by threats or promises, though made under representations of the infamy which would attend the concealment of such knowledge and while he was in great excitement. *State v. Crank*, 2 Bailey L. (S. Car.) 66, 23 Am. Dec. 117.

3. Collateral Inducement. — *Stone v. State*, 105 Ala. 69, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 455, 456, 470; *Cox v. Peuple*, 80 N. Y. 500; *State v. Cruise*, 74 N. Car. 491; *State v. Tatro*, 50 Vt. 483; *Smith v. Com.*, 10 Gratt. (Va.) 734; *State v. Hopkins*, 13 Wash. 5. See also *State v. Carrick*, 16 Nev. 120.

Where a county treasurer confessed to his two bondsmen that he was short in his accounts in response to a remark of one of the bondsmen, "There is no use putting this thing off any longer; if you are short, come out and say so, and we will try and fix it up," it was held that there was no such promise or representation as could reasonably have induced the defendant to state things that were not true, that there was no promise to relieve him from prosecution. *State v. Carrick*, 16 Nev. 120.

To Escape Civil Liability. — The confession of

(f) **Confidential Communications.** — The mere fact that a confession was made to a third person confidentially will not render it inadmissible in evidence.¹

a person, obtained on a threat of a civil suit for property stolen, is admissible in a criminal prosecution for the larceny. *Cropper v. U. S.*, 1 Morr. (Iowa) 259. See also *State v. Hopkins*, 13 Wash. 5.

Offer of Reward. — Where a confession was induced by the offer of a reward for information as to the guilty party, it was held that the confession was, notwithstanding, admissible. *State v. Wentworth*, 37 N. H. 218; *McIntosh v. State*, 52 Ala. 355.

Relaxation of Rigor of Confinement. — Where the confessions were procured by the facts that the prisoner was in solitary confinement and the jailer promised that he could go below with the other prisoners, it was held that the promise was of a collateral nature and not a hope or favor held out in respect to the criminal charge, and that the holding out of such favor did not exclude the testimony. *State v. Tatrow*, 50 Vt. 483.

But when the prisoner, a negro girl about seventeen years old, was in the service of the prosecutrix, and on the morning of the burning of the house of the prosecutrix the latter locked the prisoner up in an outhouse and said to her, "Now, I reckon you will tell me something about burning the house, I believe you know all about it," in reply to which the prisoner made a confession, acknowledging that she had burned the house at the instigation of another person, it was held that the confession ought not to be admitted in evidence, since the effect of the declarations made to her by the prosecutrix was naturally to create a hope in her mind that she might be released from confinement by making a confession. *Hoover v. State*, 81 Ala. 51.

Where a prisoner said to an officer, "If you will untie me, I will tell you all about it," whereupon the officer untied him, and the prisoner made a confession, it was held that the confession was admissible, it appearing that the tying was resorted to to restrain the violence of the prisoner, and was not done to produce pain, and it did not appear that the tying was painful. *State v. Cruse*, 74 N. Car. 491. See also *Rex v. Green*, 6 C. & P. 655, 25 E. C. L. 581.

Privilege of Seeing Wife. — In *Rex v. Lloyd*, 6 C. & P. 393, 25 E. C. L. 454, the officer having the prisoner in custody said to him, "If you will tell where the property is you shall see your wife," it was held that this was not such an inducement as would render a confession inadmissible.

Benefit to Prisoner's Mother. — In *Shifflet v. Com.*, 14 Gratt. (Va.) 652, it was held that a confession would not be excluded though it might have been induced by the hope of doing some benefit to the prisoner's mother.

Benefit to Prisoner's Sister. — In *People v. Smalling*, 94 Cal. 112, it was held that the fact that the defendant's sister was also under arrest for the commission of a homicide, and that the confession might have been made to free her from suspicion of guilt, did not invalidate his confession as evidence.

Rule as to Personal Nature of Inducement. — In

Com. v. Knapp, 9 Pick. (Mass.) 503, 20 Am. Dec. 491, Morton, J., said: "A question was made, whether the inducement must be of a personal nature. It may be supposed that a desire to benefit a child or other near relation may hold out as strong an inducement to falsify, as where the advantage contemplated is entirely personal. And there is one case reported where an innocent person was tried for his life, having made admissions against himself in order to screen his brother. Though this should seem to come within the reason of the exception, I do not find it in the books, and I am not disposed to extend the exception. Indeed, I have sometimes doubted whether confessions with the accompanying circumstances ought not always to be received in evidence, but the law is settled otherwise. So far as relates to this point, I consider the argument sound that the advantage expected must be personal."

Qualification of Rule — Strong Collateral Inducement. — In *State v. Grant*, 22 Me. 171, the rule was laid down that to exclude confessions of guilt on the ground of their not having been voluntarily made, there must appear to have been held out some fear of personal injury or hope of personal benefit of a temporal nature, unless the collateral inducement were so strong as to make it reasonable to believe that it might have produced an untrue statement as a confession. In this case where the inducement held out to the prisoner was that he should make a confession "to save his brother," it was held that under the circumstances the court could not conclude that the motive was sufficiently strong to induce him to make a false statement. This decision, however, was based partly on the fact that the inducement was but the advice of one not pretending to have or to speak by any authority, and also that there was no promise or other ground of confidence that the brother would escape if he confessed.

1. Fact of Confession Being Confidential Immaterial. — *Rex v. Shaw*, 6 C. & P. 372, 25 E. C. L. 443; *Rex v. Thomas*, 7 C. & P. 345, 32 E. C. L. 536.

On an Indictment for Passing a Counterfeit Loan Office Certificate, the counsel for the prisoner objected to the witnesses testifying to anything which the prisoner had said to them confidentially when endeavoring to persuade them to use their influence, that he might be improved as a witness against his associates; it was held that the confessions ought not to be excluded, the court saying that when disclosures of that kind have been made to the authority examining, or to the state's attorney, under such circumstances that the person disclosing considered himself as a witness, the courts have never allowed them to be given in evidence against him, but this indulgence has never been extended further. *State v. Thomson, Kirby* (Conn.) 345.

Confession Overheard. — In *Rex v. Simons*, 6 C. & P. 510, 25 E. C. L. 532, it was held that what a prisoner is overheard to say to his wife is admissible in evidence against him.

and the fact that such third person goes upon his oath not to divulge the matter communicated to him will be immaterial.¹

Communications to Priests, Physicians, or Attorneys.—The question of the admissibility of communications made to a priest or clergyman, or to a physician, or to an attorney by his client, and other privileged communications, will be found discussed in another part of this work.²

(g) Artifice or Fraud.—The fact that a confession was induced by artifice, deception, or fraud, will not exclude it from evidence,³ unless the inducement is such as to induce an untrue confession,⁴ though this fact may properly be considered as affecting the credibility of the witness.⁵

Confession Made to Detective—Representing Himself as Fellow Prisoner.—A confession made by the accused while confined in jail awaiting trial, to a detective, placed there upon a fictitious charge of crime, in order to ingratiate himself with and obtain the defendant's confidence, may be admissible on the trial of the accused.⁶

Confession Contained in Prayer.—In *Woolfolk v. State*, 85 Ga. 69, it was held that it was not against public policy to allow a prayer of a prisoner which inculcates him, to be given in evidence. In this case the jailer overheard the accused say, while alone in his cell, "Lord have mercy on me for what I have done, the only thing I regret is killing my father." And it was held that the prayer was admissible in evidence.

1. *Rex v. Shaw*, 6 C. & P. 372, 25 E. C. L. 443; *State v. Darnell*, 1 *Houst. Cr. Cas. (Del.)* 321.

On a trial for murder of the first degree the voluntary confession of it made by the prisoner, before his arrest, to a person having no authority over him, who said to him out of the hearing of any other that he must know something about the killing of the deceased, and if he would tell him all about it he would say nothing about it to any one, upon which the prisoner then stated to him how he and another person did the killing, it was held to be admissible in evidence. *State v. Darnell*, 1 *Houst. Cr. Cas. (Del.)* 321.

2. **Privileged Communications.**—See the title PRIVILEGED COMMUNICATIONS.

3. **Confessions Obtained by Artifice—England.**—*Rex v. Derrington*, 2 C. & P. 418, 12 E. C. L. 199.

Alabama.—*King v. State*, 40 Ala. 314; *Stone v. State*, 105 Ala. 60; *Burton v. State*, 107 Ala. 108, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 481.

Kentucky.—*Wigginton v. Com.*, 92 Ky. 287.

Michigan.—*People v. Barker*, 60 Mich. 279, 1 Am. St. Rep. 501.

Minnesota.—*State v. Staley*, 14 Minn. 105.

Missouri.—*State v. Phelps*, 74 Mo. 128; *State v. Fredericks*, 85 Mo. 145; *State v. Brooks*, 92 Mo. 542; *State v. Rush*, 95 Mo. 199.

Nebraska.—*Heldt v. State*, 20 Neb. 492, 57 Am. Rep. 835.

North Carolina.—*State v. Harrison*, 115 N. Car. 708, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 481.

Pennsylvania.—*Com. v. Hanlon*, 3 Brews. (Pa.) 500.

Thus, in *Rex v. Derrington*, 2 C. & P. 418, 12 E. C. L. 199, where the prisoner, while in jail having written a letter to his father, asked the turnkey to put it into the post, which the latter promised to do, but instead of this he de-

livered it to the magistrates, it was held that the evidence was admissible.

Also, where an officer told the prisoner that his supposed accomplice had been arrested and shot, and the prisoner afterwards made a confession, it was held that the fact that the statement of the officer was false did not render the confession inadmissible. *King v. State*, 40 Ala. 314.

Also, it has been held that a sheriff may testify as to confessions of the defendant after he was informed that an associate "had given him away," whether or not the associate had in fact divulged facts in relation to the crime. *State v. Rush*, 95 Mo. 199. See also *State v. Jones*, 54 Mo. 478; *Price v. State*, 18 Ohio St. 418.

Appeal to Prisoner's Superstition.—In *State v. Harrison*, 115 N. Car. 706, it was held that it is not material that the witness told the prisoner a falsehood in appealing to superstition, since the words used had no tendency to make the prisoner tell what was untrue. In this case it appeared that the witness said to the prisoner, "You had better tell me all about it. I am a right good old monger doctor. I can work roots and gummer folks, and if you will tell me all about it I can give you something so you cannot be caught," and it was held that a confession made in response to these remarks was not inadmissible in evidence.

4. *People v. Barker*, 60 Mich. 279, 1 Am. St. Rep. 501; *State v. Fredericks*, 85 Mo. 145; *Com. v. Hanlon*, 3 Brews. (Pa.) 500.

5. *State v. Brooks*, 92 Mo. 542; *Heldt v. State*, 20 Neb. 492, 57 Am. Rep. 835.

6. **Confession Made to Detective Representing Himself as Fellow Prisoner.**—*Burton v. State*, 107 Ala. 108; *State v. Brooks*, 92 Mo. 542; *Com. v. Hanlon*, 3 Brews. (Pa.) 461.

Detective Expressing Sympathy for Crime and Criminals.—That a confession was obtained from a prisoner by the artifice and deception of a detective, in making him believe that he was in sympathy with barn-burners, and wanted to have some burning done on his own account, is no reason for its exclusion. *Stone v. State*, 105 Ala. 60. To the same effect, see *Page v. Com.*, 27 Gratt. (Va.) 954.

Also Where a Detective in the Guise of a Friend induced a suspected party to make a confession of a crime, without inducements of any

(h) **Fear Produced by Suspicion or Accusation.**—Such fear of the ultimate consequences of a crime as a prisoner feels, either when he believes he is suspected of the crime,¹ or when he is actually charged therewith,² is insufficient to render a confession inadmissible.

(i) **The Fact of Being in Custody.**—The fact that a confession was made by the accused while under arrest or in confinement, and to the sheriff, constable, jailer, or other officer having him in custody at the time, will not render it involuntary so as to exclude it from evidence, unless there is also proof that it was induced by hope or fear.³ In such case it is not necessary that the

kind, except that at his request he stated that he had consulted an attorney for the prisoner, who said "he (the prisoner) had better tell the facts of the case, and that they would be likely to do him as much good as anything he could do; that there was no use lying about it, and he had better tell the truth," it was held that the alleged confession was admissible in evidence, but that the credibility of the detective was for the jury, who should be specially instructed on that point. *Heldt v. State*, 20 Neb. 492, 57 Am. Rep. 835.

In *State v. Brooks*, 92 Mo. 542, the court said: "While the officers whose duty it was to prosecute criminal offenses may, in their anxiety to ferret out the circumstances concerning the death of P., have overstepped the bounds of propriety in the course pursued by them, which is not to be commended but condemned, it affords no legal reason for rejecting the evidence and not letting it go to the jury, whose peculiar province it was to pass upon the credibility of the witness who detailed the confession and give to it such weight as under the circumstances they believed it entitled to."

Detective Falsely Pretending to Be Counsel of Accused.—In *People v. Barker*, 60 Mich. 277, it was held that where confessions were made by the accused to a detective, falsely pretending to be the counsel of the accused, they were not to be admitted in evidence. See also *State v. Russell*, 83 Wis. 337, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 481.

1. Fear Produced by Knowledge of Being Under Suspicion.—*Allen v. State*, 12 Tex. App. 190.

2. Fear Produced by Accusation of Crime.—*Hardy v. U. S.*, 3 App. Cas. (D. C.) 48; *Com. v. Mitchell*, 117 Mass. 432; *Com. v. Smith*, 119 Mass. 311; *Com. v. Myers*, 160 Mass. 530; *Honeycutt v. State*, 8 Baxt. (Tenn.) 377.

Confession in Response to Remarks Assuming Guilt.—The mere fact that a criminal was in charge of an officer at the time and that the confession was elicited by the remark of the officer that he (the prisoner) ought to have had more control over his passions and perhaps he would not have been in the place where he was, is not sufficient to render his confession inadmissible in evidence. *State v. Simon*, 50 Mo. 370.

In *People v. Wentz*, 37 N. Y. 304, the officer told the accused he was in a bad fix and was caught at last. The defendant then confessed his guilt, and it was held that there being no inducement, promise, threat, or menace used to obtain the confession, or influence its being made, the evidence was properly admitted.

3. Confession Made by Accused While in Custody—*England*.—*Reg. v. Wild*, 1 Moo. C. C. 452.

Canada.—*Reg. v. Tufford*, 8 U. C. C. P. 81.
United States.—*U. S. v. Nardello*, 4 Mackey (D. C.) 503.

Alabama.—*King v. State*, 40 Ala. 314; *Meinaka v. State*, 55 Ala. 47; *Redd v. State*, 69 Ala. 255; *McElroy v. State*, 75 Ala. 9; *Sands v. State*, 80 Ala. 201; *Grant v. State*, 55 Ala. 201; *McQueen v. State*, 94 Ala. 50; *Maull v. State*, 95 Ala. 1; *Calloway v. State*, 103 Ala. 27.

Arkansas.—*Austin v. State*, 14 Ark. 556; *Meyer v. State*, 19 Ark. 156; *Youngblood v. State*, 35 Ark. 35.

California.—*People v. Long*, 43 Cal. 445; *People v. Rodondo*, 44 Cal. 538; *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73; *People v. Abbott*, (Cal. 1884) 4 Pac. Rep. 769.

Georgia.—*Stephen v. State*, 11 Ga. 225.

Idaho.—*State v. Ellington*, (Idaho 1895) 43 Pac. Rep. 60.

Iowa.—*State v. McLaughlin*, 44 Iowa 82; *State v. Sopher*, 70 Iowa 494.

Kansas.—*State v. Ingram*, 16 Kan. 14.

Louisiana.—*State v. Simon*, 15 La. Ann. 568; *State v. Alphonse*, 34 La. Ann. 9; *State v. Revells*, 35 La. Ann. 302; *State v. Hamilton*, 42 La. Ann. 1204; *State v. Johnson*, 47 La. Ann. 1225; *State v. Jones*, 47 La. Ann. 1524.

Massachusetts.—*Com. v. Preece*, 140 Mass. 276; *Com. v. Sheehan*, 163 Mass. 170.

Michigan.—*People v. McCullough*, 81 Mich. 25.

Missouri.—*State v. Simon*, 50 Mo. 370; *State v. Carlisle*, 57 Mo. 102; *State v. Guy*, 69 Mo. 430; *State v. Rush*, 95 Mo. 199.

Nebraska.—*Ballard v. State*, 19 Neb. 609; *Anderson v. State*, 25 Neb. 550; *Furst v. State*, 31 Neb. 403.

New York.—*People v. Thoms*, 3 Park. Cr. Rep. (N. Y. Ct. App.) 256; *Hartung v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 319; *People v. Montgomery*, 13 Abb. Pr. N. S. (Monroe Oyer & T. Ct.) 207; *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *People v. Wentz*, 37 N. Y. 303; *Murphy v. People*, 63 N. Y. 590; *Cox v. People*, 80 N. Y. 500; *People v. McCallam*, 103 N. Y. 587; *People v. Chapleau*, 121 N. Y. 266; *People v. Cassidy*, 133 N. Y. 612; *State v. Druse*, 103 N. Y. 655.

North Carolina.—*State v. Jefferson*, 6 Ired. L. (N. Car.) 305; *State v. Houston*, 76 N. Car. 256; *State v. Suggs*, 89 N. Car. 527; *State v. Howard*, 92 N. Car. 772; *State v. Whitfield*, 109 N. Car. 876; *State v. Effer*, 85 N. Car. 585.

Ohio.—*Price v. State*, 18 Ohio St. 418.

Pennsylvania.—*Com. v. Hanlon*, 3 Brews. (Pa.) 499; *Com. v. Mosler*, 4 Pa. St. 264; *Com. v. McGowan*, 2 Pars. Eq. Cas. (Pa.) 346.

Rhode Island.—*State v. Habib*, 18 R. I. 558.

South Carolina.—*State v. Gossett*, 9 Rich. L. (S. Car.) 428.

confession should be preceded by an admonition placing the prisoner on his guard.¹

Tennessee. — *Wiley v. State*, 3 Coldw. (Tenn.) 362; *Honeycutt v. State*, 8 Baxt. (Tenn.) 372.

Utah. — *People v. McGrath*, 5 Utah 525.

Vermont. — *State v. Gorham*, 67 Vt. 365.

Virginia. — *Vaughan v. Com.*, 17 Gratt. (Va.) 576.

Wisconsin. — *Keenan v. State*, 8 Wis. 132.

Confessions to Sheriff. — Thus, a confession made by a prisoner is not involuntary merely because it was made while in custody, to the sheriff who had arrested him. *Murphy v. People*, 63 N. Y. 590.

The same is true of a confession made to a deputy sheriff. *State v. Houston*, 76 N. Car. 256; *Calloway v. State*, 103 Ala. 27. In the latter case, however, the prisoner was told by the deputy sheriff that whatever statements he made would be used as evidence against him.

Confessions to Constable. — In the following cases the rule of the text was applied to confessions made to a constable having the prisoner in charge: *Rex v. Richards*, 5 C. & P. 318, 24 E. C. L. 338; *Ward v. People*, 3 Hill (N. Y.) 395; *Com. v. Mosler*, 4 Pa. St. 264.

Confessions to Chief of Police. — In the same way confessions made without inducement to the chief of police, by a prisoner immediately after his arrest, are admissible against him. *Com. v. Sheehan*, 163 Mass. 170. See also *People v. Wentz*, 37 N. Y. 303.

The same rule has been applied to confessions made to the inspector of the police force. *People v. Cassidy*, 133 N. Y. 612.

Confessions to Jailer. — Nor does the mere fact that a prisoner confined in jail made a confession to the jailer render it inadmissible. *State v. Fortner*, 43 Iowa 494; *State v. Jones*, 47 La. Ann. 1527.

Confessions appearing to have been voluntary, made in jail in the presence of the jailer, to the prosecutor, are admissible in evidence. See *State v. Gossett*, 9 Rich. L. (S. Car.) 428; *State v. Cook*, 15 Rich. L. (S. Car.) 29; *State v. Kirby*, 1 Strobh. L. (S. Car.) 378.

Confessions to Keeper of Penitentiary. — That a verbal reply to a written request made in a letter was made in the penitentiary in which the defendant was confined for safe keeping, to the principal keeper thereof, constitutes no objection in law to its admissibility in evidence against the party making it, if voluntarily made, and drawn out by no improper influence. *Cobb v. State*, 27 Ga. 648.

Confessions to Detective. — Statements made by a prisoner while under arrest, to a detective, and in the district attorney's office and in his presence, have been held to be voluntary, notwithstanding those facts, where no inducements or threats were offered. *Willett v. People*, 27 Hun (N. Y.) 469.

Confessions Made Under Arrest, to Private Person. — The mere fact that a confession was made by a prisoner while under arrest, to a private person, or made to a private individual arresting him, will not render the confession inadmissible in evidence against him. *McNeezer v. State*, 63 Ala. 169; *Leslie v. State*, 35 Fla. 184; *State v. Kirby*, 1 Strobh. L. (S. Car.) 378; *State v. Gossett*, 9 Rich. L. (S. Car.) 428.

In *People v. Rogers*, 18 N. Y. 13, 72 Am. Dec. 484, Denio, J., said: "I have looked carefully into all the cases referred to by the defendant's counsel in support of that position, and many others, and do not find that it has ever been held that the single fact of the prisoner being in custody was sufficient to exclude his declarations, whether made to the officer or to third persons."

In *People v. Cassidy*, 133 N. Y. 612, it was held that a letter written by one under arrest, to his mother, and containing statements tending to show his guilt, is admissible in evidence against him.

Small, Weakly Person Arrested by Three Large Men. — Where it appeared that the officer making the arrest was accompanied by two other men, and that they were all large, strong men, but were not armed, and the prisoner was a small, weakly man, but that no threats or violence were used and no inducements held out, it was adjudged that the confessions could not be excluded on the ground that the defendant was put in fear by force in numbers. *State v. Howard*, 92 N. Car. 772.

Also, in *State v. Houston*, 76 N. Car. 256, it was held that when the defendant, a negro, was arrested by the sheriff and three other white men, and other men afterwards joined the party, and while on their way to the magistrate's the defendant made certain confessions, no threats or violence being used, such confessions were admissible.

1. Warning to Prisoner in Custody Unnecessary. *Com. v. Mosler*, 4 Pa. St. 264. See also *Com. v. Robinson*, 165 Mass. 426.

The Texas Code of Criminal Procedure, art. 750, provides that the confession shall not be used if at the time it was made the defendant was in jail or other place of confinement, nor while he is in custody of an officer, unless such confession be made voluntarily after having been first cautioned that it may be used against him. *De La Rosa v. State*, (Tex. Crim. App. 1893) 21 S. W. Rep. 192; *Lancaster v. State*, (Tex. Crim. App. 1895) 31 S. W. Rep. 517; *Marshall v. State*, 5 Tex. App. 273; *Davis v. State*, 19 Tex. App. 201; *Bell v. State*, 31 Tex. Crim. Rep. 276; *Davis v. State*, 2 Tex. App. 588; *Gilder v. State*, (Tex. Crim. App. 1896) 33 S. W. Rep. 867. See also *Carter v. State*, 23 Tex. App. 508; *Ferguson v. State*, 31 Tex. Crim. Rep. 93.

Under this statute it has been held that where the prisoner, while under arrest for murder and in shackles, was taken to the place of the homicide, and was asked what he had done with the body, and he pointed to the hill where the dead body had been found, the evidence of the foregoing was improperly admitted where he was not cautioned as to the effect of his confession. *Nolen v. State*, 14 Tex. App. 474, 46 Am. Rep. 247, *overruling Rhodes v. State*, 11 Tex. App. 563.

If the prisoner at the time of making the confession was in reality held in custody, it need not appear that he was formally arrested. *Lancaster v. State*, (Tex. Crim. App. 1895) 31 S. W. Rep. 517. In this case it appeared that

Putting Prisoner in Irons. — Nor is the rule altered by the fact that the prisoner was manacled at the time.¹

Where Officer Is Armed. — Nor is it material that the officer having him in charge was armed.²

the prisoner was in custody of officers who had no writ at the time of the making of the confession, but appeared to have gotten a writ out by the time the confession between the defendant and themselves ceased.

But it must appear that at the time the confession was made the accused was in jail or other place of confinement or in the custody of an officer. *Speer v. State*, 4 Tex. App. 474.

Thus, confessions made by the defendant before any suggestion had been made to arrest him are admissible without any warning. *McKenzie v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 543.

But where on the trial of G. for the theft of money from a fellow boarder, it appeared that while G. was in a bar-room, drunk and disorderly, in violation of a city ordinance, the marshal, with a posse, took him therefrom and confined him in a neighboring corn-crib, it was held that, notwithstanding the marshal's testimony that he did not "consider" that he had the defendant under arrest, the arrest was complete, and that the statements by the defendant under such circumstances without caution were not admissible as evidence. *Grosse v. State*, 11 Tex. App. 364.

On the trial of N. for theft of money, it appeared that S. and other rangers found him at sunrise while he was dressing, and told him they were in pursuit of stolen horses and asked him to let them examine his caballado. Before going to the caballado, and after a pistol and bag of money had been taken from N.'s saddle-bags, and while he was aware that he was virtually under arrest, he made certain statements to S. It was held that, though the defendant was not informed in so many words that he was arrested, his confessions were inadmissible in evidence. *Nolen v. State*, 9 Tex. App. 419.

But where three citizens, having a gun, rode up to the defendant on the morning after a homicide and spoke to him, but said or did nothing to indicate their intention not to let him escape, or to make him believe he was under arrest, his voluntary statements as to the killing, without warning, were admissible against him. *Craig v. State*, 30 Tex. App. 619.

Under Texas Crim. Code, § 343, providing that to prevent the consequences of theft, all persons may seize the property and thief, and bring them before a magistrate, it has been held that persons so acting are officers *de facto*, and a confession made by the thief to one of them is as if made to an officer. *Smith v. State*, 13 Tex. App. 507.

In *Neiderluck v. State*, 21 Tex. App. 320, it was held that confessions made by a prisoner while in jail, who has not been cautioned, are inadmissible in evidence against him, although he was not imprisoned for the offense confessed.

The above mentioned statutory provision, however, has been held not to apply to the introduction of confessions by the accused in support of his defense, if they are competent.

Harrison v. State, 20 Tex. App. 387, 54 Am. Rep. 529.

After the accused has received a sufficient warning, his confession, though made to an arresting officer, will be admissible against him. *Mixon v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 395; *Thompson v. State*, 19 Tex. App. 615.

Thus, where a prisoner, after his arrest on a charge of murdering his brother, voluntarily handed to the officer a document stating that it contained his confession as to how the deceased was killed, and on being duly cautioned by the officer that it could be used as evidence against him, showed no desire to withdraw it, but added that he would not have killed his brother had it not been for their father, it was held that the document was competent evidence for the state. *Harris v. State*, 6 Tex. App. 97.

It has been held that a warning by the sheriff to the defendant in the presence and hearing of his deputy is tantamount to a warning by the deputy so as to render a confession to the latter admissible in evidence. *Baldwin v. State*, (Tex. Crim. App. 1894) 28 S. W. Rep. 951.

And a confession made to a sheriff after being warned by him has been held not to be inadmissible as not being voluntary because the defendant had been previously told by another officer that he would aid him if he confessed. *Paris v. State*, (Tex. Crim. App. 1895) 31 S. W. Rep. 855.

But the confession will be inadmissible in evidence against a defendant making it where it was not made within a reasonable time from the time when he was cautioned that it might be used against him. *Baker v. State*, 25 Tex. App. 1, 8 Am. St. Rep. 427.

In *Baldwin v. State*, (Tex. Crim. App. 1894) 28 S. W. Rep. 951, it was held that a warning given within an hour of a confession is not so remote as to render the confession inadmissible.

Moreover, in *Maddox v. State*, 41 Tex. 206, it was held that a confession made by the accused on the same day he was cautioned was admissible.

And in *Adams v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 354, it was held that a confession made a day or two after he was warned by the sheriff was admissible in evidence against him.

1. Fact that Prisoner Was Manacled Immaterial. — *Hopt v. Utah*, 110 U. S. 574; *Sparf v. U. S.*, 156 U. S. 51; *Pierce v. U. S.*, 160 U. S. 355; *State v. Ingram*, 16 Kan. 14; *State v. Whitfield*, 109 N. Car. 876; *State v. Gorham*, 67 Vt. 365.

The fact that the prisoner's feet were tied at the time of making the confession does not render it inadmissible. *State v. Patterson*, 73 Mo. 695; *Franklin v. State*, 28 Ala. 9.

2. Fact that Arresting Officer Was Armed Immaterial. — *Hornsby v. State*, 94 Ala. 55; *McElroy v. State*, 75 Ala. 9.

Where Prisoner Is in Illegal Custody. — And, according to the weight of authority, a confession, if otherwise admissible, cannot be rejected for the reason that the officer to whom it was made held the prisoner in custody upon an invalid process, or without any process or legal right.¹

(j) **Administering of Oath.** — The mere fact that an extra-judicial confession is made under oath will not render it inadmissible in evidence.²

(k) **Interrogations Assuming Guilt.** — The mere fact that a confession is made in answer to a question which assumes the prisoner's guilt does not, *per se*, render the confession inadmissible.³

(l) **Necessity of Operation of External Influence.** — It has been maintained that a self-prompted hope of benefit may be sufficient to exclude a confession.⁴ But the weight of authority favors the rule that the hope or fear that is to have this effect must be induced by an external influence, and the mere fact that a prisoner may think that it will be better for him if he confesses, or worse

1. **Where Prisoner Is in Illegal Custody.** — *Rex v. Thornton*, 1 Moo. C. C. 27; *Com. v. Cuffee*, 108 Mass. 285; *Balbo v. People*, 80 N. Y. 499, *affirming* 19 Hun (N. Y.) 424.

Where a person charged with the commission of a crime was arrested and held in custody more than twenty-four hours without being taken before a magistrate, it was held that voluntary confessions made by him to the officer are not to be excluded from evidence on the ground that he was illegally in custody after the twenty-four hours expired. *People v. Devine*, 46 Cal. 46. *Compare Ackroyd's Case*, 1 Lew. 49.

In *Hooper v. State*, 81 Ala. 51, *Somerville, J.*, said: "It is not entirely settled that confessions made by one in a state of illegal imprisonment, without more, are to be deemed involuntary upon the ground that the necessary inference is that they were produced by the duress of such imprisonment."

2. **Administering of Oath.** — *U. S. v. Brown*, 40 Fed. Rep. 457. In this case *Simonton, J.*, said: "The rule laid down by Mr. Greenleaf and sustained by his authorities applies to a confession made before an examining magistrate preliminary to a trial; not to a case like this in which the sworn statement was made long anterior to any prosecution or to the issuing of any warrant, in an investigation made by a special agent of the interior department. This rule is confined to examinations before the committing magistrate. The statement offered in evidence is an extra-judicial admission, and must be treated as such."

3. **Interrogations Assuming Guilt** — *England*. — *Reg. v. Vernon*, 12 Cox C. C. 153; *Rex v. Thornton*, 1 Moo. C. C. 27; *Reg. v. Regan*, 17 L. T. N. S. 325.

Canada. — *Reg. v. Day*, 20 Ont. Rep. 209. *Alabama.* — *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282; *Grant v. State*, 55 Ala. 201; *McQueen v. State*, 94 Ala. 50.

Arkansas. — *Young v. State*, 50 Ark. 501.

Minnesota. — *State v. Staley*, 14 Minn. 105.

Mississippi. — *Sam v. State*, 33 Miss. 347.

New York. — *People v. Wentz*, 37 N. Y. 303.

See also *State v. Williams*, 68 N. Car. 60;

Speights v. State, 1 Tex. App. 551; *Reg. v.*

Kerr, 8 C. & P. 176, 34 E. C. L. 341; *State v.*

Mulholland, 16 La. Ann. 376. See also *State*

v. Chambers, 45 La. Ann. 36; *State v. Chisen-*

hall, 106 N. Car. 676. *Compare Reg. v. Male*,

17 Cox C. C. 689; *State v. Dildy*, 72 N. Car. 325.

Thus, where the officer who committed the accused on a charge of murder asked him whether, if it was to do over again he would do it, and the reply was, "Yes sir-ree Bob," it was held that both the question and answer were admissible in evidence. *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282. *Compare Reg. v. Male*, 17 Cox C. C. 689.

The mere fact that two officers who had arrested a boy thirteen or fourteen years old, without a warrant, upon suspicion of having committed a crime, after searching him, stripping him of his clothing, and putting him into a cell at the police station, took him from the cell at night and questioned him for two hours, without warning him of his right not to answer, or offering him opportunity to consult friends or counsel, has been held not to render his confessions in the conversation inadmissible on his trial for the crime. *Com. v. Cuffee*, 108 Mass. 285. *Compare Flagg v. People*, 40 Mich. 708.

Pennsylvania. — In *Com. v. Wyman*, 3 Brews. (Pa.) 338, it was held that a mere accusation of guilt will not invalidate a subsequent confession.

Also, in *McClain v. Com.*, 110 Pa. St. 263, where a witness for the commonwealth testified to a confession of the prisoner which was elicited by the following question: "Then I asked him (the prisoner) how it came that you killed that fellow?" it was held that this was not such a question as assumed the guilt of the prisoner, and that the confession which it brought forth was properly admitted in evidence. The court in this case said: "The doubt in the mind of the court [below] was caused by a dictum of Gibson, C. J., in *Com. v. Mosler*, 4 Pa. St. 264, in which that learned justice said that a confession in reply to a question which assumes the guilt of a prisoner is not admissible. No such point was decided in that case, and the remark referred to was solely for the purpose of illustration as the opinion shows. That it is true in a qualified sense may be admitted. If it amounts to an unfair advantage so as to entrap a prisoner, it may be little better as a confession than one obtained by any other undue influence. But we see nothing in the question put by the witness, F. A. Means, that is obnoxious to such an objection."

4. 1 Bishop New Crim. Proc., § 1235; Hall's Case, 2 Leach C. C. 559, note *a*.

for him if he does not confess, will be immaterial, if that state of mind is brought about by his own independent reasoning.¹

(m) **Degree of Influence Immaterial.** — The rule excluding confessions made under undue influence applies when the prisoner has been influenced by any inducement of hope or fear, however slight, for the reason that the law cannot measure the force of the influence used, or decide upon its effect on the mind of the prisoner.²

(n) **Inducement Not Taking Effect.** — Where no confession of guilt has been made by a party on trial for a criminal offense, it is immaterial what inducements may have been held out to him for the purpose of obtaining a confession.³ And even where a confession has been made, it will not be vitiated by the fact that inducements were held out, if it appears that they had no influence in bringing about the confession.⁴

Confession Antecedent to Inducement. — Thus if the confession was antecedent to and therefore uninfluenced by the promise⁵ or threat,⁶ it will be admitted in evidence.

Withdrawal of Promise or Removal of Person Making Threats. — So, where an inducement held out has been withdrawn,⁷ or the person or persons making the

1. *Hardy v. U. S.*, 3 App. Cas. (D. C.) 48; *Com. v. Knapp*, 9 Pick. (Mass.) 502, 20 Am. Dec. 491; *Com. v. Sego*, 125 Mass. 213; *People v. McMahon*, 15 N. Y. 384; *State v. Patrick*, 3 Jones L. (N. Car.) 443.

2. **Degree of Influence Immaterial.** — *Rex v. Cass*, 1 Leach C. C. 293, note; *Bonner v. State*, 55 Ala. 246; *Lacey v. State*, 58 Ala. 386; *Robinson v. People*, 159 Ill. 119; *People v. Clarke*, 105 Mich. 169; *People v. McMahon*, 15 N. Y. 387.

Georgia Code (1895), vol. 3, § 1006, provides that "to make a confession admissible it must have been made voluntarily, without being induced by another, by the slightest hope of benefit or remotest fear of injury." *Johnson v. State*, 76 Ga. 76; *Earp v. State*, 55 Ga. 136.

3. **Where There Is Inducement, but No Confession.** — *McLain v. State*, 18 Neb. 154.

4. **Confession Not Influenced by Inducement.** — *Bartley v. People*, 156 Ill. 234; *State v. Stuart*, 35 La. Ann. 1015; *Ross v. State*, 67 Md. 286; *Com. v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; *Com. v. Crocker*, 108 Mass. 464; *State v. Scates*, 5 Jones L. (N. Car.) 420; *State v. Gregory*, 5 Jones L. (N. Car.) 315; *State v. Fisher*, 6 Jones L. (N. Car.) 478; *State v. Howard*, 35 S. Car. 197; *Strady v. State*, 5 Coldw. (Tenn.) 300; *Maples v. State*, 3 Heisk. (Tenn.) 408; *Moore v. Com.*, 2 Leigh (Va.) 701. See also *Reg. v. Boswell*, C. & M. 584, 41 E. C. L. 318.

Although a threat or promise may have been made use of, the confession is to be received if it has been made under such circumstances as to create a reasonable presumption that the threat or promise had no influence or had ceased to have influence in the mind of the party. *Mose v. State*, 36 Ala. 227.

Where before the money stolen was found, the owner charged the defendant with the larceny and told him if he would return the money or tell him where it was he would let him go, but if he would not he would have him put in jail, and the defendant denied any knowledge of the theft, and said the owner could put him in jail or cut his throat, but

that he could not tell him anything about it; and after his arrest and commitment to jail, upon being again asked by the owner if he took the money he answered that "he did and was a fool to do so," it was held that his confession was admissible in evidence. *People v. Jim Ti*, 32 Cal. 60.

Influence Counteracted by Subsequent Remarks.

— One under arrest for stealing was visited in jail by the prosecutor, who said to him that if he wished for any conversation he could have a chance; the prisoner made no reply for a minute or two; the prosecutor then told the prisoner he thought it was better for all concerned in all cases for the guilty party to confess; the prisoner then said he supposed he should have to stay there whether he confessed or not; the prosecutor replied that he supposed he would, and in his opinion it would make no difference as to legal proceedings, and that it was considered honorable in all cases, if a person was guilty, to confess. It was held that the confessions of the prisoner, made immediately after this conversation, were admissible in evidence against him. *Com. v. Morey*, 1 Gray (Mass.) 461.

Rebuttal by Affirmative Proof. — In *Cain v. State*, 18 Tex. 387, it was held that where threats of personal violence in the presence and hearing of the accused are proved, it is for the state to show that they were not made at the time and under the circumstances to induce the confession.

5. **Confession Antecedent to Promise.** — *Murdock v. State*, 68 Ala. 569. See also *Lowe v. State*, 88 Ala. 8.

6. **Confession Antecedent to Threat.** — *Kollenberger v. People*, 9 Colo. 233.

7. **Withdrawal of Promise.** — *Sampson v. State*, 54 Ala. 241; *Com. v. Tuckerman*, 10 Gray (Mass.) 173; *Com. v. Howe*, 132 Mass. 250; *Ward v. People*, 3 Hill (N. Y.) 395, 6 Hill (N. Y.) 144; *Paris v. State*, (Tex. Crim. App. 1895) 31 S. W. Rep. 855.

Illustrations. — On the trial of an indictment for larceny, it appeared that the owner of the goods, on the prisoner's expressing contrition for the offense, promised not to prosecute him,

threats have been removed,¹ a confession subsequently made will be admissible in evidence.

Inducement Counteracted by Subsequent Warning. — An inducement either by threats or promises may be counteracted by a subsequent warning duly given to the prisoner as to his rights, and as to the consequences of a confession.²

Threat Counteracted by Subsequent Assurances of Protection. — Also where threats have been made to a prisoner, the influence thereof may be counteracted by assurances of protection subsequent thereto but prior to a confession, so as to render the confession admissible in evidence.³

but the officer whom they soon met told them the matter could not be settled, and immediately arrested the prisoner; it was held that the prisoner's confessions made afterwards were admissible in evidence against him, notwithstanding the previous promise of the owner. *Ward v. People*, 3 Hill (N. Y.) 395, 6 Hill (N. Y.) 144.

Where the prosecutor asked the accused to tell him where his mare could be found, saying to him that if he did not he would be arrested and it would then be too late for him to confess, and the accused denied all knowledge of the mare and was arrested and taken before the committing magistrate; and in less than half an hour after his denial, and after his arrest, while before the magistrate, he said to the prosecutor he would tell where the mare was, and was told it was too late, he ought to have told before, but he nevertheless confessed his guilt, it was held that the confession was admissible in evidence, since it was made after the inducement had ended, without any other inducement, and in the face of warning that it was too late for him to confess. *Sampson v. State*, 54 Ala. 241.

A treasurer of a railroad corporation who had embezzled funds called upon a friend, who was a surety upon his official bond and a stockholder in the corporation, for advice; and he urged him to go to the directors and make a clean breast of it, and told him that it would be for his interest to make a full confession; but said nothing in terms of a prosecution; told him that the disgrace was in doing wrong, not in suffering punishment for it, and he had better stay and meet the punishment; and (as he testified), "advised as a friend, a son." The next day they went together to see one of the directors, who, on this stockholder suggesting that he had influence with the other directors and could prevent a prosecution, stopped him, saying that he could and would make no promises, did not know what his own power or duty was, but would do all he rightfully and properly could to prevent his arrest and prosecution, and that he must confide wholly in him and his discretion. It was held that confessions made after these conversations were admissible in evidence against the defendant. *Com. v. Tuckerman*, 10 Gray (Mass.) 173.

1. Removal of Person Making Threats. — Where, at the time of the prisoner's arrest by the constable and his posse, some demonstrations were made by a portion of the latter, indicating a purpose to offer violence to him, but assurances were at once given by the officer that no harm should be done him, and the confession appears to have been voluntarily made

after the constable and the prisoner had entirely separated from the others and were on their way to the county town, the confession was held to be admissible in evidence. *Walker v. State*, 9 Tex. App. 38. To the same effect, see *Honeycutt v. State*, 8 Baxt. (Tenn.) 372.

2. Inducement Counteracted on Subsequent Warning. — *Hamilton v. State*, 3 Ind. 552; *State v. Kirby*, 1 Strobb. L. (S. Car.) 378; *State v. Vaigneur*, 5 Rich. L. (S. Car.) 391; *McGlothlin v. State*, 2 Coldw. (Tenn.) 228; *Beggarly v. State*, 8 Baxt. (Tenn.) 520; *Fife v. Com.*, 29 Pa. St. 429.

When the prisoner was arrested, one of the two constables who had him in charge said to him, "Come, Jack, you might as well out with it." The magistrate interposed and warned him not to confess. Some hours afterwards the prisoner made confessions to B., who was in no position of authority over him, but with whom and in whose buggy as a convenient mode of transportation he was riding to jail with two constables, being near but not in hearing. It was held that the confessions to B. were admissible, the warning of the magistrate being sufficient to counteract any impression made by the words of the constable. *State v. Vaigneur*, 5 Rich. L. (S. Car.) 391. Compare *State v. Carson*, 36 S. Car. 524.

Contra. — In *Reg. v. Doherty*, 13 Cox C. C. 23, it was held that where a prisoner had been told by a constable at ten o'clock A. M. that it would be better for him to tell the truth and not to put people to the extremities he was doing, a confession by the prisoner to another constable after six o'clock in the evening of the same day was not admissible in evidence, although the second constable had previously cautioned the prisoner.

3. Threats Counteracted by Subsequent Assurances of Protection. — *Wilson v. State*, 3 Heisk. (Tenn.) 232; *Honeycutt v. State*, 8 Baxt. (Tenn.) 372; *Walker v. State*, 9 Tex. App. 38.

Where a prosecutor, pursuing a prisoner, came up with him in the road, drew his gun, and ordered him to halt, and his brother coming up said the prosecutor ought to have shot the prisoner, when the prosecutor said to the prisoner he should not be harmed; and thereupon the parties proceeded two and a half miles, when the prisoner confessed, the confession was held admissible in evidence. *Wilson v. State*, 3 Heisk. (Tenn.) 232.

Threats Rebuked. — Threats by a party on the day preceding an alleged confession by a prisoner, who was not present when the confession was made, especially when such threats were rebuked in the presence of the prisoner by a magistrate and others, did not render the alleged confession inadmissible as

(o) **Presumption of Continuance of Inducement Once Operative.** — When once a confession under improper influence is obtained, the presumption arises that a subsequent confession of the same nature flows from the like influence, and this though the subsequent confession was made to a different person from the one holding out the inducement.¹

This Presumption, However, May Be Overcome so as to allow a subsequent confession to be admitted in evidence, if the court believes from the length of time intervening,² from proper warning of the consequences of the confession,³ or

evidence against the prisoner. *State v. Ostrander*, 18 Iowa 437.

1. Presumption of Continuance of Inducement Once Operative — *England*. — *Reg. v. Rue*, 13 Cox C. C. 209.

Alabama. — *Bob v. State*, 32 Ala. 560; *Ward v. State*, 50 Ala. 120; *McAdory v. State*, 62 Ala. 154; *Redd v. State*, 69 Ala. 260; *State v. Clarissa*, 11 Ala. 57; *Owen v. State*, 78 Ala. 425, 56 Am. Rep. 40; *Dinah v. State*, 39 Ala. 359; *Banks v. State*, 84 Ala. 430; *Hoober v. State*, 81 Ala. 51.

Arkansas. — *Love v. State*, 22 Ark. 336.

California. — *People v. Johnson*, 41 Cal. 452.

Colorado. — *Beery v. U. S.*, 2 Colo. 186.

Michigan. — *People v. Barker*, 60 Mich. 277, 1 Am. St. Rep. 501.

Mississippi. — *Serpentine v. State*, 1 How. (Miss.) 256; *Peter v. State*, 4 Smed. & M. (Miss.) 31; *Van Buren v. State*, 24 Miss. 512.

Missouri. — *State v. Jones*, 54 Mo. 478.

New Jersey. — *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404.

New York. — *People v. Kurtz*, 42 Hun (N. Y.) 340.

North Carolina. — *State v. Roberts*, 1 Dev. L. (N. Car.) 259; *State v. Lowhorne*, 66 N. Car. 638.

Oregon. — *State v. Wintzingerode*, 9 Oregon 153.

Pennsylvania. — *Com. v. Harman*, 4 Pa. St. 269.

Tennessee. — *Deathridge v. State*, 1 Sneed (Tenn.) 75.

Texas. — *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595.

Virginia. — *Thompson v. Com.*, 20 Gratt. (Va.) 724.

See also *Com. v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491. Compare *Mathis v. Com.*, (Ky. 1890) 13 S. W. Rep. 360; *Com. v. Myers*, 160 Mass. 530, citing 3 AM. AND ENGL. ENCYC. OF LAW (1st ed.) 439.

The prisoner, a servant girl, was questioned by the mother of a child who had been found dead in a ditch; and she was asked whether she had anything to do with its disappearance; upon which she cried and said, "If you won't send for the police I will tell the truth," whereupon her mistress replied, "I will not hurt you if you tell the truth; you will be much happier if you tell the truth;" and she promised not to send for the police; whereupon the prisoner made a confession which upon the trial was rejected as being made under an inducement. It further appeared that, shortly after this confession, the mistress sent for a neighbor and informed him of the confession, whereupon he had an interview alone with the prisoner, and asked her questions upon the subject, but he held out no inducement, and she then made

a similar confession. It was held that the second confession was so connected under the circumstances with the first that it was inadmissible. *Reg. v. Rue*, 13 Cox C. C. 209.

Where Subsequent Confession Is Judicial. — The rule of the text of course applies when the subsequent confession is made before a committing magistrate or other judicial tribunal. *People v. Johnson*, 41 Cal. 452; *Peter v. State*, 4 Smed. & M. (Miss.) 31; *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404; *Jackson v. State*, 39 Ohio St. 37; *Com. v. Harman*, 4 Pa. St. 269; *Reg. v. Finkle*, 15 U. C. C. P. 453.

Prior Confession Vitiating by Noncompliance with Statute. — Where the prior confession has been vitiated not because it was made under undue influence, but because the statutory requirement as to the giving of a caution had not been complied with, it has been held that no presumption as to the invalidity of the subsequent confession will arise. *State v. Needham*, 78 N. Car. 474.

2. Presumption of Continuance Rebutted by Length of Time Intervening. — *U. S. v. Nardello*, 4 Mackey (D. C.) 503; *Beery v. U. S.*, 2 Colo. 205; *Simon v. State*, 36 Miss. 636; *State v. Guild*, 10 N. J. L. 180, 18 Am. Dec. 404.

In *Simon v. State*, 36 Miss. 636, the subsequent confession was made three months after the first confession. In this case, moreover, the surrounding circumstances indicated that the subsequent confession was voluntary.

But, in *State v. Chambers*, 39 Iowa 179, it was held that the mere lapse of ten months time after the first confession, during which the defendant was confined in jail, was not conclusive that the influences under which the first was made had ceased to operate.

3. Presumption of Continuance of Influences Overcome by Warning. — *Rex v. Howes*, 6 C. & P. 404, 25 E. C. L. 459; *Maples v. State*, 3 Heisk. (Tenn.) 408; *Reg. v. Finkle*, 15 U. C. C. P. 453; *Jackson v. State*, 39 Ohio St. 37.

Sufficient Warning. — A prisoner, under the influence of inducements held out by an officer and his assistants who made the arrest, made confessions to the latter. Five hours later the prisoner made a confession, though the state's attorney told him that he must not expect any favor in consequence of the confession, that he was under no obligation to make one unless he chose to. It was held that the second confession was admissible as evidence, and that it was not necessary for that purpose that the prisoner should have been informed that no use of his previous confession could be made against him. *State v. Carr*, 37 Vt. 191. To the same effect, see *Rex v. Howes*, 6 C. & P. 404, 25 E. C. L. 459. Compare *Porter v. State*, 55 Ala. 95.

from other circumstances, that the delusive hopes¹ or fears² under the influence of which the original confession was obtained were entirely dispelled.

Clear Evidence in Rebuttal Necessary. — But the evidence adduced in rebuttal of this presumption must be strong and clear in order to render the confession admissible.³

Confession Subsequent to Inducement Unavailing when Offered. — The rule allowing a presumption as to the continuance of an inducement which has once elicited a confession, has also been applied to the case where the confession has been

Insufficient Warning. — In *People v. Kurtz*, 42 Hun (N. Y.) 335, it was held that where a confession had been made under inducements held out by the person acting for the prosecuting attorney, the simple statement, "Your statement must be voluntary, and you can make one or not as you please," afterwards made by the prosecuting attorney, did not so repudiate the previous inducement as to take away from the mind of the prisoner the influence which had been exerted, and render a subsequent confession admissible.

1. Presumption of Continuance of Influence of Promise Rebutted by Circumstances. — *Owen v. State*, 78 Ala. 425, 56 Am. Rep. 40; *Banks v. State*, 84 Ala. 430; *Beery v. U. S.*, 2 Colo. 205; *Com. v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; *State v. Guild*, 10 N. J. L. 180, 18 Am. Dec. 404; *Deathridge v. State*, 1 Sneed (Tenn.) 75; *State v. Frasier*, 6 Baxt. (Tenn.) 539; *Thompson v. Com.*, 20 Gratt. (Va.) 724.

A Girl, Accused of Poisoning, was told by her mistress, that if she did not tell all about it that night a constable would be sent for in the morning to take her before a magistrate; she then made a statement, which was held to be not admissible in evidence. Next day, a constable was sent for, and as he was taking the accused to the magistrate, she voluntarily said something to him, he having held out no inducement whatever to her to do so. It was held that this was receivable, as the former inducement ceased on her being put into the hands of the constable. *Rex v. Richards*, 5 C. & P. 318, 24 E. C. L. 338.

Withdrawal of Inducement. — In *Simmons v. State*, 61 Miss. 258, it was held that where several confessions were made to third persons under an inducement held out by the prosecuting attorney, the confessions made before the withdrawal of the promise, and which were fairly traceable to that promise as an inciting influence, were inadmissible in evidence, and those made afterwards were admissible.

Withdrawal of Inducement Without Due Warning. — The first confessions of the prisoner in this case, who was a freedman, were made during his preliminary examination before a magistrate on a charge of murder, and were obtained from him, after a great deal of hesitation on his part, by the strongest assurances on the part of his attorney, confirmed by the prosecuting attorney, the brother of the deceased, and the magistrate, that he should not be prosecuted, but should be used as a witness against the other defendants; and these confessions were repeated by him, on the next day, to the constable who was carrying him to jail, and who had given him three drinks of liquor. On the first and second days after his commitment to jail, the leading counsel for the prosecution, accompanied by a brother-in-law

of the deceased and another friend, visited him in jail, and said to him, no other persons being present: "I have heard what you confessed at U. You did not tell the whole truth about it. I want you to be particular how you talk, as what you say may send you to the penitentiary or gallows. I have control of the case now, and all that was done at U. is done away. I withdraw all hopes of reward, and fears of punishment. You have not told all the truth about it. I tell you now, again, that you must not hope or expect to receive any benefit, favor, or mercy, or think the case will go lighter with you for what you said at U., or what you may say now; and if they promised to let you off, or to make the punishment lighter, or to let you be a state witness, I tell you it cannot be. You cannot be a state witness, and you must not expect any mercy, or to be a state witness. I want you to understand that all promises made at U. are taken back, and what you said there will do you no good and cannot be used for or against you. If you wish to tell anything you must do it of your own free will; and remember it may hang you, or send you to the penitentiary for life. Now, you can tell the truth about it if you wish. Do you understand what I mean?" The prisoner replied, "that he did understand; that he did not expect any mercy; that he expected to be hung; that he told it because his conscience hurt him, and he could not keep it any longer;" and he made confessions substantially the same as the former. It was held that these last confessions ought not to have been received in evidence against him. *Porter v. State*, 55 Ala. 95. See also *People v. Kurtz*, 42 Hun (N. Y.) 335.

Retention in Prison After Promise Insufficient in Rebuttal of Presumption. — A slave, while in prison under a criminal charge, having been induced to make several confessions by an implied promise that his master would sell him and not let him be hanged, the fact that he was still kept in prison, and that these confessions were offered in evidence against him on his trial, was not sufficient to show that the influence of such inducements was entirely removed from his mind, so as to render a subsequent reiteration of the confession competent evidence against him on a second trial. *Bob v. State*, 32 Ala. 560.

2. Circumstances in Rebuttal of Presumption of Continuance of Fear. — *Owen v. State*, 78 Ala. 425, 56 Am. Rep. 40; *Banks v. State*, 84 Ala. 430; *State v. Guild*, 10 N. J. L. 180, 18 Am. Dec. 404; *State v. Fisher*, 6 Jones L. (N. Car.) 478; *Deathridge v. State*, 1 Sneed (Tenn.) 75.

3. Clear Proof in Rebuttal Necessary. — *State v. Lowhorne*, 66 N. Car. 638; *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595; *Thompson v. Com.*, 20 Gratt. (Va.) 724.

made to the party holding out the inducement, though such inducement was unavailing at the time of its being offered.¹ On the other hand, where a confession does not immediately follow an inducement held out, but is made some time afterwards to a different person from the one offering the inducement, it seems to be the prevailing rule that no such presumption will arise.²

(p) **Confession and Inducement Relating to Different Crimes.** — Where an inducement is offered the prisoner to confess a certain crime, and he confesses a different crime, the inducement will be inoperative to invalidate the confession.³

(5) *The Person Offering the Inducement* — (a) **Person in Authority.** — It is a rule

1. Confession to Person Offering Inducement Which Was Unavailing when Offered. — A confession or admission by one under arrest on a criminal charge, to the officer having him in custody, made the day after the party had been told by the officer that "he could make him no promises, but if he made any disclosures that would be of benefit to the government, the officer would use his influence to have it go in his favor," is not admissible in evidence against such party; although the officer testified that he thought the statement was voluntary, and would have been made if the inducement of the day before had not been held out; and although the judge instructed the jury that if the statement was not made freely and voluntarily, or if it was induced by the previous promises, they should exclude it altogether. *Com. v. Taylor*, 5 Cush. (Mass.) 605.

The defendant having been once threatened with death by hanging, by parties in disguise, and again taken from the jail by the same parties about a month thereafter, evidently for the purpose of repeating the threat, possibly in a more effectual manner, and without any assurance or caution, was induced to make a confession. Under such circumstances it was held that where there was no proof whether the defendant was so taken from the jail, or what was said or done to him to induce the confession, it would be presumed that the influence of the former threat had not wholly ceased. *Barnes v. State*, 36 Tex. 356.

Surrounding Circumstances Indicating Continuance of Influence. — In *Robinson v. People*, 159 Ill. 119, it was held that where promises have been held out and a subsequent confession is made to the person who previously made the promises, under circumstances indicating that it was understood by both parties that the promises were not withdrawn, the confession is admissible in evidence.

2. Confession Subsequent to Inducement and to Person Other than the One Offering Inducement. — *Mose v. State*, 36 Ala. 211; *McAdory v. State*, 62 Ala. 154; *Com. v. Cullen*, 111 Mass. 435; *Lynes v. State*, 36 Miss. 617. See also *Hardy v. U. S.*, 3 App. Cas. (D. C.) 35; *Com. v. Cuffee*, 108 Mass. 285. Compare dictum in *Barnes v. State*, 36 Tex. 356.

Where the master of the prisoner made a promise of favor and protection, to the effect that he would run the slave out of the country and sell him, but the slave made no disclosure to him, but several weeks afterwards he made a disclosure to a third person, it was held that the confession was admissible in evidence. *Mose v. State*, 36 Ala. 211.

When the prisoners were witnesses before

the coroner's jury some of the jury told them that their stories were contradictory, and that they had better confess, and afterwards the jury sent another person to advise them to confess, and the next day they did confess to another who was not present when the above advice was given, and who held out no inducement at the time; it was held that the confession was admissible in evidence. *Lynes v. State*, 36 Miss. 617.

Contra. — On the other hand, where the committing magistrate had told the prisoner that he would do all that he could for him, if he would make a disclosure, and after this the prisoner made a statement to the turnkey of the prison, who held out no inducement to the prisoner to confess, it was held that what the prisoner said to the turnkey could not be received in evidence, more especially as the turnkey had not given the prisoner any caution. *Rex v. Cooper*, 5 C. & P. 535, 24 E. C. L. 444. See also *Reg. v. Hewett*, C. & M. 534, 41 E. C. L. 291.

3. Where Confession and Inducement Relate to Different Crimes. — *U. S. v. Kurtz*, 4 Cranch (C. C.) 682; *State v. Fortner*, 43 Iowa 494.

Thus where at the trial of a prisoner who was jointly indicted with another for larceny, a witness, who also had property stolen, testified that he went to the prisoner while the latter was in jail and told him that his associate had turned state's evidence and asked him to turn state's evidence also, and promised that if he stole his (the witness's) property and owned it up, he would clear him, and that the prisoner then said he did not take the witness's property but did take the property of the prosecuting witness, it was held that the testimony was admissible. *State v. Fortner*, 43 Iowa 494.

Also if a prisoner arrested for larceny made a confession to an officer as to that larceny, under a promise by the officer to do what he could for him if he would tell where the stolen goods were, and afterwards before the magistrate, without any new promise or threat or question, makes a confession of a different larceny, such latter confession is admissible in evidence against the party upon his trial for such latter larceny. *U. S. v. Kurtz*, 4 Cranch (C. C.) 682.

Inducement to Disclose Accomplices. — A suggestion from a witness to the accused, after a confession has been freely and voluntarily made by him, that it would be better for him if he would disclose who were his accomplices, will not render inadmissible a confession as to his own guilt subsequently made by the accused to another witness. *Williams v. State*, 94 Ga. 400.

universally recognized by the authorities, that if the confession was the result of inducements of a threat¹ or promise² held out by a person having authority or power to assure the person confessing the promised good, or cause or influence the threatened injury, it will be excluded from evidence.

Officer Having Prisoner in Custody. — Thus the officer having the prisoner in custody is regarded as a person in authority under this rule.³

1. The Person Making Promise — Person in Authority — England. — *Rex v. Mills*, 6 C. & P. 146, 25 E. C. L. 324.

Alabama. — *Murphy v. State*, 63 Ala. 3; *Ward v. State*, 50 Ala. 120; *Lacey v. State*, 58 Ala. 385; *Kelly v. State*, 72 Ala. 244; *Hoover v. State*, 81 Ala. 51; *Anderson v. State*, 104 Ala. 83.

California. — *People v. Johnson*, 41 Cal. 452; *People v. Barric*, 49 Cal. 342.

Georgia. — *Green v. State*, 88 Ga. 516.

Illinois. — *Robinson v. People*, 159 Ill. 115.

Massachusetts. — *Com. v. Chabcock*, 1 Mass. 144; *Com. v. Taylor*, 5 Cush. (Mass.) 605; *Com. v. Tuckerman*, 10 Gray (Mass.) 190; *Com. v. Cullen*, 111 Mass. 435; *Com. v. Smith*, 119 Mass. 305; *Com. v. Piper*, 120 Mass. 188; *Com. v. Kennedy*, 135 Mass. 543.

Minnesota. — *State v. Staley*, 14 Minn. 105.

Mississippi. — *Jones v. State*, 58 Miss. 354; *Simmons v. State*, 61 Miss. 243.

Missouri. — *Couley v. State*, 12 Mo. 462; *State v. Hagan*, 54 Mo. 192.

New Hampshire. — *State v. York*, 37 N. H. 175.

Oregon. — *State v. Wintzingerode*, 9 Oregon 153.

Tennessee. — *McGlothlin v. State*, 2 Coldw. (Tenn.) 228.

Virginia. — *Vaughan v. Com.*, 17 Gratt. (Va.) 576.

2. Person in Authority Making Threat. — *Beckham v. State*, 100 Ala. 15; *Com. v. Tuckerman*, 10 Gray (Mass.) 190; *Com. v. Piper*, 120 Mass. 188; *State v. Staley*, 14 Minn. 105.

3. Officer Having Prisoner in Custody Holding Out Inducement — England. — *Rex v. Swatkins*, 4 C. & P. 548, 19 E. C. L. 520; *Rex v. Mills*, 6 C. & P. 146, 25 E. C. L. 324; *Rex v. Shepherd*, 7 C. & P. 579, 32 E. C. L. 639.

Alabama. — *Ward v. State*, 50 Ala. 120; *Redd v. State*, 69 Ala. 255; *Anderson v. State*, 104 Ala. 83.

California. — *People v. Johnson*, 41 Cal. 452.

Massachusetts. — *Com. v. Taylor*, 5 Cush. (Mass.) 605; *Com. v. Kennedy*, 135 Mass. 543.

Michigan. — *Flagg v. People*, 40 Mich. 706.

Minnesota. — *State v. Staley*, 14 Minn. 105.

Missouri. — *Couley v. State*, 12 Mo. 462.

Montana. — *Territory v. McClintock*, 1 Mont. 394.

New Hampshire. — *State v. York*, 37 N. H. 175.

Oregon. — *State v. Wintzingerode*, 9 Oregon 153.

Tennessee. — *McGlothlin v. State*, 2 Coldw. (Tenn.) 228.

Virginia. — *Vaughan v. Com.*, 17 Gratt. (Va.) 576.

See also *Barnes v. State*, 36 Tex. 356; *State v. Patterson*, 73 Mo. 702.

Sheriffs. — The rule of the text applies in the case of inducements offered by a sheriff. *Redd v. State*, 69 Ala. 255.

Constable. — Also to a constable. *Rex v. Mills*, 6 C. & P. 146, 25 E. C. L. 324; *McGlothlin v. State*, 2 Coldw. (Tenn.) 228.

Thus, a person committed on a charge of larceny by a justice was sent in charge of a special constable and the prosecutor to jail, and on the way the constable said to him, "You had as well tell all about it." They then rode on about a mile after this remark, without any other remark being addressed to the prisoner; after which time he voluntarily said to the prosecutor, "I will tell you all about it;" and proceeded to tell how and by whom the breaking and larceny were committed. It was held that the constable was one in authority over him, and the statement was not admissible in evidence. *Vaughan v. Com.*, 17 Gratt. (Va.) 576.

Jailer. — Also, the same rule has been applied in the case of inducements offered by a jailer. *Rex v. Gilham*, 1 Moo. C. C. 186.

But a young man living in the jailer's family, who occasionally, in the absence of the jailer, attended on the prisoners and kept the keys of the jail, has been held not to be a person in authority. *Shifflett v. Com.*, 14 Gratt. (Va.) 652.

Person Assisting Officer. — In *Rex v. Enoch*, 5 C. & P. 539, 24 E. C. L. 446, a confession made by a woman in whose custody the prisoner, who was also a female, had been left by the officer, was held to be inadmissible, where it was the result of an inducement by the woman having the prisoner in charge.

But where a female prisoner, in custody on a charge of murder, desiring to go to a water-closet, was sent there by the police with a woman who was impliedly authorized to prevent her escape, and when alone together in the closet, the woman, an acquaintance of the prisoner, alluding to the crime, said, "How came you to do it?" whereupon the prisoner made a statement in the nature of a confession, it was held that the woman having the prisoner in charge, while to a certain extent possessed of the authority of the police not to let the prisoner escape, was not in any way filling the character of a person in authority. But in this case the decision was made on the further ground that no inducement had been held out. *Reg. v. Vernon*, 12 Cox C. C. 153. And to the same effect see *Reg. v. Sleeman*, 6 Cox C. C. 245; *State v. Patterson*, 73 Mo. 702.

Person Having Prisoner in Custody Without Warrant. — In *State v. George*, 15 La. Ann. 146, it was held that the parties who arrested the prisoner, but who were not public officers, must be viewed in no other light than public officers for the time being, and that a confession made under inducements held out by such parties could not be considered voluntary and was inadmissible in evidence. The court in this case said: "Private individuals are allowed in some cases and required in others,

Magistrate. — An extra-judicial confession will be excluded from evidence where it is the result of inducements held out by a magistrate who is in any way connected with the prosecution, as where the confession is the result of an inducement previously held out by him as an examining officer.¹

Prosecutor — Prosecuting Attorney. — It is well settled also that where the inducement is offered by a person officially connected with the prosecution, as the prosecuting attorney, the confession will not be allowed to go to the jury.²

Person Injured. — In *England* it is the rule that some person, generally the party injured, though it might be another person, must be named as prosecutor, except in special cases. Through this official relation to the prosecution a private prosecutor becomes a person of authority within the meaning of the rule.³

In State Courts. — In the decisions of the state courts in the *United States* also the injured party is regarded as a person of authority.⁴ In many of these cases the injured party is mentioned as the prosecutor.⁵ But it has been held that the injured person is one in authority without regard to any official relation sustained to the prosecution.⁶ Thus where it appeared that the injured party was active in instituting and prosecuting proceedings, it was held that an inducement held out by him would invalidate a confession though he sustained no official relation to the proceedings.⁷

Rule in Federal Courts. — But in the federal courts it has been held that from the earliest time, by the force of statute, the district attorney is the only prosecutor known to the law, and hence the person injured being without capacity to control the prosecution, through the necessity of becoming prosecutor, cannot be recognized as a person in authority.⁸

by the law, to arrest offenders without a warrant of justice. The witnesses who arrested the prisoner must be viewed in no other light than as public officers for the time being; they unquestionably were, by arresting him, exercising legal authority on his person."

1. Magistrate a Person in Authority. — *Rex v. Cooper*, 5 C. & P. 535, 24 E. C. L. 444; *Com. v. Harman*, 4 Pa. St. 269. See also *Simon v. State*, 5 Fla. 285.

The committing magistrate had told a prisoner that he would do all he could for him if he would make a disclosure; after this the prisoner made a statement to the turnkey of the prison, who held out no inducement to the prisoner to confess. It was held that what the prisoner said to the turnkey could not be received in evidence, more especially as the turnkey had not given the prisoner any caution. *Rex v. Cooper*, 5 C. & P. 535, 24 E. C. L. 444.

2. Prosecuting Attorney a Person in Authority. — *Simmons v. State*, 61 Miss. 243; *Robinson v. People*, 159 Ill. 115; *People v. Clarke*, 105 Mich. 169.

3. Person Injured a Prosecutor and Person in Authority — English Doctrine. — *Rex v. Thompson*, 1 Leach C. C. 291; *Rex v. Cass*, 1 Leach C. C. 293, note; *Rex v. Warwickshall*, 1 Leach C. C. 263; *Rex v. Parratt*, 4 C. & P. 570, 19 E. C. L. 532; *Reg. v. Hearn*, C. & M. 109, 41 E. C. L. 65; *Rex v. Partridge*, 7 C. & P. 551, 32 E. C. L. 627; *Rex v. Jones*, R. & R. 152; *Rex v. Griffin*, R. & R. C. C. 152. See also *U. S. v. Stone*, 8 Fed. Rep. 232.

Prosecutor's Wife. — In *Rex v. Upchurch*, 1 Moo. C. C. 465, the prisoner was a domestic servant to the prosecutor, who kept a beer house. The prosecutor's wife lived with him

and took her share in the management of the house, and it was by her the inducements to confess were held out. It was held that the confession was not admissible. To the same effect see *Reg. v. Taylor*, 8 C. & P. 733, 34 E. C. L. 608.

And in *Rex v. Simpson*, 1 Moo. C. C. 410, the inducements were held out by the mother-in-law of the prosecutor, in his house and in the presence of his wife who was very deaf, and the confession thus obtained was held inadmissible.

4. Person Injured a Person in Authority — Rule in State Courts. — *Newman v. State*, 49 Ala. 9; *Lacey v. State*, 58 Ala. 385; *Murphy v. State*, 63 Ala. 3; *Beckham v. State*, 100 Ala. 15; *Frain v. State*, 40 Ga. 529; *People v. Smith*, 15 Cal. 409; *Com. v. Chabcock*, 1 Mass. 144; *State v. Brockman*, 46 Mo. 566; *State v. Roberts*, 1 Dev. L. (N. Car.) 259; *State v. Whitfield*, 70 N. Car. 356.

Owner of Stolen Goods. — Under this rule the owner of goods stolen has been held to be a person in authority. *Lacey v. State*, 58 Ala. 385; *People v. Smith*, 15 Cal. 409; *Ccm. v. Chabcock*, 1 Mass. 144; *State v. Brockman*, 46 Mo. 566; *State v. Whitfield*, 70 N. Car. 356.

5. Newman v. State, 49 Ala. 9; *Lacey v. State*, 58 Ala. 385; *People v. Smith*, 15 Cal. 409; *Com. v. Chabcock*, 1 Mass. 144; *State v. Brockman*, 46 Mo. 566; *State v. Roberts*, 1 Dev. L. (N. Car.) 259; *State v. Whitfield*, 70 N. Car. 356.

6. Murphy v. State, 63 Ala. 4; *State v. Walker*, 34 Vt. 296.

7. State v. Walker, 34 Vt. 296.

8. Person Injured Not Person in Authority — Rule in Federal Courts. — *U. S. v. Stone*, 8 Fed. Rep. 232.

Agent of Person in Authority. — The inducement need not be addressed to the prisoner directly by the person in authority; it will be sufficient if brought to his knowledge indirectly.¹

Inducement Held Out in Presence of Person in Authority. — Moreover, the inducement, to exclude the confession, need not be made by the person in authority, if it be shown that it was made by a third person in his presence and by his sanction.²

(b) **Person Supposed to Be in Authority.** — Though the person offering the inducement is not actually one in authority, the confession will be inadmissible if he is supposed by the accused to have some power or authority to assure the promised good, or cause or influence the threatened injury.³

Thus in *U. S. v. Stone*, 8 Fed. Rep. 237, it was held that a detective who was the agent of the owners of a vessel for the collection of goods lost or taken from a wreck, and who had with him letters of authority from the underwriters, the wrecking company, and the owners of the vessel, instructing him to institute criminal proceedings against the guilty parties in the federal courts, is not such a person in authority as to render inadmissible confessions made to him, though promises or threats were used.

1. Inducement Held Out by Agent of Person in Authority. — *Robinson v. People*, 159 Ill. 115; *Womack v. State*, 16 Tex. App. 178. See also *People v. Clarke*, 105 Mich. 169.

Under the New York Statute, providing substantially that a confession will not be excluded from evidence on account of a promise held out, except in case where it is "made upon a stipulation of the district attorney that he should not be prosecuted therefor," it has been held that where a detective had been in communication with the district attorney about a case and the district attorney had given his instructions in regard to the prisoner, the detective was to some extent acting for the district attorney, and what the detective said to the prisoner might be deemed to come from the district attorney, unless it was positively disavowed. *People v. Kurtz*, 42 Hun (N. Y.) 340.

2. Inducement Held Out in Presence of Person in Authority. — *Reg. v. Luckhurst*, 22 Eng. L. & Eq. 604; *Reg. v. Garner*, 1 Den. C. C. 329; *Reg. v. Laughner*, 2 C. & K. 225, 61 E. C. L. 225; *Rex v. Pountney*, 7 C. & P. 302, 32 E. C. L. 516; *Reg. v. Taylor*, 8 C. & P. 733, 34 E. C. L. 608; *U. S. v. Stone*, 8 Fed. Rep. 232; *State v. Roberts*, 1 Dev. L. (N. Car.) 259; *Morehead v. State*, 9 Humph. (Tenn.) 635. See also *State v. Kirby*, 1 Strobb. L. (S. Car.) 378. Compare *Rex v. Row*, R. & R. C. C. 153.

Case Held Not to Amount to Sanction. — In *Young v. Com.*, 8 Bush (Ky.) 370, it was held that where the prisoner was advised by a mere private friend to confess, the advice could not be regarded as given in the immediate presence of the sheriff and with his sanction, merely because it was given in view of the fact that the sheriff and his posse then held the prisoner in their power and further resistance must be fruitless.

Warning as Excluding Idea of Sanction. — *L.*, a sheriff, went into a jail under his charge, in company with *W.*, who wished to see some of the prisoners. While in the cell where *A.* was

confined they were told by another prisoner therein that "*A.* wanted to make a statement to the sheriff; that his father had sent him word that if he knew anything about the killing of *J.* it would be best for him to tell the whole truth." The sheriff replied that if *A.* did tell what he knew it must be voluntary, and he need expect no favors from him. *W.* then told *A.* that it would be best for him to tell the whole truth, and urged him to do so; whereupon *A.* made a statement admitting his connection with the killing of *J.* The sheriff on the next day returned with writing materials, and after again warning *A.* that his confession must be voluntary, and that he could promise him nothing, took down in writing his detailed statement. Upon the trial of *A.* it was objected that his confession was incompetent evidence, because the inducement thereto was held out by *W.* in the presence of the sheriff. It was held that the warning given by the sheriff excludes the idea that he sanctioned the inducement, and as it must be regarded as held out by a private person without authority over the prisoner or power over the prosecution, and assuming none, the circuit judge was well warranted in treating the confession as voluntary. *Jones v. State*, 58 Miss. 349.

3. Person Supposed to Be in Authority Offering Inducement. — *Gregg v. State*, 106 Ala. 44; *People v. Wolcott*, 51 Mich. 612; *People v. Clarke*, 105 Mich. 169.

Thus where it appeared that in the middle of the night, after the officer who had arrested the prisoner had retired, the prisoner was visited by three persons in succession, whose mission appeared to have been to obtain confessions by impressing upon the mind of the prisoner that it would be better for him, or that he would get off easier, if he made confession, it was held that the confession so obtained was inadmissible in evidence, though no one of the persons was the officer in charge, the admission to the cell at such an unreasonable hour carrying with it an implication of the officer's consent to their mission. *People v. Wolcott*, 51 Mich. 612.

In *Com. v. Tuckerman*, 10 Gray (Mass.) 190, Merrick, J., said: "It is certainly a clear as well as familiar principle of law that every free and voluntary confession is admissible in evidence against a party accused of any criminal offense, but that all those which are obtained from him by threats of harm or promises of favor and worldly advantage, held out by a person in authority, or standing in any

(c) **Person Not in Authority.** — There Is a Great Contrariety of Opinion among the authorities as to whether a confession made to a person who has no authority in the matter, after an inducement held out by that person, is receivable in evidence.¹

Rule Excluding the Confession. — In some of the decisions the rule has been laid down that where any person tells the prisoner that it will be better for him to confess, the confession will always be excluded from evidence.²

Rule that Voluntary Nature of Confession Is Mixed Question of Law and Fact. — According to other decisions which have been sanctioned by several text-writers, the rule which is most in accord with reason is, that where an inducement to confess has been held out by a person not in authority, the question of the voluntary character of the confession is a mixed one of law and fact, and the court should admit or exclude the confession according as it shall determine, from all the circumstances of the case, that the inducements held out were or were not sufficient to overcome the mind of the prisoner.³

Prevailing Doctrine. — But the doctrine in *England* at present, and the prevailing doctrine in the *United States*, is that evidence of any confession is receivable, unless there has been some inducement held out by some person who had, or was supposed to have, authority to assure the accused the promised good.⁴

relation from which the law will presume that his communications would be likely to exercise an influence over the mind of the accused, are to be excluded from the hearing of judicial tribunals."

1. Contrariety of Opinion as to Whether Person Offering Inducement Must Be Person in Authority. — *Rex v. Spencer*, 7 C. & P. 776, 32 E. C. L. 731.

2. Confession Excluded by Some Authorities. — *Rex v. Dunn*, 4 C. & P. 543, 19 E. C. L. 518; *Rex v. Slaughter*, 4 C. & P. 543, note *b*, 19 E. C. L. 518, note *b*; *Rex v. Kingston*, 4 C. & P. 387, 19 E. C. L. 434; *Rex v. Clewes*, 4 C. & P. 221, 19 E. C. L. 354; *Rex v. Walkley*, 6 C. & P. 175, 25 E. C. L. 340; *Rex v. Thomas*, 6 C. & P. 353, 25 E. C. L. 435. See also *Rex v. Warickshall*, 1 Leach C. C. 263; *Rex v. Rudd*, 1 Cowp. 331.

A girl was charged with administering poison, with intent to murder. The surgeon said to her, "You are under suspicion of this, and you had better tell all you know." After this she made a statement to the surgeon. It was held that that statement was not admissible in evidence. *Rex v. Kingston*, 4 C. & P. 387, 19 E. C. L. 434.

Under the Georgia Code, providing that, to make a confession admissible, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury, it has been held that the distinction between persons in authority and persons not in authority has been abolished, and that a confession will be inadmissible if induced by a private person. *Byrd v. State*, 68 Ga. 661; *Johnson v. State*, 61 Ga. 305. See also *Stephen v. State*, 11 Ga. 225; *Miller v. State*, 94 Ga. 1.

3. Voluntary Nature of Confession Mixed Question of Law and Fact. — 1 *Bishop's New Crim. Proc.*, § 1233; 1 *Greenl. on Ev.*, § 223; *Jones v. State*, 58 Miss. 354; *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404; *State v. Carroll*, 30 S. Car. 85, 14 Am. St. Rep. 883. See also *State v. Kirby*, 1 Strobb. L. (S. Car.) 155; *Beggarly v. State*, 8 Baxt. (Tenn.) 520. Compare *State v. Gossett*, 9 Rich. L. (S. Car.) 428.

Statement of This Rule. — In *Jones v. State*, 58 Miss. 349, the court said: "The admissibility of the confession in this case must therefore be tried by the same rule as if the inducements to confess were held out by a mere private person, not having, nor assuming to have, any power over the prosecution. There is some difference in the authorities as to the effect of inducements held out by merely private persons on the admissibility of confessions thus obtained. The better rule seems now to be, that confessions made in consequence of inducements held out by persons in authority ought to be excluded on grounds of public policy, and that in all such cases the law will conclusively presume that the mind of the prisoner was influenced by them. But inducements held out by private persons, who have interfered without any kind of authority, and promised without the means of performance, are not presumed to have the effect to induce a false confession. But they may have such effect, owing to the position of the person holding out the inducements or the weakness of the prisoner. In cases of confessions made to such persons, the question of their freedom or the contrary is a mixed question of law and fact, and should be submitted to the judge. He should admit or exclude them according as he shall determine, from all the circumstances of the case, that they are voluntary, or that the inducements held out were sufficient to overcome the mind of the prisoner."

4. Prevailing Doctrine — England. — *Rex v. Gibbons*, 1 C. & P. 97, 11 E. C. L. 327; *Rex v. Tyler*, 1 C. & P. 129, 11 E. C. L. 343; *Rex v. Hardwich*, 1 C. & P. 98, note *a*, 11 E. C. L. 328, note *a*; *Reg. v. Taylor*, 8 C. & P. 733, 34 E. C. L. 608; *Reg. v. Moore*, 12 Eng. L. & Eq. 583, 2 Den. C. C. 522, 3 C. & K. 153, 5 Cox C. C. 555; *Rex v. Row*, R. & R. C. C. 153.

United States. — *U. S. v. Stone*, 8 Fed. Rep. 232.

Kentucky. — *Young v. Com.*, 8 Bush (Ky.) 366.

Massachusetts. — *Com. v. Morey*, 1 Gray (Mass.) 461; *Com. v. Flood*, 152 Mass. 529.

Minnesota. — *State v. Holden*, 42 Minn. 350,

Necessity of Authority in Connection with Prosecution. — The doctrine seems to be advanced by some of the authorities that an inducement which is held out by a person in authority will invalidate a confession induced thereby, though such person had no authority in connection with the particular prosecution.¹ But the weight of the modern decisions at least favors the rule that the person offering the inducement must have some authority over the prosecution of the particular offense confessed, whether he be an officer of the law or not.²

Confessions Induced by Master. — Thus by the weight of authority it is maintained that the simple relation of master or mistress to a party making a confession under inducements is not *per se*, and unconnected with any other circumstance creating an interest or concern in the matter, sufficient to exclude

citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 456.

Rhode Island. — *State v. Habib*, 18 R. I. 558.

Texas. — *Thompson v. State*, 19 Tex. App. 616.

Virginia. — *Smith v. Com.*, 10 Gratt. (Va.) 734; *Shifflet v. Com.*, 14 Gratt. (Va.) 652.

West Virginia. — *State v. Morgan*, 35 W. Va. 260.

See also *Rex v. Spencer*, 7 C. & P. 776, 32 E. C. L. 731; *State v. Potter*, 18 Conn. 166. *Compare Hudson v. Com.*, 2 Duv. (Ky.) 531.

In *Reg. v. Moore*, 12 Eng. L. & Eq. 586, Parke, B., said: "The cases on this subject have gone quite far enough, and ought not to be extended. It is admitted that the confessions ought to be excluded unless voluntary, and the judge, not the jury, ought to determine whether they are so. One element in the consideration of the question as to their being voluntary is, whether the threat or inducement was such as to be likely to influence the prisoner. Perhaps it would have been better to have held (when it was determined that the judge was to decide whether the confession was voluntary) that in all cases he was to decide that point upon his own view of all the circumstances, including the nature of the threat or inducement, and the character of the person holding it out, together; not necessarily excluding the confession on account of the character of the person holding out the inducement or threat. But a rule has been laid down in different precedents by which we are bound, and that is, that if the threat or inducement is held out, actually or constructively, by a person in authority, it cannot be received, however slight the threat or inducement; and the prosecutor, magistrate, or constable is such a person, and so the master or mistress may be. If not held out by one in authority, they are clearly admissible."

"Of course such inducement must be held out to the accused by some one who has, or is supposed by the accused to have, some power or authority to assure to him the promised good, or cause or influence the threatened injury." *Shaw, C. J.*, in *Com. v. Morey*, 1 Gray (Mass.) 461. To the same effect see *Com. v. Flood*, 152 Mass. 529. But see *Com. v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491.

Sureties on Bond. — Where a confession was made by the defendant, a county treasurer, to two of his bondsmen, that he was short in his accounts, in answer to a remark of one of the

bondsmen that "there is no use putting this thing off any longer; if you are short, come out and say so, and we will try and fix it up," it was held that the bondsmen were not persons in authority so as to make the defendant's confession inadmissible by reason of the inducement offered by them. *State v. Carrick*, 16 Nev. 120.

Private Detective. — It has been held that a private detective employed to "look up a case" was not a person in authority. *Territory v. McKern*, 2 Idaho 759; *Early v. Com.*, 86 Va. 921, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 460.

Promise by Private Person of Aid of Another Private Person. — A confession obtained by a private person by saying to the accused, "I know your father, and you had better tell me, so I can tell him all about it, so that he can help you," is not obtained by duress where there is no reason to believe that the person obtaining it or the father of the accused could influence the prosecution. *Ulrich v. People*, 39 Mich. 245. In this case the court said: "The help was to come from a particular person, the father of the accused, who, from aught that appears, neither had, nor could be supposed to have, any power or authority whatever to influence in any way the officers of the law or the complaining witness or her friends. Not only this, but it is not apparent what right Miller had to make such an agreement or hold out such a promise, or that it would be performed. The only legitimate inference to be drawn from the inducement held out in this case would be that his father would aid and assist him in any prosecution that might afterwards be commenced. Such help when promised by a private individual is not in my opinion such a flattery of hope as to destroy the voluntary character of the confession made in consequence thereof."

1. 1 Bishop New Crim. Proc., § 1233; 1 Greenl. on Ev., § 222; *Bob v. State*, 32 Ala. 560.

Offers of Private Assistance to Elude Prosecution. — Thus an offer on the part of a private person to buy the prisoner's crop and assist him in leaving the country, if he would confess, has been held to render a confession induced thereby inadmissible. *Anderson v. State*, 104 Ala. 83. *Compare Com. v. Flood*, 152 Mass. 529.

2. *Reg. v. Moore*, 2 Den. C. C. 522; *U. S. v. Stone*, 8 Fed. Rep. 232; *Smith v. Com.*, 10 Gratt. (Va.) 734.

a confession, as made to a person in authority within the meaning of the rule.¹

Officer Not Acting in Official Capacity. — Nor does the mere fact that the person offering the inducement is an officer answer the purpose; he must be connected with the prosecution, and have authority through that connection over the prisoner.² Thus where a magistrate was not acting as such, nor was in any way concerned in the prosecution, it has been held that the mere fact that he was an officer did not render invalid a confession made under an inducement held out by him.³ Also it has been held that the fact that an inducement was held out by a person not in authority, in the presence of a deputy marshal, will not invalidate a subsequent confession, where it appears that the deputy marshal was present only in his character as assistant of the person offering the inducement.⁴

Parent. — Nor, it has been said, does the relation of a parent to a child of tender years bring the case within the rule where the parent is unaffected with the crime.⁵

Inducement by Threats. — It has been said that, in order to render a confession induced by threats inadmissible, the threat must have been made by one in authority.⁶ But the rule which best accords with reason and is supported by the weight of authority is, that such a confession is inadmissible in evidence though the threat was made not by one in authority, but by a private individual.⁷

1. Confessions Induced by Master. — Reg. v. Moore, 2 Den. C. C. 522; U. S. v. Stone, 8 Fed. Rep. 232; Smith v. Com. 10 Gratt. (Va.) 734. Compare Bob v. State, 32 Ala. 560.

In Reg. v. Moore, 2 Den. C. C. 522, it was held that a confession made to the prisoner's mistress under inducements held out by her to confess, being unconnected with the person or property or dwelling house of the mistress, was admissible in evidence.

In Carrington's Case and Howell's Case, cited by Parke, B., in delivering the opinion of the judges in Reg. v. Moore, 2 Den. C. C. 522, the same or a similar distinctive feature, we are told, will be found to exist.

Master of Apprentice. — Under this rule it has been held that a person to whom a free negro is bound as apprentice, though a justice of the peace, if not acting as such and not affected by the offense, is not a person in authority. Smith v. Com., 10 Gratt. (Va.) 734.

Master Connected with Prosecution. — And in the following cases in which the master or mistress has been held to be a person in authority it will be found that in them all the confessions in some way concerned the master or mistress and that they were connected with the matter itself. Rex v. Upchurch, 1 Moo. C. C. 465; Reg. v. Taylor, 8 C. & P. 733, 34 E. C. L. 608; Rex v. Simpson, 1 Moo. C. C. 410; Rex v. Parratt, 4 C. & P. 570, 19 E. C. L. 532; Reg. v. Hearn, C. & M. 109, 41 E. C. L. 65; State v. Brockman, 46 Mo. 566; State v. Whitfield, 70 N. Car. 356; Newman v. State, 49 Ala. 9.

In Reg. v. Warringham, 2 Den. C. C. 477, note, the offense was stealing from a shop, and the confession was induced by what was said by the mistress of the prisoner, who, it appeared, was in the habit of managing the shop.

In Rex v. Parratt, 4 C. & P. 570, 19 E. C. L. 532, the prisoner was a mariner, and was charged with having stolen a watch from a shipmate while on board their vessel, the watch having been found concealed in the

cable. The captain of the ship threatened to commit him to jail immediately upon their arrival at Newcastle, unless he would confess who his partner was, and the prisoner accordingly did make a confession. Here the felony was committed on board the vessel of which the party holding out the inducements was the master, and he had the right to arrest the prisoner and commit him to jail on reasonable suspicion that he was the guilty party.

Under the Georgia Code, providing that confessions induced by another by the slightest hope of benefit or remotest fear of injury are inadmissible in evidence, it has been held that a confession of larceny by an employee, induced by a statement from his employer that if he would bring up the articles stolen there was a probability the whole matter would be settled, is inadmissible, although the employer was not the prosecutor. Byrd v. State, 68 Ga. 661.

2. Officer Not Acting in Official Capacity. — U. S. v. Stone, 8 Fed. Rep. 232.

3. Magistrate Not Acting Officially. — Smith v. Com., 10 Gratt. (Va.) 734.

But in Rex v. Clewes, 4 C. & P. 221, 19 E. C. L. 354, it was intimated that a confession made under inducements held out by a magistrate was inadmissible, although the magistrate was not acting as an examining officer nor was concerned in the prosecution, where it appeared that the interview between him and the prisoner took place in his character of magistrate and clergyman, and his magisterial character was made known to the prisoner and recognized by him.

4. Deputy Marshal Not Acting Officially. — U. S. v. Stone, 8 Fed. Rep. 232.

5. Inducement Offered by Parent. — U. S. v. Stone, 8 Fed. Rep. 232, citing Reg. v. Reeve, L. R. 1 C. C. 362.

6. Reg. v. Moore, 12 Eng. L. & Eq. 583.

7. Person Making Threats Need Not Be One in Authority. — Jordan v. State, 32 Miss. 382. See also the two notes following.

Threat of Mob Violence.—Thus, if a confession is made under the influence of a threat of mob violence, it is settled that it will not be admissible in evidence.¹

Inducement by Actual Violence.—And the same rule applies in the case of confessions extorted by infliction of pain or actual violence by a private individual.²

(6) *Effect of Mistake of Fact.*—It has been maintained that a confession made inadvertently and under a mistake of fact may be inadmissible in evidence.³

(7) *Ascertainment of Facts in Consequence of Involuntary Confession.*—**A Modification of the Rule** which excludes a confession not shown to be voluntary exists where the information derived in consequence of a confession leads to the discovery of material facts which go to prove the commission of the crime confessed. In that case, so much of the confession as strictly relates to the facts discovered and the facts themselves will be received in testimony, though the confession may be shown to be involuntary, for the reason that the discovery of the facts corroborates the truth of the confession to that extent and excludes the idea of its fabrication under undue influence,⁴ though in some

1. Threats by Mob.—*Wigginton v. Com.*, 92 Ky. 287; *Barnes v. State*, 36 Tex. 356. See also *Redd v. State*, 69 Ala. 255; *Simon v. State*, 5 Fla. 285.

The confession of the accused while he was in the hands of his captors, who were not officers of the law and were not so regarded by him, and after they had put a rope around his neck, could not be considered as a voluntary and free confession, and should not have been received in evidence by the lower court. *State v. Revells*, 34 La. Ann. 381, 44 Am. Rep. 436. See also *State v. George*, 15 La. Ann. 146.

In *Cady v. State*, 44 Miss. 332, confessions made by the accused in the presence of a crowd of one hundred or one hundred and fifty persons, much excited and insisting that he should be hung, were held competent. But in the more recent case of *Williams v. State*, 72 Miss. 117, the doctrine there declared was repudiated, and it was held that where a prisoner on being arrested by a mob for murder was first taken into the woods, where he was told by one that it would be best for him to confess, although the leader of the mob stated that they did not want a confession unless it was voluntary, whereupon the defendant confessed, and then in order to compel him to tell where the weapon was that he used, the mob threatened to hang him, no part of the confession was admissible.

2. Person Inflicting Pain Need Not Be One in Authority.—*Hector v. State*, 2 Mo. 166, 22 Am. Dec. 454.

Where a person was taken from home about midnight, by a body of men armed and disguised, to a neighboring wood, and hung by the neck on a tree, and being taken down almost senseless, confessed that he, with the other prisoners charged, committed the robbery, it has been held error to allow the confession to go to the jury. The court said: "The rule has been long settled in our law that while a free and voluntary confession of guilt is of the highest order of evidence, one extorted is never received." *Miller v. People*, 39 Ill. 457.

3. Confession Made Under Mistake.—1 *Bishop's New Crim. Proc.*, § 1237; *State v. Welch*, 7 Port. (Ala.) 463; *Stallings v. State*, 29 Tex. App. 220.

4. Ascertainment of Facts in Consequence of Involuntary Confessions—Prevailing Rule—England.—*Reg. v. Gould*, 9 C. & P. 364, 38 E. C. L. 156; *Rex v. Butcher*, 1 Leach C. C. 265, note a; *R. v. Grant*, 2 East P. C. 658; *Rex v. Griffin*, R. & R. C. C. 152.

Canada.—*Reg. v. McCafferty*, 25 New Bruns. 396.

United States.—*U. S. v. Negro Richard*, 2 Cranch (C. C.) 439; *U. S. v. Hunter*, 1 Cranch (C. C.) 317.

Alabama.—*Mountain v. State*, 40 Ala. 344; *Murphy v. State*, 63 Ala. 1; *Banks v. State*, 84 Ala. 430; *Lowe v. State*, 88 Ala. 8; *Gregg v. State*, 106 Ala. 44.

Arkansas.—*Yates v. State*, 47 Ark. 172.

California.—*People v. Ah Ki*, 20 Cal. 177; *People v. Hoy Yen*, 34 Cal. 176.

Colorado.—*Beery v. U. S.*, 2 Colo. 186.

Georgia.—*Sarah v. State*, 28 Ga. 576; *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238; *Rusher v. State*, 94 Ga. 363, 47 Am. St. Rep. 175.

Illinois.—*Gates v. People*, 14 Ill. 433.

Kentucky.—*Jane v. Com.*, 2 Metc. (Ky.) 30.

Louisiana.—*State v. George*, 15 La. Ann. 145; *State v. Garvey*, 28 La. Ann. 925, 26 Am. Rep. 123; *State v. Jones*, 46 La. Ann. 1395.

Massachusetts.—*Com. v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; *Com. v. Moulton*, 4 Gray (Mass.) 39.

Mississippi.—*Belote v. State*, 36 Miss. 96, 72 Am. Dec. 163; *Garrard v. State*, 50 Miss. 152.

Nebraska.—*Walrath v. State*, 8 Neb. 80.

New Hampshire.—*State v. Due*, 27 N. H. 256.

New York.—*Duffy v. People*, 26 N. Y. 588.

North Carolina.—*State v. Garrett*, 71 N. Car. 85, 17 Am. Rep. 1; *State v. Lindsey*, 78 N. Car. 499; *State v. Winston*, 116 N. Car. 990.

South Carolina.—*State v. Vaigneur*, 5 Rich. L. (S. Car.) 391; *State v. Motley*, 7 Rich. L. (S. Car.) 327; *State v. Crank*, 2 Bailey L. (S. Car.) 67, 23 Am. Dec. 117.

jurisdictions it seems that in such case the entire confession is admissible.¹

Illustration. — Thus a confession of the locality of stolen property, though made under inducement, is admissible when verified by finding the property

Tennessee. — *Deathridge v. State*, 1 Sneed (Tenn.) 75; *McGlothlin v. State*, 2 Coldw. (Tenn.) 228; *Rice v. State*, 3 Heisk. (Tenn.) 215; *White v. State*, 3 Heisk. (Tenn.) 338; *Clemons v. State*, 4 Lea (Tenn.) 23.

West Virginia. — *Fredrick v. State*, 3 W. Va. 695.

See also *Rex v. Jones*, R. & R. 152; *Reg. v. Hobson*, 33 Eng. L. & Eq. 525; *Sampson v. State*, 54 Ala. 241. Compare *Rex v. Waricks-hall*, 1 Leach C. C. 263; *Hervey's Case*, 2 East P. C. 658; *Rex v. Mosey*, 1 Leach C. C. 265, note; *Reg. v. Berriman*, 6 Cox C. C. 388.

Thus where the confessions were excluded a witness was nevertheless permitted to testify that a weapon used in the commission of a murder was found by him in a particular place, and that he was directed to the place by the prisoner. *Com. v. Knapp*, 9 Pick. (Mass.) 495, 20 Am. Dec. 491.

Upon the trial of the defendant for suffering a convict to escape from the penitentiary, a confession of the defendant induced by improper means may be used to the extent of showing that it was thereby discovered that his wife had in her possession a draft and a deed, dated shortly before the escape, the draft being drawn by the brother of the convict and made payable to the defendant or his wife, and the deed being a conveyance of land executed by the convict's wife to the defendant's wife. *Clemons v. State*, 4 Lea (Tenn.) 23.

On a Trial for Infanticide, where, in consequence of an involuntary confession, a search was instituted and a box containing the body of a newly born male child found, it was held that so much of the confession was admissible as related strictly to the material facts discovered. *Gregg v. State*, 106 Ala. 44.

Georgia—Evidence Obtained by Violence. — The well-established rule that independent facts discovered in consequence of a constrained confession made by a prisoner are admissible in evidence against him is of force in Georgia, unless it appears that criminal violence was used in procuring the confession or making the discovery, and where such independent facts are admissible so much of the prisoner's acts and declarations as are necessary to account for the discovery and explain the manner of it are admissible also, but solely for this purpose. Thus, upon an indictment for burglary, it was held admissible to show the act of the accused in conducting the witness and his associates to the place where certain money stolen was found, and his declarations while the search was in progress to "keep looking for the money up by the fence; it is there somewhere." *Rusher v. State*, 94 Ga. 363, 47 Am. St. Rep. 175.

Rule Not in Violation of Georgia Constitution. — It has been held that the constitutional provision in Georgia that no person shall be compelled to give testimony tending in any manner to criminate himself does not displace or repeal the rule of law that independent facts discovered in consequence of a constrained confession made by a prisoner are admissible

in evidence against him; the court saying: "It is manifest that the letter of the provision does not have that effect, for the subject-matter of the common-law rule is not the giving of testimony by the accused, but the admissibility in evidence of facts, acts, and declarations known to and detailed by other witnesses." *Rusher v. State*, 94 Ga. 364, 47 Am. St. Rep. 175.

1. Jurisdictions Allowing Whole Confession to Be Admitted. — *Laros v. Com.*, 84 Pa. St. 208. See also *State v. Moore*, 1 Hayw. (N. Car.) 482.

Under Statute in Texas. — When a prisoner makes a statement of facts, and in consequence of such information the property stolen, the bloody clothes of the deceased, or the instrument with which the offense was committed, or any other material fact, is discovered, such statement, together with the confession of the crime itself, is proper testimony to go to the jury, though the statement, together with the confession, was induced by promises or threats. *Walker v. State*, 2 Tex. App. 326; *Davis v. State*, 2 Tex. App. 588; *Weller v. State*, 16 Tex. App. 200 [overruling the following cases: *Davis v. State*, 8 Tex. App. 510; *Walker v. State*, 9 Tex. App. 38; *Massey v. State*, 10 Tex. App. 645; *Kenyon v. State*, 11 Tex. App. 356; *O'Connell v. State*, 10 Tex. App. 567]; *Brown v. State*, 26 Tex. App. 308; *Collins v. State*, 24 Tex. App. 141; *Neeley v. State*, 27 Tex. App. 329; *Prince v. State*, (Tex. Crim. App. 1892) 20 S. W. Rep. 582. See also *Selvidge v. State*, 30 Tex. 60; *Strait v. State*, 43 Tex. 486.

Thus an exception to the statutory rule in this state, that the confession of an unwarned defendant while in duress or under arrest cannot be used against him, exists when, in connection with the confession, he makes a statement of facts and circumstances found to be true which conduce to establish his guilt. *Jackson v. State*, 29 Tex. App. 463; *Sands v. State*, 30 Tex. App. 578; *Spearman v. State*, 34 Tex. Crim. Rep. 279; *Williams v. State*, 34 Tex. Crim. Rep. 327; *Collins v. State*, 24 Tex. App. 141; *Smith v. State*, 34 Tex. Crim. Rep. 124. See also *Walker v. State*, 28 Tex. App. 112; *Elizabeth v. State*, 27 Tex. 329; *Berry v. State*, 4 Tex. App. 492; *Angell v. State*, 8 Tex. App. 451.

Thus where in a confession made before an examining magistrate the prisoner stated that he killed the deceased and proposed to show the place where he had buried the child, for the murder of which he was indicted, and guided the magistrate and others to a place in the woods which he pointed out as the burial place of the dead child, and where upon examination made, bones, hair, clothing, etc., resembling those of the child, were found, it was held that the confession, while it was not a "confession made in the voluntary statement of the accused taken before an examining court," because it was made after other witnesses had been examined, and was, moreover, sworn to by the defendant, still, though not

at the place indicated by the prisoner, and all he says in conveying the information which is directly connected with or explanatory of the discovery is also admissible, but the admission of the further confession that he stole the property would be unwarranted.¹

Confessions Accompanying Delivery of Stolen Property. — Likewise it has been held that statements amounting to a confession may be admitted in evidence, where they are accompanied by the delivery of stolen property, although inducements may have been held out.² But it has been said that whatever may have been said at the time not qualifying or explaining the act of delivery is to be rejected.³

Confession Corroborated by Facts Previously Discovered. — A confession which has been obtained by inducements will not be admissible by reason of the fact that it is corroborated by facts previously discovered.⁴

(8) *Burden of Proof.* — It is the prevailing rule among the authorities that

admissible as a voluntary statement, it was nevertheless admissible as a confession, since, in connection with such confession, he made a statement of facts and circumstances that were afterwards found to be true, which conduced to establish his guilt. *Jackson v. State*, 29 Tex. App. 458.

But it has been held that the facts stated by the defendant must be known to him through his guilty participation in the crime, and the truth of the same must be ascertained by means of the information derived from the defendant. *Musgrave v. State*, 28 Tex. App. 57.

Moreover, where the fact found to be true is not inculpatory, a confession made while under arrest and without caution is not admissible against him. *Owens v. State*, 16 Tex. App. 448.

1. *Alabama.* — *Murphy v. State*, 63 Ala. 4; *Banks v. State*, 84 Ala. 430.

Arkansas. — *Yates v. State*, 47 Ark. 172.

Colorado. — *Beery v. U. S.*, 2 Colo. 186.

Kansas. — *State v. Mortimer*, 20 Kan. 93.

Louisiana. — *State v. George*, 15 La. Ann. 145.

Mississippi. — *Garrard v. State*, 50 Miss. 152. *New Hampshire.* — *State v. Due*, 27 N. H. 256.

North Carolina. — *State v. Winston*, 116 N. Car. 990.

Tennessee. — *Deathridge v. State*, 1 Sneed (Tenn.) 80; *McGlothlin v. State*, 2 Coldw. (Tenn.) 228; *White v. State*, 3 Heisk. (Tenn.) 338; *Rice v. State*, 3 Heisk. (Tenn.) 215.

Where a prisoner, accused of robbery of certain money, promised to point out the place where the money was buried, and afterward pointed out a place at which, it was proved by other witnesses, the stolen money was found, it was held that such statement, when taken in connection with said fact and proof, was admissible in evidence against him, although not voluntarily made. But when, in such case, in connection with such promise, the prisoner further stated, "I buried it in the ground there;" it was held that this was inadmissible as evidence against him. *People v. Hoy Yen*, 34 Cal. 176.

Other Evidence as to Identity of Property Discovered Necessary. — It is to be observed, however, that the rule by which it is held that the fact of the discovery of stolen property in consequence of the confession may be received in

evidence makes it essential to the competency of the evidence that the goods should be identified by other testimony as the goods which were stolen. Thus where a person was charged with stealing two one hundred dollar bills and a wallet, and on inducement held out to him to confess he produced a hundred dollar bill saying to the complainant, "This is yours," or, as another witness understood him, "This is one of the bills which I took with the wallet," it was held that the evidence was incompetent unless the bill should be identified by other evidence as one of those which had been stolen. *State v. Due*, 27 N. H. 256.

2. Confessions Accompanying Delivery of Stolen Property. — 1 Greenl. on Ev., § 232, citing *Rex v. Griffin*, R. & R. C. C. 152; *Rex v. Jones*, R. & R. 152.

Admissibility of Fact of Delivery. — In *U. S. v. Negro Richard*, 2 Cranch (C. C.) 439, it was held that although a confession made under a promise of favor is not in itself evidence against the prisoner, yet the fact of the prisoner's going to the place where the property was secreted and identifying it, is evidence against him.

3, 1 Greenl. on Ev., § 232.

In *Beery v. U. S.*, 2 Colo. 186, it was held that the fact that the prisoner produced gold dust and identified it as that which had been stolen, may be shown, but the accompanying declaration, if it amount to a confession of guilt, and was drawn from the prisoner by a promise of favor, cannot be received.

But, in *Fredrick v. State*, 3 W. Va. 695, it was held unqualifiedly that confessions of the accused made under inducements, to officers in whose custody he was at the time, or others having authority over him, are not to be excluded on the trial, when the confession is accompanied with the surrender and restoration of the stolen property.

4. Confession Corroborated by Facts Previously Discovered. — *Banks v. State*, 84 Ala. 430.

Presumption of Subsequent Discovery in Absence of Disclosure by Record. — Where the bill of exceptions does not show whether the corroborating facts were discovered before or after the confessions were made, but does not purport to set out all the evidence, the supreme court will presume, if necessary to sustain the ruling of the trial court, that they were discovered afterwards. *Lowe v. State*, 88 Ala. 8.

all confessions are *prima facie* involuntary, and before they can be given in evidence satisfactory affirmative proof must be made that they were voluntary,¹ and in the event of any doubt subsisting on this head the confession will be rejected. But, according to other authorities, the onus is on the accused to show that the confession is involuntary,² and where there is a conflict of testimony and the court is left in doubt upon the question, the question may be left to the jury with the direction that they should disregard and reject the confession if upon the whole evidence they are satisfied that the confession was obtained under improper influences.³

(9) *A Question for the Court.* — It belongs to the judicial province alone to determine as a preliminary question whether the confession was made with that degree of freedom which ought to occasion its admission as evidence. And this question should be determined before allowing the confession to go to the jury.⁴

1. Burden of Proof as to Voluntary Character — Prevailing Rule — *England.* — Reg. v. Thompson, (1893) 2 Q. B. 12.

Alabama. — Wyatt v. State, 25 Ala. 12; Brister v. State, 26 Ala. 128; Porter v. State, 55 Ala. 95; Johnson v. State, 59 Ala. 37; Murphy v. State, 63 Ala. 1; Young v. State, 68 Ala. 569; Redd v. State, 69 Ala. 255; Amos v. State, 83 Ala. 1, 3 Am. St. Rep. 682; Jackson v. State, 83 Ala. 76; Banks v. State, 84 Ala. 430; Bradford v. State, 104 Ala. 68.

Arkansas. — Love v. State, 22 Ark. 336.

California. — People v. Rodriguez, 10 Cal. 50; People v. Soto, 49 Cal. 67.

Georgia. — Mitchell v. State, 79 Ga. 730; Smith v. State, 88 Ga. 627.

Louisiana. — State v. Peter, 14 La. Ann. 527; State v. Garvey, 28 La. Ann. 925, 26 Am. Rep. 123; State v. Johnson, 30 La. Ann. 881.

Maryland. — Nicholson v. State, 38 Md. 140; Biscoe v. State, 67 Md. 6.

Mississippi. — Simmons v. State, 61 Miss. 243; State v. Smith, 72 Miss. 420.

South Carolina. — State v. Moorman, 27 S. Car. 22.

Virginia. — Thompson v. Com., 20 Gratt. (Va.) 724.

Compare Rex v. Williams, 3 Russ. on Cr. (9th Am. ed.) 432; Stallings v. State, 47 Ga. 572; Eberhart v. State, 47 Ga. 598; Carr v. State, 84 Ga. 250; Thomas v. State, 84 Ga. 613.

Burden of Proof as to Prior Confession upon Admission of Subsequent Confession. — In State v. Washington, 40 La. Ann. 669, it was held that where the accused has made several distinct confessions at different times, the state cannot be required to show that the first confession was obtained without threats, violence, or undue influence before interrogating the witnesses as to the other confessions, there being nothing to show but that all the confessions were voluntary.

Waiver of Rule. — But it seems to be the rule that if no objection is made to a confession at the time it is offered in evidence, it must be shown affirmatively afterwards that it was made under undue influence, in order to exclude it from evidence. Bradford v. State, 104 Ala. 68; McGuff v. State, 88 Ala. 147, 16 Am. St. Rep. 25; People v. Rodriguez, 10 Cal. 50; People v. Long, 43 Cal. 444; State v. Davis, 34 La. Ann. 351; State v. Madison, 47 La. Ann. 30. See also State v. Gorham, 67

Vt. 365; Mitchell v. State, 79 Ga. 730; Woodford v. People, 62 N. Y. 117, 20 Am. Rep. 464.

2. Burden of Proof on Accused — Rule in Some Jurisdictions. — Com. v. Sego, 125 Mass. 213; Com. v. Culver, 126 Mass. 464; People v. Barker, 60 Mich. 277, 1 Am. St. Rep. 501; State v. Meyers, 99 Mo. 107; Rufer v. State, 25 Ohio St. 470; Williams v. State, 19 Tex. App. 276; Rex v. Paakaula, 3 Hawaiian 30. See also Com. v. Ackert, 133 Mass. 402; State v. Anderson, 96 Mo. 249. *Compare* Barnes v. State, 36 Tex. 356; Cain v. State, 18 Tex. 387.

3. Hardy v. U. S., 3 App. Cas. (D. C.) 35; Com. v. Cuffee, 108 Mass. 285; Com. v. Smith, 119 Mass. 305; Com. v. Piper, 120 Mass. 188; Com. v. Culver, 126 Mass. 464; Com. v. Nott, 135 Mass. 269; Com. v. Preece, 140 Mass. 276; Com. v. Burrough, 162 Mass. 513; People v. Barker, 60 Mich. 277, 1 Am. St. Rep. 501; People v. Howes, 81 Mich. 396; People v. Robinson, 86 Mich. 415; Burdge v. State, 53 Ohio St. 512; Com. v. Springs, 2 Leg. Gaz. (Pa.) 93. See also Com. v. Russell, 156 Mass. 196.

4. Voluntary Character a Question for the Court — *England.* — Reg. v. Garner, 1 Den. C. C. 329, 2 C. & K. 920, 61 E. C. L. 920, 3 Cox C. C. 175.

United States. — U. S. v. Nott, 1 McLean (U. S.) 499; Hopt v. Utah, 110 U. S. 583.

District of Columbia. — U. S. v. Nardello, 4 Mackey (D. C.) 503.

Alabama. — Brister v. State, 26 Ala. 107; Bob v. State, 32 Ala. 560; Ward v. State, 50 Ala. 120; Washington v. State, 53 Ala. 29; Sullins v. State, 53 Ala. 474; Bonner v. State, 55 Ala. 246; Johnson v. State, 59 Ala. 39; Redd v. State, 69 Ala. 255; Amos v. State, 83 Ala. 1, 3 Am. St. Rep. 682.

Arkansas. — Runnells v. State, 28 Ark. 121; Wallace v. State, 28 Ark. 531; Corley v. State, 50 Ark. 308.

California. — People v. Jim Ti, 32 Cal. 60; People v. Ah How, 34 Cal. 218; People v. Kamaunu, 110 Cal. 609.

Connecticut. — State v. Potter, 18 Conn. 178. *Delaware.* — State v. Harman, 3 Harr. (Del.) 567.

Florida. — Simon v. State, 5 Fla. 285; Metzger v. State, 18 Fla. 481; Murray v. State, 25 Fla. 528.

Georgia. — Whaley v. State, 11 Ga. 123; Holsenbake v. State, 45 Ga. 43; Earp v. State,

Mode of Determining Admissibility — Negative Answers. — It has been said that whether or not a confession is voluntary is usually shown by negative answers, as whether the prisoner had been told that it would be better for him to confess, or worse for him if he did not, or whether similar language had been addressed to him.¹

All the Defendant's Evidence to Be Considered. — But it is the duty of the judge in such case to determine the question of admissibility, not upon such showing as the prosecutor may deem proper to make upon the preliminary examination of its witnesses; he should hear and consider also the evidence offered by the prisoner.²

55 Ga. 136; *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238.

Indiana. — *Brown v. State*, 71 Ind. 470.

Iowa. — *State v. Fidment*, 35 Iowa 541.

Kentucky. — *Hudson v. Com.*, 2 Duv. (Ky.)

531.

Louisiana. — *State v. Garvey*, 28 La. Ann. 925, 26 Am. Rep. 123; *State v. Miller*, 42 La. Ann. 1186, 21 Am. St. Rep. 418.

Maine. — *State v. Grant*, 22 Me. 171.

Maryland. — *Nicholson v. State*, 38 Md. 140; *Biscoe v. State*, 67 Md. 10.

Massachusetts. — *Com. v. Taylor*, 5 Cush. (Mass.) 605; *Com. v. Morrell*, 99 Mass. 542; *Com. v. Cuffee*, 108 Mass. 285; *Com. v. Smith*, 119 Mass. 305; *Com. v. Culver*, 126 Mass. 464; *Com. v. Nott*, 135 Mass. 269; *Com. v. Preece*, 140 Mass. 276.

Michigan. — *People v. Barker*, 60 Mich. 277, 1 Am. St. Rep. 501.

Minnesota. — *State v. Staley*, 14 Minn. 105; *State v. Barrett*, 40 Minn. 65, 77.

Mississippi. — *Simmons v. State*, 61 Miss. 243; *Ellis v. State*, 65 Miss. 44, 7 Am. St. Rep. 634.

Missouri. — *Hector v. State*, 2 Mo. 166, 22 Am. Dec. 454; *Couley v. State*, 12 Mo. 462; *State v. Kinder*, 96 Mo. 548.

New Hampshire. — *State v. Squires*, 48 N. H. 364.

New York. — *Woodford v. People*, 62 N. Y. 117, 20 Am. Rep. 464; *People v. Fox*, 121 N. Y. 453.

North Carolina. — *State v. Davis*, 63 N. Car. 580; *State v. Vann*, 82 N. Car. 631; *State v. Effer*, 85 N. Car. 585.

Ohio. — *Spears v. State*, 2 Ohio St. 583.

Pennsylvania. — *Fife v. Com.*, 29 Pa. St. 429.

South Carolina. — *State v. Kirby*, 1 Strobb. L. (S. Car.) 157.

Tennessee. — *Boyd v. State*, 2 Humph. (Tenn.) 39.

Texas. — *Thomas v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 771; *Carter v. State*, 37 Tex. 362.

Vermont. — *State v. Gorham*, 67 Vt. 365.

Washington. — *Yelm Jim v. Territory*, 1 Wash. Ter. 63.

Canada. — *Reg. v. Finkle*, 15 U. C. C. P. 453.

Hawaii. — *Rex v. Paakaula*, 3 Hawaiian 30.

Before permitting a witness to testify in regard to a confession, the court ought to ascertain, first, whether any inducement at the time or prior thereto had been held out to the prisoner, and in the next place whether he was influenced by such inducement in making the confession. *Biscoe v. State*, 67 Md. 6.

Question as to whether Influence Once Exerted Has Ceased. — The rule as laid down in the text

applies to the question as to whether, when one confession has been induced by improper influence, a subsequent confession was evoked by the same influence. *People v. Jim Ti*, 32 Cal. 60; *State v. Wintzingerode*, 9 Oregon 153.

1. Determining Question of Admissibility from Negative Answers of Witness. — 1 Greenl. on Ev., § 219; *Johnson v. State*, 59 Ala. 39; *King v. State*, 40 Ala. 314; *State v. Peter*, 14 La. Ann. 527.

Where a witness testifies that he went to see the prisoner after his arrest, at the instance and request of the latter, and found him confined and chained; that in reply to an inquiry why he had sent for him the prisoner referred to an informal preliminary examination, at which the witness had assisted, admitted that his denial of guilt on that occasion was false, and proceeded to confess his guilt; and that he did not know of any promises or threats previously made to the prisoner, this is sufficient *prima facie* to show that the confessions were voluntary, and to authorize their admission as evidence before the jury. *Mose v. State*, 36 Ala. 211.

Where the brother of the prosecutrix testified that he went into the field where the prisoner was at work, that at the time he had no weapon, made no threats and held out no promises or inducements to the prisoner, and that he did not say that it would be better for him to tell all about it; that no one was present except the defendant and himself; it was held that a sufficient predicate was laid for the introduction in evidence of the confessions made by the prisoner on that occasion. *Bracken v. State*, 111 Ala. 68.

Where the witnesses who testified to confessions having been made to them were well known to the defendant and had sworn affirmatively that neither persuasion, promises, nor threats were used, the confessions were *prima facie* admissible. *Burton v. State*, 107 Ala. 108.

Inquiry by Court as to Character of Inducement. — Notwithstanding a witness may testify that the confessions of the prisoner were made under threats, it has been held that the court should inquire what those threats were in order to ascertain their sufficiency in law to exclude the confession. *Whaley v. State*, 11 Ga. 123.

2. Duty of Court to Hear Prisoner's Evidence. — *Bonner v. State*, 55 Ala. 246; *Jackson v. State*, 83 Ala. 76; *People v. Soto*, 49 Cal. 68; *State v. Platte*, 34 La. Ann. 1061; *Biscoe v. State*, 67 Md. 10; *Com. v. Culver*, 126 Mass. 464; *State v. Kinder*, 96 Mo. 548; *People v. Fox*, 121 N. Y. 449; *Rufer v. State*, 25 Ohio St. 470. See also *Com. v. Ackert*, 133 Mass. 402.

Surrounding Circumstances. — He should take into consideration the age, condition, situation, and character of the prisoner, and all the attending circumstances.¹ These, it has been said, may satisfy the mind, although the usual preliminary questions are answered in the negative, that the confession was not voluntary, but sprang from the flattery of hope or the torture of fear unduly excited. Or, though these questions may not be answered negatively, the circumstances attending the confession, connected with the character of the prisoner, may clearly indicate that it was spontaneous and not affected by hope or fear springing from the words or conduct of others.²

Confession Found to Be Involuntary After Admission. — In some jurisdictions a confession is allowed under certain circumstances to go to the jury with the instruction that the confession should be afterwards disregarded if it is found to be involuntary.³ According to other authorities, it has been maintained that it is improper thus to submit a question of the competency of the confession to the jury, but that if a confession has been admitted in evidence and afterwards in the progress of the trial it appears that it was not voluntary, it should be excluded from the jury by the court.⁴

In Georgia, however, the rule is, where it affirmatively appears by the witness who heard the confession that he held out no inducement and did nothing to excite either hope or fear, and knew of nothing done by others to induce the confession, it is *prima facie* receivable in evidence; and the court, before admitting it, is not bound to hear evidence offered by the defendant which might show the excitement of fear or hope as an inducement to confess. *Irby v. State*, 95 Ga. 467. See also *Dawson v. State*, 59 Ga. 333.

1. Surrounding Circumstances to Be Considered. — 1 Greenl. on Ev., § 219; *Hopt v. Utah*, 110 U. S. 583; *King v. State*, 40 Ala. 314; *Porter v. State*, 55 Ala. 95; *Bonner v. State*, 55 Ala. 246; *Johnson v. State*, 59 Ala. 39; *Young v. State*, 68 Ala. 569.

What will or will not be sufficient to deprive the mind of its free volition, or, when once so deprived, to restore it to freedom, must depend upon the circumstances surrounding the accused, his intelligence, mental capacity, etc. *McGlothlin v. State*, 2 Coldw. (Tenn.) 228.

2. Johnson v. State, 59 Ala. 39.

3. Instruction to Jury to Reject Confession Found to Be Involuntary After Admission. — *Com. v. Preece*, 140 Mass. 276; *Com. v. Burrough*, 162 Mass. 513; *People v. Barker*, 60 Mich. 277, 1 Am. St. Rep. 501; *Burdge v. State*, 53 Ohio St. 512. See also *Thomas v. State*, 84 Ga. 613. Compare *Com. v. Culver*, 126 Mass. 464.

In the cases cited directly to this point the testimony as to the freedom of the confession was conflicting. The prevailing rule is that such testimony should not be allowed to go to the jury. See *supra*, this section, *Burden of Proof*.

4. Rejection by Court of Confession Found to Be Involuntary After Admission. — *Bob v. State*, 32 Ala. 560; *Bonner v. State*, 55 Ala. 246; *Simon v. State*, 5 Fla. 285; *Biscoe v. State*, 67 Md. 10; *State v. Staley*, 14 Minn. 105; *Simmons v. State*, 61 Miss. 243; *Cain v. State*, 18 Tex. 387.

Mississippi. — In *Garrard v. State*, 50 Miss. 147, it was held that when there was a conflict of testimony as to whether a confession was voluntary, a question of fact determinate by the jury was raised, and that the court prop-

erly submitted to the jury the question of the competency of the confession.

But by later decisions in this state a different rule has been maintained. Thus in *Ellis v. State*, 65 Miss. 44, 7 Am. St. Rep. 634, it was decided that where a confession is offered in evidence the court, upon a preliminary examination, should determine its competency, in which examination the defendant is entitled to the benefit of any reasonable doubt that may exist as to the fact of its being free and voluntary. If the court admits the confession, the state or the defendant may produce before the jury the same evidence which was submitted to the court when it was called on to decide the question of its competency, and all other facts and circumstances relevant to the confession or affecting its weight and credit as evidence, and if it shall be made to appear at this point or at any other during the progress of the trial that the confession was made under such circumstances as to render it incompetent as evidence, it shall be excluded by the court. The jury cannot reject or disregard a confession which has been admitted by the court merely because they may deem it incompetent, for the competency or incompetency of evidence is a legal question not within their province. But, on the other hand, they are not bound to believe or attach any weight or credit to a confession on the ground alone that the court has decided that it was admissible and might be heard by them. The jury have the same freedom of action in reference to confessions which they have in regard to other testimony. To the same effect see *Simmons v. State*, 61 Miss. 243.

Also, in *Williams v. State*, 72 Miss. 117, the same rule was declared. In this case the court said: "The distinction between disregarding evidence and disbelieving it is a refined one, but it necessarily inheres in the trial of cases under a system in which, as with us, the competency of evidence is to be determined by the court and its credibility by the jury. If because of the circumstances of a confession the jury does not believe it to be true, it ought not to rest a verdict of conviction thereon merely because the court had admitted

b. APPLICATION OF RULE TO MERE CRIMINATING STATEMENTS. —

According to some of the authorities, mere criminating statements not amounting to confessions do not require preliminary proof of their voluntary character.¹ But other authorities seem to be to the contrary.²

c. RULE CONSIDERED IN CONNECTION WITH PRISONER'S CONDUCT. —

It may be stated as a general rule that the acts or conduct of a prisoner amounting to an indirect or implied confession or admission are admissible in evidence without proof of their voluntary character.³

Silence of Accused. — But the courts have been very careful in applying the rule which permits the silence of one charged with crime to be received in evidence against him.

Circumstances Calling for Reply Necessary. — Thus it is well settled that to render such evidence admissible, it must appear not only that it was voluntary and that the prisoner was at liberty to make a reply to the accusation, but also that the statement addressed to him was made by such person and under such circumstances as naturally to call for a reply.⁴

it; but the evidence cannot be disregarded by the jury — cannot be excluded and not at all considered. The jury must consider all the evidence submitted by the court for the purpose of determining its credibility, its weight and effect. Of course if it is not believed it can have no further influence, and when this stage in its consideration is reached, then, and not till then, may it be disregarded."

1. Mere Criminating Statements — Authorities Not Requiring Preliminary Proof of Voluntary Character. — *People v. Hickman*, 113 Cal. 80. See also *Wilson v. U. S.*, 162 U. S. 613; *Luby v. Com.*, 12 Bush (Ky.) 1; *State v. Hogard*, 12 Minn. 293; *State v. Barton*, 19 Mo. 227; *State v. Bullard*, 16 N. H. 139; *People v. Gates*, 13 Wend. (N. Y.) 311.

2. Authorities Requiring Preliminary Proof that Criminating Statements Are Voluntary. — *Fletcher v. State*, 90 Ga. 468. See also *Territory v. Eagan*, 3 Dakota 119.

3. Confessions Implied from Conduct Admissible Without Proof of Voluntary Character. — See, *supra*, the cases cited under the division *Definitions and General Considerations*.

Indirect Confessions. — In *Texas*, however, it has been intimated that acts of the accused tantamount to a confession, such as nods, winks, or gestures, are admissible or inadmissible under the same circumstances as confessions by words. Thus it has been held that where the confessions of a defendant under arrest are inadmissible against him because made while he was uncautioned, his acts, if tantamount to such a confession and done under similar circumstances, are likewise inadmissible. *Nolen v. State*, 14 Tex. App. 480, 46 Am. Rep. 247. See also *Fulcher v. State*, 28 Tex. App. 472.

4. Circumstances Calling for Reply a Prerequisite to Admissions of Confessions Implied from Silence. — *Sparf v. U. S.*, 156 U. S. 51; *Lawson v. State*, 20 Ala. 66, 56 Am. Dec. 182; *Com. v. Brown*, 121 Mass. 69; *Com. v. Funai*, 146 Mass. 570; *Com. v. Brailley*, 134 Mass. 527; *State v. Murray*, 126 Mo. 611; *State v. Mullins*, 101 Mo. 517, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 494; *Kelley v. People*, 55 N. Y. 572, 14 Am. Rep. 342; *Loggins v. State*, 8 Tex. App. 444. See also *Flanagin v. State*, 25 Ark.

92; *People v. Lewis*, (Supreme Ct.) 16 N. Y. Supp. 881.

Statements Not Amounting to Accusation. — Thus the statement of a person in the presence of the defendant that he thought the man who committed the murder could be found in the field has been held not to be admissible, it not being such a statement as called for action or reply from the defendant. *State v. Glahn*, 97 Mo. 679.

Also where a witness testified that the prisoner's father said the next morning after the commission of a trespass, in the presence of the prisoner, "If Mr. Loomis had any depredations committed last night we know that E. [defendant] and M. did not do it, because they both stayed at our house all night," it was held that the statement was incompetent, since the words did not call for any denial from the defendant. *People v. O'Brien*, 68 Mich. 468.

Admission Not to Be Implied from Slave's Silence in Master's Presence. — A slave being summoned to the presence of a company of white persons, among whom were his master and mistress, for the purpose of having his shoes compared with the measure of certain tracks supposed to have been made by the perpetrator of a crime whom they were endeavoring to discover, and several of the company exclaiming, when it appeared that there was a perfect correspondence between his shoes and the tracks, that "they were the shoes that made the tracks," it was held that this exclamation, with the fact that the slave made no reply to it, was not admissible evidence against him as an implied admission. *Bob v. State*, 32 Ala. 560. The court in this case said: "The exclamation was not addressed to the accused. It was made by white persons, in the presence of his master and mistress, and in a room of their house. It was rather an emotional expression, demanding no reply. Such an expression, made in such presence, by such persons, and in such a place, did not properly and naturally call for a reply from the accused slave. His social relation to his master and mistress, and to the other white persons present, forbidding the freedom of speech allowed among equals, and making a contradiction in most cases an insolence, rendered it unnatural, and, perhaps,

Statement Made in Judicial Proceeding.— Under this rule it has been held that statements made in the presence of a defendant during the progress of a judicial investigation will not be admissible against him, for in such cases the accused is not at liberty to interpose and contradict the evidence when and where he pleases.¹

When Defendant Is Under Arrest.— But upon the question as to the admissibility of a statement made in the presence of a person while in custody, to which he does not reply, there is lack of harmony among the authorities. By some it is maintained that in such case the prisoner is not called upon to reply to or contradict any statement made in his hearing, and no inference against him is warranted by his silence.² On the other hand, it has been held that the prisoner's silence under such circumstances is admissible as evidence in like manner as are direct confessions made under similar circumstances.³

Where Conversation Is Between Third Parties.— The rule admitting evidence of the silence of a person against him has been held to have no application to the case where the statement to which no reply was made occurred in a conversation between third persons, not addressed to nor intended to affect the accused, or induce any action in respect to him, so that for him to speak would be a manifest intrusion in the discourse.⁴

improper, under the circumstances, for him to interpose a denial to the accusation implied in the expression which he heard."

Silence as a Result of Agreement.— Where a defendant whose wife had left him and gone to her father got a neighbor to go with him to see his wife, on his promise to keep his temper and be upon his good behavior, and while at the wife's father's house the father stated to him many acts of violence and unkindness to his wife, which he did not deny, and this was claimed, on his trial for producing an abortion on his wife, as an admission of the facts stated by the father, it was held not to be an admission of the truth of such facts, as the defendant was not in a position to deny them, owing to his promise to be on his good behavior. *Slattery v. People*, 76 Ill. 217.

1. Silence at Judicial Proceeding.— *Rex v. Appleby*, 3 Stark. 33, 14 E. C. L. 152; *U. S. v. Brown*, 4 Cranch (C. C.) 508; *Bell v. State*, 93 Ga. 557, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 494; *Broyles v. State*, 47 Ind. 252; *State v. Smith*, 30 La. Ann. 457; *Kelley v. People*, 55 N. Y. 572, 14 Am. Rep. 342; *People v. Willett*, 92 N. Y. 29; *Kirby v. State*, 23 Tex. App. 13.

A and B are charged with the joint commission of a felony. A, on his examination before the magistrate, states in the presence and hearing of B that he and B jointly committed the felony, and this B does not deny. These circumstances are not evidence against B. *Rex v. Appleby*, 3 Stark. 33, 14 E. C. L. 152.

Coroner's Inquest.— Under this rule a coroner's inquest has been held to be a judicial proceeding. *State v. Mullins*, 101 Mo. 517, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 494; *People v. Willett*, 92 N. Y. 29.

Failure to Reply to Opinion Expressed by Judge.— The fact that a prisoner remained silent when the justice on the preliminary examination told him that his own statement would convict him is not equivalent to a confession, nor to an admission implied from silence. *Weaver v. State*, 77 Ala. 26.

Failure as Witness to Deny.— It has been

held that a defendant in a criminal case by failing, when a witness, to deny testimony fastening the commission of the crime upon him confesses its truth. *State v. Good*, 132 Mo. 114; *State v. Musick*, 101 Mo. 260; *State v. Patrick*, 107 Mo. 174; *State v. Alexander*, 119 Mo. 461; *State v. Paxton*, 126 Mo. 514.

2. When Prisoner Under Arrest — Rule that No Inference Is Warranted by Silence.— *Com. v. Kenney*, 12 Met. (Mass.) 235, 46 Am. Dec. 672; *Com. v. McDermott*, 123 Mass. 440, 25 Am. Rep. 120; *Com. v. Walker*, 13 Allen (Mass.) 570; *Gardner v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 945. See also *State v. Johnson*, 35 La. Ann. 842.

Caution to Prisoner Immaterial.— In *Texas* it has been held that if a party is under arrest, silence cannot be used to support the hypothesis of consent to statements made in his presence by others, and this whether he was cautioned or not. *Gardner v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 945.

3. Jurisdictions Making Silence While Under Arrest Evidence.— *Kelley v. People*, 55 N. Y. 572, 14 Am. Rep. 342; *State v. Murray*, 126 Mo. 611; *Murphy v. State*, 36 Ohio St. 628. Compare *State v. Young*, 99 Mo. 666.

Thus where two persons charged with a larceny were taken into custody by a police officer, having the stolen property in their possession, the declarations of one of them, assuming to speak for and implicating both, made to the officer in the presence and hearing of the other, who remained silent, are competent evidence for the state on the separate trial of the latter. *Murphy v. State*, 36 Ohio St. 628.

Prisoner Silent by Officer's Command.— Where from the language used by the officer to the prisoner he might reasonably infer that he must remain silent, his silence when accused of crime will not be admissible against him. *People v. Kessler*, 13 Utah 69.

4. Silence Where Conversation Is Between Third Parties.— *State v. Young*, 99 Mo. 666; *State v. Mullins*, 101 Mo. 518; *Kelley v. People*, 55 N. Y. 572, 14 Am. Rep. 342.

Statement Must Be Heard and Understood. — Before the acquiescence of a defendant in the language of another can be assumed as a concession of the truth of any particular statement, it must clearly appear that the language was heard¹ and understood² by the defendant at the time, and that the truth of the facts embraced therein must be within his knowledge.³ But in *New York* it has been held that, in the absence of any indication to the contrary, a statement made in the presence of the prisoner will be presumed to have been made in his hearing also.⁴

d. JUDICIAL CONFESSIONS — (1) *Confession by Plea* — **Plea Accepted and Recorded.** — It may be stated as a general rule that if a plea of guilty, regularly rendered, has been accepted and entered of record, it is conclusive of the fact of the defendant's guilt and is not mere evidence to go to the jury as a confession.⁵

Plea before Examining Magistrate. — But the voluntary plea of guilty by the accused, before a committing magistrate, may be submitted to the jury as a confession on the subsequent trial of the accused.⁶

1. Statement to Accused Must Have Been Heard. — *Com. v. Harvey*, 1 Gray (Mass.) 489; *Com. v. Kenney*, 12 Met. (Mass.) 235, 46 Am. Dec. 672; *Com. v. Brailey*, 134 Mass. 530; *Sauls v. State*, 30 Tex. App. 496.

Proof Beyond Reasonable Doubt Necessary. — It has been said that the facts and circumstances must show beyond a reasonable doubt that the language was heard or the conduct understood by the defendant. *Sauls v. State*, 30 Tex. App. 496.

In *Com. v. Galavan*, 9 Allen (Mass.) 273, statements made under such circumstances that they might well have been heard by the defendant were held admissible against him.

A Question for Jury. — Where declarations were offered as evidence on a trial for murder, as having been made in the prisoner's presence and not contradicted by him, it was held to be properly left to the jury to determine whether they were made in his hearing, and whether he understood them. *Moye v. State*, 66 Ga. 740; *State v. Bowman*, 80 N. Car. 432. See also *Com. v. Brailey*, 134 Mass. 530.

2. Statement to Accused Must Have Been Understood — *Georgia*. — *Moye v. State*, 66 Ga. 740.

Massachusetts. — *Com. v. Harvey*, 1 Gray (Mass.) 489; *Com. v. Kenney*, 12 Met. (Mass.) 235, 46 Am. Dec. 672; *Com. v. Funai*, 146 Mass. 570.

Michigan. — *People v. O'Brien*, 68 Mich. 46.

Montana. — *Territory v. Big Knot on Head*, 6 Mont. 242.

Texas. — *Long v. State*, 13 Tex. App. 211; *Sauls v. State*, 30 Tex. App. 496; *Robertson v. State*, 30 Tex. App. 498.

Ignorance of Language. — A statement to a third party by an interpreter of confessions by the accused, though made in their presence, cannot bind them when it appears that they did not understand the language in which it was made. *Territory v. Big Knot on Head*, 6 Mont. 242.

Accusation Made Without Specification of Charge. — Where a third person said, in the presence of a prisoner, "He is guilty and he is going to leave the country," and the accused remained silent and afterwards did leave the country, it was held that, there being no evi-

dence to show that he was ever informed of the charge against him, his silence would not amount to a confession. *Robertson v. State*, 30 Tex. App. 498.

Intoxicated Person. — Where declarations were offered in evidence as having been made in the presence of a party and not contradicted by him, and it was also in evidence that the party to be affected by them was partially intoxicated, it was properly left to the jury to ascertain whether the party was too much intoxicated to hear and understand the statement when made. *State v. Perkins*, 3 Hawks (N. Car.) 377.

3. Truth of Facts Embraced in Statement Must Have Been Within Prisoner's Knowledge. — *Com. v. Kenney*, 12 Met. (Mass.) 235, 46 Am. Dec. 672; *Com. v. Galavan*, 9 Allen (Mass.) 273; *Long v. State*, 13 Tex. App. 211.

4. Statement Made in Prisoner's Presence Presumptively Sufficient. — *Hochrieter v. People*, 2 Abb. App. Dec. (N. Y.) 363. For similar decision in England see *Rex v. Bartlett*, 7 C. & P. 832, 32 E. C. L. 759.

5. Recorded Confessions by Plea. — *Reg. v. Goldshede*, 1 C. & K. 657, 47 E. C. L. 657; *State v. Meyers*, 99 Mo. 107; 1 *Bishop's New Crim. Proc.*, § 1254a.

Plea Rejected. — If a plea of guilty is offered by the defendant and refused by the court, it cannot be given in evidence against him on trial. *State v. Meyers*, 99 Mo. 107. Especially if it is the work of his attorney alone. 1 *Bish. New Crim. Proc.*, § 1254a; *Cooley v. State*, 55 Ala. 162; *Com. v. Lannan*, 13 Allen (Mass.) 563.

6. Admissibility of Plea before Magistrate. — *State v. Briggs*, 68 Iowa 416; *Com. v. Brown*, 150 Mass. 330; *People v. Gould*, 70 Mich. 240, 14 Am. St. Rep. 493; *Rice v. State*, 22 Tex. App. 654.

In *People v. Gould*, 70 Mich. 240, 14 Am. St. Rep. 493, the court said: "While it was not necessary for the justice to take respondent's plea, the case being one which the justice had no power to try and determine, yet, the respondent having voluntarily tendered his plea of guilty, it was such a confession of his guilt which, taken with his confessions made to others and the circumstances surrounding the cases, might very properly be submitted to the jury for their consideration."

(2) *Confession in Application for Continuance.* — Also the application for continuance, made by the accused at a former term of the court, is competent evidence against him as to any confession contained therein.¹

(3) *Former Testimony* — (a) *Of Person Not Under Accusation* — *Sworn Testimony at Examination Not in Regard to Crime Confessed.* — A confession will not be rejected merely on account of its having been made under oath, where the oath was administered in the course of an inquiry regarding matters other than the crime for which the prisoner is on trial.²

Testimony at Trial of Another for the Same Offense. — But a distinction has sometimes been sought to be made between the case just stated and that where the examination relates strictly to the crime, a greater mental agitation being supposed to exist in the latter case than in the former.³ And it has been intimated that no statement made upon oath in a judicial investigation of a crime can ever be used against the party making it, in a prosecution of him for the same crime, because the fact that he is under oath of itself operates as a compulsion upon him to tell the truth, and the whole truth, and his statement therefore cannot be regarded as free and voluntary.⁴ But, by the great weight of authority, it is held that if the testimony of a witness is voluntarily given upon the trial of another for the same offense for which he is subsequently prosecuted, his statements may be used

Plea of Guilty as Evidence in Civil Action. — In *Birchard v. Booth*, 4 Wis. 67, it was held that a plea of guilty to a charge of assault and battery, before a police justice, might be given in evidence in a civil action for the same assault.

Necessity of Caution. — On a trial for horse thieving the state was permitted to prove, over the defendant's objection, that, upon his examining trial before a magistrate, after being fully warned that whatever statement he made could be used against him, the defendant pleaded guilty to the charge. It was further proved that prior to this plea the owner of the stolen horse advised the defendant that if he would plead guilty it would go better with him. It was held that the defendant's plea of guilty was not made as a voluntary statement under article 262 of the Code of Criminal Procedure, but was merely an extrajudicial confession, and being voluntarily made as such, after he had been legally warned by the magistrate, it was admissible in evidence for the state. *Rice v. State*, 22 Tex. App. 654.

But in *State v. Briggs*, 68 Iowa 416, where the defendant was arrested and taken before the magistrate for preliminary examination and was asked by the magistrate what plea he desired to enter, and he answered that he pleaded guilty to the charge, it was held that such plea was to be regarded as a confession of his guilt, although under the statute he was not required to enter a formal plea to the preliminary information, and he was not informed as to the legal rights in the matter.

1. *Confession in Application for Continuance.* — *Coker v. State*, 20 Ark. 53; *Pledger v. State*, 77 Ga. 242; *Behler v. State*, 112 Ind. 140; *State v. Hayes*, 78 Mo. 307; *State v. Young*, 99 Mo. 666; *Austin v. State*, 15 Tex. App. 388; *Wimberly v. State*, 22 Tex. App. 506.

Application Made While in Custody — *Texas Statute.* — Under Texas Code of Criminal Procedure, art. 750, it has been held that statements made by the defendant in his applica-

tion for a continuance being in the nature of confessions, and made while in custody, are not admissible in evidence against him on his trial unless he was previously duly warned. *Austin v. State*, 15 Tex. App. 388.

But it is only in case the defendant was in custody at the time of his application for a continuance that such application is considered so far in the nature of a confession that it cannot be used against him unless he was warned that it might be. *Wimberly v. State*, 22 Tex. App. 506.

2. *Sworn Testimony at Examination Not in Regard to Crime Confessed.* — *Reg. v. Wheeler*, 2 Moo. C. C. 45; *Rex v. Mercer*, 2 Stark. 366, 3 E. C. L. 447; *Reg. v. Sloggett*, 36 Eng. L. & Eq. 620. See also *State v. Witham*, 72 Me. 531.

In the case of *Reg. v. Wheeler*, 2 Moo. C. C. 45, the prisoner had been convicted of the forgery of an acceptance to a bill of exchange which, with other forged bills, had been found in his possession. His father, through whose hands the bill had passed, having become bankrupt, the prisoner had been examined on oath before the commissioners in regard to all the bills. Upon the trial his examination before the commissioners had been given in evidence against him. The evidence was held to have been properly received.

In *Rex v. Mercer*, 2 Stark. 366, 3 E. C. L. 447, which was an indictment against the defendant for misconduct as a magistrate, it was proposed to prove on the part of the prosecution what had been said by the defendant in the course of his examination before a committee of the House of Commons appointed for the purpose of inquiring into the police of the metropolis, where he had been compelled to appear. It was objected by the defendant that the examination, having been made under compulsory process from the House of Commons, was not voluntary and therefore not admissible, but Abbott, J., admitted it.

3. *People v. McMahon*, 15 N. Y. 391.

4. *Jackson v. State*, 56 Miss. 311.

against him upon the subsequent trial.¹

At Investigation Where No One Is Under Accusation. — In the same way where a confession is voluntarily given in testimony by a witness, though under oath, at a coroner's inquest,² at a fire inquest,³ or before a grand

1. *People v. Mitchell*, 94 Cal. 550; *Burnett v. State*, 87 Ga. 622; *People v. Gallagher*, 75 Mich. 512; *Harris v. State*, (Tex. Crim. App. 1396) 36 S. W. Rep. 88.

Testimony at Preliminary Examination of Another. — Thus it has been held that the declarations of a defendant voluntarily made during the preliminary examination of the prosecution of another person are receivable against him in the prosecution of himself for the same crime. *Reg. v. Chidley*, 8 Cox C. C. 365; *Rex v. Haworth*, 4 C. & P. 254, 19 E. C. L. 370; *State v. Lewis*, 39 La. Ann. 1110; *People v. Burns*, 2 Park. Cr. Rep. (Oneida Oyer & T. Ct.) 34. *Compare Rex v. Davis*, 6 C. & P. 177, 25 E. C. L. 341.

Testimony before Grand Jury. — In the same way it has been held that grand jurors may testify as to confessions made by the prisoner before them, upon oath, when under examination as a witness against another person. *U. S. v. Negro Charles*, 2 Cranch (C. C.) 76.

Witness Objecting to Testifying. — In *People v. Mitchell*, 94 Cal. 550, it was held that statements made by a prisoner while testifying as a witness on the trial of one charged with the same offense as that for which he is being tried, upon a subsequent information, are admissible against him where it does not appear that he objected to being sworn or testifying on that occasion.

New York Statute — Investigation of Bribery. — Under section 79, Penal Code of New York, providing that "a person offending against any provision of any foregoing sections of this code relating to bribery is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding, or investigation, in the same manner as any other person. But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying to the giving of a bribe which has been accepted shall not thereafter be liable to indictment, prosecution, or punishment for that bribery, and may plead or prove the giving of testimony accordingly, in bar of such an indictment or prosecution," it has been held that where a person attends before a legislative committee in obedience to its subpoena and is sworn and examined as a witness, he cannot be deemed a willing or consenting witness, and he does not waive the privilege given by said section by not asserting it before the committee, and his testimony cannot be used against him upon a subsequent trial. *People v. Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 851.

2. **Testimony before Coroner Where No One Is Under Accusation** — *England*. — *Reg. v. Chesham*, 3 Russ. on Cr. (5th ed.) 482; *Reg. v. Sandys*, C. & M. 345, 41 E. C. L. 191.

Connecticut. — *State v. Coffee*, 56 Conn. 399.

Florida. — *Newton v. State*, 21 Fla. 53.

Kansas. — *State v. Taylor*, 36 Kan. 329.

Maine. — *State v. Gilman*, 51 Me. 206.

Nebraska. — *Clough v. State*, 7 Neb. 320.

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New York. — *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721.

Pennsylvania. — *Williams v. Com.*, 29 Pa. St. 102.

Wisconsin. — *Schoeffler v. State*, 3 Wis. 823; *Mack v. State*, 48 Wis. 271.

See also *Rex v. Tubby*, 5 C. & P. 530, 24 E. C. L. 441; *People v. Montgomery*, 13 Abb. Pr. N. S. (Monroe County Oyer & T. Ct.) 207; *State v. Vaigneur*, 5 Rich. L. (S. Car.) 391. *Compare Rex v. Haworth*, 4 C. & P. 254, 19 E. C. L. 370; *Reg. v. Wheeler*, 8 C. & P. 250, 34 E. C. L. 375; *State v. Senn*, 32 S. Car. 392.

Contra — Examination before Magistrate. — In *Rex v. Lewis*, 6 C. & P. 161, 25 E. C. L. 333, it was held that where a magistrate was engaged in the investigation of a felony, and no one in particular was then charged with it, and the prisoner and other persons were summoned and sworn as witnesses, and the prisoner gave evidence upon which he was committed for trial, his examination was not admissible against him. See also *Rex v. Davis*, 6 C. & P. 177, 25 E. C. L. 341.

Under Indiana Statute. — On the trial of an indictment for murder, a writing or statement signed by the defendant as his statement or evidence given by him as a witness before the coroner's inquest, held over the body of the deceased, is admissible in evidence, on behalf of the state, over the defendant's objection, unless it be shown to have been made by the defendant under the influence of fear produced by threats. And whether the coroner's jury was legally organized or not would not affect the question of the admissibility of such a statement freely made by the defendant. *Snyder v. State*, 59 Ind. 105.

Witness in Custody. — In *Reg. v. Owen*, 9 C. & P. 83, 38 E. C. L. 44, the question arose whether the testimony of the prisoner at the coroner's inquest was admissible. He had been brought in custody before the jury, not as a party charged with a crime, but as a witness merely. The question was considered one of so much doubt that *Williams, J.*, while he admitted the evidence, reserved the point for the opinion of the fifteen judges.

But in *Reg. v. Owen*, 9 C. & P. 238, 38 E. C. L. 99, where the same question arose upon the same deposition, *Gurney, B.*, considered the point so clear that he would not even reserve the question, and the evidence was rejected. It appeared that no inducement of any kind was held out to the prisoner to make any statement.

Prisoner Cautioned. — In the following cases it appeared that the prisoner, before testifying, was cautioned as to his right of refusal to testify. *State v. Coffee*, 56 Conn. 399; *Newton v. State*, 21 Fla. 53; *Com. v. Clark*, 130 Pa. St. 641.

3. **Testimony before Fire Inquest.** — *Reg. v. Coote*, L. R. 4 P. C. 599; *Com. v. Bradford*, 126 Mass. 42; *Com. v. King*, 8 Gray (Mass.) 501; *Com. v. Wesley*, 166 Mass. 248.

In *Com. v. Wesley*, 166 Mass. 248, it ap-

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jury,¹ before any person has been arrested charged with the crime, it will be receivable in evidence against him upon a subsequent trial for the offense, although he was not previously cautioned as to his right of refusal to testify.

Compelled to Testify After Claiming His Privilege. — If, however, he should be compelled to testify after claiming his privilege, his testimony will be deemed compulsory, and cannot be given in evidence against him.²

(b) **Of Person Under Accusation — Preliminary Examination.** — The practice of examining the prisoner when charged with crime seems to have originated in *England* under the statutes of 1 & 2 Philip and Mary, c. 13; 2 & 3 Philip and Mary, c. 10; and 7 Geo. IV. 64; since at the common law the fault of the prisoner was not to be wrung out of himself, but rather to be proved by others.³ This practice has been very carefully regulated in *England* by a more recent statute in which the mode of proceeding on the part of the magistrate is very minutely pointed out.⁴ In many of the *United States* statutory provisions on this question also exist.⁵

Where Testimony Is Voluntary. — Where the prisoner has been thus placed upon examination, it is agreed by all of the authorities that his testimony, if offered in evidence as a confession upon a subsequent trial, will, like other confessions, be admitted if it appears to have been freely and voluntarily given.⁶

peared that the defendant was warned that he was not obliged to incriminate himself.

Ignorance of the Law Enabling Prisoner to Decline to Testify Immaterial. — In *Reg. v. Coote*, L. R. 4 P. C. 599, the court said: "The chief justice indeed suggests that Coote may have been ignorant of the law enabling him to decline to answer crinating questions, and that if he had been acquainted with it he might have withheld some of the answers which he gave. As a matter of fact, it would appear that Coote was acquainted with so much of the law; but be this as it may, it is obvious that to institute an inquiry in each case as to the extent of the prisoner's knowledge of law, and to speculate whether if he had known more he would or would not have refused to answer certain questions, would be to involve a plain rule in endless confusion. Their lordships see no reason to introduce, with reference to this subject, an exception to the rule recognized as essential to the administration of the criminal law, *ignorantia juris non excusat*."

1. **Testimony before Grand Jury.** — *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267; *Gardner v. State*, (Tex. Crim. App. 1894) 28 S. W. Rep. 470. Compare *State v. Broughton*, 7 Ired. L. (N. Car.) 96, 45 Am. Dec. 507.

In *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267, it appeared, however, that the prisoner, before being examined, was cautioned that he need not testify unless he was willing to do so, and that he could not be compelled to criminate himself.

2. **Testimony Under Compulsion.** — *Reg. v. Coote*, L. R. 4 P. C. 599; *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721.

3. **Origin of Practice Permitting Examination of Accused.** — 1 Greenl. on Ev., § 224; *State v. Gilman*, 51 Me. 206.

4. **Modern English Statute as to Examination of Accused.** — 11 & 12 Vict., c. 42.

5. **Statutory Provisions in United States Permitting Examination of Accused — California.** — *People v. Kelley*, 47 Cal. 125. See also *People v. Bojorquez*, 55 Cal. 463.

Louisiana. — *State v. Bruce*, 33 La. Ann. 186.

Missouri. — *State v. Mullins*, 101 Mo. 514.

New York. — *People v. Mondon*, 103 N. Y. 211, 57 Am. Rep. 709.

North Carolina. — *State v. Matthews*, 66 N. Car. 106; *State v. Rorie*, 74 N. Car. 148; *State v. Needham*, 78 N. Car. 474; *State v. Spier*, 86 N. Car. 600.

Oregon. — *State v. Hatcher*, 29 Oregon 309.

Texas. — *Rice v. State*, 22 Tex. App. 654; *Jackson v. State*, 29 Tex. App. 458.

Wisconsin. — *State v. Glass*, 50 Wis. 218, 36 Am. Rep. 845.

And see the statutes of the various states.

Testimony Not to Be Used by Accused. — In *State v. Vandergraff*, 23 La. Ann. 96, it was held that the voluntary declarations of the accused, made before the committing magistrate on a preliminary examination and certified to by him in the presence of two witnesses, in conformity with section 1010 of the Revised Statutes of 1870, cannot be offered in evidence or used on the trial before the jury by the accused. Declarations so taken are intended only to perpetuate for the use of the state such confessions as the accused may choose to make. See also *State v. Dufour*, 31 La. Ann. 804.

6. **Voluntary Testimony — England.** — *Rex v. Green*, 5 C. & P. 312, 24 E. C. L. 335; *Rex v. Rivers*, 7 C. & P. 177, 32 E. C. L. 486.

United States. — *Wilson v. U. S.*, 162 U. S. 613.

California. — *People v. Kelley*, 47 Cal. 125; *People v. Soto*, 49 Cal. 67.

Florida. — *Coffee v. State*, 25 Fla. 501, 23 Am. St. Rep. 525.

Iowa. — *State v. McLaughlin*, 44 Iowa 82; *State v. Carroll*, 85 Iowa 1.

Louisiana. — *State v. Havelin*, 6 La. Ann. 167; *State v. Bruce*, 33 La. Ann. 186.

Michigan. — *People v. Clarke*, 105 Mich. 169; *People v. Eaton*, 59 Mich. 559.

New York. — *People v. Mondon*, 103 N. Y. 211, 57 Am. Rep. 709.

Ohio. — *State v. Leuth*, 5 Ohio Cir. Ct. Rep. 94.

Testimony Induced by Hope or Fear. — But if the testimony of the accused offered

South Carolina. — *State v. Branham*, 13 S. Car. 389.

Texas. — *Jackson v. State*, 29 Tex. App. 458; *Thomas v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 771; *Paris v. State*, (Tex. Crim. App. 1895) 31 S. W. Rep. 855.

Utah. — *U. S. v. Kirkwood*, 5 Utah 123.

Wisconsin. — *State v. Glass*, 50 Wis. 218, 36 Am. Rep. 845.

Confession before Grand Jury. — A voluntary confession before the grand jury, made after the defendant, who was under arrest, was cautioned, has been held to be receivable in evidence. *State v. Carroll*, 85 Iowa 1; *Thomas v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 771; *U. S. v. Kirkwood*, 5 Utah 123. See also *Paris v. State*, (Tex. Crim. App. 1895) 31 S. W. Rep. 855.

Confession before Coroner. — And the same is true of a confession before a coroner. *People v. Martinez*, 66 Cal. 278.

Confession to Coroner Not Acting in Official Capacity. — Upon the trial of an indictment for murder the statement or confession made and signed by the prisoner was offered in evidence on the part of the prosecution. It appeared that when the prisoner was arrested the officer making the arrest, an inspector of police in the city of New York, informed him of the crime for which he was arrested, and that he, the officer, was an inspector of police and had been watching for him, the prisoner, since the shooting, and saw him, in company with a man named Ely, try to steal a barrel of whiskey the night before, and also told him about pledging the pistol with which the murder was supposed to have been committed. The prisoner thereupon said he would make a statement. A coroner was sent for, who came to the police headquarters where the prisoner was in custody, and the confession in question was then made, the coroner not acting in an official capacity, but simply as a clerk to take down and prove the confession. It was held that the evidence did not disclose any threats and did not authorize an inference that the confession was made under the influence of fear, and that assuming that the paper was sworn to by the accused it was in no respect a compulsory statement, and it was properly received in evidence under the Code of Criminal Procedure, § 395. And it was further held that the provisions of the code regulating the mode of taking and authenticating the statement of prisoners accused of crime (§§ 188-200) referred only to the judicial examinations therein provided for, regularly instituted before a magistrate authorized to conduct such an examination; they do not include a statement made in the manner of the one in question. *People v. McGloin*, 91 N. Y. 241.

Prisoner Tied During Examination. — It has been held in *North Carolina* that the fact that a prisoner was tied during his examination before the committing magistrate will not constitute a valid objection to his confession being admitted as evidence, unless it appeared that he was tied in such a manner as to produce pain or to tend to induce or extort from him a confession. *State v. Rogers*, 112 N. Car. 874.

Expression of Desire to Waive Examination. — In *Shaw v. State*, 32 Tex. Crim. Rep. 155, it was held that where the prisoner was properly warned of the effect of making a confession, the fact that he expressed a desire to waive examination would not affect the admissibility of the evidence of his confession.

Adjuration to Speak the Truth. — In *Reg. v. Holmes*, 1 C. & K. 248, 47 E. C. L. 248, it was held that where a prisoner was before a magistrate on a charge of felony, and after the examination of the witnesses against him the magistrate said to him, "Be sure you say nothing but the truth, or it will be taken against you and may be given in evidence against you at your trial," this remark did not exclude the prisoner's statement from being given in evidence.

But in *Com. v. Harman*, 4 Pa. St. 269, it was held that where a prisoner charged with homicide was taken before a committing magistrate and there sworn to tell the truth, and told, "If you do not tell the truth, I will commit you," a confession thus exacted is inadmissible as evidence against the prisoner on trial.

Mississippi. — Under a statute in Mississippi making an accused person a competent witness in his own behalf, it has been held that his testimony before a committing magistrate was admissible against him. *Hill v. State*, 64 Miss. 431.

Missouri. — It was ruled under former statutes in Missouri that statements made by the accused and taken down by an examining magistrate are not competent evidence for the state or for the accused. *State v. Marshall*, 36 Mo. 400.

But under present statutes in that state a defendant in a criminal case or prosecution may testify if he sees fit to do so. *Rev. Stat. Mo. 1889*, § 4218; *State v. Mullins*, 101 Mo. 514.

Under the Code of West Virginia, c. 152, § 20, providing that "in criminal prosecution other than for perjury, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination," it was held that the statement when he was before a justice on his preliminary examination was inadmissible in evidence. *State v. Hall*, 31 W. Va. 505.

Burden of Proof. — In *People v. Soto*, 49 Cal. 67, it was held that if the prosecution in a criminal case offers in evidence a confession of the defendant contained in a deposition made by him before a committing magistrate, the foundation must be laid for its introduction by preliminary proof, showing *prima facie* that it was freely and voluntarily made.

But under statute in *Missouri* it has been held that evidence given and reduced to writing before a coroner, and signed by the accused at the coroner's inquest, was admissible against him on his trial where it is not shown that his testimony was not of his own accord. The court in this case said: "It will be presumed that the defendant testified before the coroner of his own accord until the contrary is made to appear, and that has not been done in this case." *State v. Mullins*, 101 Mo. 514.

as a confession was induced by either hope or fear, it will be inadmissible in evidence.¹

Necessity of Caution as to Right of Refusal to Testify. — In England, prior to the statute of 11 and 12 Vict., c. 42, the rule was laid down that before allowing the prisoner to make a statement on his preliminary examination he should be warned that anything he says to criminate himself will be used as evidence against him on his trial.²

But It Has Been Maintained in the United States that, apart from statutory provision to the contrary, the omission of such caution will not of itself render the confession inadmissible. If the confession is voluntary it will be admissible though it appears that the prisoner was not warned.³

1. Testimony Induced by Hope or Fear — *Canada.* — Reg. v. Soucie, 17 New Bruns. 611.

Hawaii. — Rex v. Paakaula, 3 Hawaiian 30.

United States. — U. S. v. Pocklington, 2 Cranch (C. C.) 293; U. S. v. Maunier, 26 Fed. Cas., No. 15,746.

California. — People v. Johnson, 41 Cal. 452.

Florida. — Coffee v. State, 25 Fla. 501, 23 Am. St. Rep. 525.

Pennsylvania. — Com. v. Harman, 4 Pa. St. 269; Com. v. Clark, 130 Pa. St. 650.

South Carolina. — State v. Carson, 36 S. Car. 524.

Threats of Crowd. — In *Serpentine v. State*, 1 How. (Miss.) 256, it was held that a confession made before an examining magistrate was to be excluded where it appeared that at the time the prisoner was surrounded by several persons who had on the preceding night greatly abused him and severely scourged him, informing him at the same time that their object was to make him confess, especially where he was not warned by the magistrate of the consequences of a confession.

Peremptory Manner of Magistrate. — But the mere fact that the manner of the magistrate was peremptory will not be sufficient to render the confession inadmissible, where no inducements were held out. *State v. Branham*, 13 S. Car. 395.

2. Necessity of Caution — English Authorities. — In *Rex v. Green*, 5 C. & P. 312, 24 E. C. L. 335, where the magistrate's clerk stated that before the prisoners said anything they were not only told that they must not expect any favor from confessing, but they were also dissuaded from confessing, Mr. Baron Gurney said: "That was wrong. A prisoner ought to be told that his confessing will not operate at all in his favor; and that he must not expect any favor because he makes a confession; and that if any one has told him that it will be better for him to confess, or worse for him if he does not, he must pay no attention to it; and that anything he says to criminate himself will be used as evidence against him on his trial. After that admonition it ought to be left entirely to himself whether he will make any statement or not; but he ought not to be dissuaded from making a perfectly voluntary confession, because that is shutting up one of the sources of justice." See also Reg. v. Arnold, 8 C. & P. 621, 34 E. C. L. 556.

But by statute 11 & 12 Vict., c. 42, it is enacted "that after the examinations of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the jus-

tice of the peace or one of the justices by or before whom such examination shall have been so completed as aforesaid shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words or words to the like effect: 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence against you upon your trial;' and whatever the prisoner shall then say in answer thereto shall be taken down in writing and read over to him, and shall be signed by the said justice or justices and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards, upon the trial of the said accused person, the same may, if necessary, be given in evidence against him without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: Provided always that the said justice or justices, before such accused person shall make any statement, shall state to him and give him clearly to understand that he has nothing to hope from any promise of favor and nothing to fear from any threat which may have been holden out to him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat; provided, nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person." See also Reg. v. Pettit, 4 Cox C. C. 164; Reg. v. Berriman, 6 Cox C. C. 388; Reg. v. Bond, 1 Den. C. C. 517; Reg. v. Sansome, 1 Den. C. C. 645; Reg. v. Stripp, 36 Eng. L. & Eq. 587; Reg. v. Higson, 2 C. & K. 769, 61 E. C. L. 769.

3. Necessity of Caution — Doctrine in United States Apart from Statute. — 1 Greenl. on Ev., § 225, note 2; Wilson v. U. S., 162 U. S. 613.

Missouri Statute. — Under § 4218, Rev. Stat. of Missouri, 1889, providing that the defendant in a criminal case or prosecution may testify if he sees fit to do so, it has been held that evidence given and reduced to writing before a coroner and signed by the accused at the coroner's inquest was admissible against him on his trial, where it was not shown that his testi-

The Actual Practice.—In many of the decisions in the United States, however, admitting the testimony of the accused in evidence as a confession, it appears that before the confession was made the prisoner was cautioned.¹

Moreover, by Statute in some of the states it is made absolutely essential that the accused should be informed of his right of refusal to testify.²

mony was not given of his own accord, and that in such case it was not necessary that the prisoner should have been informed that he was not bound to give evidence against himself. The court in this case said: "There is nothing in this evidence which shows or tends to show that defendant gave his evidence at the inquest by compulsion or otherwise than of his own volition. But it is further argued that it should appear that the coroner informed the defendant of his rights and that he was not bound to give evidence against himself. We have no statute like those in some states which are modeled after the statute of Philip and Mary. * * * It will be seen that they are unlike the statutes of this state of which we have been speaking. It will be presumed that the defendant testified before the coroner of his own accord until the contrary is made to appear, and that has not been done in this case, so that the court did not err in admitting the defendant's evidence given on the former occasion." *State v. Mullins*, 101 Mo. 514. See also *State v. Lamb*, 28 Mo. 218. Compare *State v. Marshall*, 36 Mo. 400.

Testimony Under Compulsion.—But it has been held that the confession of a prisoner before a coroner should be excluded where it plainly appeared that he testified without any knowledge of his lawful rights, without the aid of counsel, and under the belief that he had to answer the questions put to him. *State v. O'Brien*, 13 Mont. 1.

1. Instances Where Caution Was Given.—*People v. Kelley*, 47 Cal. 125; *State v. Carroll*, 85 Iowa 1; *State v. Staley*, 14 Minn. 105; *State v. Leuth*, 5 Ohio Cir. Ct. Rep. 94; *Alfred v. State*, 2 Swan (Tenn.) 581; *U. S. v. Kirkwood*, 5 Utah 123.

Warning Held to Be Sufficient.—Where prisoners were taken before a trial justice who asked them what they had to say for themselves, and told them that if they desired to make a statement it was their privilege to do so, and they were warned that whatever they said would be taken for them or against them as it might be, it was held that confessions thus elicited were admissible on a subsequent trial, although the prisoners were not warned that it was also their privilege to remain silent. *State v. Branham*, 13 S. Car. 389.

2. Statutes Requiring Warning.—*People v. Mondon*, 103 N. Y. 211, 57 Am. Rep. 709; *State v. Matthews*, 66 N. Car. 106; *State v. Rorie*, 74 N. Car. 148; *State v. Needham*, 78 N. Car. 474; *State v. Spier*, 86 N. Car. 600; *State v. Rogers*, 112 N. Car. 874; *State v. Hatcher*, 29 Oregon 309.

It Is Provided by Statute in North Carolina that at the commencement of the examination (preliminary examination before a magistrate) the prisoner should be informed by the magistrate that he is at liberty to refuse to answer any question that may be put to him, and that his refusal to answer shall not be used to his preju-

dice in any stage of the proceedings. *State v. Matthews*, 66 N. Car. 106; *State v. Rorie*, 74 N. Car. 148; *State v. Needham*, 78 N. Car. 474; *State v. Spier*, 86 N. Car. 600.

The reason of this statute has been held to extend to an inquisition by the coroner. Thus it has been held when a prisoner was brought before a coroner while he was holding an inquisition; and after witnesses had been examined, a post-mortem examination made, and a verdict entered up, in answer to a question asked by the foreman of the jury he confessed; that although after the first question was put, the prisoner was cautioned by the coroner not to answer, the caution came too late to afford the protection which the law requires, and the confession was inadmissible. *State v. Matthews*, 66 N. Car. 106.

The warning need not be given in the exact language of the statute; a substantial compliance therewith is sufficient. Thus where the testimony was that the prisoner "was duly warned—told that he need not say anything unless he wanted to, and it would not be used against him if he did not testify, and it was dangerous to go on the stand," etc., there was held to be a sufficient cautioning under the statute. *State v. De Graff*, 113 N. Car. 692.

But where the justice before whom the prisoner was brought for a preliminary examination asked the prisoner if he was ready to proceed, and the prisoner replied that for certain reasons he was not, it was held that his declarations then made were evidence against him, although he was not cautioned, the examination not having commenced. *State v. Conrad*, 95 N. Car. 666.

Under Texas Statute.—In *Jackson v. State*, 29 Tex. App. 458, it was held that where, at the examining trial, the magistrate, before any witnesses were examined, informed the accused of his right to make a voluntary statement, and warned him that if he made such statement it might be used in evidence against him, and the accused made a statement which was reduced to writing and properly certified to by a magistrate, and this statement, over his objection, was used in evidence against him on the final trial, the statement was made in strict accordance with the provisions of the Texas Code of Criminal Procedure, arts. 261, 262, and was competent evidence against the defendant.

The court in *Kirby v. State*, 23 Tex. App. 13, in commenting on the above-mentioned provisions, said: "It will be noticed that a voluntary statement made at an examining trial is made after the defendant is warned and cautioned. Hence a confession thus made is *per se* legitimate evidence."

Moreover, it has been maintained that under the Texas Code of Criminal Procedure, art. 750, a confession made by a prisoner before an examining magistrate, though not made in the voluntary statement of the accused taken be-

Specially Interrogating Accused. — It has been contended by some of the authorities that the practice of specially interrogating the accused on a preliminary examination is unwarranted by the principles of the common law, and that the confessions made by a prisoner in answer to questions propounded to him by the magistrate will be taken to be involuntary, though no threats were made or promises given, if the prisoner was not apprised of his right of refusal to testify. This rule has been maintained where the examination was or was not under oath.¹ By other authorities a contrary view has been upheld.²

Testimony Given Under Oath. — It has been laid down as a rule in *England* that the testimony of the accused, to be admissible as a confession against him, must not have been given under oath, as in that case it would be involuntary.³ In the *United States* there is a contrariety of opinion on this point.⁴ The English rule has been adopted in some of the states.⁵ Moreover, in some of the states statutory enactments exist requiring the testimony to be unsworn.⁶

fore an examining court, in accordance with the provisions mentioned above, will be receivable in evidence if voluntarily made by the prisoner after having been first cautioned that it might be used against him. *Rice v. State*, 22 Tex. App. 654.

In *Kirby v. State*, 23 Tex. App. 13, it was held that the Code of Procedure prescribes no form in which must be given the caution that a voluntary statement may be used in evidence against the maker, and that the caution is sufficient if the maker of a statement be warned that so much of it as is inculpatory of himself may be used against him.

But in *Dill v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 126, it was held that if the accused voluntarily testified on his preliminary examination, his statements are admissible against him on his subsequent trial, whether he was or was not in arrest or cautioned.

Under a Statute in Oregon relative to a preliminary examination of a criminal offense providing as follows: that "when the examination of the witnesses on the part of the state is closed the magistrate must inform the defendant that it is his right to make a statement in relation to the charge against him; that the statement is designed to enable him, if he sees fit, to answer the charge and explain the facts alleged against him; that he is at liberty to waive making a statement, and that his waiver cannot be used against him on the trial," it has been held that a written statement by the magistrate that "defendant was informed of his right to make a statement and proceeded as follows" was defective in that it did not relate that the prisoner was informed of his right to waive making a statement, and that such waiver could not be used against him. *State v. Hatcher*, 29 Oregon 309.

1. Specially Interrogating Accused — Better Rule. — *Wilson v. State*, 84 Ala. 426; *Kelly v. State*, 72 Ala. 244; *Cicero v. State*, 54 Ga. 156; *State v. Clifford*, 86 Iowa 550, 41 Am. St. Rep. 518, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 438.

Where a prisoner under arrest on the charge of a crime was taken before the grand jury, not of his own volition but by the direction of the examining body, for the purpose of being interrogated as to his supposed connection with the crime of which he was accused, and he testified under oath without being informed

of his rights in the premises, or of the effect of his testimony, it was held that his confession was involuntary and inadmissible in evidence. *State v. Clifford*, 86 Iowa 550, 41 Am. St. Rep. 518, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 438.

General Inquiry as to Guilt. — In *Seaborn v. State*, 20 Ala. 15, it was held that the fact that a confession was made to an examining magistrate, when voluntarily made, is not sufficient to exclude it. In that case the prisoner pleaded guilty and voluntarily made a confession of the circumstances of the killing, in response to an inquiry by the magistrate. There was no special interrogation with a view to obtaining a confession, and there was corroborating proof to show that the confessions were true.

Also, where a prisoner confessed his guilt in response to the question, "Are you guilty or not guilty?" propounded by the magistrate before whom he was examined, it was held that his confession was not inadmissible in evidence where it was elicited neither by threat nor promise of benefit. *Wolf v. Com.*, 30 Gratt. (Va.) 833. In this case it did not appear that the confession was made under oath.

2. *Rex v. Ellis*, R. & M. 432, 21 E. C. L. 483; *Com. v. Myers*, 160 Mass. 530. Compare *Rex v. Wilson*, Holt 597, 3 E. C. L. 234.

Answer to Direction to Be Expeditious. — The mere fact that the defendant in a criminal case was urged to state, and to state quickly, where he was at a particular time, does not render his statement inadmissible as a confession. *State v. Howard*, 17 N. H. 171.

3. Testimony Under Oath — English Rule. — Bull. N. P. 242; 2 Hawk. Pl. 6, c. 46, § 37; *Rex v. Rivers*, 7 C. & P. 177, 32 E. C. L. 486; *Rex v. Smith*, 1 Stark. 242, 2 E. C. L. 98; *Reg. v. Pikesley*, 9 C. & P. 124, 38 E. C. L. 67. This rule has not been altered by statute 11 and 12 Vict., c. 42, 1 Roscoe's Cr. Ev. 94.

4. Testimony Under Oath — Authorities in This Country Conflicting. — Fuller, C. J., in *Wilson v. U. S.*, 162 U. S. 613.

5. Authorities in This Country Following English Rule. — *State v. Garvey*, 25 La. Ann. 191. See also *U. S. v. Williams*, 1 Clift. (U. S.) 5.

6. Statutes Requiring Testimony to Be Unsworn. — *State v. Broughton*, 7 Ired. L. (N. Car.) 96, 45 Am. Dec. 507; *State v. Conrad*, 95 N. Car. 668.

But in other jurisdictions the mere fact that the testimony was given under oath has not been regarded as rendering it inadmissible, where it appeared to be otherwise free and voluntary.¹

Testimony at Former Trial. — Where the defendant has voluntarily gone on the witness stand and testified in his own behalf on the first trial of a criminal case his statements may be used against him upon a second trial.²

Testimony of Person Charged at Trial of Another for Same Offense. — It has been held that the testimony of a witness on the trial of a person indicted jointly with himself, but separately tried, cannot be afterwards used against him for the same offense.³ On the other hand, it has been held that where a prisoner has been arrested and examined before a committing magistrate after being duly warned, and afterwards, without any inducements having been held out, he testifies upon the examination of another for the same offense, his testimony will be admissible against him though he was not cautioned upon the latter examination that his testimony might be used against him.⁴

(c) **Of Person Resting Under Suspicion.** — It has been held that the mere fact that at the time of his examination the prisoner was aware that a crime was suspected and that he was suspected of being the criminal, will not prevent his being regarded as a mere witness whose testimony, though on oath, may be afterwards given in evidence against him, though he was not cautioned that he was not bound to criminate himself.⁵

The same statutory requirement has been held to exist in *Texas*. *Kirby v. State*, 23 Tex. App. 13; *Walker v. State*, 28 Tex. App. 112.

But in *Salas v. State*, 31 Tex. Crim. Rep. 485, it was held that a confession before a committing magistrate, though made on oath, might be given in evidence against the defendant, if he was warned, and afterwards voluntarily confessed.

Prisoner Testifying "at His Own Request" — *North Carolina*. — Under statute in North Carolina it has been held that where a prisoner arraigned before a magistrate testifies "at his own request," his testimony under oath is admissible in evidence against him. *State v. Ellis*, 97 N. Car. 447. The court in this case said: "It must be borne in mind that the statement made by the defendant was not under the examination provided for in § 1145 *et seq.* of the Code, for such examination shall not be on oath, but it was upon his examination as a witness sworn 'at his own request' as allowed by § 1353 of the Code."

1. Testimony Under Oath Admissible — Prevailing Rule. — *People v. Kelley*, 47 Cal. 125; *Com. v. Clark*, 130 Pa. St. 641; *U. S. v. Kirkwood*, 5 Utah 123; *State v. Glass*, 50 Wis. 218, 36 Am. Rep. 845.

In *State v. Gilman*, 51 Me. 206, Rice, J., said: "But when he [the prisoner] is fully apprised of his rights, and informed that he is under no legal obligation to disclose any facts prejudicial to himself, or to give evidence against himself, and then deliberately makes statements under oath, no good reason is perceived why such statements should not be given in evidence against him."

California. — In *People v. Gibbons*, 43 Cal. 557, it was held that the committing magistrate had no authority to receive a sworn statement from the accused on his preliminary examination, detailing generally the facts of the transaction, and that a statement thus made under oath in the form of a deposition

was not competent evidence against him on a subsequent trial for the offense.

But under the Penal Code of California it is now held that a person accused of crime may voluntarily become a witness against himself at a preliminary examination, and if it appears that his testimony, though under oath, was voluntary and free from undue influence, it may be used in evidence against him on his subsequent trial for the offense. *People v. Kelley*, 47 Cal. 125.

2. Testimony at Former Trial. — *State v. Duffy*, 57 Conn. 525; *Com. v. Reynolds*, 122 Mass. 454; *State v. Eddings*, 71 Mo. 545, 36 Am. Rep. 496; *State v. Jefferson*, 77 Mo. 136; *Rafferty v. State*, 91 Tenn. 655. See also *Com. v. Doughty*, 139 Pa. St. 383.

Answers in Chancery. — On the trial of an indictment for a conspiracy, the answers in chancery of the defendants, made on oath by them in a suit instituted against them by the prosecutor, are receivable in evidence on the part of the prosecution. *Reg. v. Goldshede*, 1 C. & K. 657, 47 E. C. L. 657.

Confessions Used in Civil Actions. — In a civil action for an assault, the defendant's confessions, made on the trial of a criminal prosecution against him for the same assault, are admissible against him. *Eno v. Brown*, 1 Root (Conn.) 528.

3. Testimony of Person Charged at Trial of Another for Same Offense. — *Josephine v. State*, 39 Miss. 613; *Jackson v. State*, 56 Miss. 311.

4. Reg. v. Field, 16 U. C. C. P. 98.

5. Testimony of Person Resting Under Suspicion. — *People v. Mondon*, 103 N. Y. 211, 57 Am. Rep. 709; *Schoeffler v. State*, 3 Wis. 824. Compare *Reg. v. Gillis*, 11 Cox C. C. 69.

Coroner's Inquest. — The rule of the text has been held to be true in the case of a confession made to a coroner, where no warning or caution was given. *Schoeffler v. State*, 3 Wis. 824. See also *People v. Mondon*, 103 N. Y. 211, 57 Am. Rep. 709.

Person Under Arrest on Suspicion — Testimony on the Trial of Another. — It has been held not to be error to admit in evidence against a prisoner, testimony given by him as a witness for the state, while under arrest upon suspicion of having committed an offense, upon the examination of another person accused of the same offense, there being no reason for believing that the testimony was not entirely voluntary.¹

Testimony before Coroner. — But where a person is brought before a coroner's jury under arrest, without warrant, because suspected of having committed a crime, it has been held that he is then a prisoner charged not formally but in fact with the offense, and his sworn testimony before the inquest cannot be given in evidence against him upon a subsequent trial.²

2. Necessity of Correspondence of Confession to the Offense Charged. — As a general rule, a confession to be given in evidence must be of the offense charged, and the rule is not altered by the fact that the confession relates to an offense similar to the one charged.³ But the confession of a crime other

Testimony before Agent of United States Treasury. — Likewise, where a person not under arrest, but informed that he was charged with being connected with smuggling, made a written statement before an agent of the treasury detailed to investigate frauds on the government, this was admissible in evidence, although it was made under oath, where it appeared that it was made freely, without the influence of threat or promise. *U. S. v. Graff*, 14 Blatchf. (U. S.) 381. The court in this case said: "I know of no authority binding upon the courts of the United States, which compels the holding that an arrest, or a charge of crime, or being sworn, or all three combined, are sufficient to exclude a confession that otherwise appears to have been freely made, without the influence of threat or promise."

At Trial of Another for the Same Offense. — Under the Texas statute providing that "the confession of a defendant may be used in evidence against him if it appear that the same was freely made without compulsion or persuasion," etc., it has been held that the statements of the defendant when examined as a witness in another case may be given in evidence by the state against him, there being no intimidation or persuasion, although it did not appear that the defendant when examined as a witness knew that he could decline to criminate himself. *Alston v. State*, 41 Tex. 39. In this case the defendant was not under arrest at the time, but knew that he was suspected.

Caution Given. — In *Teachout v. People*, 41 N. Y. 7, the defendant appeared at a coroner's inquest in pursuance of a subpoena to testify and voluntarily attended. He was not under arrest, but was informed by one present that it was charged that his wife was poisoned, and that he would be arrested for the crime. Before he was sworn he was informed by the coroner that there were rumors that his wife came to her death by foul means, and that some of those rumors implicated him. It was held that the mere consciousness of being suspected of the crime did not so disqualify the witness that his testimony, in other respects freely and voluntarily given before the coroner, could not be used against him on his trial on a charge of such crime subsequently made. It is proper, however, to state further that in this case the

prisoner was further informed by the coroner before he was sworn that he was not obliged to testify unless he chose. He said he had no objection to telling all he knew. To the same effect, see *State v. Gilman*, 51 Me. 206.

1. Testimony on Trial of Another by Person Arrested on Suspicion. — *Dickerson v. State*, 48 Wis. 288. See also *Reg. v. Field*, 16 U. C. C. P. 98; *People v. Thayer*, 1 Park. Cr. Rep. (Erie Oyer & T. Ct.) 595.

Caution Necessary — Texas Statute. — Where the prisoner while under arrest on suspicion of complicity in a crime, but not under indictment, was used as a witness for the state in a trial of another person for the same offense, and no warning whatever was given him as required by the Code of Criminal Procedure, art. 750, the confession is not admissible on a subsequent trial of an indictment against him for the same offense. *Gilder v. State*, (Tex. Crim. App. 1896) 33 S. W. Rep. 867.

2. Person Arrested on Suspicion Testifying before Coroner. — *Farkas v. State*, 60 Miss. 847; *People v. McMahon*, 15 N. Y. 384; *State v. Young*, 1 Winst. L. (N. Car.) 126.

Caution Necessary — Texas Statute. — Under Texas Code of Criminal Procedure, art. 750, a confession of a prisoner before a coroner, under arrest on suspicion of complicity in a crime, but not under indictment, is inadmissible in evidence unless he has been duly warned. *Kirby v. State*, 23 Tex. App. 22; *Wood v. State*, 22 Tex. App. 431.

New York Code. — A similar requirement is contained in the New York Code of Criminal Procedure, §§ 188, 196, 198. *People v. Mondon*, 103 N. Y. 211, 57 Am. Rep. 709.

3. Confession Must Be of Offense Charged. — *Gabriel v. State*, 40 Ala. 357; *Yourcee v. Territory*, (Arizona 1892) 29 Pac. Rep. 894; *State v. Cowen*, 56 Kan. 470; *Com. v. Call*, 21 Pick. (Mass.) 515, 32 Am. Dec. 284; *Com. v. Campbell*, 155 Mass. 537; *State v. Cox*, 65 Mo. 29; *People v. Corbin*, 56 N. Y. 363, 15 Am. Rep. 427; *Warren v. State*, 29 Tex. 369; *Kollock v. State*, 88 Wis. 663. See also *Com. v. Keyes*, 11 Gray (Mass.) 323. Compare *McNeary v. People*, 7 N. Y. Wkly. Dig. 512.

Thus, on a trial for feloniously burning a barn, a confession by the prisoner that he previously burned the owner's hay and poisoned his horses does not tend to prove the commis-

than that charged in an indictment, while not admissible as a substantive fact, may, when not separable from a competent confession, go to the jury under cautionary direction from the court.¹

3. Prima Facie Establishment of Corpus Delicti as Prerequisite. — If there is no evidence that a crime has been committed, it would be improper to admit the confessions of the accused, but it is not necessary that the *corpus delicti* be established beyond a reasonable doubt before evidence can be introduced of the prisoner's confessions. When there is evidence from which a jury may reasonably infer the commission of the offense charged, then a sufficient foundation has been laid for admitting the voluntary confession of the prisoner, the prosecution however being still held to the production of the proofs requisite to warrant a conviction.²

4. The Person Making the Confession or Affected Thereby — *a. GENERAL STATEMENT AS TO COMPETENCY.* — The capacity to commit a crime necessarily supposes the capacity to confess it, and hence, as a general rule, all persons capable of committing crime are competent to make confessions.³

sion of the crime charged, and is inadmissible. *Kollock v. State*, 88 Wis. 663.

Variance as to Ownership of Property Stolen. — Also, if an indictment charge that the prisoner stole a mule, the property of J. L. Terrell, evidence of the confession of the prisoner that he was arrested "for taking Mass' Lee's mule," is inadmissible without proof that Mass' Lee and J. L. Terrell were the same person, although the defendant's bill of exceptions stated that Terrell's name was Lee Terrell. *Gabriel v. State*, 40 Ala. 357.

1. Inseparable Confession of Offenses. — *Gore v. People*, 162 Ill. 259; *State v. Smith*, 125 Mo. 2; *State v. Moran*, 15 Oregon 262.

Thus, a statement by the defendant charged with a felonious assault, made immediately after the affray in the presence of spectators, that "I have fixed one of you, and I would just as soon fix three or four more of you as not," is admissible as a confession that the defendant committed the deed. *State v. Smith*, 125 Mo. 2. The court in this case said: "While a disconnected threat to stab Cannon would have been immaterial and irrelevant, when it is a part of an admission that defendant had stabbed Cook, it was competent although it tended to prove another distinct offense."

Also, an admission made by the defendant but a short time after the administration of the poison which destroyed the life of the deceased, that he took money from the pocket of the deceased to keep for him, is proper as showing all the facts constituting the entire transaction, although it tends to prove another offense. *State v. Moran*, 15 Oregon 262.

On a trial for wilfully and maliciously shooting at a person without wounding him, it was held that the remark of the prisoner upon being told that he had killed one person and shot at another, "I am damn sorry I did not get them both," is admissible in evidence though it tended to prove another crime. *Cogswell v. Com.*, (Ky. 1895) 32 S. W. Rep. 935.

2. Prima Facie Establishment of Corpus Delicti a Prerequisite. — *Winslow v. State*, 76 Ala. 42; *Floyd v. State*, 82 Ala. 16; *Lambright v. State*, 34 Fla. 575; *State v. Laliyer*, 4 Minn. 368; *Gray v. Com.*, 101 Pa. St. 380, 47 Am. Rep.

733. See also *U. S. v. Williams*, 1 Cliff. (U. S.) 25; *State v. Phelps*, 2 Root (Conn.) 87.

In *Lambright v. State*, 34 Fla. 575, the court said: "The court must decide in the first instance whether the evidence of the *corpus delicti* is *prima facie* sufficient to allow the confessions to go to the jury, and when the evidence of the *corpus delicti* has been admitted by the court, the jury must determine its sufficiency to establish the fact for which it was admitted as any other question of fact before them. The decision of the court in admitting evidence of the *corpus delicti* does not bind the jury, as the province of the court in such particular is only to determine whether sufficient evidence has been adduced to allow it to go to the jury for their determination." To the same effect, see *Winslow v. State*, 76 Ala. 42.

On a trial for arson, evidence that the fire occurred about midnight in a portion of the house where there had been no fire during the day or night, and when first discovered was burning on the outside, and that in the morning fresh tracks were found, leading from the road to the house, was held sufficient *prima facie* proof of the *corpus delicti* to render the defendant's confessions admissible. *Winslow v. State*, 76 Ala. 42.

Also, it has been held that where the body of the deceased had not been seen since the alleged murder, but there was pregnant evidence of the *corpus delicti* independent of the defendant's confession, the confession may be admitted. *State v. Brown*, 1 Mo. App. 86.

Confession of Various Larcenies. — The accused was a coal-heaver on a steamship at the time of the alleged larceny of certain goods therefrom, and goods of this character having been found in his possession and shown to have been taken from a box before the same left the vessel, testimony as to a confession by him of larcenies of goods from the steamship company at various times was not open to the objection that such confession was too general for proof of the special offense charged. *Griffin v. State*, 86 Ga. 257.

3. General Statement as to Competency. — *Martin v. State*, 90 Ala. 602, 24 Am. St. Rep. 844; *Studstill v. State*, 7 Ga. 2; *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404. See also *Earp v. State*, 55 Ga. 136.

b. INFANTS. — If, therefore, a child of fourteen years¹ or under,² or even under thirteen years,³ is proven to have sufficient capacity to render him amenable to the law, he has sufficient capacity to make a confession of his guilt. But it has been held that the confession of an infant under twelve years⁴ is inadmissible unless there is strong proof that he is *capax doli*.

c. PERSON ASLEEP. — Also statements made by the defendant in a criminal case, while asleep, are not admissible in evidence against him as a confession.⁵

d. PERSON INTOXICATED. — The mere fact that a person was intoxicated when making a confession does not render it inadmissible, the fact of intoxication affecting the weight of the confession rather than its competency.⁶ But a confession made by one so much under the influence of liquor as not to understand what he was confessing is not evidence of guilt, and this question is for the determination of the jury.⁷

e. AGENTS. — It has been held that whatever an agent says in reference to the business in which he is at the time employed, and within the scope of his authority, is said by the principal, and may be proved as well in a criminal case as a civil case, in like manner as if the evidence applied personally to the principal.⁸ But an unauthorized statement will not be admitted in evidence.⁹

1. *Child Fourteen Years Old.* — *Burton v. State*, 107 Ala. 108; *Com. v. Smith*, 119 Mass. 311.

2. *Child Under Fourteen.* — *Rex v. Thornton*, 1 Moo. C. C. 27; *Martin v. State*, 90 Ala. 602, 24 Am. St. Rep. 844.

3. *Child Under Thirteen.* — *State v. Bostick*, 4 Harr. (Del.) 563; *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404.

Thus, it has been held that a boy of the age of twelve years and five months may be convicted on his own confessions of the crime of murder, and executed. *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404.

4. *Child Under Twelve.* — *State v. Aaron*, 4 N. J. L. 263, 7 Am. Dec. 592.

5. *Confession Made in Sleep.* — *People v. Robinson*, 19 Cal. 40.

A Question for the Jury. — Where an ejaculation was made by the defendant in bed at night, and it did not appear whether the prisoner was awake or asleep, it was held to be a question for the jury to determine whether he was asleep or not. *State v. Morgan*, 35 W. Va. 260.

6. *Person Intoxicated Not Necessarily Incompetent* — *England.* — *Rex v. Spilsbury*, 7 C. & P. 187, 32 E. C. L. 487.

Alabama. — *Eskridge v. State*, 25 Ala. 30.

Arkansas. — *Lester v. State*, 32 Ark. 727.

California. — *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73.

Iowa. — *State v. Feltes*, 51 Iowa 495.

Massachusetts. — *Com. v. Howe*, 9 Gray (Mass.) 110.

Minnesota. — *State v. Grear*, 28 Minn. 426, 41 Am. Rep. 206.

Missouri. — *Whitney v. State*, 8 Mo. 165.

Tennessee. — *Williams v. State*, 12 Lea (Tenn.) 211.

Texas. — *Lienpo v. State*, 28 Tex. App. 179.

Thus, it has been held that the fact that the defendant was intoxicated, that he was excited and scattering in his conversation, and that no one who heard him could repeat all that he said, does not render his declarations or confessions of guilt inadmissible. *Eskridge v. State*, 25 Ala. 30.

7. *Person So Intoxicated as to Be Wanting in Understanding, Incompetent.* — *Lester v. State*, 32 Ark. 727; *Com. v. Howe*, 9 Gray (Mass.) 110; *State v. Grear*, 28 Minn. 426, 41 Am. Rep. 206.

Expert Testimony. — When a confession is shown and there is evidence tending to prove that the defendant, at the time of the confession, was laboring under delirium tremens, or was otherwise insane, the opinion of an expert may properly be taken upon the defendant's mental condition, as indicated by the facts proved. *State v. Feltes*, 51 Iowa 495.

Where Liquor Is Furnished by Person Having Prisoner in Charge. — In *McCabe v. Com.*, (Pa. 1886) 8 Atl. Rep. 46, it was held that statements made by the prisoner while under the influence of liquor supplied him by the officer having him in charge were inadmissible in evidence. See also *Flagg v. People*, 40 Mich. 709.

But in *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73, it was held that a confession made by a prisoner under the influence of liquor furnished him with the consent of the officer having him in charge, but not influenced by anything said to him by the officer, was admissible in evidence.

8. *Confessions by Agents.* — *American Fur Co. v. U. S.*, 2 Pet. (U. S.) 358; *U. S. v. Gooding*, 12 Wheat. (U. S.) 468.

Thus, upon an indictment under the Slave Trade Act of the 20th of April, 1818, c. 373, against the owner of a ship, testimony of the declarations of the master, being a part of the *res geste* connected with acts in furtherance of the voyage and within the scope of his authority as agent of the owner in the conduct of the guilty enterprise, is admissible in evidence against the owner. *U. S. v. Gooding*, 12 Wheat. (U. S.) 460.

Also, in *Browning v. State*, 33 Miss. 48, it was held that the declarations of a messenger sent by the prisoner to a third party, if made with reference to the object of his visit are admissible in evidence against him.

9. *Unauthorized Statement Inadmissible.* — *Lambert v. People*, 6 Abb. N. Cas. (N. Y. Ct. App.) 181.

Confessions by Counsel. — Thus a statement in court by the prisoner's attorney, without the prisoner's consent,¹ or a pleading which is the work of counsel alone, amounting to an acknowledgment of guilt,² has been held not to be receivable against the prisoner as a confession.

f. **CO-CONSPIRATORS.** — Where a conspiracy between two or more persons for the accomplishment of the same criminal design has been established,³ the declarations of one of them made during the pendency of the unlawful enterprise, and in furtherance of its objects, are receivable in evidence against one or all of them.⁴ But the confession of one conspirator made after a conspiracy has come to an end, whether by success or failure, is not admissible in evidence against any but himself.⁵

1. Unauthorized Statement of Counsel in Court.

— *Nels v. State*, 2 Tex. 280; *Clayton v. State*, 4 Tex. App. 515; *Simco v. State*, 9 Tex. App. 338.

2. A Pleading the Work of Counsel Alone. — *Cooley v. State*, 55 Ala. 162; *Com. v. Lannan*, 13 Allen (Mass.) 564.

3. Conspiracy to Be Established Before Declaration of Conspirator Receivable — *England*. — *Reg. v. Brittain*, 3 Cox C. C. 77.

United States. — *U. S. v. Wilson*, 1 Baldw. (U. S.) 78; *American Fur Co. v. U. S.*, 2 Pet. (U. S.) 358; *U. S. v. Graff*, 14 Blatchf. (U. S.) 381.

Alabama. — *Stewart v. State*, 26 Ala. 44; *McAnally v. State*, 74 Ala. 9.

Arkansas. — *Ford v. State*, 34 Ark. 649; *Casey v. State*, 37 Ark. 67; *Rowland v. State*, 45 Ark. 132.

California. — *People v. Stonecifer*, 6 Cal. 405; *People v. Cotta*, 49 Cal. 167; *People v. Bentley*, 77 Cal. 7, 11 Am. St. Rep. 225.

Connecticut. — *State v. Shields*, 45 Conn. 256.

Indiana. — *Belcher v. State*, 125 Ind. 419.

Louisiana. — *State v. Buchanan*, 35 La. Ann. 89.

Massachusetts. — *Com. v. Crowninshield*, 10 Pick. (Mass.) 497; *Com. v. Ratcliffe*, 130 Mass. 36.

Michigan. — *Hamilton v. People*, 29 Mich. 105; *People v. Parker*, 67 Mich. 222.

Mississippi. — *Browning v. State*, 30 Miss. 656; *Garrard v. State*, 50 Miss. 147.

Missouri. — *State v. Walker*, 98 Mo. 95.

Montana. — *State v. English*, 14 Mont. 399.

New Hampshire. — *State v. Larkin*, 49 N. H. 39.

New York. — *People v. Parish*, 4 Den. (N. Y.) 153.

North Carolina. — *State v. George*, 7 Ired. L. (N. Car.) 321.

Ohio. — *Clawson v. State*, 14 Ohio St. 237; *Davis v. State*, 19 Ohio St. 217; *Tarbox v. State*, 38 Ohio St. 581.

Pennsylvania. — *Com. v. Eberle*, 3 S. & R. (Pa.) 9.

South Carolina. — *State v. Borgman*, 2 Nott & M. (S. Car.) 34.

Texas. — *Preston v. State*, 4 Tex. App. 186; *Baker v. State*, 7 Tex. App. 612; *Loggins v. State*, 8 Tex. App. 434; *Avery v. State*, 10 Tex. App. 199; *Crook v. State*, 27 Tex. App. 198; *Ake v. State*, 30 Tex. App. 472; *Wright v. State*, 43 Tex. 170; *Wicks v. State*, 28 Tex. App. 448.

Virginia. — *Williamson v. Com.*, 4 Gratt. (Va.) 547; *Danville Bank v. Waddill*, 31 Gratt. (Va.) 469; *Brown v. Com.*, 86-Va. 935.

West Virginia. — *Carskadon v. Williams*, 7 W. Va. 1.

See also the title CONSPIRACY, *post*.

4. Statement of One Conspirator During Pendency of Conspiracy Receivable Against Another — *England*. — *Rex v. Salter*, 5 Esp. 125; *Reg. v. Petcherini*, 7 Cox C. C. 79; *Reg. v. Desmond*, 11 Cox C. C. 146.

United States. — *U. S. v. Hinman*, 1 Baldw. (U. S.) 202; *U. S. v. Flowery*, 1 Sprague (U. S.) 109; *American Fur Co. v. U. S.*, 2 Pet. (U. S.) 358; *U. S. v. McKee*, 3 Dill. (U. S.) 546; *U. S. v. Gooding*, 12 Wheat. (U. S.) 469; *U. S. v. Graff*, 14 Blatchf. (U. S.) 381.

Alabama. — *Stewart v. State*, 26 Ala. 44; *Smith v. State*, 52 Ala. 407.

Arkansas. — *Glory v. State*, 13 Ark. 236; *Lawson v. State*, 32 Ark. 220.

California. — *People v. Cotta*, 49 Cal. 166; *People v. Estrado*, 49 Cal. 171; *People v. Geiger*, 49 Cal. 643.

Colorado. — *Solander v. People*, 2 Colo. 48.

Georgia. — *Malone v. State*, 8 Ga. 408; *Reid v. State*, 20 Ga. 681; *Horton v. State*, 66 Ga. 690.

Illinois. — *Gardner v. People*, 4 Ill. 83; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320.

Indiana. — *Williams v. State*, 47 Ind. 568.

Iowa. — *State v. Hudson*, 50 Iowa 157.

Kentucky. — *Cornelius v. Com.*, 15 B. Mon. (Ky.) 539.

Massachusetts. — *Com. v. Tivnon*, 8 Gray (Mass.) 375, 69 Am. Dec. 248.

Missouri. — *State v. Melrose*, 98 Mo. 594.

North Carolina. — *State v. George*, 7 Ired. L. (N. Car.) 321; *State v. Anderson*, 92 N. Car. 732; *State v. Ellis*, 101 N. Car. 765, 9 Am. St. Rep. 49.

Oregon. — *State v. Fitzhugh*, 2 Oregon 227.

Pennsylvania. — *Com. v. Eberle*, 3 S. & R. (Pa.) 9; *Brandt v. Com.*, 94 Pa. St. 290.

South Carolina. — *State v. Cardoza*, 11 S. Car. 195.

Texas. — *Zumwalt v. State*, 5 Tex. App. 521; *Hannon v. State*, 5 Tex. App. 549; *Cohea v. State*, 11 Tex. App. 153; *O'Neal v. State*, 14 Tex. App. 582; *Clark v. State*, 28 Tex. App. 189, 19 Am. St. Rep. 817; *McFadden v. State*, 28 Tex. App. 241.

Virginia. — *Martin v. Com.*, 2 Leigh (Va.) 745; *Williamson v. Com.*, 4 Gratt. (Va.) 547; *Sands v. Com.*, 21 Gratt. (Va.) 871.

See also the title CONSPIRACY, *post*.

5. Confessions Subsequent to Completion of Conspiracy Inadmissible — *England*. — *Rex v. Turner*, 1 Moo. C. C. 347; *Rex v. Appleby*, 3 Stark. 33, 14 E. C. L. 152.

Hawaii. — *Rex v. Marks*, 1 Hawaiian 49.

g. CO-DEFENDANTS. — And in those cases where the crime charged was not pursuant to a conspiracy, the fact that two parties are charged with a joint offense and on the same indictment, does not give to either the power to affect the other by a confession of the charge or any material part thereof.¹ Thus the confessions made by one of two defendants charged with adultery, in the absence of the other are not evidence against the absent defendant.² But where several prisoners are tried jointly for the same crime, a confession by one of them is evidence on the trial against him although it implicates the others and although it may tend to prejudice the minds of the jury against them.³ The remedy in such case is a motion for a direction by the court to the jury as the proper application and effect of the confession.⁴

United States. — *U. S. v. Hartwell*, 3 Cliff. (U. S.) 221; *Logan v. U. S.*, 144 U. S. 263; *Brown v. U. S.*, 150 U. S. 93; *Sparf v. U. S.*, 156 U. S. 51; *U. S. v. White*, 5 Cranch (C. C.) 38.

Alabama. — *Gore v. State*, 58 Ala. 391.
Arkansas. — *Polk v. State*, 45 Ark. 165; *Foster v. State*, 45 Ark. 328.

California. — *People v. English*, 52 Cal. 212.

Florida. — *Anderson v. State*, 24 Fla. 139; *Hall v. State*, 31 Fla. 176; *Jenkins v. State*, 35 Fla. 738, 48 Am. St. Rep. 267.

Illinois. — *Samples v. People*, 121 Ill. 547; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320.

Indiana. — *O'Neil v. State*, 42 Ind. 346; *Card v. State*, 109 Ind. 415.

Iowa. — *State v. Arnold*, 48 Iowa 566.

Kansas. — *State v. Rogers*, 54 Kan. 683.

Kentucky. — *Miller v. Com.*, 78 Ky. 15, 39 Am. Rep. 194; *Shelby v. Com.*, 91 Ky. 569; *Twyman v. Com.*, (Ky. 1895) 33 S. W. Rep. 409.

Louisiana. — *State v. Havelin*, 6 La. Ann. 167; *State v. Weasel*, 30 La. Ann. 919; *State v. Carroll*, 31 La. Ann. 860; *State v. Jackson*, 29 La. Ann. 354; *Reid v. Louisiana State Lottery Co.*, 29 La. Ann. 388.

Massachusetts. — *Com. v. Thompson*, 99 Mass. 444.

Mississippi. — *Lynes v. State*, 36 Miss. 617.

Missouri. — *State v. Duncan*, 64 Mo. 262; *State v. Hickman*, 75 Mo. 416; *State v. Fredericks*, 85 Mo. 145; *State v. Melrose*, 98 Mo. 594.

Nebraska. — *Priest v. State*, 10 Neb. 393.

New Hampshire. — *State v. Larkin*, 49 N. H. 36, 6 Am. Rep. 456.

New York. — *People v. Gorham*, 16 Hun (N. Y.) 93; *People v. Davis*, 56 N. Y. 103; *People v. McQuade*, 110 N. Y. 284.

North Carolina. — *State v. Dean*, 13 Ired. L. (N. Car.) 63.

Ohio. — *Patton v. State*, 6 Ohio St. 467; *Fouts v. State*, 7 Ohio St. 471; *Clawson v. State*, 14 Ohio St. 237; *Rufer v. State*, 25 Ohio St. 464.

Pennsylvania. — *Heine v. Com.*, 91 Pa. St. 145.

Tennessee. — *Riggs v. State*, 6 Coldw. (Tenn.) 517.

Texas. — *Phillips v. State*, 6 Tex. App. 364; *Davis v. State*, 9 Tex. App. 363; *Long v. State*, 13 Tex. App. 211; *Ricks v. State*, 19 Tex. App. 308; *Tillery v. State*, 24 Tex. App. 251, 5 Am. St. Rep. 882; *Ake v. State*, 30 Tex. 466; *Spencer v. State*, 31 Tex. 64; *Martin v. State*, (Tex. Crim. App. 1895) 30 S. W. Rep. 222; *Wicks v. State*, 28 Tex. App. 448.

Vermont. — *State v. Thibeau*, 30 Vt. 100; *State v. Dyer*, 67 Vt. 690.

See also the title CONSPIRACY, *post*.

1. Confession of One Co-Defendant Inadmissible Against Another — *Alabama.* — *Gore v. State*, 58 Ala. 391.

Louisiana. — *State v. Weasel*, 30 La. Ann. 919; *State v. Johnson*, 47 La. Ann. 1225.

Massachusetts. — *Com. v. Ingraham*, 7 Gray (Mass.) 46; *Com. v. Thompson*, 99 Mass. 444.

Mississippi. — *Browning v. State*, 30 Miss. 656.

Missouri. — *State v. Berry*, 24 Mo. App. 466.

Texas. — *Spencer v. State*, 31 Tex. 64.

Vermont. — *State v. Fuller*, 39 Vt. 74.

Wisconsin. — *Kollock v. State*, 88 Wis. 663.

Thus where a woman is indicted for fornication, the declarations of the man with whom such illicit connection is charged are not admissible in evidence to prove her guilt. *Spencer v. State*, 31 Tex. 64.

Confession Made in Address to Court. — A confession by one of two persons jointly indicted and tried together by the same jury is not admissible in evidence against any one but himself, in a case where it was made in an address to the judge, in like manner as if made in the plea of guilty. *State v. Weasel*, 30 La. Ann. 919.

2. Confession of One Party to Adultery Inadmissible Against the Other. — *Gore v. State*, 58 Ala. 391; *Frost v. Com.*, 9 B. Mon. (Ky.) 362.

Statement as to Marriage. — On the trial of a joint indictment of a man and woman for adultery with each other which charges that at the time of the offense she was the wife of another man, it has been held that her statement in her paramour's absence that she was so, is not competent evidence against him. *Com. v. Thompson*, 99 Mass. 444. To the same effect see *Frost v. Com.*, 9 B. Mon. (Ky.) 362; *State v. Berry*, 24 Mo. App. 471.

3. Statement of Co-Defendant Admissible Against Himself Though It Implicates Another. — *Ackerson v. People*, 124 Ill. 563; *Com. v. Ingraham*, 7 Gray (Mass.) 46; *State v. Berry*, 24 Mo. App. 471; *State v. Brite*, 73 N. Car. 26; *Fife v. Com.*, 29 Pa. St. 429; *State v. Fuller*, 39 Vt. 74.

Omission of Name of Other Defendant Implied Unnecessary. — A written confession of one defendant, mentioning the other defendants, may be read in evidence without omitting the names of the other defendants, the jury being instructed that they should consider it only against the defendant who made it. *State v. Dodson*, 16 S. Car. 453.

4. Effect of Confession Limited by Instruction by Court. — *Ackerson v. People*, 124 Ill. 563;

h. **STRANGER — Confession of Distinct and Independent Offense.** — As a general rule the confession of a person not a party to the record, nor a confederate, is inadmissible against the defendant on trial for an offense distinct from and independent of the offense confessed. Thus in a prosecution for concealing a horse thief, it has been held incompetent for the prosecutor to prove the confessions of the alleged thief in the presence of the defendant, merely to establish the fact that the horse was stolen, and not to make out a scienter in the defendant.¹

In **Exoneration of Defendant.** — Nor are the declarations of a third person, not under oath and not part of the *res gestæ*, admissible in evidence for the purpose of exculpating the accused, by establishing the guilty agency of the declarant in the commission of the offense, since to admit such testimony would be to overturn the well-settled rules of law excluding hearsay evidence.²

i. **IDENTIFICATION OF PERSON CONFESSING.** — In order that a confession may be evidence against the accused there must be some evidence of his identity with the person confessing.³

State *v.* Johnson, 47 La. Ann. 1225; Com. *v.* Ingraham, 7 Gray (Mass.) 46; State *v.* Berry, 24 Mo. App. 466; State *v.* Workman, 15 S. Car. 541; State *v.* Dodson, 16 S. Car. 453.

In State *v.* Fuller, 39 Vt. 74, where a witness in detailing the confessions of one respondent in a criminal trial repeated portions of the confession which tended to implicate another respondent, it was held that the whole confession should be received, but it should be received under instructions to the jury that it would be evidence only against him who made it.

1. Confession by Stranger of Distinct Offense. — Morrison *v.* State, 5 Ohio 438. The court in this case said: "If the record showed that proof had been introduced to satisfy the jury that Driskell had stolen the horse mentioned in the indictment, and upon that the prosecution had sought to establish Morrison's knowledge of the guilt when he concealed him, proof of what Driskell told Morrison would have been both competent and sufficient unless the communication was attended by circumstances to induce a disbelief of the tale. This case is different. The proof here was not directed to make out a scienter in Morrison, but the fact of Driskell's having stolen the horse."

2. Confession of Stranger in Exoneration of Prisoner — United States. — U. S. *v.* Miller, 4 Cranch (C. C.) 104; U. S. *v.* McMahon, 4 Cranch (C. C.) 573; U. S. *v.* Douglass, 2 Blatchf. (U. S.) 207.

Alabama. — Smith *v.* State, 9 Ala. 990; Snow *v.* State, 54 Ala. 138; Snow *v.* State, 58 Ala. 372; West *v.* State, 76 Ala. 98; Owensby *v.* State, 82 Ala. 64.

New York. — Greenfield *v.* People, 85 N. Y. 75, 39 Am. Rep. 636.

Tennessee. — Peck *v.* State, 86 Tenn. 259.

Texas. — Boothe *v.* State, 4 Tex. App. 202; Sharp *v.* State, 6 Tex. App. 656; Holt *v.* State, 9 Tex. App. 571.

Thus in Rhea *v.* State, 10 Yerg. (Tenn.) 258, it was held that it is not competent for the defendant to prove by the witness that a negro slave had confessed to him that he had stolen the goods, for the larceny of which the defendant was being tried.

In Snow *v.* State, 58 Ala. 375, Brickell, C. J.,

said: "It was certainly proper for the defendants to show that if the offense had been committed, Daniel Smith, jointly indicted with them but not on trial, was the guilty agent in its commission, and that they were free from all guilty connection with it. This must, as must any other material fact, have been shown by legal evidence. Smith's declarations of his guilt and of the innocence of the defendants certainly seem evidence of great weight in favor of the defendants. But suppose it is admitted, and in the judgment of the jury outweighs the evidence against the defendants and they are acquitted. Smith is arraigned for the offense, and proves the declarations of the prisoners that they committed the offense, and he is free from all complicity with it. Each by the mere verbal declarations of the other, in the absence of all opportunity for cross-examination, has afforded evidence which results in their mutual exculpation. Or the defendants having been acquitted, protected by the justice and the humanity of the law from further prosecution, could become witnesses for Smith, proving their guilt and his innocence. Or suppose Smith is arraigned and shows, as it would be his right to show, that the witnesses misunderstood his declarations, or that they were carelessly or loosely made, and are in fact untrue unless connected with other evidence of his guilt, his acquittal must follow. Such declarations are hearsay evidence, the weakest, most uncertain, and most dangerous, and were by the court properly rejected."

Discrediting Witness. — But, in Smith *v.* State, 9 Ala. 990, it was intimated that if a third person examined as a witness has implicated the prisoner by his testimony, his declaration tending to establish the innocence of the prisoner by fixing the crime upon himself, is receivable for the purpose of discrediting him as a witness.

3. Identification of Person Confessing. — U. S. *v.* Gilbert, 2 Sumn. (U. S.) 19. In this case it was held that upon an indictment for robbery on the high seas by a part of the officers and crew of a Spanish schooner, committed on board an American brig, the court properly instructed the jury that if the persons who made the confessions at any time were not identified,

Identification by Voice.— But it is not necessary that the identification should be by vision; it may be made by the sense of hearing as well.¹ Thus it has been held that a witness may testify to the confessions of a prisoner made through the soil pipes of a prison if he recognized the prisoner by his voice.²

5. To Establish Treason.— Under the English statutes requiring the testimony of two witnesses to convict of treason, it has been held that a confession by a person charged with treason, though not in open court, may be admitted in evidence, if it be proved by two witnesses.³ But in a decision in this country a different rule has been laid down.⁴

III. MODE AND REQUISITES OF PROOF— **1. Who May Testify.**— Any competent witness, to whom a confession was made,⁵ or by whom it was overheard,⁶ may testify to such confession.

2. Whole Confession to Be Admitted.— When a defendant's confession is given in evidence, he is entitled to have submitted to the jury all that he said on the occasion, his exculpatory as well as inculpatory statements.⁷

but the statement was only that some did, or three did confess, not being named, and not being identified, such confessions could not be applied to any one of the persons in particular as proofs of his guilt, but might be considered by the jury so far as they applied to the identification of the piratical vessel.

1. Identification by Voice.— Thus a witness may testify to a confession that he heard the defendant make to a third person at night, though the witness could not see the defendant at the time, and only knew him by his voice. *Fussell v. State*, 93 Ga. 450; *Deal v. State*, 140 Ind. 354.

2. *Brown v. Com.*, 76 Pa. St. 319.

3. Admissibility of Confession to Establish Treason—Rule in England.— *Francia's Case*, 1 East P. C. 133.

4. Admissibility of Confession to Establish Treason—United States.— *U. S. v. Lee*, 2 Cranch (C. C.) 104.

The Constitution of the United States, art. 3, § 3, provides that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court.

5. Person to Whom Confession Is Made a Competent Witness.— Thus it is common for the officer to whom a confession is made to testify thereto.

England.— *Rex v. Wild*, 1 Moo. C. C. 452.

United States.— *U. S. v. Nardello*, 4 Mackey (D. C.) 503.

Alabama.— *King v. State*, 40 Ala. 314.

Arkansas.— *Austin v. State*, 14 Ark. 556.

California.— *People v. Long*, 43 Cal. 445; *People v. Rodondo*, 44 Cal. 538.

Georgia.— *Stephen v. State*, 11 Ga. 225.

Iowa.— *State v. McLaughlin*, 44 Iowa 84.

Kansas.— *State v. Ingram*, 16 Kan. 14.

Louisiana.— *State v. Simon*, 15 La. Ann. 568.

Massachusetts.— *Com. v. Preece*, 140 Mass. 276.

The law does not disqualify a jailer from testifying as to the voluntary confessions of persons in his charge. *Woolfolk v. State*, 85 Ga. 101.

A Grand Juror has been allowed under certain circumstances also to testify as to confessions made before the grand jury. *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267; *U. S. v. Kirkwood*, 5 Utah 123.

Pardoned Convict.— Where a confession was made to a convict who had been recently pardoned, it was held that the convict was competent to testify. *Com. v. Hanlon*, 8 Phila. (Pa.) 425.

Witness Having Imperfect Understanding of Language Used.— In *People v. Gelabert*, 39 Cal. 663, it was held that a witness who has an imperfect knowledge of the language employed in the conversation, and does not understand the whole of the conversation in which the supposed confession was made to him by the accused, is incompetent to testify as to such confession. Compare *Dean, J.*, in *People v. Thoms*, 3 Park. Cr. Rep. (N. Y. Ct. App.) 256.

Person Reducing Confession to Writing.— Where a prisoner makes a confession to one person in the first instance, who afterwards procures another to reduce it to writing, the latter is competent to prove that it was freely and voluntarily made when recited by the prisoner before him; and the person to whom it was first made need not be put upon the stand at all. *State v. Howard*, 35 S. Car. 197.

Statement of Infant Made in Presence of Accused.— It has been held that where an infant on whom an assault is alleged to have been committed is, by reason of her youth, incompetent to testify, her statements, though made in the presence of the prisoner, are also incompetent. *People v. Quong Kun*, (New York Gen. Sess.) 34 N. Y. Supp. 260.

6. Person Overhearing Confession as Witness.— *Rex v. Simons*, 6 C. & P. 510, 25 E. C. L. 532; *Woolfolk v. State*, 85 Ga. 101; *State v. Miller*, 100 Mo. 606.

A Bystander who hears a conversation is a competent witness to prove it. *State v. Gossett*, 9 Rich. L. (S. Car.) 428.

Witness Compelled to Testify as to Other Witnesses Present.— A witness stated that the defendant had admitted to him, in the presence of several others, his guilt of the crime of which he stood charged. It was held that the witness might be compelled to give the names of the others present at the time the confession was made. *State v. Fav*, 43 Iowa 651.

7. Whole Confession to Be Admitted—England.— *Abbott, C. J.*, in *Queen's Case*, 2 Brod. & B. 297, 6 E. C. L. 154.

United States.— *U. S. v. Wilson*, 1 Baldw. (U. S.) 78; *U. S. v. Barlow*, 1 Cranch (C. C.) 94;

Substance of Confession Sufficient.—This rule, however, does not make it necessary that a witness should repeat verbatim all that the accused uttered; the substance of the prisoner's statement will be sufficient.¹ Nor will a witness's

U. S. *v.* Negro Ralph Prior, 5 Cranch (C. C.) 37; U. S. *v.* Long, 30 Fed. Rep. 678.

Alabama.—Chambers *v.* State, 26 Ala. 59; Frank *v.* State, 27 Ala. 38; Corbett *v.* State, 31 Ala. 330; William *v.* State, 39 Ala. 532; Burns *v.* State, 49 Ala. 370.

Arkansas.—Adkins *v.* Hershy, 14 Ark. 442; Frazier *v.* State, 42 Ark. 70.

California.—People *v.* Navis, 3 Cal. 106; People *v.* Murphy, 39 Cal. 52; People *v.* Yeaton, 75 Cal. 415.

Delaware.—State *v.* Smith, 9 Houst. (Del.) 597.

Georgia.—Long *v.* State, 22 Ga. 40; Hudgins *v.* State, 26 Ga. 350; Peterson *v.* State, 47 Ga. 524.

Louisiana.—State *v.* Isaac, 3 La. Ann. 359; State *v.* Gilcrease, 26 La. Ann. 622; State *v.* Hughes, 29 La. Ann. 514; State *v.* Johnson, 47 La. Ann. 1225.

Mississippi.—Coon *v.* State, 13 Smed. & M. (Miss.) 246; McCann *v.* State, 13 Smed. & M. (Miss.) 471.

Missouri.—State *v.* Martin, 28 Mo. 530; State *v.* Hollenscheit, 61 Mo. 302; State *v.* Peak, 85 Mo. 190.

Nebraska.—Walrath *v.* State, 8 Neb. 80; Long *v.* State, 23 Neb. 33.

New York.—People *v.* Ruloff, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 401; People *v.* Johnson, 2 Wheel. Cr. Cas. (N. Y. Oyer & T. Ct.) 377.

North Carolina.—State *v.* Worthington, 64 N. Car. 594.

Ohio.—Blackburn *v.* State, 23 Ohio St. 146; Morehead *v.* State, 34 Ohio St. 212.

Pennsylvania.—Respublica *v.* M'Carty, 2 Dall. (Pa.) 86.

Tennessee.—Tipton *v.* State, Peck. (Tenn.) 308; Young *v.* State, 2 Yerg. (Tenn.) 292; Crawford *v.* State, 4 Coldw. (Tenn.) 190.

Vermont.—State *v.* Mahon, 32 Vt. 241; State *v.* McDonnell, 32 Vt. 491.

Virginia.—Brown *v.* Com., 9 Leigh (Va.) 633, 33 Am. Dec. 263; Parrish *v.* Com., 81 Va. 1.

Statements of Both Parties to Conversation.—Where a confession is contained in a conversation, what was said by each party thereto is admissible. State *v.* Travis, 39 La. Ann. 356; State *v.* Taylor, 3 Oregon 11; Emery *v.* State, 92 Wis. 146; 1 Greenleaf on Evidence, § 218.

Also, in Com. *v.* Kenney, 12 Met. (Mass.) 235, 46 Am. Dec. 672, it was said that "if a statement is made in the hearing of another in regard to facts affecting his rights, and he makes a reply wholly or partially admitting their truth, then the declaration and the reply are both admissible; the reply because it is the act of the party who will not be presumed to admit anything affecting his own interest or his own rights unless compelled to it by the force of truth, and the declaration because it may give meaning and effect to the reply." See also Com. *v.* Brown, 121 Mass. 70.

Judicial Confession.—In State *v.* West, 1 Houst. Cr. Cas. (Del.) 371, it was held that the rule laid down in the text applies to a con-

fession made by a prisoner upon an examination made at a coroner's inquest.

But it has been held that a portion of the testimony of the accused at an inquest may be introduced in evidence by the prosecution against him, without introducing the whole of the testimony. The defendant is entitled to introduce the remainder of the testimony or call it out on cross-examination. Rounds *v.* State, 57 Wis. 45; Emery *v.* State, 92 Wis. 146.

Documentary Evidence—Admissibility of a Part.—On the trial of a respondent for homicide, a witness testified to the respondent's reading a newspaper account of the transaction, and to his admitting it to be correct except in one or two particulars; and the prosecuting attorney was permitted to introduce in evidence a portion of the article, purporting to be a statement of the circumstances of the case as taken from the evidence of the respondent at the coroner's inquest, against the objection of the respondent that the whole should be introduced or none. It was held that if the entire article had not been a part of the manuscript bill of exceptions, the conviction should be reversed; but as a perusal of it showed that the admission of the excluded portion would have prejudiced the respondent, he cannot complain. People *v.* Coughlin, 67 Mich. 466.

Witness's Deductions from Conversation Inadmissible.—If the state gives in evidence the confessions of the prisoner, he is not entitled to prove the impressions made upon the mind of the witness testifying to such conversation, where such impressions are the mere deductions of the witness, drawn from the conversation. Peterson *v.* State, 47 Ga. 524.

Subsequent Conversation Inadmissible.—A slave confessed to a stranger, in the absence of the master, that he had killed the deceased. In two or three minutes thereafter the master arrived, and the slave confessed the killing to him, stating his reasons for doing the act. It was held that the introduction in evidence against the slave of the first confession did not authorize him to introduce in evidence, on his own behalf, the second. Alfred *v.* State, 37 Miss. 296.

But in *Texas* it has been held that article 751 of the Code of Criminal Procedure expands the common-law rule upon this question, so that when a confession is introduced in evidence against the party, such party is entitled to prove the whole of what he said upon the subject in explanation of the statement proved against him, whether made at or subsequent to the time he made the confession. Greene *v.* State, 17 Tex. App. 395; Harrison *v.* State, 20 Tex. App. 388, 54 Am. Rep. 529.

1. Substance of Confession Sufficient.—State *v.* Desroches, 48 La. Ann. 428; State *v.* Thomas, 28 La. Ann. 827; State *v.* Madison, 47 La. Ann. 30. See also Martin *v.* State, 39 Ala. 523; Berry *v.* Com., 10 Bush (Ky.) 15; State *v.* Hughes, 29 La. Ann. 514; Brown *v.* Com., 76 Pa. St. 319; Finn *v.* Com., 5 Rand. (Va.) 701.

testimony be excluded merely because he did not hear¹ or remember² all of the conversation of the accused, where there are no circumstances suggesting that the confession was incomplete and would be modified if all that the accused said was before the jury. Where, however, the party making the confession was not allowed to say all that he desired, as where a party confessed that he had killed the deceased, and commenced justifying the act, when the witness stopped him, the confession will not be allowed to go to the jury, since in that case the prisoner is deprived of the benefit of the explanation with which he intended to accompany it, and which if made would have been admissible in evidence.³

3. Confession in Writing.—If a confession is taken down in writing and signed by the accused, or acknowledgment of its truth is orally made, or if it is written by him, it may be read by the officer of the court.⁴ And it has

1. Hearing of Entire Conversation Not Essential.—*Westmoreland v. State*, 45 Ga. 225; *Woolfolk v. State*, 85 Ga. 69; *State v. Elliott*, 15 Iowa 72; *Com. v. Pitsinger*, 110 Mass. 101; *State v. Miller*, 100 Mo. 606; *State v. Gossett*, 9 Rich. L. (S. Car.) 428. Compare *State v. Gilcrease*, 26 La. Ann. 622; *State v. Hughes*, 29 La. Ann. 514.

Illustrations.—Thus in *Com. v. Pitsinger*, 110 Mass. 101, it was held that on the trial of two persons for adultery with each other a witness may testify that in passing through a room where the defendants were he overheard one of them in speaking to the other admit the adultery, although he did not overhear the rest of their conversation.

Also, in *Woolfolk v. State*, 85 Ga. 69, it was held that the fact that the defendant on the same occasion said something else, in connection with the confession, which the witness did not hear, does not render the confession inadmissible; the latter testifying that nothing was said in his hearing, and it not appearing from the evidence that anything else was said.

In *State v. Covington*, 2 Bailey L. (S. Car.) 569, it was held that the rule that all of a party's confession must be taken together does not exclude the evidence of a conversation overheard between himself and another person, although the witness did not hear the whole of the conversation, where it did not appear that this further conversation had any relation to the subject-matter.

In *Bob v. State*, 32 Ala. 560, it was held that where the part of a conversation containing the confession which was heard by the witness did not appear in itself to be incomplete, it should not be excluded merely because the witness had stated that he did not remain to hear the entire confession.

In *Clough v. State*, 7 Neb. 320, it was held not to be necessary to the competency of a witness called to testify as to what he had heard the prisoner say, that he should have heard all the prisoner said on that occasion. If what he heard would be sufficient to carry an intelligible idea respecting the commission of the offense, it may be given in evidence against the prisoner.

Further Conversation to Be Proved by Defendant.—If further conversation on the same subject, favorable to the defendant, takes place after the witness testifying to the part containing the confession has left, it has been held proper for

the accused to prove it by another witness. *Frank v. State*, 27 Ala. 38. See also *Bob v. State*, 32 Ala. 560.

2. Recollection of Entire Conversation Not Essential.—*Kendall v. State*, 65 Ala. 492; *State v. Vallery*, 47 La. Ann. 182; *State v. Madison*, 47 La. Ann. 30; *State v. Thomas*, 28 La. Ann. 827.

Where a witness testified to the substance of what the accused said, and stated that if anything else was said he did not remember it, the testimony was held to be admissible. *State v. Madison*, 47 La. Ann. 30.

Also it has been held that the confession of the accused will not be excluded merely because a witness testifying to it states that he cannot recollect all that was said by the accused, there having been no interruption of the confession and nothing to indicate that it was subject to any qualifications. *State v. Vallery*, 47 La. Ann. 182.

But in *Berry v. Com.*, 10 Bush (Ky.) 16, it was held that if a witness called to prove a confession of a prisoner says he does not remember all the conversation, and that a great many things were said in the conversation which he did not remember, and is still permitted to testify without even stating that he remembers the substance of all that was said at the time on the subject, it is error.

3. Where Prisoner Was Interrupted in Midst of Confession.—*William v. State*, 39 Ala. 532; *State v. Isaac*, 3 La. Ann. 359.

But in *Levison v. State*, 54 Ala. 520, it was held that a confession is not rendered inadmissible merely because the conversation in which it occurred was interrupted. Where the confession is full and unqualified, and all that the accused said on that subject is proved to the jury, the confession cannot be excluded on the speculation that the prisoner would have said something favorable to himself if the conversation was continued.

4. Confession in Writing Admissible.—1 Roscoe's Crim. Ev. *56; *Rex v. Swatkins*, 4 C. & P. 548, 19 E. C. L. 520; *Murphy v. People*, 63 N. Y. 597; *Waite v. State*, 13 Tex. App. 181; *Harris v. State*, 6 Tex. App. 97.

Confession in Handwriting of Prisoner Unnecessary.—In *Com. v. Coy*, 157 Mass. 200, it was held that when a prisoner signs a confession which has been reduced to writing by another, he waives any objection to it as evidence, for by adopting the language he makes it his own.

been maintained that when the confession is contained in a document signed by the prisoner, this is the best evidence upon the subject, and the prisoner is entitled to have it produced in the very terms in which the confession was made, and parol evidence thereof will be inadmissible if the written instrument is in existence.¹

4. Confession before Examining Magistrate.—Under the ancient English statutes of Philip and Mary the committing magistrate, before whom a prisoner charged with a felony was examined, was to take the examination of the prisoner in writing, which was to be subscribed by the magistrate and delivered to the court before which the further proceedings were to be had.² But it seems that the signature of the prisoner to the writing, though it is advisable to obtain it, is not essential.³ In *England* the above mentioned statutes have been slightly modified by subsequent enactments.⁴ In the *United States* they have been adopted as the common law in some of the states,⁵ and have been made the basis of similar statutory enactments in others.⁶

Written Confession to Be Proved by Writing.—Where a confession is contained in the written examination of a prisoner taken in conformity with the provisions of the statute, the confession can be proved only by the production of the writing itself, unless the writing has been lost or destroyed, or its non-production is otherwise explained.⁷ And, even in the absence of statutory requirement,

1. Right of Prisoner to Have Writing Produced.—1 *Roscoe's Crim. Ev.*, § 56; *U. S. v. Gibert*, 2 Sumn. (U. S.) 19; *State v. Branham*, 13 S. Car. 389. See also immediately *infra*, *Confessions Before Examining Magistrate*.

As to prisoner's right under certain circumstances to contradict by parol, see *infra*, this article, *Evidence in Rebuttal*.

Copy of Written Confession as Evidence.—In *Austine v. People*, 51 Ill. 240, it was held that after a lapse of nearly two years it would be unsafe to give a copy of the confession written out from mere recollection of the contents of the original. In this case, however, the confession was inadmissible because made under undue influence.

2. Ancient English Statute Directing Preliminary Examination.—1 and 2 Philip and Mary, c. 13; 2 and 3 Philip and Mary, c. 10; 1 Chitty Cr. L. *87.

Authentication of Writing by Magistrate—Texas.—Under the Texas statute it has been held that unless the written voluntary statement containing the prisoner's confession was authenticated by the magistrate before whom it purported to have been made, it is inadmissible in evidence. *Walker v. State*, 28 Tex. App. 112; *Guy v. State*, 9 Tex. App. 161.

Oregon.—Also under Hill's Anno. Laws Oregon, § 1598, subd. 4, it has been held that a statement made by one accused of crime, on his preliminary examination, must be signed and certified to by the magistrate, so as to be admissible in evidence on a subsequent trial. *State v. Hatcher*, 29 Oregon 309.

3. Signature of Prisoner Not Essential.—1 Chitty Cr. L. 87; *Rex v. Lambe*, 2 Leach C. C. 552; *Rex v. Thomas*, 2 Leach C. C. 637; *People v. Johnson*, 1 Wheel. Cr. Cas. (N. Y.) 193; *Com. v. Boyer*, 2 Wheel. Cr. Cas. (N. Y.) 150; *People v. Robertson*, 1 Wheel. Cr. Cas. (N. Y.) 66; *State v. Stoops*, Add. (Pa.) 381. Compare *Rex v. Pressly*, 6 C. & P. 183, 25 E. C. L. 345.

But by Statute in Delaware it must appear that the written examination of the accused was approved and signed by him. *State v. Harman*, 3 Harr. (Del.) 567; *State v. Brister*, 1 Houst. Cr. Cas. (Del.) 150.

Signature Refused by Prisoner.—Where the examination of a prisoner before a magistrate has been taken down in writing according to statute, and is read over to him, and he is told that he may sign it or not as he chooses, it has been held that if he declines to sign it, it will not be admissible in evidence against him as a confession. *Rex v. Telicote*, 2 Stark. 483, 3 E. C. L. 497; *Bennet's Case*, 2 Leach C. C. 553, note a; *Foster's Case*, 1 Lew. 46; *Hirst's Case*, 1 Lew. 46.

But where the prisoner, upon hearing the examination read to him, said that it was all true enough, but he would rather decline signing it, it was held that it was admissible against him. *Rex v. Lambe*, 2 Leach C. C. 552.

4. Modern English Statutes as to Mode of Examination.—7 Geo. IV., c. 64, §§ 2-5; 11 and 12 Vict., c. 42, §§ 17, 18.

5. Decisions in This Country Following Ancient English Statutes.—1 *Bishop's New Crim. Proc.*, § 1258; *Peter v. State*, 4 Smed. & M. (Miss.) 31; *State v. Irwin*, 1 Hayw. (N. Car.) 112; *State v. Parish*, Busb. L. (N. Car.) 239; *State v. Stoops*, Add. (Pa.) 381.

6. Statutes in This Country Prescribing Mode of Examination.—*State v. Johnson*, 5 Harr. (Del.) 507; *State v. Brister*, 1 Houst. Cr. Cas. (Del.) 150; *State v. Vincent*, 1 Houst. Cr. Cas. (Del.) 11; *Guy v. State*, 9 Tex. App. 161; *Bailey v. State*, 26 Tex. App. 706. And see the statutes of the various states.

7. Written Confession in Conformity with Statute to Be Proved by Writing.—*Rex v. Jacobs*, 1 Leach C. C. 309; *Reg. v. Dingley*, 1 C. & K. 637, 47 E. C. L. 637; *Davis v. State*, 17 Ala. 415; *State v. Johnson*, 5 Harr. (Del.) 507; *Cicero v. State*, 54 Ga. 156; *Peter v. State*, 4 Smed. & M. (Miss.) 31; *Wright v. State*, 50

if the confession is reduced to writing, this is the best evidence upon the subject, and the prisoner is entitled to have it produced.¹

Confession Provable by Parol in Absence of Written Examination.—But it has been uniformly held that the requisition upon the magistrate to reduce the examination to writing is directory merely; and consequently, where an examination in writing was not taken,² or if taken is entirely void for

Miss. 332. See also *State v. Harman*, 3 Harr. (Del.) 567; *State v. Miller*, 35 Kan. 328; *Rex v. Hollingshead*, 4 C. & P. 242, 19 E. C. L. 365.

Written Instrument Not to Be Contradicted by Parol.—In *Rex v. Walter*, 7 C. & P. 267, 32 E. C. L. 506, it was held that where a magistrate returned, with the depositions taken before him, that the prisoner said: "I decline to say anything,"—a witness for the prosecution could not be allowed to give evidence of the terms of a confession, which he stated that the prisoner made in the presence of the magistrate and while under examination. See also *Rex v. Bentley*, 6 C. & P. 148, 25 E. C. L. 325; *Rex v. Rivers*, 7 C. & P. 177, 32 E. C. L. 486; *Reg. v. Pikesley*, 9 C. & P. 124, 38 E. C. L. 67. Compare *Reg. v. Morse*, 8 C. & P. 605, 34 E. C. L. 547.

Writing Supplemented by Parol.—In *Rowland v. Ashby*, R. & M. 231, 21 E. C. L. 425, Mr. Justice Best was of the opinion that "upon clear and satisfactory evidence, it would be admissible to prove something said by a prisoner beyond what was taken down by the committing magistrate."

Also, in *R. v. Moore*, 2 Den. C. C. 526, it was held that an incidental observation by the prisoner in the course of his examination before a magistrate, but which did not form a part of the judicial inquiry so as to make it the duty of the magistrate to take it down in writing, and which was not so taken down, may be given in evidence against the prisoner.

So also it has been held that if a prisoner, during the examination of witnesses against him before the magistrate, makes an observation, parol evidence may be given of such observation, if the magistrate's clerk proves that he only took down the evidence of the witnesses and the statement of the prisoner after the evidence against him was concluded. *Rex v. Spilsbury*, 7 C. & P. 187, 32 E. C. L. 487.

Also where, on the examination of a prisoner charged with several larcenies, the magistrate took his confession regarding the property of A, but failed to take down his confession as to the goods of B, not recollecting anything said in regard to them, it was held that parol evidence of the latter confession, being separate and distinct, was properly admitted. *Rex v. Harris*, 1 Moo. C. C. 343.

But, on the other hand, in *Reg. v. Weller*, 2 C. & K. 223, 61 E. C. L. 223, it was held that where, during the examination of a witness before a magistrate in support of a charge of felony, the prisoner interposes an observation which is material to the case, such observation should be taken down in the deposition, and if it is not, the judge at the trial will not allow any evidence of it to be given.

Also, in *Reg. v. Carpenter*, 2 Cox C. C. 228, it was held that an incidental observation made by a prisoner in the course of his examination before a magistrate, which is not taken

down as part of the prisoner's statement, is not admissible in evidence against him at the trial if it relates to any matter which forms part of the judicial inquiry then being conducted before the magistrate. See also *Rex v. Lewis*, 6 C. & P. 161, 25 E. C. L. 333.

Also, in *Reg. v. Morse*, 8 C. & P. 605, 34 E. C. L. 547, it was held that where, on the examination before the magistrate of persons charged with felony, the magistrate's clerk in taking down the prisoner's statements had left a blank where either of the persons had mentioned the name of another of the persons, the judge at the trial would not allow these blanks to be supplied by parol evidence.

Prior Oral Confessions Not Merged in Written Confession.—Prior oral confessions of crime are not merged in a confession reduced to writing before the coroner who held the inquest, and are admissible. *State v. Leuth*, 5 Ohio Cir. Ct. Rep. 94; *Rex v. Corty*, McNally's Ev. 45. See also *R. v. Moore*, 2 Den. C. C. 526.

Lost Record.—In *Hightower v. State*, 58 Miss. 636, it was held that where the court sent one of its officers to search for the record of the examination before the committing magistrate, who reported to the court under oath that it could not be found, it was held proper to admit parol evidence of the confession of the accused. The court in this case said: "Presumably the record made by the examining magistrate was in the possession of the circuit court. If it caused search to be made for it among its records and it could not be found, it was competent to prove by parol the confession, unless it was made to appear that the record of it was in existence somewhere else. There was no such suggestion."

1. Writing to Be Produced Apart from Statute.—*State v. Branham*, 13 S. Car. 389.

Plea of Guilty—How Provable.—It has been held that parol evidence of a plea of guilty made by a prisoner before a magistrate on the preliminary examination will be excluded on a subsequent trial, unless it is shown that no entry of the plea was made on the record. *Metzer v. State*, 39 Ind. 596.

2. Parol Evidence of Examination Not Taken in Writing Admissible.—*State v. Irwin*, 1 Hayw. (N. Car.) 112; *State v. Parish*, Busb. L. (N. Car.) 239.

Existence of Writing Presumed.—In the absence of proof, it will be presumed that the officer did his duty and that the examination was reduced to writing, and, therefore, in order to introduce parol evidence it must clearly appear that the examination was not taken in writing. *Hinxman's Case*, 1 Leach C. C. 310, note *a*; *Hall's Case*, 1 McNally 40, cited in 2 Leach C. C. 559; *Phillips v. Wimburn*, 4 C. & P. 273, 19 E. C. L. 380; *State v. Harman*, 3 Harr. (Del.) 567; *State v. Johnson*, 5 Harr. (Del.) 507; *Hightower v. State*, 58 Miss. 638;

irregularity,¹ oral proof of any confessions made by the prisoner before the magistrate may be given.

IV. WEIGHT AND SUFFICIENCY — 1. General Statements. — It is universally recognized by the courts that an oral confession should be received and examined with caution, owing to the fact that such testimony is hard to be contradicted, and liable to be incorrectly reported and to be untrue, because of the influence of hope or fear exerted upon the prisoner.² But when voluntarily and deliberately made, and when clearly proved, confessions are entitled to the highest credit.³

An instruction by the Court embodying the above principles has been held by some of the authorities to be error, as being a charge on the weight of evidence.⁴ But by other authorities such an instruction has been allowed.⁵

State v. Parish, Busb. L. (N. Car.) 239; *State v. Irwin*, 1 Hayw. (N. Car.) 112. Compare *Reg. v. McGovern*, 5 Cox C. C. 506.

1. Parol Evidence of Examination Void for Irregularity Admissible. — *Rex v. Tarrant*, 6 C. & P. 182, 25 E. C. L. 345; *Rex v. Pressly*, 6 C. & P. 183, 25 E. C. L. 345; *Rex v. Reed*, M. & M. 403, 22 E. C. L. 341; *Rex v. Bell*, 5 C. & P. 162, 24 E. C. L. 256; *Brown v. State*, 71 Ind. 470; *Guy v. State*, 9 Tex. App. 161. Compare *Rex v. Bentley*, 6 C. & P. 148, 25 E. C. L. 325.

Thus where it was shown that a defendant's confession made before an examining court, and after he had been duly cautioned that it might be used against him, was reduced to writing, but that the writing was not so authenticated as to render it competent evidence, it was not error to allow the state, after laying the proper predicate, to adduce parol proof of the statement made by the defendant in his confession before the examining court. *Guy v. State*, 9 Tex. App. 161.

Where Informality Renders Confession Involuntary. — Where the informality of taking the examination renders the prisoner's confession involuntary, neither the written instrument nor parol evidence of the confession will be receivable in evidence. *Rex v. Rivers*, 7 C. & P. 177, 32 E. C. L. 486; *Reg. v. Pikesley*, 9 C. & P. 124, 38 E. C. L. 67.

Thus if a prisoner's examination before a magistrate concludes, "Taken and sworn before me," and after that is the magistrate's signature, the examination will not be received in evidence; and the court will neither allow the magistrate's clerk to prove that in fact it was not sworn, nor will it receive parol evidence of what the prisoner said. *Rex v. Rivers*, 7 C. & P. 177, 32 E. C. L. 486. Compare a decision under statute in *Texas*, *Kirby v. State*, 23 Tex. App. 13.

Refreshing Memory from Written Examination. — Where a written examination is rejected for mere informality, the written instrument may nevertheless be used by a witness giving parol testimony of the prisoner's confessions, for the purpose of refreshing his memory. *R. v. Laver*, 6 How. St. Tr. 215; *Rex v. Bell*, 5 C. & P. 162, 24 E. C. L. 256; *Rex v. Swatkins*, 4 C. & P. 548, 19 E. C. L. 520; *Rex v. Tarrant*, 6 C. & P. 182, 25 E. C. L. 345; *Rex v. Pressly*, 6 C. & P. 183, 25 E. C. L. 345; *Rex v. Jones*, 2 Russ. 658, note; *Rex v. Watson*, 3 C. & K. 111.

Absence of Proof of Prisoner's Signature — Delaware Statute. — Under a statute in Delaware requiring not only that the examination of a

prisoner before a magistrate should be reduced to writing, but that it should be read and tendered to the prisoner for his approval and signature, it has been held that courts will not presume that it was assented to and signed by the accused after having been read over to him, and that without such proof parol evidence of his confession is inadmissible. *State v. Johnson*, 5 Harr. (Del.) 507; *State v. Brister*, 1 Houst. Cr. Cas. (Del.) 150; *State v. Vincent*, 1 Houst. Cr. Cas. (Del.) 11; *State v. Harman*, 3 Harr. (Del.) 567; *State v. Eaton*, 3 Harr. (Del.) 554.

2. Caution to Be Used in Receiving and Weighing Confessions — Arkansas. — *Ford v. State*, 34 Ark. 654.

Florida. — *Metzger v. State*, 18 Fla. 491.

Louisiana. — *State v. Gilcrease*, 26 La. Ann. 622.

Massachusetts. — *Com. v. Sanborn*, 116 Mass. 61.

New York. — *Murphy v. People*, 63 N. Y. 596.

Tennessee. — *State v. Fields*, Peck (Tenn.) 142.

Texas. — *Gay v. State*, 2 Tex. App. 127.

See also *State v. Clump*, 16 Mo. 387.

3. Confession Deliberately Made Entitled to Highest Credit — England. — *Rex v. Warickshall*, 1 Leach C. C. 263.

United States. — *U. S. v. Hughes*, 34 Fed. Rep. 732; *Hopt v. Utah*, 110 U. S. 584; *Wilson v. U. S.*, 162 U. S. 622.

Arkansas. — *Ford v. State*, 34 Ark. 656.

Connecticut. — *State v. Potter*, 18 Conn. 178.

Florida. — *Metzger v. State*, 18 Fla. 491.

Iowa. — *State v. Brown*, 48 Iowa 384.

Kentucky. — *Becker v. Crow*, 7 Bush (Ky.) 198.

Tennessee. — *Deathridge v. State*, 1 Sneed (Tenn.) 75.

Hawaii. — *Rex v. Marks*, 1 Hawaiian 49.

Compare *Keithler v. State*, 10 Smed. & M. (Miss.) 229.

4. Jurisdictions Disallowing Instructions as to Caution, etc. — *Blackburn v. Com.*, 12 Bush (Ky.) 187; *Morrison v. State*, 41 Tex. 516; *Harris v. State*, 1 Tex. App. 74.

In *Morrison v. State*, 41 Tex. 520, the court said: "When it is said that deliberate or voluntary confessions of guilt are among the most effectual proofs in the law, it is to be regarded as persuasive rather than any authoritative rule of law." To the same effect see *Com. v. Galligan*, 113 Mass. 202.

5. Jurisdictions Allowing Instructions as to Caution, etc. — *Rex v. Marks*, 1 Hawaiian 49;

Question for the Jury.—It may be laid down as a general principle, however, that after a confession has been given in evidence, it is for the jury to determine, from all the facts and circumstances proved on the trial in connection with the confession, what credit shall be given it.¹

U. S. v. Hughes, 34 Fed. Rep. 735; *State v. Brown*, 48 Iowa 384; *Com. v. Sanborn*, 116 Mass. 61. See also *State v. Fields*, Peck (Tenn.) 142. Compare *Com. v. Galligan*, 113 Mass. 202.

In *Mercer v. State*, 17 Ga. 146, the court was asked generally by the prisoner's counsel, as the jury were about retiring, to charge them as to confessions, whereupon he gave them in the charge the general principles on this subject, in which he stated that confessions freely and voluntarily made were the highest kind of evidence, but in the course of his remarks also told them that they must weigh them as any other testimony. It was held that this charge under the circumstances was sufficiently correct. To the same effect see *Metzger v. State*, 18 Fla. 481.

1. Weight of Evidence Question for Jury—Alabama.—*State v. Welch*, 7 Port. (Ala.) 463; *Seaborn v. State*, 20 Ala. 15; *Corbett v. State*, 31 Ala. 329; *Levy v. State*, 49 Ala. 390; *Redd v. State*, 69 Ala. 255; *McGuff v. State*, 88 Ala. 147, 16 Am. St. Rep. 25.

California.—*People v. Williams*, 17 Cal. 146; *People v. Carabin*, 14 Cal. 438; *People v. Wyman*, 15 Cal. 70; *People v. Levison*, 16 Cal. 98, 76 Am. Dec. 505; *People v. Ah Fung*, 16 Cal. 137.

Colorado.—*Roberts v. People*, 11 Colo. 214.

Delaware.—*State v. Smith*, 9 Houst. (Del.) 588.

Georgia.—*Banks v. State*, 42 Ga. 544; *Stallings v. State*, 47 Ga. 572.

Iowa.—*State v. Elliott*, 15 Iowa 72.

Kentucky.—*Butler v. Com.*, 2 Duv. (Ky.) 435; *Blackburn v. Com.*, 12 Bush (Ky.) 181.

Louisiana.—*State v. Wedemeyer*, 11 La. Ann. 49.

Massachusetts.—*Com. v. Sanborn*, 116 Mass. 61.

Michigan.—*People v. Flynn*, 96 Mich. 276; *De Foe v. People*, 22 Mich. 224; *People v. Taylor*, 93 Mich. 638.

Minnesota.—*State v. Staley*, 14 Minn. 105.

Mississippi.—*Keithler v. State*, 10 Smed. & M. (Miss.) 192; *Ellis v. State*, 65 Miss. 44, 7 Am. St. Rep. 634.

Missouri.—*Bower v. State*, 5 Mo. 364, 32 Am. Dec. 325.

Nebraska.—*Shepherd v. State*, 31 Neb. 389.

New Jersey.—*Donnelly v. State*, 26 N. J. L. 463.

New York.—*Barnes v. Allen*, 30 Barb. (N. Y.) 663; *Murphy v. People*, 63 N. Y. 590.

North Carolina.—*State v. Patterson*, 68 N. Car. 292; *State v. Ellis*, 97 N. Car. 447.

Pennsylvania.—*Com. v. Dillon*, 4 Dall. (Pa.) 116.

South Carolina.—*Smith v. Hunt*, 1 McCord L. (S. Car.) 449.

Texas.—*Harris v. State*, 1 Tex. App. 74; *Morrison v. State*, 41 Tex. 516.

Vermont.—*State v. Jenkins*, 2 Tyler (Vt.) 377.

Conflicting Testimony of Accused.—The de-

fendant, at his own request, was examined before the committing magistrate as a witness on his own behalf. While testifying he denied the truth of certain confessions which had been illegally extorted from him. It was held that the jury were at liberty to believe the truth of his confessions or not as they chose. *State v. Ellis*, 97 N. Car. 447. See also *Keithler v. State*, 10 Smed. & M. (Miss.) 192.

A Slave's Voluntary Confessions of guilt were admissible evidence against him. The facts that he was a slave and ignorant, and to some extent unacquainted with the consequences which might attend the making of such confessions, did not affect the admissibility of the evidence, but should be considered by the jury in connection with the admissions in ascertaining the weight to be given to them. *Seaborn v. State*, 20 Ala. 15.

Testimony of Witness Having No Other Means than Confession of Hearing the Crime.—If it appears that the witness who details an alleged confession had no other means of learning the circumstances of the crime, his testimony should have greater weight with the jury. *Com. v. Hanlon*, 3 Brewst. (Pa.) 461.

Where There Are Circumstances Showing Confessions to Be Involuntary—Civil Action.—It has been held that a written confession of adultery, made by a married woman, though sworn to before an officer duly qualified to administer an oath, is not entitled to any weight as evidence, when the circumstances under which such confession was made compel the belief that it was not fairly obtained nor made with a full understanding of its force and effect. *Derby v. Derby*, 21 N. J. Eq. 36.

Silence of Accused.—Silence when accused of crime is only a very weak admission of guilt, and should be received with caution. Its weight is to be determined by the jury. *Campbell v. State*, 55 Ala. 80; *Matthews v. State*, 55 Ala. 195, 28 Am. Rep. 698; *Williams v. State*, 42 Ark. 380; *State v. Pratt*, 20 Iowa 268; *State v. Johnson*, 10 La. Ann. 456; *State v. Mullins*, 101 Mo. 517.

In *Matthews v. State*, 55 Ala. 195, 28 Am. Rep. 698, the court said: "The admissions to be implied against the prisoner from his silence, and the character of his answers are of a species of evidence which ought always to be received and acted on with great caution. Its admissibility rests on the probability that a man will repel by denial an unjust, unfounded accusation—that such is the instinct of our nature; and therefore silence, or a response which is not a denial, is a tacit admission of the truth of the accusation. Much depends, of necessity, on the time, place, and manner in which the accusation is made, or the information of it conveyed, and the person from whom it proceeds, and on the peculiar temperament and characteristics of the person accused. One of perfect innocence may be abashed and humiliated to silence by the accusation of crime, while another, hard-

2. Necessity of Corroborating Evidence — Extra-judicial Confessions — English Rule. —

It has been asserted to be the rule in the English courts that a confession duly made and satisfactorily proved is sufficient alone to warrant a conviction without any corroborating circumstance *aliunde*.¹ But it has been gravely doubted² whether the cases referred to, to sustain the English doctrine, are sufficient for that purpose, it appearing upon an examination that in every case³ there were corroborating circumstances with but one exception,⁴ and in that even the statement of what the court decided is in terms so general that it is not necessarily inconsistent with there having been corroborating circumstances as to the commission of the offense, if not as to the criminal agency of the defendant.

ened by guilt, would answer with a vehement and seemingly indignant denial."

Failure to Make Second Denial a Circumstance for Jury. — Where the prisoner has denied an assault when charged with it, the fact that in another conversation, in the presence of different auditors and after the lapse of three-fourths of an hour, the charge was repeated by the plaintiff with some variations, did not make it, as a matter of law, necessary that the prisoner should repeat his denial upon the accusation being renewed, but it was proper to submit to the jury the question as to the weight to be given to such evidence. *Jewett v. Banning*, 21 N. Y. 27.

Acts of Accused. — The weight of evidence of acts of the accused is also to be determined by the jury.

California. — *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *People v. Montgomery*, 53 Cal. 576; *People v. Wong Ah Ngow*, 54 Cal. 151, 35 Am. Rep. 69; *People v. Forsythe*, 65 Cal. 101; *People v. Choy Ah Sing*, 84 Cal. 276; *People v. Clark*, 84 Cal. 573.

Georgia. — *Golden v. State*, 25 Ga. 527; *Revel v. State*, 26 Ga. 275.

Illinois. — *Fox v. People*, 95 Ill. 71.

Kentucky. — *Plummer v. Com.*, 1 Bush (Ky.) 76; *Kennedy v. Com.*, 14 Bush (Ky.) 340.

Missouri. — *State v. Phillips*, 24 Mo. 475; *State v. Mallon*, 75 Mo. 355; *State v. Barham*, 82 Mo. 67.

Nebraska. — *Mathews v. State*, 19 Neb. 330.

Texas. — *Mathews v. State*, 9 Tex. App. 138; *Arnold v. State*, 9 Tex. App. 435; *Williams v. State*, 43 Tex. 182, 23 Am. Rep. 590.

Compare Coleman v. State, 87 Ala. 14; *Robinius v. State*, 63 Ind. 235.

The Jury May Give Unequal Credit to Different Parts of Confession. — While a confession must be received in its entirety, the jury is not bound to give equal credit to every part thereof. They may accept one part, and reject such portion as is disproved by the other evidence in the case, or by its own innate improbability or inconsistency.

England. — *Rex v. Jones*, 2 C. & P. 629, 12 E. C. L. 292; *Rex v. Higgins*, 3 C. & P. 603, 14 E. C. L. 476; *Rex v. Steptoe*, 4 C. & P. 397, 19 E. C. L. 440.

United States. — *U. S. v. Long*, 30 Fed. Rep. 678.

Alabama. — *Brister v. State*, 26 Ala. 117; *Eiland v. State*, 52 Ala. 327.

Delaware. — *State v. Miller*, 9 Houst. (Del.) 564; *State v. West*, 1 Houst. Cr. Cas. (Del.) 371.

Georgia. — *Licett v. State*, 23 Ga. 57; *Hudg-*

ins v. State, 26 Ga. 350; *Banks v. State*, 42 Ga. 544; *Marable v. State*, 89 Ga. 425.

Illinois. — *Jackson v. People*, 18 Ill. 271.

Mississippi. — *Coon v. State*, 13 Smed. & M. (Miss.) 246; *McCann v. State*, 13 Smed. & M. (Miss.) 471.

Missouri. — *Bower v. State*, 5 Mo. 364, 32 Am. Dec. 325; *Green v. State*, 13 Mo. 382; *State v. Peak*, 85 Mo. 190.

Nebraska. — *Walrath v. State*, 8 Neb. 80; *Furst v. State*, 31 Neb. 403.

New York. — *People v. Ruloff*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 401.

Ohio. — *Blackburn v. State*, 23 Ohio St. 146; *Morehead v. State*, 34 Ohio St. 212.

Tennessee. — *Young v. State*, 2 Yerg. (Tenn.) 292; *Crawford v. State*, 4 Coldw. (Tenn.) 190.

Texas. — *Brown v. State*, 2 Tex. App. 139; *Riley v. State*, 4 Tex. App. 538; *McHenry v. State*, 40 Tex. 46; *Carr v. State*, 24 Tex. App. 562, 5 Am. St. Rep. 905.

Vermont. — *State v. McDonnell*, 32 Vt. 491.

Wisconsin. — *Griswold v. State*, 24 Wis. 144.

See also *Conner v. State*, 34 Tex. 659. *Compare U. S. v. Barlow*, 1 Cranch (C. C.) 94.

In *State v. Smith*, 9 Houst. (Del.) 597, the court said: "With respect to verbal confessions of the accused, it is proper here to say that they are to be received with due caution. The degree of credit due to them is to be estimated by the jury, under the circumstances of each case. The whole of what the prisoner said on the subject, at the time of making the confession, should be taken together. The jury may believe that part which criminate the accused and reject that part which is in his favor, or *vice versa*, if they see sufficient grounds for doing so; for the jury are at liberty to judge of a confession like other evidence — that is, in connection with all the circumstances of the case."

But in *Jones v. State*, 29 Tex. App. 20, 25 Am. St. Rep. 715, it was held that where the evidence consists almost altogether of confessions of the accused which contain statements in his favor, not shown to be false, it is error to refuse to instruct that the prosecution is bound by such statements unless they are shown by the evidence to be untrue.

1. **English View as to Necessity of Corroborating Evidence.** — 3 Russ. on Crimes (9th ed.) 366.

For the same interpretation of the English rule see also *U. S. v. Williams*, 1 Cliff. (U. S.) 25; *Stephen v. State*, 11 Ga. 225.

2. 1 Greenl. on Evidence, § 217; *State v. Laliyer*, 4 Minn. 368.

3. *Rex v. Eldridge*, R. & R. C. C. 440; *Rex v. Falkner*, R. & R. C. C. 481.

4. *Wheeling's Case*, 1 Leach C. C. 310, note a.

Rule in United States. — But in this country the rule is well established that a conviction cannot be had on the extra-judicial confession of the defendant, unless corroborated by proof *aliunde* of the *corpus delicti*.¹

Full, Direct, and Positive Evidence, however, of the *corpus delicti* is not indispensable; ² a confession will be sufficient if there be such extrinsic corroborative

1. Doctrine in United States as to Necessity of Corroborating Evidence — *United States*. — U. S. v. Boese, 46 Fed. Rep. 917; U. S. v. Mayfield, 59 Fed. Rep. 119, *citing* 3 AM. AND ENG. ENCYC. OF LAW 477.

Alabama. — *Matthews v. State*, 55 Ala. 187, 28 Am. Rep. 698; *Johnson v. State*, 59 Ala. 37; *Young v. State*, 68 Ala. 569; *Winslow v. State*, 76 Ala. 42; *Harden v. State*, 109 Ala. 50; *Ryan v. State*, 100 Ala. 94.

California. — *People v. Jones*, 31 Cal. 565; *People v. Ah How*, 34 Cal. 218; *People v. Thrall*, 50 Cal. 415.

Colorado. — *Roberts v. People*, 11 Colo. 213.

Georgia. — *Allen v. State*, 91 Ga. 189.

Illinois. — *Bergen v. People*, 17 Ill. 426, 65 Am. Dec. 672; *May v. People*, 92 Ill. 343; *South v. People*, 98 Ill. 261; *Williams v. People*, 101 Ill. 382.

Iowa. — *State v. Carroll*, 85 Iowa 1.

Kentucky. — *Mullins v. Com.*, (Ky. 1893) 20 S. W. Rep. 1035.

Michigan. — *People v. Lane*, 49 Mich. 340.

Mississippi. — *Stringfellow v. State*, 26 Miss. 157, 59 Am. Dec. 247; *Brown v. State*, 32 Miss. 433; *Jenkins v. State*, 41 Miss. 582; *Pitts v. State*, 43 Miss. 472.

Missouri. — *State v. Scott*, 39 Mo. 424; *Robinson v. State*, 12 Mo. 592; *State v. German*, 54 Mo. 526, 14 Am. Rep. 481; *State v. Patterson*, 73 Mo. 695; *State v. Brooks*, 92 Mo. 542.

Montana. — *Territory v. McClintock*, 1 Mont. 394; *Territory v. Farrell*, 6 Mont. 12; U. S. v. Weikel, 8 Mont. 124.

Nebraska. — *Priest v. State*, 10 Neb. 393; *Smith v. State*, 17 Neb. 358.

New Jersey. — *State v. Aaron*, 4 N. J. L. 263, 7 Am. Dec. 592.

New York. — *People v. Ruloff*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 401, 18 N. Y. 179; *People v. Hennessey*, 15 Wend. (N. Y.) 148; *People v. Badgley*, 16 Wend. (N. Y.) 53; *People v. Burton*, 77 Hun (N. Y.) 498; *Lyon v. Lyon*, 62 Barb. (N. Y.) 138.

North Carolina. — *State v. Long*, 1 Hayw. (N. Car.) 455.

Ohio. — *Blackburn v. State*, 23 Ohio St. 146.

Pennsylvania. — *Com. v. Hanlon*, 3 Brews. (Pa.) 461.

Tennessee. — *Tyner v. State*, 5 Humph. (Tenn.) 383.

Texas. — *Hill v. State*, 11 Tex. App. 132; *Willard v. State*, 27 Tex. App. 386, 11 Am. St. Rep. 197; *Harris v. State*, 28 Tex. App. 308, 19 Am. St. Rep. 837; *Jackson v. State*, 29 Tex. App. 458, *citing* 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 447, and 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 309.

Vermont. — *State v. Jenkins*, 2 Tyler (Vt.) 377.

Virginia. — *Wolf v. Com.*, 30 Gratt. (Va.) 833; *Early v. Com.*, 86 Va. 921.

See also *People v. Hess*, 85 Mich. 128; *Ettlinger v. Com.*, 98 Pa. St. 338. *Compare* *Rice v. State*, 47 Ala. 40.

Entire Absence of Proof of Commission of Crime.

— Where there is an entire absence of proof of the commission of the offense charged, no conviction can be had. *People v. Thrall*, 50 Cal. 415; *People v. Jones*, 31 Cal. 565; *Bergen v. People*, 17 Ill. 426, 65 Am. Dec. 672; *People v. Porter*, 2 Park. Cr. Rep. (Washington Oyer & T. Ct.) 14; U. S. v. Mulvaney, 4 Park. Cr. Rep. (U. S. Cir. Ct.) 164.

Thus on an indictment for murder it has been held that the extra-judicial confession of a prisoner, without proof *aliunde* of the commission of the offense and of the death of the party, is insufficient to warrant a conviction. *Stringfellow v. State*, 26 Miss. 157, 59 Am. Dec. 247.

Conviction of Felony. — It is undisputed that an extra-judicial confession, not corroborated by independent evidence of the *corpus delicti*, will not support a conviction for felony. *Johnson v. State*, 59 Ala. 37; *Matthews v. State*, 55 Ala. 187, 28 Am. Rep. 698; *People v. Lane*, 49 Mich. 340; *State v. Aaron*, 4 N. J. L. 263, 7 Am. Dec. 592.

Misdemeanors. — But in *Vermont* it has been held that a confession alone will warrant a conviction of a misdemeanor, such as selling liquor contrary to the statute. *State v. Gilbert*, 36 Vt. 145.

Existence of Proof Aliunde of Commission of Offense and of Prisoner's Agency. — In the following cases there was proof independent of the confession, establishing the fact that the offense had been committed and tending to show the prisoner's criminal agency, and it was held that an extra-judicial confession of the prisoner in addition to this evidence would warrant a conviction. *Young v. State*, 68 Ala. 570; *Mose v. State*, 36 Ala. 211; *Com. v. Tolliver*, 119 Mass. 312; *Weinecke v. State*, 34 Neb. 14; *Dunn v. State*, 34 Tex. Crim. Rep. 257.

Under Statute. — In many of the states there are statutory enactments providing that the extra-judicial confessions of a defendant will not warrant a conviction unless accompanied with other proof that the offense was committed. *Smith v. State*, 64 Ga. 605; *Johnson v. State*, 86 Ga. 90; *State v. Dubois*, 54 Iowa 363; *Patterson v. Com.*, (Ky. 1887) 5 S. W. Rep. 387; *Wigginton v. Com.*, 92 Ky. 287; *State v. Grear*, 29 Minn. 221.

2. Full, Direct, and Positive Evidence of Corpus Delicti Not Essential. — *Winslow v. State*, 76 Ala. 42; *Ryan v. State*, 100 Ala. 94; *State v. Keeler*, 28 Iowa 551; *People v. Badgley*, 16 Wend. (N. Y.) 53; *State v. Davidson*, 30 Vt. 377, 73 Am. Dec. 312.

In *People v. Badgley*, 16 Wend. (N. Y.) 53, Nelson, C. J., said: "Full proof of the body of the crime, the *corpus delicti*, independently of the confession, is not required by any of the cases; and in many of them slight corroborating facts were held sufficient."

In *State v. Hall*, 31 W. Va. 505, it was held error to give the following instruction: "that

circumstances as will, when taken in connection with the confession, establish the prisoner's guilt in the minds of the jury beyond a reasonable doubt.¹

the *corpus delicti* must be established, independent of any admission, beyond a reasonable doubt." The court said: "We know of no decisions anywhere that hold the admissions of the defendant are not competent evidence tending to prove the *corpus delicti*. Such admissions may not be sufficient proof of the *corpus delicti*, but they certainly are competent evidence tending to prove that the crime charged has been committed."

1. Proof of Corpus Delicti Beyond Reasonable Doubt Sufficient — *United States*. — U. S. v. Williams, 1 Cliff. (U. S.) 25.

Alabama. — *Harden v. State*, 109 Ala. 50.

Georgia. — *Crowder v. State*, 56 Ga. 44; *Williams v. State*, 57 Ga. 478.

Massachusetts. — *Com. v. Tarr*, 4 Allen (Mass.) 315.

Missouri. — *State v. Patterson*, 73 Mo. 712.

New York. — *People v. Badgley*, 16 Wend. (N. Y.) 53.

Pennsylvania. — *Gray v. Com.*, 101 Pa. St. 380, 47 Am. Rep. 733.

Texas. — *Jackson v. State*, 29 Tex. App. 463, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 309.

On the Trial of a Person for Larceny of a hog, the prosecutor testified that in November, 1892, about a year before the trial, he lost several shoats; that one was an unmarked black sow shoat, with a white list under the stomach; that it would weigh from fifty to seventy pounds, perhaps not more than fifty or sixty pounds, and that it had never been seen since; that the hogs ranged near one Thomas, who knew them better than the witness. Thomas testified that at the time Jackson lost his hog he ascertained that the defendant had killed a hog; that it was on Sunday, and about dark he went to defendant's house; found him with a freshly cleaned hog; that it was a sow shoat, unmarked, and would weigh about fifty pounds, and, judging from the hair left on the hog, it was black, with a white list on the back and foreshoulder; that the defendant said he got the shoat from one Eliza Richardson; that it got out of his pen, and he killed it; that the witness called the defendant's daughter up, who, when asked about the hog, said in the presence of the defendant that she knew nothing of the hog, and did not know the defendant had a hog in his pen. This was held sufficient evidence of the *corpus delicti* to warrant the admission of the defendant's confession. *Ryan v. State*, 100 Ala. 94.

Adultery may be proved by the direct confession of a man charged with it, corroborated by evidence of an opportunity to commit the crime, and his subsequent acts making it probable that he did commit it, and if such evidence has been introduced and is undisputed, no exception lies to a refusal to instruct the jury that mere confessions of the defendant are not sufficient to warrant a conviction. *Com. v. Tarr*, 4 Allen (Mass.) 315. See also *Com. v. McCann*, 97 Mass. 580.

Body of Person Murdered Not Found. — Also, it has been held, on a trial for murder, that an extra-judicial confession with extrinsic circum-

stantial evidence satisfying the minds of a jury beyond a reasonable doubt that the crime charged has been committed, will warrant a conviction, although the dead body may not have been discovered and seen so that its existence and identity can be testified to by an eye witness. *State v. Lamb*, 28 Mo. 218. See also *State v. Patterson*, 73 Mo. 712.

Corroborating Circumstances Defined. — The phrase clearly does not mean facts which, independent of the confession, will warrant a conviction, for then the verdict would stand not on the confession, but upon those independent circumstances. To corroborate is to strengthen, to confirm by additional security, to add strength. The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or to comport with some facts otherwise known or established. Corroborating circumstances then, used in reference to a confession, are such as serve to strengthen it, to render it more probable, such, in short, as may serve to impress a jury with a belief of its truth. *State v. Guild*, 10 N. J. L. 180, 18 Am. Dec. 404.

New York Code. — Under § 395 of the Code of Criminal Procedure of New York requiring, where a confession is introduced in evidence, "additional proof that the crime charged has been committed, in order to warrant a conviction," it has been held that where, in addition to the confession of the defendant, there was proof of circumstances which, although they might have an innocent construction, were nevertheless calculated to suggest the commission of the crime charged and for the explanation of which the confession furnished a good key, will be sufficient additional proof. *People v. Jaehne*, 103 N. Y. 182. See also *People v. Fanning*, 131 N. Y. 659, 43 N. Y. St. Rep. 771.

Under the Georgia Code, providing that a confession alone, uncorroborated by other evidence, will not justify a conviction, it has been held that, upon an indictment for murder, the court did not err in charging to the effect that if the body of the deceased showed wounds like those which would be produced by the instrument the defendant confessed he had used upon him, then this would be a sufficient corroboration of the confession to justify a conviction. *Williams v. State*, 57 Ga. 478. See also *Anderson v. State*, 72 Ga. 98.

Also, it has been held under the same statute that when the assistance furnished prisoners to escape from jail consisted of two augers, to one of which the defendant had peculiar access, and when the defendant frequently visited the jail to see her husband, who was one of the prisoners, and in whose cell the augers were used, and made repeated confessions to various persons of her guilt and her connection with the augers, and where she got them, such repeated confessions, in connection with her peculiar access to one of the augers and to the jail to visit her husband, would authorize her conviction; and that the court would not control the discretion of the court below in refusing to grant a new trial. *Crowder v. State*, 56 Ga. 44.

When Fact of Commission of Offense Established. — Moreover, it is generally held that if the fact of the commission of the offense be established, the prisoner may be convicted on his own confession without further corroborative evidence of his criminal agency.¹

1. Confession Sufficient to Establish Criminal Agency. — *U. S. v. Williams*, 1 Cliff. (U. S.) 26; *U. S. v. Jones*, 10 Fed. Rep. 469; *Melton v. State*, 43 Ark. 370; *Andrews v. People*, 117 Ill. 195; *Gore v. People*, 162 Ill. 265; *State v. Knowles*, 48 Iowa 598; *Sam v. State*, 33 Miss. 347; *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404; *Williams v. State*, 12 Lea (Tenn.) 211; *Attaway v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 112. See also *State v. Lamb*, 28 Mo. 230.

The confession of a defendant, accompanied by proof that the offense was actually committed by some one, will warrant a conviction. *Melton v. State*, 43 Ark. 370; *Gore v. People*, 162 Ill. 265.

Thus, where the fact of the commission of a larceny is shown by other and direct evidence, the defendant may be convicted of the same by proof of his confessions deliberately made. *Andrews v. People*, 117 Ill. 195.

In *Attaway v. State*, (Tex. Crim. App. 1896) 34 S. W. Rep. 112, it was held that, a burglary having been proved, the confession of the party accused is sufficient to connect him with that crime. In this case the court said: "It is contended that the evidence is not sufficient to support the conviction, in this, that the state did not by any evidence corroborate the defendant's confession, by proving *aliunde* the *corpus delicti*. We think it is well settled that, to convict on the confession of a defendant, the *corpus delicti* must be shown *aliunde*. It cannot be done by the confession. In this case the proof of the *corpus delicti* is sufficiently made, independent of any confession. It is shown that the house was closed and all of the openings fastened securely when the proprietor left it on Saturday night some time after dark. On the following morning the watch and watch-chains and other property were found to have been taken from the house. This is sufficient evidence of the fact that a burglary had been committed during the night by somebody. In this state of the case the confession of the appellant was sufficient evidence to connect him with that burglary. It is well settled, the *corpus delicti* being proven, that the confession of the party accused of the crime is sufficient to connect him with that crime."

But in *Harris v. State*, 28 Tex. App. 308, 19 Am. St. Rep. 837, a different definition of the *corpus delicti* was given, namely, that it consists not merely of an objective crime, but of the defendant's agency of the crime, and it was held that unless the *corpus delicti* in both these respects is proved, a confession is not by itself enough to sustain a conviction. See also *Hill v. State*, 11 Tex. App. 132. See the title *CORPUS DELICTI*.

Confession Must Be Clear and Specific. — In *Smith v. Com.*, 21 Gratt. (Va.) 809, it was held that, until there is clear proof of the death of the person for whose murder the prisoner has been indicted and tried, the confessions of the prisoner as to his having committed the act

must be clear and explicit to authorize conviction.

Under Statute — Kentucky. — It appears to have been the ruling in *Cunningham v. Com.*, 9 Bush (Ky.) 149, that under § 238, Criminal Code of Practice of Kentucky, providing that a confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that such an offense was committed, the jury should have been instructed that they have no right to convict unless such confession is corroborated by other evidence tending to connect the defendant with the commission of the offense, and that the corroboration is not sufficient if it merely shows the offense was committed and the circumstances thereof. The court in this case said: "The manifest meaning of this provision is that, besides the proof of any confession a defendant may have made of his guilt, unless made in open court, there must, to warrant a conviction, be other evidence conducing to prove him guilty of the offense alleged to have been committed by him; or, in other words, to show that such an offense had been committed, and not inconsistent with his guilt, and not merely some 'other testimony' than that adduced to prove the confession, which might have no tendency whatever to establish the charge."

But in the subsequent case of *Wigginton v. Com.*, 92 Ky. 289, the holding in *Cunningham v. Com.*, 9 Bush (Ky.) 149, was criticised, and it was held that the following instruction, that a confession of either of the defendants will not warrant a conviction against the defendant making the confession unless accompanied with other proof that such an offense was committed, was sufficient under the statute without indicating any other or further condition necessary to a conviction, since the instructions given were fully and exactly what the section of the code in question required.

To the same effect, see *Patterson v. Com.*, (Ky. 1887) 5 S. W. Rep. 387. See also *Osborn v. Com.*, (Ky. 1892) 20 S. W. Rep. 223. Compare *Mullins v. Com.*, (Ky. 1893) 20 S. W. Rep. 1035.

Minnesota. — Under § 103, c. 73, General Statutes 1878 of Minnesota, declaring that a confession of a defendant is not sufficient to warrant his conviction without evidence that the offense charged has been committed, does not mean that the confession is not sufficient without evidence that the defendant on trial has committed the offense. Evidence that the offense charged has been committed by some person is all that is required. *State v. Gear*, 29 Minn. 221. See also *State v. Laliyer*, 4 Minn. 368.

Under the Georgia Code, providing that a confession alone uncorroborated by other evidence will not justify a conviction, it has been held that when on a trial for murder the confessions of the prisoner were in evidence before the jury, and the judge in his charge told the jury

Where There Is No Corroborative Evidence of Criminal Agency. — And there is authority to the effect that a confession may be sufficient to warrant a conviction without corroborative evidence of any criminal agency whatever. Thus in a case of arson it has been held that if the burning of the house is shown by other evidence, the confession of the accused will be sufficient to establish the fact that the burning was felonious and that he was the criminal agent.¹ Also it has been intimated that where upon a trial for murder the fact of death is fully proved by other evidence, the free and voluntary confession of the prisoner if deliberately made may be sufficient to establish the other element of the *corpus delicti*, provided it satisfactorily appears that other evidence does not exist.² But the soundness of this view has been denied by other well-considered authorities.³

Judicial Confessions, uncorroborated by any other proof of the *corpus delicti*, are

that whilst they could not convict upon the confessions alone, uncorroborated by other evidence, yet that if it was proven that the person to whom the confession referred was unlawfully killed, this was evidence of corroboration sufficient to authorize the jury under the laws to convict on the confession. It was held that this was not error. *Holsenbake v. State*, 45 Ga. 43; *Daniel v. State*, 63 Ga. 339.

1. View That Confession is Sufficient Without Proof of Any Criminal Agency. — *Sam v. State*, 33 Miss. 347. In this case the court said: "The rule with regard to proof of the *corpus delicti*, apart from the mere confessions of the accused, proceeds upon the reason that the general fact without which there could be no guilt, either in the accused or in any one else, must be established before any one could be convicted of the perpetration of the alleged criminal act which caused it; as in cases of homicide, the death must be shown; in larceny, it must be proved that the goods were lost by the owner; and in arson, that the house had been burned; for otherwise the accused might be convicted of murder when the person alleged to be murdered was alive; or of larceny, when the owner had not lost the goods; or of arson, when the house was not burned. But when the general fact is proved the foundation is laid, and it is competent to show by any legal and sufficient evidence how and by whom the act was committed, and that it was done criminally."

2. Clifford, J., in U. S. v. Williams, 1 Cliff. (U. S.) 26.

3. View Requiring Proof of Criminal Agency On Part of Some One. — In *People v. Simonsen*, 107 Cal. 345, it was held that a conviction cannot be had for obtaining property under false pretenses on the extra-judicial confession of the defendant alone as to the falsity of the statements, such falsity being part of the *corpus delicti* which must be proved otherwise. In this case the court said: "At the trial the only evidence offered by the prosecution to prove that defendant did not own any land as represented were the extra-judicial statements and admissions of the defendant himself to that effect, and we hold them insufficient to prove the fact. It is elementary that the *corpus delicti* must be established before extra-judicial statements and admissions of a defendant are admissible in evidence and can be considered as tending to establish the fact to

which they relate. The falsity of the representations made by defendant as to his ownership of the land is a material and essential element and portion of the *corpus delicti*, and a defendant's admissions alone can never be relied upon to establish as sufficient any fact which is a necessary ingredient to form the body of the crime. The term *corpus delicti* means exactly what it says. It involves the element of crime. Upon a charge of homicide, producing the dead body does not establish the *corpus delicti*. It would simply establish the *corpus*. And proof of the dead body alone, joined with a confession by the defendant of his guilt, would not be sufficient to convict, for there must be some evidence tending to show the commission of a homicide before a defendant's confession would be admissible for any purpose. Upon a charge of arson mere proof that a building was destroyed by fire does not establish the *corpus delicti*; and the defendant's confession of his guilt, made extra-judicially, in connection with such proof is not sufficient to sustain a judgment of conviction, for there is no evidence of the commission of a crime other than the defendant's statements, and the law, in the exercise of a jealous care over its subjects, demands something more. To be sure, the appearance of the dead body, the nature of the wounds, the evidences of a struggle, and the physical circumstances surrounding the affair may furnish evidence of the *corpus delicti*; they may indicate that a crime has been committed; but there must be proof of the fact from some source other than the defendant's admissions. A building may be burned under such suspicious circumstances as to indicate the act of an incendiary, and thus a *corpus delicti* established, and the doors opened for the defendant's admissions and confessions; but there must be some evidence of some kind tending to show the incendiary character of the fire, aside from these admissions and confessions."

To the same effect, see decisions under Georgia Code. *Murray v. State*, 43 Ga. 256; *Stallings v. State*, 47 Ga. 572; *Westbrook v. State*, 91 Ga. 11.

Also, it has been held under a statute in *Minnesota* that on a trial for murder not only the fact of death, but that the death was caused by the criminal agency of another, must be established by evidence other than the confession of the accused. *State v. Laliyer*, 4 Minn. 368.

sufficient to found a conviction even if it be followed by a sentence of death, since they "are deliberately made under the deepest solemnities, with the advice of counsel and the protecting caution and oversight of the judge."¹

Confession before Coroner.— But it has been held that a confession before a coroner is not a judicial confession dispensing with other proof of the *corpus delicti*, but must be sustained by corroborative evidence which, however, need not be such as would be necessary for a conviction of the prisoner independent of the confession.²

3. Evidence in Rebuttal.— Confessions are open to rebuttal by the prisoner in like manner as any other evidence.³

Confessions False in Fact.— Thus it is competent for the prisoner to show by other evidence that the facts could not have occurred as alleged in the confession, or did not.⁴

Written Confession Contradicted by Parol.— Moreover where a confession of a prisoner was reduced to writing, though not in his precise words, in his presence, and signed by him and by witnesses, it was held to be erroneous to exclude parol testimony offered by the prisoner to show that his words had been misunderstood and that he had not said what had been stated in the writing.⁵

Confessions Involving a Question of Law.— It has been said that a confession involving a legal question is specially unreliable; for the confessing party may have mistaken the law.⁶

Self-serving Statements in Rebuttal.— A confession is not rendered inoperative by a subsequent retraction of it or a denial of the charge on a previous occasion, where the denial and confession do not form part of the same conversation, under the general rule that a person's declarations shall be evidence against himself but not in his own favor.⁷

1. Judicial Confessions Uncorroborated Sufficient.— 1 Greenl. Ev., § 216; *Dantz v. State*, 87 Ind. 398; *Roberts v. Com.*, (Ky. 1888) 7 S. W. Rep. 401; *State v. Lamb*, 28 Mo. 218; *State v. Brooks*, 99 Mo. 137; *State v. German*, 54 Mo. 528, 14 Am. Rep. 481; *State v. Cowan*, 7 Ired. L. (N. Car.) 239. See also *People v. Hennessey*, 15 Wend. (N. Y.) 148; *Buckingham v. State*, 32 Ark. 218.

Thus, in *Dantz v. State*, 87 Ind. 398, it was held that a confession of guilt in open court, in the presence of the jury, is evidence enough to sustain a conviction.

Confessions of Witness.— In *Anderson v. State*, 26 Ind. 89, it was held that the deliberate admissions of a person, made under oath while giving testimony as a witness in a cause, are sufficient without corroborative evidence to support a conviction for felony. The court in this case said: "It would be difficult to conceive of evidence of guilt ordinarily more satisfactory to a sensible mind than the party's own statements, solemnly and freely made under oath, upon the trial of another cause, when not himself accused, and when no motive or inducement is perceptible to beguile a departure from the truth, and when falsehood would be wilful and corrupt perjury."

Agreed Statement of Facts.— In *Maine* it has been held that under the constitutional provision that no person can be punished for crime except upon the verdict of a jury, or upon the plea of guilty or of *nolo contendere*, sentence could not be passed upon a prisoner under a mere statement of facts agreed upon by counsel. *State v. Cross*, 34 Me. 594. But see, on this point, *Marmont v. State*, 48 Ind. 21;

Simco v. State, 9 Tex. App. 338; *Cross v. State*, 11 Tex. App. 84. See also *Gindrat v. State*, 3 Tex. App. 573.

2. Sufficiency of Confessions before Coroner.— *State v. Leuth*, 5 Ohio Cir. Ct. Rep. 94.

3. Evidence in Rebuttal.— The defendant's confession will not prevail over the testimony of two witnesses to the contrary. *Com. v. Pettit*, 8 Phila. (Pa.) 608.

4. Confessions False in Fact.— *Com. v. Howe*, 9 Gray (Mass.) 110; *Com. v. Howe*, 2 Allen (Mass.) 153.

In an indictment for larceny, if a confession by the defendant is introduced tending to prove that soon after the larceny was committed he was in possession of a part of the stolen property, and gave the same to his mother, it is competent for him to prove in defense that his mother never had the property in question from him. *Com. v. Howe*, 2 Allen (Mass.) 153.

5. Written Confession Contradicted by Proof.— *State v. Brown*, 1 Mo. App. 86.

6. Confessions Involving a Question of Law.— 1 Bishop's N. Crim. Proc., § 1286; *Rex v. Philp*, 1 Moo. C. C. 264.

7. Self-serving Statement in Rebuttal.— *Ray v. State*, 50 Ala. 104; *Woolfolk v. State*, 85 Ga. 101; *Beauchamp v. Tennel*, 1 Bibb (Ky.) 441; *Com. v. Myers*, 160 Mass. 530; *State v. Wright*, Phil. L. (N. Car.) 486; *Jones v. State*, 13 Tex. 177, 62 Am. Dec. 550.

Introduction of Subsequent Confession in Prisoner's Behalf.— On the same principle, it has been held that where a slave confessed to a stranger, in the absence of the master, that he had killed the deceased, and in two or three minutes thereafter the master arrived, and the

CONFIDENCE. — The word "confidence" is a word peculiarly appropriate to create a trust. It is, as applicable to the subject of a trust, as nearly a synonym as the English language allows. Trust is a confidence which one man reposes in another, and confidence is a trust.¹

CONFIDENCE GAME. (See also the titles FALSE PRETENSES; GAMING.) — "Confidence" is any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler.²

CONFIDENTIAL COMMUNICATIONS. — See the title PRIVILEGED COMMUNICATIONS.

CONFINE — CONFINEMENT. (See also the title PRISONS.) — Confinement, within the meaning of an act prohibiting confinement of the master of a ship, may be by a moral or physical restraint; by threats of violence with a present force, which restrains the master from his freedom of movement or command in his ship; or by physical restraint of his person.³ But assault and battery does not amount to a confinement.⁴

As to whether the term when used in relation to prisoners means actual confinement, and what constitutes actual confinement, see note 5.

slave confessed the killing to him, stating the reasons for his doing the act, the introduction in evidence against the slave of the first confession did not authorize him to introduce in evidence on his own behalf the second. *Alfred v. State*, 37 Miss. 296. Compare *Keithler v. State*, 10 Smed. & M. (Miss.) 192; *Greene v. State*, 17 Tex. App. 395; *Harrison v. State*, 20 Tex. App. 388, 54 Am. Rep. 529.

Declaration of Third Person in Rebuttal. — When the defendant being accused makes a confession of his guilt implicating another person, and the other person, upon the confession being communicated to him, denies his complicity, the declarations of the latter are hearsay only, and are not admissible upon the trial of the person making the confession. The confession cannot be impeached or discredited by unsworn testimony, and it was therefore error to admit the declarations of the alleged accomplice. *Brooks v. State*, 96 Ga. 354.

1. WILLS. (See also the title WILLS.) — *Coates's Appeal*, 2 Pa. St. 133. In that case it was held that a bequest to a wife in full confidence that she will leave the surplus to be divided among the testator's children, gives the widow a life estate only.

Where a testator gave his property to his wife "for her sole use and benefit, in the full confidence that she will so bestow it on her decease to my children, in a just and equitable spirit," it was held that the wife took a life interest with a power of disposition among the children. *Le Marchant v. Le Marchant*, L. R. 18 Eq. 416; *distinguishing Webb v. Wools*, 2 Sim. N. S. 267. In the latter case the words were: "Upon the fullest trust and confidence reposed in her that she shall dispose of the same to and for the joint benefit of herself and my children." To the same effect as *Le Marchant v. Le Marchant*, L. R. 18 Eq. 416, see *Palmer v. Simmonds*, 2 Drew. 221; *Curnick v. Tucker*, L. R. 17 Eq. 320.

2. Maxwell v. People, 158 Ill. 248.

Confidence Game, in a statutory prohibition, is the obtaining or attempting to obtain from any person money or property by means of the use of any false or bogus check, or by any other means, instrument, or device. *Morton v. People*, 47 Ill. 474.

In *State v. Terry*, 109 Mo. 621, it is said: "Where an indictment charges that certain property, describing it, or that a certain sum of money, stating the amount, was obtained, etc., by means of the confidence game, and that term by long and common usage is well understood as meaning a particular kind of game played in a particular kind of way, this would possibly be sufficient where the facts in evidence would warrant the use of such a term, and this was so decided in *Morton v. People*, 47 Ill. 468."

3. Master of Vessel. (See also the titles MASTERS OF VESSELS; SEAMEN.) — *U. S. v. Thompson*, 1 Sumn. (U. S.) 171.

And it matters not whether such seizure or restraint is principally or wholly for the purpose of inflicting personal chastisement upon the master, and not to deprive him of his authority or command on board the ship. *Story, J.*, said: "The law looks to the act, and not merely to the intent. If the seizure is unlawful, it is a confinement." *U. S. v. Savage*, 5 Mason (U. S.) 461. See also *U. S. v. Sharp*, 1 Pet. (C. C.) 118.

4. U. S. v. Lawrence, 1 Cranch (C. C.) 94.

5. Actual Confinement, in a statute relating to insolvent debtors, means either an actual imprisonment or "being upon the limits," the limits being simply by a fiction of law an extension of the prison walls. *In re Moschberger*, 10 N. J. L. J. 121, *citing Smick v. Opdycke*, 12 N. J. L. 347.

In *Hutchins v. Tyler*, 53 Vt. 572, *confinement* was held to mean actual confinement in jail.

Persons Out on Bail. — A person indicted for a felony and enlarged on bail was held not to be in confinement within the meaning of an Alabama statute which authorized a circuit judge to order an inquiry into the sanity of persons in confinement under criminal charges. The court said: "The jurisdiction extends only to those who may be in confinement. If they are not in confinement, he is as devoid of jurisdiction as he would have been if the statute had never been enacted. The words 'in confinement' are used to import those who are imprisoned in the county jail awaiting a final trial, or in the actual custody of the officers of the law, as distinguished from those not having

CONFIRMATION. (See the titles JUDICIAL SALES; TAX SALES; and see RATIFICATION, and cross-references there given. As to the confirmation of proceedings of fiduciaries, see such titles as EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; TRUSTS AND TRUSTEES, etc.)—A “confirmation” is the conveyance of an estate, or right, that one hath in or unto lands or tenements, to another that hath the possession thereof, or some estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased and enlarged.¹

“‘Recognition,’ ‘confirmation,’ ‘adoption,’ and ‘ratification’ are used indifferently in the books as having substantially the same legal import.”²

Confirmation is the judicial sanction of a court, *e. g.*, of a sale.³

been arrested, or, having been arrested, have been discharged from arrest on bail.” *Ex p. Price*, 53 Ala. 548.

Confined—Actual Imprisonment.—But in Kishbaugh’s Petition, 135 Pa. St. 472, where a statute provided that in certain cases a court should have power to discharge persons *confined* by order of the court, it was held that actual *confinement* was not necessary. The court said: “It was urged, however, that the use of the words ‘*confined* by sentence’ implies imprisonment. There may be some force in this, if we consider these words literally. Yet, in contemplation of law, a man is *confined* the moment he is handed over to the sheriff under sentence. It might not be straining a point to hold that the doors of the prison must first close upon him before he can apply for his discharge under the insolvent laws. But *cui bono*? What practical good would result from the application of such a technical rule? Why hold that the prison bolts must first close behind him, if the sheriff is obliged the next moment to throw them back in obedience to the mandate of the insolvent laws? The effect would merely be to put the county to a needless expense, and subject to useless mortification a man who has violated no law, who may be an honest, law-abiding citizen, and guilty of no crime but poverty.”

Same—Arrest.—A *New Jersey* statute provided that “it should not be lawful to *confine* the person of any female for debt.” The plaintiff appeared before a justice and made oath that he would be in danger of losing his debt if process issued against the defendant, a woman, by summons. A warrant was accordingly issued and judgment given against her, overruling her plea that she was not liable to arrest by warrant. The case was appealed to the Common Pleas and the judgment sustained. On appeal to the Supreme Court it was held that an arrest was an imprisonment and came within the meaning of the Act, and therefore the issuing of a warrant against a woman was improper. *Blight v. Meeker*, 7 N. J. L. 97.

Herd Law. (See also the title FENCES.)—In *St. Louis, etc., R. Co. v. Mossman*, 30 Kan. 340, the court said: “The words *confined* in one Act, and ‘prohibited from running at large’ in the other Act, mean substantially the same thing.”

1. *Langdeau v. Hanes*, 21 Wall. (U. S.) 530; *De Mares v. Gilpin*, 15 Colo. 81, *quoting* *Shepard’s Touchstone*, in which it was further said that a legislative *confirmation* of a claim

to land is a recognition of the validity of such claim and operates as effectually as a grant or quit-claim from the government. See also the title PUBLIC LANDS.

A *confirmation* is a conveyance of an estate or right in lands to one who has the possession or some estate therein. *Morrow v. Whitney*, 95 U. S. 554.

Creating an Estate.—A statute was passed to *confirm* a grant or resolution of the common council authorizing the construction of a railroad in certain streets. In construing this statute, the court in *People v. Law*, 34 Barb. (N. Y.) 511, said: “In addition to this, I regard the Act in question as intended to confer, and as actually conferring, an original grant of power to construct this railroad. * * * If so, it comes within the very case put by another elementary writer: ‘*Confirmation* is the approbation or consent to an estate already created, which, as far as it is in the *confirming* power, makes it good and valid. So that the *confirmation* does not regularly create the estate, yet such words may be mingled in the *confirmation* as may create or enlarge an estate; but that is by the force of such words that are foreign to the business of *confirmation*, and by their own force and power tend to create the estate.’ *Gilbert’s Tenures*, 69.”

Confirmed Land. (See generally the title STATE LANDS.)—In *Hendry v. Willis*, 33 Ark. 833, it is said: “The selections have been, in fact, made by the agents of the state, sent to the secretary of the interior, through the commissioner of the General Land Office, approved and returned to the governor. * * * When these lists so approved have been transmitted to the governor, they have been treated in our legislative and official acts as *confirmed*, and so we must understand the word.” This was *quoted with approval* in *Chism v. Price*, 54 Ark. 260.

2. *Byrne v. Doughty*, 13 Ga. 46.

Ratification and Confirmation. See also RATIFICATION.)—In *Seiffert, etc., Lumber Co. v. Hartwell*, 94 Iowa 576, the court, by Robinson, J., said: “The appellants contend that *confirmation* applies to that by which what was before voidable is made valid, as where one makes valid a voidable contract of his own, which he might have repudiated, while ‘*ratification*’ applies to the act of another, in the nature of an act of agency. That such is the primary use of the words is true, but they are often used interchangeably as synonyms.”

3. *Langyher v. Patterson*, 77 Va. 473.

CONFIRMATION OF ASSESSMENTS.—See the titles TAXATION; SPECIAL ASSESSMENTS.

CONFISCATE. (See also CONDEMNATION. And see the titles CONSTITUTIONAL LAW; INTERNATIONAL LAW; WAR.)—The verb “confiscate” is derived from the Latin *con*, with, and *fiscus*, a basket or hamper in which the emperor’s treasure was formerly kept. The meaning of the word “confiscate” is to transfer property from private to public use, or to forfeit property to the prince or state.¹

CONFLICT.—See note 2.

CONFLICT OF LAWS. (See the title PRIVATE INTERNATIONAL LAW, where this subject will be thoroughly treated.)—“Conflict of laws” is the opposition between the municipal laws of different countries or states in the case of an individual who may have acquired rights or become subject to duties within the limits of more than one country or state.³

1. *Ware v. Hilton*, 3 Dall. (U. S.) 234. The Supreme Court gave this definition, upholding the power of the state of Virginia to *confiscate* the property of British subjects during the Revolutionary war.

In *Levi v. Allnutt*, 15 East 269, Ellenborough, C. J., said: “*Confiscation* must be an act done in some way on the part of the government of the country where it takes place, and in some way beneficial to that government; though the proceeds may not, strictly speaking, be brought into its treasury.”

Forfeiture and Confiscation. (See also the title FORFEITURE.)—In *Read v. Read*, 5 Call (Va.) 208, it is said by Roane, J.: “‘Forfeitures of lands and goods for offenses’ (and this right is founded on the offense of an alien in presuming to purchase lands contrary to law, 1 Bl. Com. 372, 2 Bl. Com. 274), says Sir William Blackstone, ‘are called by the civilians *bona confiscata*, because they belonged to the *fiscus*, or imperial treasury, or, as our common lawyers term them, *bona foris facta*’ (1 Bl. 299). Indeed, Lord Coke seems, in one passage, to consider *confiscation* and ‘forfeiture’ as synonymous terms (3 Inst. 227); and the author of the Commentaries appears also, in a few passages of his work, to have used the term *confiscation* as descriptive of a forfeiture into the treasury; but keeping in view the distinction, which this elegant and accurate writer has taken, between the terms as above stated, the one being a civil-law and the other a common-law term, and finding that he has expressly treated of the right now in question in a chapter headed, ‘Title by Forfeiture’ (2 Bl. Com. 267), I must conclude that the technical and appropriate term descriptive of this right is ‘forfeiture’ and not *confiscation*.”

Confiscation Distinguished from Condemnation. (See also CONDEMNATION.)—“*Confiscation* is the act of the sovereign against a rebellious subject. Condemnation as prize is the act of a belligerent against another belligerent. *Confiscation* may be effected by such means, either summary or arbitrary, as the sovereign, expressing its will through lawful channels, may please to adopt. Condemnation as prize can only be made in accordance with principles of law recognized in the common jurisprudence of the world. Both are proceedings *in rem*, but *confiscation* recognizes the title of the original owner to the property which is to be forfeited, while in prize the tenure of the property

seized is qualified, provisional, and destitute of absolute ownership. The Peterhoff, Blatchf. Pr. Cas. 620. To *confiscate* property seized upon land, resort must be had to the common-law side of the court. *Confiscation Cases*, 20 Wall. (U. S.) 110. Prize proceedings are always in admiralty.” *Winchester’s Case*, 14 Ct. of Cl. 48.

2. **Conflict.**—A statute prescribed that property to the value of two hundred dollars of a deceased debtor should be reserved to the use of his family against all creditors; after defining “family,” it also provided that nothing in the section should be permitted to *conflict* with the provisions of any last will. In construing this statute the court, by McGill, Ord., said: “I at first thought that perhaps, in interpreting the provision of the fifty-third section, the word *conflict*, taken in its sense of violent, active collision, should induce the holding that the will must expressly override the bounty of the fifty-second section; but, after having regard to the whole statute, I conceive the better opinion to be that such was not the legislative intent. I conclude that, if the will disposes of the whole estate, the bounty is lost; the word *conflict* meaning that the will shall be supreme where the complete execution of its provisions does not admit, expressly or impliedly, of the bestowal of the bounty. See *Mulford v. Mulford*, 42 N. J. Eq. 68, 73.” *Carey v. Monroe*, 54 N. J. Eq. 632. See also the title EXEMPTION LAWS.

3. Mr. Dicey has the following to say upon the various names applied to this department of the law: “By many American writers, and notably by Story, it has been designated as the *conflict of laws*. The apparent appropriateness of the name may be best seen from an example of the kind of case in which a *conflict* is supposed to arise. H. and W., Portuguese subjects, are first cousins. By the law of Portugal they are legally incapable of intermarriage. They come to England, and there marry each other in accordance with the formalities required by the English Marriage Acts. Our courts are called upon to pronounce upon the validity of the marriage. If the law of England be the test the marriage is valid; if the law of Portugal be the test the marriage is invalid. The question at issue, it may be said, is, whether the law of England or the law of Portugal is to prevail. Here we have a *conflict*, and the branch of law which con-

CONFORMITY. — See note 1.

CONFRONT. — “Confront” means to bring face to face.²

tains rules for determining it may be said to deal with the *conflict of laws*, and be for brevity's sake called by that title. The defect, however, of the name is that the supposed *conflict* is fictitious and never really takes place. If English tribunals decide the matter in hand, with reference to the law of Portugal, they take this course not because Portuguese law vanquishes English law, but because it is a principle of the law of England that, under certain circumstances, marriages between Portuguese subjects shall depend for their validity on conformity with the law of Portugal. Any such expression, moreover, as *conflict* or ‘collision’ of laws has the further radical defect of concealing from view the circumstance that the question by the law of what country a given transaction shall be governed, is often a matter too plain to admit of doubt. No judge probably ever doubted that the validity of a contract for the purchase and sale of goods between French subjects made at Paris, and performed, or intended to be performed, in France, depends upon the rules of French law. The term *conflict of laws* has been defended on the ground of its applicability, not to any collision between the laws themselves, but to a *conflict* in the mind of a judge on the question which of two systems of law should govern a given case. This suggestion gives, however, a forced and new sense to a received expression. It also amounts simply to a plea that the term *conflict of laws* may be used as an inaccurate equivalent for the far less objectionable phrase ‘choice of law.’ Modern authors, and notably Mr. Westlake, have named our subject Private International Law. This expression is handy and manageable. It brings into light the great and increasing harmony between the rules as to the application of foreign law which prevails in all civilized countries, such as England, France, and Italy. The tribunals of different countries, as already pointed out, follow similar principles in determining what is the law applicable to a given case, and aim at the same result, namely, the recognition in every civilized country of rights acquired under the law of any other country. Hence an action brought to enforce a right acquired under the law of one country (*e. g.* of France) will in general be decided in the same manner in whatever country it be maintained, whether, that is to say, it be brought in the courts of England or of Germany. On this fact is based the defense of the name Private International Law. The rules, it may further be said, which the words designate, affect the rights of individuals as against one another, and therefore belong to the sphere of ‘private,’ not of public law; and these rules, as they constitute a body of principles common to all civilized countries, may be rightly termed ‘international.’” Dicey on Conflict of Laws, p. 12.

So the term Private International Law is adopted by Prof. Westlake, and Prof. Woolsey says: “It is called Private because it is concerned with the private rights and relations of individuals. It differs from territorial or municipal law, in that it may allow the law of

another territory to be the rule of judgment in preference to the law of that territory in which the case is tried. It is International because, with a certain degree of harmony, Christian states have come to adopt the same principles in judicial decisions, where different municipal laws clash. It is called Law, just as public international law is called, not as imposed by a superior, but as a rule of action freely adopted by the sovereign power of a country, either in consideration of its being so adopted by other countries, or of its essential justice. And this adoption may have taken place through express law, giving direction to courts, or through power lodged in the courts themselves.” Woolsey’s International Law (ed. 1879), § 73.

1. **Jury and Jury Trial.** — A statute required a judge to certify that the list of names from which jurors were to be drawn had been duly selected in *conformity* with and according to the spirit and intent of the Act. It was held that a certificate by a judge “that the foregoing list of names to serve as jurors in *conformity* with acts of assembly in such case made and provided,” was a substantial compliance with the act. The court said: “Where a statute like this directs how the selection shall be made, a certificate stating it was made ‘in *conformity*’ therewith, upon every reasonable construction of language, means that it was made ‘according to the spirit and intent’ of the law. The two expressions are of equivalent import; the use of the latter phrase in the present certificate would impart to it no additional substance or force, and, as we have seen from the authorities cited, either may be used, or words of similar signification substituted for both.” *Friend v. Hamill*, 34 Md. 303. See also the title **JURY AND JURY TRIAL**.

2. **Confronting Witnesses.** (See also the titles **CONSTITUTIONAL LAW**; **JURY AND JURY TRIAL**; **WITNESSES**.) — *Confronting* witnesses means cross-examination in the presence of the accused; it does not mean impeaching their character. *Howser v. Com.*, 51 Pa. St. 332.

In *State v. Behrman*, 114 N. Car. 805, it is said: “The defendant was accused of an infamous crime, and in such cases it was said by Pearson, C. J., in *State v. Thomas*, 64 N. Car. 76, that the word *confront* was intended not simply to secure to the defendant ‘the privilege of examining witnesses in his behalf,’ but was ‘in affirmance of the rule of common law that in trials by jury the witness must be present before the jury and accused, so that he may be *confronted* — that is, put face to face.’”

Same — View. — It has been held in a criminal prosecution that the accused is deprived of his constitutional right of appearing and defending in person, and of being *confronted* with the witnesses against him, if the jury, under the direction of the court, view the *locus in quo* without the presence of the defendant. *People v. Lowrey*, 70 Cal. 193; *People v. Bush*, 68 Cal. 623; *State v. Bertin*, 24 La. Ann. 46. See also the titles **CONSTITUTIONAL LAW**; **JURY AND JURY TRIAL**; **VIEW**.

CONFUSION.—The term “confusion,” when applied to mental processes and conditions, is a synonym of “bewilderment” and “distraction.”¹

CONFUSION OF DEBTS. (See also the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, pp. 495, 504.)—Confusion of debts is the concurrence of two adverse rights; the same thing in one and the same person.²

1. Alabama G. S. R. Co. v. Hill, 93 Ala. 527.

2. Woods v. Ridley, 11 Humph. (Tenn.) 198, quoting Story on Prom. Notes, § 439.

A concurrence of characters of creditor and debtor of the same debt in the same person, whereby the two characters are mutually destroyed. Booth v. Kinsey, 8 Gratt. (Va.) 560.

Civil Law. (See also the title **MERGER**.)—In Palmer v. Burnside, 1 Woods (U. S.) 182, it is said: “The term *confusion* as used in the

civil law is synonymous with ‘merger’ as used in the common law. It arises where two titles to the same property unite in the same person. Article 2214 of the Louisiana Civil Code provides that ‘when the qualities of debtor and creditor are united in the same person there arises a confusion of right which extinguishes the two credits.’ So at the common law, A owes B; B makes A his heir; the debt of A is merged.”

CONFUSION OF GOODS.

- I. DEFINITION, 592.
- II. CONFUSION WITH CONSENT OF PARTIES, 592.
- III. CONFUSION RESULTING FROM ACCIDENT OR MISTAKE, 593.
- IV. CONFUSION WITH FRAUDULENT INTENT, 594.
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CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles: *ACCESSION*, vol. 1, p. 247; *BAILMENTS*, vol. 3, p. 732; *CARRIERS OF GOODS*, vol. 5, p. 226; *DAMAGES*; *EXECUTIONS*; *FIXTURES*; *FRAUDULENT SALES AND CONVEYANCES*; *GRAIN ELEVATORS*; *JOINT TENANTS AND TENANTS IN COMMON*; *LOGS AND LUMBER*; *MORTGAGES*; *RECEIVERS*; *TROVER AND CONVERSION*; *TRUSTS AND TRUSTEES*; *WAREHOUSEMEN*.

I. DEFINITION. — Confusion of goods is such an intermixture of the goods of two or more persons that the parts belonging to each in the resulting mixture or product cannot be separated or distinguished.¹

Confusion of goods may take place: (1) with the consent of all the owners; (2) by mistake or accident, or as a result of *vis major*; or (3) by the act of one or more owners without the consent of the others.

II. CONFUSION WITH CONSENT OF PARTIES. — It is frequently stated that where a confusion takes place by the consent of the owners they become tenants in common in the mixture;² but it is evident that, in such cases, the question of

1. 2 Kent's Com. 364.

Confusion of Goods takes place when the goods of two or more persons become mixed together so that they cannot be separated; as, if the cider of two different persons be poured into the same barrel: when the things put together are capable of separation, the mixture is called commixtion; as, if the flock of sheep belonging to A be mixed with that of B. 1 Bouv. Inst., § 506.

When there has been such an intermixture of goods owned by different persons that the property of each can no longer be distinguished, what is denominated a confusion of goods has taken place. *Per* Shepley, C. J., in *Hesseltine v. Stockwell*, 30 Me. 241, 50 Am. Dec. 627.

Confusion, as understood in English and American law, is the wilful and fraudulent intermixture of the chattels of one person with the chattels of another, without the consent of

the latter, in such a way that they cannot be separated and distinguished. *Dwight on Persons and Personal Property*, 486.

In the Civil Law the term "confusion" (*confusio*) was applied to the mingling of liquids or fluids belonging to two or more persons, while the mingling of solids was called "commixture" (*commixtio*). If a new species was created by the act it was called "specification" (*specificatio*). *Brown's Law Dict.*; *Dwight on Persons and Personal Property*, 486; *Mackeldey's Modern Civil Law* (Eng. ed. 1845) 285; *Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 438. See, as to the union of materials creating a new species, the title *ACCESSION*, vol. 1, p. 247.

2. **Consent of Parties.** — 2 Bl. Com. 405; 2 Kent's Com. 364; *Story on Bailments*, § 40; 3 Dane's Abr. 117; *Tufts v. McClintock*, 28 Me. 429, 48 Am. Dec. 501; *Bryant v. Ware*, 30 Me. 298; *Dunning v. Stearns*, 9 Barb. (N. Y.) 634;

property in the goods mixed depends upon the agreement of the parties,¹ and the rule may perhaps be stated that, in the absence of evidence to show a different intent, the law will presume an intention to become tenants in common in the mixture.²

Intermixture with Express or Implied Assent of Owner. — Where a person who has an interest in property, as, for instance, a mortgagee, or a vendor in a conditional sale, permits, either expressly or impliedly, another to mingle such property with his own, the rights of third parties as against the persons producing or permitting the intermixture are not affected.³

III. CONFUSION RESULTING FROM ACCIDENT OR MISTAKE. — Where confusion of goods results from accident, the property in the mixture does not pass from the several owners, but they become tenants in common in proportion to their respective interests.⁴

Mixture without Fraudulent Intent. — And the same rule applies where the mixture

Brown v. Bacon, 63 Tex. 598. See also *Jones v. Jackson*, 9 Cal. 245.

1. 2 Schouler on Personal Property, § 45.

2. **Contract Controlling Ownership in Mixture.**

— Where a debtor placed his creditor in possession of goods under an agreement that the latter should reconvey after selling a sufficient quantity to pay the debt, or should pay for the whole at a fixed valuation, evidence that the creditor commingled the goods with subsequent purchases in such a way as to make it impossible to identify them, and sold an undivided interest to an incoming partner, was held to establish an election on his part to take all the goods at the valuation fixed. *Williams v. Geiger*, 12 Wash. 42.

Where several farmers delivered milk to a cheese factory, each to be credited with the quantity of his milk, and to bear his share of the expense, and the company having sold the cheese each farmer received his share of the proceeds in proportion to the milk furnished by him, it was held that this arrangement did not constitute the farmers partners nor tenants in common of the cheese, but that it was a sale of milk to be paid for in a particular time and manner. *Butterfield v. Lathrop*, 71 Pa. St. 226.

Where the Grain of Different Persons Is Placed in a Warehouse in one common mass, the owners become, according to the weight of authority, tenants in common in the mass. *Cushing v. Breed*, 14 Allen (Mass.) 376, 92 Am. Dec. 777. See the titles GRAIN ELEVATORS; WAREHOUSEMEN.

3. *Hamilton v. Rogers*, 8 Md. 301, explained in *Kreuzer v. Cooney*, 45 Md. 592.

A sold to B timber to be manufactured into shingles, upon the agreement that the title to the timber and shingles was to remain in A, and that he might seize the same in case B failed to perform his part of the contract. B manufactured the timber into shingles, and in the ordinary course of business mingled them with shingles belonging to other persons, and afterwards sold a quantity of the shingles to C. A thereupon, claiming that B was behind in his payments, seized and converted the shingles so sold. It was held that C could maintain trover against A for the shingles, it appearing that A had invested B with the *indicia* of ownership, and that C had purchased from him *bona fide* and without notice of A's rights, and that agents of A knew of B's

method of dealing with the property and made no objection thereto. *Foster v. Warner*, 49 Mich. 641.

4. *Bryant v. Ware*, 30 Me. 298; *Lawrie v. Rathbun*, 38 U. C. Q. B. 265.

"If the Goods Are Accidentally Mingled and they are of such a character that they can be distinguished and separated, there will be no change of property, but each is entitled to his own; if they are of such a nature that they cannot be identified and separated, as corn, oil, wine, hay, etc., then each is entitled to his aliquot part of the entire quantity." *Bellows, J.*, in *Moore v. Bowman*, 47 N. H. 501.

Where a ship containing cotton belonging to various owners is wrecked by a storm, and the marks upon the bales are so obliterated that the cotton cannot be identified, the owners become tenants in common of the cotton in proportion to their several interests. *Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 427.

So where corded wood belonging to different owners is floated away by a freshet and so intermingled as to be undistinguishable. *Moore v. Erie R. Co.*, 7 Lans. (N. Y.) 39. See also 3 *Dane's Abr.* 119, § 19; *Story on Bailments*, § 40.

In *Buckle v. Gross*, 3 B. & S. 566, 113 E. C. L. 566, where tallow deposited in warehouses melted in consequence of a fire, and flowed down into the river, the question was as to the rights of a stranger who had taken the tallow from the river. Lord Blackburn, in delivering judgment, said: "The tallow of the different owners was indeed mixed up into a molten mass, so that it might be difficult to apportion it among them, but I dissent from the doctrine that because the property of different persons is confused together, that entitles a third person to steal it with impunity. Probably the legal effect of such a mixture would be to make the owners tenants in common in equal portions of the mass, but, at all events, they do not lose their property in it."

The Civil Law, in case of intermixture by accident, deemed the property to be held in common, whether the mixture produced a thing of the same sort or not, as, if the wine of two persons were mixed by accident. *Story on Bailments*, § 40, citing *Vinn. ad Inst.*, lib. 2, tit. 2, § 28. To the same effect is 1 *Bouv. Inst.*, § 507, quoting *Justinian's Inst.*, lib. 2, tit. 1, § 27.

is the result of an honest mistake or a *bona fide* claim of right,¹ and, apparently, where the mixture is brought about by negligence or inadvertence, but without any fraudulent intent,² or is the act of a stranger.³

IV. CONFUSION WITH FRAUDULENT INTENT — 1. General Rule — Works a Forfeiture. — Where one fraudulently, wilfully, or wrongly intermingles his goods with those of another, so that there is no evidence to distinguish the goods of the one from those of the other, the wrongdoer forfeits all his interest in the mixture to the other party.⁴

1. Honest Mistake. — "There may be an intentional intermingling, and yet no wrong intended, as where a man mixes two parcels together, supposing both to be his own; or that he was about to mingle his with his neighbor's, by agreement, and mistakes the parcel. In such cases, which may be deemed accidental intermixtures, it would be unreasonable and unjust that he should lose his own, or be obliged to take his neighbor's." Morton, J., in *Ryder v. Hathaway*, 21 Pick. (Mass.) 305, quoted in *Wetherbee v. Green*, 22 Mich. 318, 7 Am. Rep. 653.

"There is, therefore, no forfeiture of the goods of one who voluntarily and without fraud makes such an admixture. As when, for example, he supposes all the goods to be his own, or when he does it by mistake." Shepley, C. J., in *Hesseltine v. Stockwell*, 30 Me. 242, 50 Am. Dec. 627. See also *Claffin v. Continental Jersey Works*, 85 Ga. 46; *Thome v. Colton*, 27 Iowa 425; *Pratt v. Bryant*, 20 Vt. 333.

Where a person mixed wood cut on his own land with wood unlawfully cut and taken from the land of another, so that the trees taken from the two lots were no longer distinguishable, it was held that he did not divest himself of what honestly belonged to him if he actually supposed that all the land from which the wood was taken was his own; and that he might recover, either in trespass or trover, from the owner of the other lot who, under the claim that by the mixture the whole had become his, had carried it away and converted it to his own use, the value of that proportion which belonged to him, although the rights of the parties would have been different had the mixture been made with an intention to mislead or deceive. *Ryder v. Hathaway*, 21 Pick. (Mass.) 298.

2. *Ryder v. Hathaway*, 21 Pick. (Mass.) 298; *Moore v. Bowman*, 47 N. H. 501. But see *infra*, this title, *Confusion by Fiduciaries*.

3. Stranger. — *Brown v. Bacon*, 63 Tex. 598.

4. Fraudulent Confusion without Consent — *England*. — *Ward v. Ayre*, Cro. Jac. 366; *Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 437.

Canada. — See *Smith v. Merchants' Bank*, 28 Grant's Ch. (U. C.) 629; *Gilmour v. Buck*, 24 U. C. C. P. 187; *Lawrie v. Rathbun*, 38 U. C. Q. B. 265; *Great Western R. Co. v. Hodgson*, 44 U. C. Q. B. 187; *McDonald v. Lane*, 7 Can. Sup. Ct. 462.

United States. — *The Idaho*, 93 U. S. 586; *Williams v. Morrison*, 28 Fed. Rep. 873.

Alabama. — *Alley v. Adams*, 44 Ala. 610; *Burns v. Campbell*, 71 Ala. 288.

California. — *Graham v. Plate*, 40 Cal. 598, 6 Am. Rep. 639.

Florida. — *Mayer v. Wilkins*, 37 Fla. 244.

Georgia. — *Claffin v. Continental Jersey Works*, 85 Ga. 27.

Idaho. — *Hawkins v. Spokane Hydraulic Min. Co.*, (Idaho 1893) 33 Pac. Rep. 40.

Illinois. — *Beach v. Schmultz*, 20 Ill. 190;

Elgin First Nat. Bank v. Schween, 127 Ill. 573.

Indiana. — *Brackenridge v. Holland*, 2

Blackf. (Ind.) 383, 20 Am. Dec. 123.

Maine. — *Tufts v. McClintock*, 28 Me. 428,

48 Am. Dec. 501; *Bryant v. Ware*, 30 Me. 295.

See *Wingate v. Smith*, 20 Me. 287.

Massachusetts. — *Ryder v. Hathaway*, 21

Pick. (Mass.) 298; *Willard v. Rice*, 11 Met.

(Mass.) 493, 45 Am. Dec. 226; *Smith v. San-*

born, 6 Gray (Mass.) 134.

Michigan. — *Stephenson v. Little*, 10 Mich.

433.

Mississippi. — See *Evans v. Morgan*, 69 Miss.

328.

Nebraska. — *Denver First Nat. Bank v. Scott*,

36 Neb. 607.

New Hampshire. — *Seavy v. Dearborn*, 19 N.

H. 361; *Gilman v. Hill*, 36 N. H. 323; *Robinson*

v. Holt, 39 N. H. 557, 75 Am. Dec. 233;

Moore v. Bowman, 47 N. H. 502.

New Jersey. — *Jewett v. Dringer*, 30 N. J.

Eq. 291. See *Wooley v. Campbell*, 37 N. J. L.

169.

New York. — *Dunning v. Stearns*, 9 Barb.

(N. Y.) 634; *Hart v. Ten Eyck*, 2 Johns. Ch.

(N. Y.) 108.

North Carolina. — *Queen v. Wernwag*, 97 N.

Car. 383.

Tennessee. — *Brooks v. Lowenstein*, 95 Tenn.

269.

Texas. — *Brown v. Bacon*, 63 Tex. 595; *B.*

C. Evans Co. v. Reeves, 6 Tex. Civ. App. 254.

Wisconsin. — *Jenkins v. Steanka*, 19 Wis.

126, 88 Am. Dec. 675; *Root v. Bonnama*, 22

Wis. 539.

In *Lupton v. White*, 15 Ves. Jr. 442, Lord

Eldon said: "What are the cases in the old

law of a mixture of corn or flour? If one

man mixes his corn or flour with that of an-

other, and they were of equal value, the latter

must have the given quantity; but if articles

of different value are mixed, producing a third

value, the aggregate of both, and through the

fault of the person mixing them the other

party cannot tell what was the original value

of his property, he must have the whole."

It is only when the mixture is undistinguish-

able because a new substance or thing is

formed not capable of just appreciation and

division according to the original rights of the

proprietors, or when the articles mixed are of

different values or quantities and the original

values or quantities cannot be determined, that

the party who occasioned, or through whose

fault or negligence occurs, the wrongful mix-

ture, forfeits his title in the whole. *Robinson*

v. Holt, 39 N. H. 563, 75 Am. Dec. 233. See

Question of Fact. — Whether a case of fraudulent admixture exists is a question of fact to be submitted to the jury.¹

Contrast Between Common and Civil Law. — The rule of the common law, though derived from that of the civil law, differs radically from it. It appears that in the civil law the title to the whole mixture passed to the confuser, although he was compelled to make compensation to him whose property was invaded.²

2. Limitations — *a. GENERALLY* — **Rule Adopted to Prevent Frauds.** — The rule above announced, that a wrongful or fraudulent confusion of goods works a forfeiture of the interest of the wrongdoer in the mixture, is adopted solely to prevent fraud and will not be extended further than that object requires.³

Innocent Third Parties. — It will not be applied to the prejudice of an innocent third party.⁴

b. WHERE THE GOODS CAN BE DISTINGUISHED. — Where the goods mingled are of a kind which may readily be identified, as, for instance, horses and cattle, the doctrine of forfeiture by confusion has no application, for the obvious reason that the very foundation for the application of the rule is wanting, that is, the confusion of goods or the inability to identify them.⁵

Smith v. Sanborn, 6 Gray (Mass.) 134; *B. C. Evans Co. v. Reeves*, 6 Tex. Civ. App. 254; *Gunter v. James*, 9 Cal. 660; *Butte Canal, etc., Co. v. Vaughn*, 11 Cal. 151, 70 Am. Dec. 769.

Rule Applied without Regard to Value of Portions. — A loss or forfeiture of goods resulting from indistinguishable intermingling is not made to depend upon the comparative value of the portions belonging to the respective owners. *Brooks v. Lowenstein*, 95 Tenn. 268.

Confused Goods Embodying Skill or Labor of Wrongdoer. — The wilful wrongdoer who appropriates the goods of another acquires no property in them through any change wrought by his labor or skill. *Wetherbee v. Green*, 22 Mich. 311, 7 Am. Rep. 653.

Right of Innocent Owner to Take Possession of Whole Mass. — The innocent owner whose property another has fraudulently commingled with his own may take possession of the whole mass for the purpose of separating and securing, or of disposing of, the portion belonging to him. *Stephenson v. Little*, 10 Mich. 433.

First Levy Gives Prior Right when Fraud on Both Sides. — Where creditors of a corporation levy upon goods which are fraudulently mixed by the members of an insolvent firm with the goods of such corporation, in which the members of such firm are directors, the creditors of the insolvent firm cannot complain of the fraudulent intermixture, and all the property will not, on that ground, be applied to the firm debts; for, there being fraud on both sides, the equities are equal, and the first levy gives prior right. *Gottlieb v. Miller*, 154 Ill. 44.

1. Confusion a Question of Fact for the Jury. — *Johnson v. Ballou*, 25 Mich. 460; *Cadwell v. Pray*, 41 Mich. 311; *Taylor v. Jones*, 42 N. H. 32.

2. Common and Civil Law Contrasted. — 2 Kent's Com. 364; Dwight on Persons and Personal Property 486.

Other authorities state the rule of the civil law to be, that he who has made the intermixture forfeits all his property to him whose property is invaded, but that the latter is compelled to make restitution to the confuser. 2 Bl. Com. 405. See also Story on Bailments, § 40.

3. Object of Rule — Prevention of Fraud. — 2 Kent's Com. 365; Story on Bailments, § 40; 2 Bl. Com. 405; *Hesseltine v. Stockwell*, 30 Me. 237, 50 Am. Dec. 627; *Smith v. Sanborn*, 6 Gray (Mass.) 134; *Moore v. Bowman*, 47 N. H. 502; *Queen v. Wernwag*, 97 N. Car. 383; *Brown v. Bacon*, 63 Tex. 595; *B. C. Evans Co. v. Reeves*, 6 Tex. Civ. App. 254.

4. Rights of Innocent Third Parties Protected. — The general rule of law is that, as between an innocent party and a wrongdoer, where the property of the former has been mingled with, and cannot be separated from, that of the latter, the whole bulk shall be adjudged to the former; but it is a rule of strict application between the parties to the transaction, and where the interests of other parties intervene, and full protection can otherwise be given to the innocent person whose goods are thus wrongfully used, the rule should not be applied. *National Park Bank v. Goddard*, 9 Misc. Rep. (N. Y. Supreme Ct.) 626, affirmed 87 Hun (N. Y.) 487. See also *Foster v. Warner*, 49 Mich. 641; *Hamilton v. Rogers*, 8 Md. 301, explained in *Kreuzer v. Cooney*, 45 Md. 592.

Intermingling Logs — Laborers' Lien Continues on Mass. — Where a grant of land is made authorizing the grantee to cut lumber therefrom, and by the negligence of the grantee several lots of lumber cut upon the land become intermixed, so that the respective lots upon which the several laborers worked cannot be distinguished, their respective liens are upon the whole mass. *Spofford v. True*, 33 Me. 283, 54 Am. Dec. 621. See also *Creighton v. Cole*, 10 Wash. 472.

5. Where Goods Are Distinguishable — England. — *Colwill v. Reeves*, 2 Campb. 576, and note. *United States.* — *The Idaho*, 93 U. S. 586; *Clafin v. Beaver*, 55 Fed. Rep. 576.

Alabama. — *Alley v. Adams*, 44 Ala. 610.

California. — *Butte Canal, etc., Co. v. Vaughn*, 11 Cal. 151, 70 Am. Dec. 769.

Connecticut. — *Baldwin v. Porter*, 12 Conn. 483.

Georgia. — *Clafin v. Continental Jersey Works*, 85 Ga. 46.

Iowa. — *Goodenow v. Snyder*, 3 Greene (Iowa) 601.

Goods Fraudulently Purchased. — And even though a person fraudulently purchases goods with the intention of hindering, delaying, or defrauding the creditors of the vendor, and mixes them with his own, this will not operate as a forfeiture of ownership in the vendee if they are distinguishable.¹

Burden of Distinguishing on Wrongdoer. — But all the inconvenience of the confusion is thrown upon the party who produces it, and generally it is for him to distinguish his own property or lose it.²

Maine. — *Wingate v. Smith*, 20 Me. 287; *Tufts v. McClintock*, 28 Me. 429, 48 Am. Dec. 501.

Michigan. — *Bethel v. Linn*, 63 Mich. 464.

New Hampshire. — *Robinson v. Holt*, 39 N. H. 563, 75 Am. Dec. 233; *Gilman v. Hill*, 36 N. H. 323; *Moore v. Bowman*, 47 N. H. 502.

New York. — *Frost v. Willard*, 9 Barb. (N. Y.) 447.

North Carolina. — *Queen v. Wernwag*, 97 N. Car. 383.

Texas. — *Brown v. Bacon*, 63 Tex. 598.

Vermont. — *Holbrook v. Hyde*, 1 Vt. 286.

See also *Smith v. Sanborn*, 6 Gray (Mass.) 134.

In Order to Work a Change of Title the admixture must be of such a character that the property of each can no longer be distinguished. *Hesseltine v. Stockwell*, 30 Me. 237, 50 Am. Dec. 627.

Logs Marked. — Where floating logs belonging to different owners are mingled in a boom, there is no confusion of goods in a legal sense if the logs are distinctly marked so as to render separation possible. *Goff v. Brainerd*, 58 Vt. 468.

When Identity of Property Not Changed. — Where pork, packed in barrels, is consigned to a commission merchant for sale, it does not, by being stored in a warehouse with a larger quantity of the same quality and brand, lose its identity as the particular property of the consignor. *Seymour v. Wyckoff*, 10 N. Y. 213.

Where potatoes belonging to two different persons are put into different parts of a trench, but separated by a partition of hay, and the point of division between the goods of both is otherwise marked, this is not such a mingling of goods as produces confusion. *Scott v. Schofield*, (Iowa 1897) 69 N. W. Rep. 1127.

Wood Converted into Coal. — Where wood has been converted and made into coal, the identity of the property is not changed. *Riddle v. Driver*, 12 Ala. 590.

Trees. — Nor where trees cut down upon another's land are made into rails and posts, or sawlogs. *Snyder v. Vaux*, 2 Rawle (Pa.) 423, 21 Am. Dec. 466; *Gates v. Rifle Boom Co.*, 70 Mich. 309.

Logs. — Nor where logs are sawed into boards or shingles. *Betts v. Lee*, 5 Johns. (N. Y.) 348, 4 Am. Dec. 368; *Brown v. Sax*, 7 Cow. (N. Y.) 95.

Steam Machinery. — Nor where one made additions to steam machinery belonging to another. *Alley v. Adams*, 44 Ala. 609.

Crockery, China, etc. — The placing of crockery, china, and other articles resembling each other on the same shelf, is not confusion of them within the meaning of the law. *Treat v. Barber*, 7 Conn. 280.

1. Goods Fraudulently Purchased and Commingled by Vendee with His Own. — *Susskind v.*

Hall, (Cal. 1896) 44 Pac. Rep. 328; *Treat v. Barber*, 7 Conn. 274; *Capron v. Porter*, 43 Conn. 383; *Mayer v. Wilkins*, 37 Fla. 244; *Allen v. Kirk*, 81 Iowa 668; *B. C. Evans Co. v. Reeves*, 6 Tex. Civ. App. 260.

In *Stearns v. Herrick*, 132 Mass. 114, it was held that where a party adds to a stock of goods, acquired under a fraudulent sale in which he participated, other goods subsequently purchased, he cannot, in an action against an officer who attaches all the goods as the property of the fraudulent vendor of the first mentioned goods, recover the value of the goods afterwards purchased, if the intermingling was done purposely or through want of proper care.

When Fraudulent Vendee Personally Liable.

— When the fraudulent vendee takes the stock of goods, and in continuing the business adds other goods to those purchased, he is liable personally for so much of the original stock as he has sold, and attachments levied on the blended stock operate as a lien on so much of said stock as remains unsold. *Carter v. Carpenter*, 7 Bush (Ky.) 257.

Principal and Agent. — Where there is evidence of fraudulent conduct between two parties in regard to the creditors of one of them, an improper intermixture of their goods by the party indebted, acting as the agent of the other, cannot be taken advantage of, nor disavowed by the principal in a contest with a *bona fide* execution creditor of the party by whom the intermixture was made. As to such creditors, the colluding parties are one. *McDowell v. Rissell*, 37 Pa. St. 164.

2. Wrongdoer Must Distinguish His Property or Lose It — *Alabama.* — *Lehman v. Kelly*, 68 Ala. 197.

Connecticut. — See *Treat v. Barber*, 7 Conn. 274.

Florida. — *Mayer v. Wilkins*, 37 Fla. 244.

Illinois. — *Elgin First Nat. Bank v. Schween*, 127 Ill. 580; *Diversey v. Johnson*, 93 Ill. 548.

Iowa. — *Stuart v. Phelps*, 39 Iowa 20.

Kentucky. — *Weil v. Silverstone*, 6 Bush (Ky.) 698.

Maine. — *Loomis v. Green*, 7 Me. 386; *Wingate v. Smith*, 20 Me. 287; *Dillingham v. Smith*, 30 Me. 383.

Maryland. — *Kreuzer v. Cooney*, 45 Md. 591. See *Preston v. Leighton*, 6 Md. 97.

Massachusetts. — *Ryder v. Hathaway*, 21 Pick. (Mass.) 306.

Michigan. — *Stephenson v. Little*, 10 Mich. 441.

Missouri. — *Franklin v. Gumersell*, 9 Mo. App. 90.

New Hampshire. — *Seavy v. Dearborn*, 19 N. H. 361; *Wilson v. Lane*, 33 N. H. 466; *Robinson v. Holt*, 39 N. H. 557, 75 Am. Dec. 233.

New Jersey. — *James v. Burnet*, 20 N. J. L. 642.

c. WHERE GOODS INTERMIXED ARE OF EQUAL VALUE. — Where the goods intermixed are of equal value, that is, when the mixture is approximately homogeneous, neither party loses his property, but each is entitled to his aliquot part of the whole,¹ and may peaceably retake the same.²

New York. — Hart *v.* TenEyck, 2 Johns. Ch. (N. Y.) 108; Starr *v.* Winegar, 3 Hun (N. Y.) 491; 6 Thomp. & C. (N. Y.) 35.

Canada. — Great Western R. Co. *v.* Hodgson, 44 U. C. Q. B. 187.

"The purchase of goods from the assignee with knowledge of the fraudulent purpose for which they were assigned, and the mingling of them with other goods, would place plaintiffs in the position of parties fraudulently mixing goods." Mayer *v.* Wilkins, 37 Fla. 244.

Where one in possession of a tract of land, claiming it as sub-lessee, mixed a quantity of grain belonging to himself with grain belonging to the owner of the tract, it was held that the whole became the property of the latter unless the sub-lessee could himself separate the part belonging to himself. Samson *v.* Rose, 65 N. Y. 411.

What Is Sufficient Identification. — A warehouse receipt which describes the property as "50,000 pounds of bar iron, assorted, made at the Vulcan Works," is sufficient identification, though the property is stored in mass with other property of the same kind so as not to be susceptible of identification by mark or otherwise; and the holder of such receipt can claim the property as against attaching creditors of the parties issuing the receipt; for the creditors have no higher right than the debtors, and the warehouseman is estopped from denying the possession of the articles mentioned in his receipts. Rome Bank *v.* Haselton, 15 Lea (Tenn.) 242. See also Stewart *v.* Phoenix Ins. Co., 9 Lea (Tenn.) 110.

Where no more precise identification is possible than that a block of stock of a particular kind, sufficient to satisfy the demands for that kind of stock, was purchased for customers of a firm, it is sufficient. Skiff *v.* Stoddard, 63 Conn. 225.

Identification of Fowls. — Where one person's turkeys become mingled with his neighbor's he has a right to his own, though he can only identify some of them by their following a certain other one; and an offer by his neighbor to deliver him those he can identify, and any others he may select, to a certain number, but less than the owner is entitled to, will not release the neighbor from liability. And if the neighbor shut up the whole flock, and refuse to let them at large on the owner's request to see if he can identify his own, it is the exercise of such dominion over them, in exclusion or defiance of the owner's right, as to amount to a conversion. Leonard *v.* Belknap, 47 Vt. 602.

1. Goods of Equal Value — *England.* — Lupton *v.* White, 15 Ves. Jr. 442.

United States. — The Distilled Spirits, 11 Wall. (U. S.) 368; The Idaho, 93 U. S. 586; Norris *v.* U. S., 44 Fed. Rep. 739.

Alabama. — Sims *v.* Glazener, 14 Ala. 695, 48 Am. Dec. 120.

California. — Gunter *v.* James, 9 Cal. 660; Butte Canal, etc., Co. *v.* Vaughn, 11 Cal. 151, 70 Am. Dec. 769.

Georgia. — Claflin *v.* Continental Jersey Works, 85 Ga. 46, per Simmons, J.

Kentucky. — Reid *v.* King, 89 Ky. 388.

Maine. — Martin *v.* Mason, 78 Me. 452.

Massachusetts. — Ryder *v.* Hathaway, 21 Pick. (Mass.) 305, per Morton, J.

Michigan. — Hance *v.* Tittabawassee Boom Co., 70 Mich. 231; Gates *v.* Rifle Boom Co., 70 Mich. 309.

Minnesota. — Stone *v.* Quaal, 36 Minn. 46; Chandler *v.* De Graff, 25 Minn. 88.

Missouri. — Kaufman *v.* Schilling, 58 Mo. 218.

Nebraska. — Denver First Nat. Bank *v.* Scott, 36 Neb. 607.

New Hampshire. — Robinson *v.* Holt, 39 N. H. 563, 75 Am. Dec. 233; Gilman *v.* Hill, 36 N. H. 323; Moore *v.* Bowman, 47 N. H. 502; Pickering *v.* Moore, (N. H. 1894) 32 Atl. Rep. 828.

New York. — Wilson *v.* Nason, 4 Bosw. (N. Y.) 155.

Vermont. — Pratt *v.* Bryant, 20 Vt. 333.

Wisconsin. — Starke *v.* Paine, 85 Wis. 633.

See Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44; Stephenson *v.* Little, 10 Mich. 433.

"There is no forfeiture in case of a fraudulent intermixture when the goods intermixed are of equal value. This has not been sufficiently noticed, and yet it is a just rule and well sustained by authority." Shepley, C. J., in Hesselstine *v.* Stockwell, 30 Me. 242, 50 Am. Dec. 627.

Where, without fraudulent intent, goods of the same nature and value, belonging to different owners, are mixed, if a division can be made of equal value, as in case of a mixture of grains of the same kind, quality, and value, then each owner may claim his aliquot part of the whole mass. Stone *v.* Quaal, 36 Minn. 46.

Where A contracted to deliver to B a quantity of railroad ties to be used in the construction of a railroad, and A delivered a number greatly in excess of the quantity contracted for but of like value and quality, and the surplus ties were so commingled with the ties contracted for and accepted as to be undistinguishable therefrom, it was held that B had a lawful right to take and use from the common mass or lot his proportionate share, without restriction in choice to any particular portion of said lot, provided there was no advantage in selection as to quality, value, or otherwise. Chandler *v.* De Graff, 25 Minn. 88.

When one party has wrongfully commingled his own logs with those of another, the extent of the right of the party whose logs are commingled is to select from the whole lot an equivalent in number and quality for those which he originally possessed. McDonald *v.* Lane, 7 Can. Sup. Ct. 462.

2. Owner May Peaceably Retake His Proportional Part. — Ryder *v.* Hathaway, 21 Pick. (Mass.) 306; Gates *v.* Rifle Boom Co., 70 Mich. 309; Moore *v.* Bowman, 47 N. H. 501.

V. CONFUSION BY FIDUCIARIES. — Bailees, trustees, and other persons occupying a fiduciary relation, forfeit their own goods by intermingling them with the goods of those to whom they sustain a trust relation, even though the mingling is due to negligence or carelessness and is not fraudulent.¹ This principle has been applied in the case of mortgagors intrusted with possession,² and in the case of guardians.³ But here, as elsewhere, forfeiture will not be adjudged where the property confused is of like kind and value,⁴ or

Liability for Difference in Value on Retaking. — Where one has peaceably retaken his logs which have been cut by mistake on his land by another, he is not liable to pay to the trespasser the difference between the value of the stumpage and the value of the logs at the time of such retaking. *Arpin v. Burch*, 68 Wis. 619.

Retaking without Knowledge of Substituted Things. — Where a party in possession of the wagon of another takes off part of its appendages and substitutes others belonging to himself, and the owner repossesses himself of the wagon without knowledge of the change, trespass cannot be maintained against him for the substituted articles, and if any action could be sustained, which is doubtful, without returning the appendages which belonged to the wagon, it must be an action of trover after demand and refusal. *Parker v. Walrod*, 13 Wend. (N. Y.) 296, 16 Wend. (N. Y.) 515, 30 Am. Dec. 124.

1. *Simmons, J.*, in *Clafin v. Continental Jersey Works*, 85 Ga. 46. See also the titles AGENCY, vol. 1, p. 1089; EXECUTORS AND ADMINISTRATORS; TRUSTS AND TRUSTEES.

If a Party Having Charge of the Property of Another so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon him who produces it, and it is for him to distinguish his own property or lose it. *Diversey v. Johnson*, 93 Ill. 547; *Brackenridge v. Holland*, 2 Blackf. (Ind.) 377, 20 Am. Dec. 123; *Loomis v. Green*, 7 Me. 386; *Kreuzer v. Cooney*, 45 Md. 591; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 108; *Story on Bailments*, § 40; Ga. Code, 1895, §§ 3020, 3990. See also *Lupton v. White*, 15 Ves. Jr. 432; *Panton v. Panton*, cited in *Lupton v. White*, 15 Ves. Jr. 440.

2. Mixture by Mortgagee. — Where a mortgagee in possession of mortgaged goods fails to keep them separate from his own, as it is his duty to do, and intermixes them purposely or through want of proper care with goods belonging to himself, and sells the whole to a third person, the mortgagee may replevy the whole from the purchaser unless the latter identifies the specific articles not embraced in the mortgage. *Adams v. Wildes*, 107 Mass. 123. See also *Howe v. Wadsworth*, 59 N. H. 402.

And where the mortgagee in such a case consigns the goods, after intermingling them with his own, to a third person, who sells them, the mortgagee is entitled to recover of the consignee the value of the whole. *Willard v. Rice*, 11 Met. (Mass.) 493, 45 Am. Dec. 226.

According to the ordinary principle governing confusion of goods, if the goods of one person be wilfully or through want of proper care on his part so mixed or confused with the

goods of another that they cannot be distinguished, the latter is entitled to the whole unless he consented to the act; and this doctrine applies to mortgaged goods, such confusion making the whole, *prima facie* at least, subject to the lien and operation of the mortgage. *Burns v. Campbell*, 71 Ala. 288. See also *Simmons v. Jenkins*, 76 Ill. 483.

To the same effect see *People v. Bristol*, 35 Mich. 33; *Kreth v. Rogers*, 101 N. Car. 263. See also *Fuller v. Paige*, 26 Ill. 358, 79 Am. Dec. 379.

Third Person Negligently Allowing Mixture by Mortgagee. — Where a third person through negligence allows a mortgagee to mix mortgaged goods with the goods of such third person, so that they cannot be distinguished nor their proportionate value ascertained, the loss must fall upon such third person. *Wells v. Batts*, 112 N. Car. 283, 34 Am. St. Rep. 506.

Where the Intermixture Takes Place with the Mortgagee's Permission, the mortgagee cannot throw the loss on innocent creditors dealing with the mortgagee. *Hamilton v. Rogers*, 8 Md. 301, explained in *Kreuzer v. Cooney*, 45 Md. 592. See *Paine v. Young*, 56 Md. 314; *Baltimore First Nat. Bank v. Lindenstruth*, 79 Md. 141; *Rosenberg v. Thompson*, (Ky. 1888) 8 S. W. Rep. 896.

In *Hubbell v. Allen*, 90 Mo. 574, it was held that when a mortgagee, by consent of a mortgagee, removes the mortgaged goods and intermingles them with other goods belonging to the mortgagee upon which other parties hold mortgages, the mortgagee so consenting can by replevin obtain possession only of the goods removed, when he claims only by virtue of his mortgage.

Mixture by Mortgagee. — In *Burr v. Dana*, 72 Wis. 639, it was held that the goods added by a mortgagee to the mortgaged property, where he takes possession of it and continues the business, are to be treated as a part of the mortgaged property; but that in an accounting between the parties he is to be allowed credit for the cost of the same.

3. Guardian. — Where, in a suit on a guardian's bond, it appeared that some of the vouchers of the guardian were for goods, most of which were furnished for the mother of the ward and some for the ward, and the guardian failed to distinguish between those furnished for the mother and those for the ward, it was held that the jury was authorized to disregard the whole account. *Hudson v. Hawkins*, 79 Ga. 274, applying Ga. Code 1895, § 3990.

4. Mortgaged Property Mingled with Other Property of Like Kind and Value. — Where mortgaged property is commingled with property of like kind and equal value, the more equitable doctrine of giving to each party his due proportion will govern, rather than the harsher one of holding the whole subject to the mortgage.

is capable of being separated.¹

VI. MEASURE OF DAMAGES.—In the case of a confusion of goods, it has been held that when the action is for damages they are to be given to the utmost value the article will bear.²

Conduct of Parties.—In determining the damages, the conduct of the party producing the confusion, after he has knowledge of the claim of right by another, may be construed against him by the jury, if such conduct is in wilful disregard of the claimant's rights.³

CONGLOMERATE.—To gather together in a mass; closely crowded together. A sort of pudding-stone.⁴

CONGREGATE.—See note 5.

CONGREGATION. (See *CHURCH*. And see the titles *CEMETERIES*; *EXEMPTIONS FROM TAXATION*; *PEWS*; *RELIGIOUS SOCIETIES*; *SUBSCRIPTIONS*.)—Congregation means an assemblage or union of persons for some religious purpose, to unite in the public worship of their God, in such manner as they deem most acceptable to him.⁶

Mittenthal v. Heigel, (Tex. Civ. App. 1895) 31 S. W. Rep. 87; *Mowry v. White*, 21 Wis. 417.

Where a mortgagor wilfully, but not in bad faith, mixes the wheat produced from a ten-acre field, which he had mortgaged, with that of an eight-acre field, which was not mortgaged, the mortgagee does not thereby become the owner of the whole, and when the part of the whole mass belonging to the mortgagee is, by reason of such confusion, made uncertain, every reasonable doubt as to the amount of his share must be resolved in his favor; but it will be presumed, in the absence of any evidence on the point, that as much wheat grew on each acre of the eight-acre field as on each acre of the ten-acre field. *Osborne v. Cargill Elevator Co.*, 62 Minn. 400.

1. Where a mortgagee in good faith added to mortgaged property which he had replevied other property of like description, and sold from the whole stock from time to time, but the amount realized from the mortgaged property could be fairly ascertained, this did not constitute confusion of goods which would make the mortgagee chargeable with the value of the mortgaged property at the time of the addition. *Armstrong v. McAlpin*, 18 Ohio St. 188.

2. **Measure of Damages.**—The rule was so stated by Chancellor Kent in *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 108, and followed in *Starr v. Winegar*, 3 Hun (N. Y.) 491; *Brackenridge v. Holland*, 2 Blackf. (Ind.) 383, 20 Am. Dec. 123. The same rule is asserted in *Lupton v. White*, 15 Ves. Jr. 440. See also *Armory v. Delamirie*, 1 Stra. 505; *Bullock v. Dibler*, Popham 38; *Colt v. Lasnier*, 9 Cow. (N. Y.) 334; *Rockwell v. Saunders*, 19 Barb. (N. Y.) 473; *Silisbury v. McCoon*, 3 N. Y. 389, 53 Am. Dec. 307.

Time and Place—Confusion by Mistake.—In *Weymouth v. Chicago*, etc., R. Co., 17 Wis. 550, 84 Am. Dec. 763, the plaintiff had wood cut and piled on the premises of the defendant in the town of F., with a view of selling it to the defendant. The complaint showed that at that place the wood was worth about one dollar and fifty cents per cord. Before the contract of sale was completed, the defendant by

a mistake carried the wood to J., and there mingled it with other wood in such a manner that its identity was lost. The plaintiff then demanded it at J., and the defendant did not deliver it. Wood at that time was worth in J. four dollars per cord, and was afterwards worth five dollars. It was held that the proper measure of damages was the value of the wood at F. at the time of the conversion, with such increase as it might have received from fluctuations of the market or other causes, independent of the acts of the defendant. Compare *Single v. Schneider*, 24 Wis. 299.

3. *Cheesman v. Shreeve*, 40 Fed. Rep. 787.

4. *Roosevelt v. Law Tel. Co.*, 33 Fed. Rep. 509. This was a patent case.

5. **Congregate.**—A statute provided that minors should not be permitted to *congregate* in or about the place where billiard tables, bagatelle tables, etc., were kept. In construing this statute, the court, in *Powell v. State*, 62 Ind. 532, said: "A *congregation* or assemblage of minors at some one of the specified places at which these tables are kept must be shown, to make out the offense. To *congregate*, within the meaning of the section of the statute above quoted, necessarily implies the joint action or co-operation of two or more persons, and is usually applicable to the coming together of a considerable number of persons. It is meaningless to say that a man can *congregate* at any given place without the co-operation of some one else, or that one man can, by himself, form a *congregation* of any kind."

6. On a motion to show cause why a writ of mandamus should not issue, commanding the defendants to restore their pastor into the place and function of minister of the *congregation* of the German or High Dutch Reformed Christian church in Fredericktown, the court, by Chase, J., in granting the mandamus, held that the court had jurisdiction therein both because by the form of government in Maryland the Christian religion is the established religion, and also because of the temporal rights and emoluments annexed to the position, these emoluments being held by trustees for the use of the *congregation*, whom he de-

CONGREGATIONAL. — See note 1.

CONGRESS. — See the titles CONSTITUTIONAL LAW; LEGISLATURES; PARLIAMENTARY LAW; POLICE POWER; STATUTES.

CONJUGAL RIGHTS. — See the title HUSBAND AND WIFE, and references there given.

CONJURATION. (See also the titles CONSIDERATION, *post*; FALSE PRETENSES.) — “Conjuration” signifies a plot or compact made by persons combining by oath to do any public harm. The term was more especially used for the having personal influence with the devil or some evil spirit, to know any secret or effect any purpose.²

CONNECT, CONNECTIONS, ETC. — To “connect” is to bind, to unite, to affiliate.³

finer as above. *Runkel v. Winemiller*, 4 Har. & M. (Md.) 429.

Communicants. — In a *New York* statute providing for the incorporation of religious societies, it was held that the word *congregation* means an assembly met, or a body of persons who usually meet in some stated place for the worship of God and for religious instruction, and it seems it may or may not include a church or spiritual body. *Robertson v. Bul lions*, 9 Barb. (N. Y.) 65, *affirmed* in 11 N. Y. 243. Upon this, however, Cady, J., dissented, holding that a *congregation* must be composed wholly of persons in full communion.

Distinguished from Church. — In refusing an application for an injunction restraining the defendants from occupying the pulpit or impeding the complainants from celebrating divine worship in the church by a Baptist minister in regular standing, and from using or interfering with the temporalities of the church, Chancellor Walworth said: “The complainants appear to have acted on the supposition that the decision of the ecclesiastical judicatory that a certain portion of the members of the Baptist church in Hartford were heterodox in doctrine or practice, and were not the true church, must have a legal effect upon the incorporation of the members of this religious society. But I apprehend that in this they have overlooked the distinction between the *congregation* and the church strictly so called, which comprises only a part of the *congregation* or society. The church consists of an indefinite number of persons, of one or both sexes, who have made a public profession of religion, and who are associated together by a covenant of church fellowship, for the purpose of celebrating the sacrament and watching over the spiritual welfare of each other. But a religious society, or *congregation*, as recognized by the third section of the statute providing for the incorporation of religious societies, is, with us, what is usually denominated a ‘poll parish’ in some of the neighboring states. It consists of a voluntary association of individuals or families, united for the purpose of having a common place of worship, and to provide a proper teacher to instruct them in religious doctrines and duties and to administer the ordinances of baptism, etc. Although a church, or body of professing Christians, is almost uniformly connected with such a society or *congregation*, the members of the church have no other or greater rights than any other members of the society who

statedly attend with them for the purposes of divine worship.” *First Baptist Church v. Witherell*, 3 Paige (N. Y.) 296.

Disturbing Meetings. (See also the title DISTURBING MEETINGS.) — An indictment for disturbing a *congregation* met for religious worship is not sustained by evidence of a disturbance in the churchyard after the *congregation* had been dismissed. The court said: “After the minister in charge dismisses his *congregation*, it then ceases to be a *congregation* met for religious worship.” *State v. Jones*, 53 Mo. 489.

1. For the meaning of this term and a history of the *Congregational* denomination, see *Atty.-Gen. v. Dublin*, 38 N. H. 516.

2. *Cooper v. Livingston*, 19 Fla. 694, in which case it was held that *conjuration* was not a valid consideration for a promissory note. The court also said: “Hawkins, in his Pleas of the Crown, says that *conjurers* are those who, by force of certain magic words, endeavor to raise the devil and oblige him to execute their commands. (Tomlin’s L. Dict.) And such persons were punished as rogues and vagabonds. (4 Bl. Com. 60.) According to Noah Webster *conjuration* is the act of using certain words or ceremonies to obtain the aid of a superior being; the act of summoning in a sacred name; the practice of arts to expel evil spirits, allay storms, or perform supernatural or extraordinary acts. *Conjurer*, one who practices *conjuration*; one who pretends to the secret art of performing things supernatural or extraordinary by the aid of superior powers; an impostor who pretends by unknown means, etc.”

3. *Allison v. Smith*, 16 Mich. 433, in which case it was held that the term “connected with” as applied to religious societies is not to be interpreted as necessarily meaning an organic *connection* created by charter, but includes those cases where the *connection* is one of fact established by the bodies themselves. See generally the title RELIGIOUS SOCIETIES.

Railroad Connections. (See also the titles CONNECTING CARRIERS, *post*; RAILROADS.) — For an example of the use of the term *connection* as synonymous with “switch road,” see *Palfrey v. Foster*, 47 La. Ann. 939.

In *Eakin v. St. Louis, etc., R. Co.*, 3 Cent. L. J. 656, it was held that two roads operated by a third and having termini in the same city were *connected roads*.

Where a charter of a railroad company reserved the right to any other road thereafter

to be built to *connect* with the defendant's road, it was held that the legislature could not grant permission to use the track of the first company upon such terms and considerations as it might see fit to prescribe. *Pennsylvania R. Co. v. Baltimore, etc., R. Co.*, 60 Md. 263.

A statute provided for the delivery of freight by railroads at their termini to *connecting* roads. It was held that a *connecting* line in the sense of this act is where any railroad at its terminus, or any intermediate point along its line, joins another, or where two railroads have the same terminus; and where a railroad is adjacent to another and capable of being joined to it by a switch, either at its terminus or anywhere along its line where they meet or converge, the right is given to make such *connection*, whether it be voluntarily granted or not. *Logan v. Central R. Co.*, 74 Ga. 685.

In Philadelphia, etc., *R. Co. v. Catawissa R. Co.*, 53 Pa. St. 59, it was held that the phrase "railroad *connection*," without qualifying terms, in a statute, means either a union of tracks so as to admit the passage of cars from one road to the other, or such intersection of roads as to admit the convenient interchange of freight and passengers at the point of intersection. The court said: "If, in construing the proviso, we were to govern ourselves by the strict laws of language, the argument would be likely to prevail; because it is indubitable that the word *connect*, etymologically considered, implies a closer union than can be made of railroad tracks of different gauges. The Latin particle *con*, when used as a prefix, signifies union or association; as 'concourse' — a running together; and when placed before the verb *necto*, which means to tie, we have the root of our English word *connect*, which, taken literally, must mean to tie together, to be joined or united. Perhaps the most perfect illustration of the meaning of this word is derived from the process of knitting, where the union of parts becomes very intimate. It would be difficult to say that railroads of different gauges could be knitted together; so intimate a union between such roads is physically impossible. But it is legislative language we are to construe, and it must be received, not necessarily according to its etymological meaning, but according to its popular acceptance, and especially in the sense in which the legislature is accustomed to use the same words. The legislature did not limit the right of *connection* to roads of similar gauge."

But in *Denver, etc., R. Co. v. Atchison, etc., R. Co.*, 4 McCrary (U. S.) 327, in construing a provision that every railroad should have the right with its road to *connect* with any other road, the court said that *connect* was not used in its largest sense: "The roads are to be connected physically, as distinguished from the business *connection* always existing between roads which have approximate termini. It is a union of tracks admitting of the passage of cars from one road to the other, and not a mere meeting of roads which may admit of continuous traffic in some form."

In *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 679, the court said: "The railroad companies are not to be *connected*, but their roads. A *connection* of roads may make

a *connection* in business convenient and desirable, but the one does not necessarily carry with it the other. The language of the constitution is that railroads may 'intersect, *connect* with, or cross' each other. This clearly applies to the road as a physical structure, not to the corporation or its business."

Connections — Insurance. (See also the title MARINE INSURANCE.) — Where wheat was insured from port to port on a certain steamer and *connections*, it was held that *connections* meant regular *connections* and not an unusual substitution unanticipated at the time of the issuing of the policy. *Schroeder v. Schweizer Lloyd Transport, etc.*, 60 Cal. 467, 44 Am. Rep. 61.

Connections — Wills. (See also the title WILLS. And see AFFINITY, vol. I, p. 911; RELATIONS.) — In *Storer v. Wheatley*, 1 Pa. St. 506, it was held that a bequest to the testator's nearest relations or *connections* did not include his widow. The court said: "It is true that every word which is susceptible of a distinct meaning must have effect; but nothing can be more indistinct than the meaning of this word in the relation which it bears to the other words in the context. In popular phrase, a wife's relations are her husband's *connections*; but *connections*, unless they are also relations, never take by the statute of distributions. The testator, therefore, could not have used words to let in her relations as a class distinct from his own; and if he intended by it to let in his wife only, why did he use it in the plural number? He intended to designate such of his relations as would have taken had he died intestate; and the word *connections*, which was thrown in as a synonym, according to the practice of scribes, was redundant."

Where the gift is to relatives or *connections*, substitution may be intended, but *connections* by affinity will not take until the class of relatives by blood is first exhausted. The court said: "The word *connections* used in the bequest now under consideration may have a larger signification than 'relatives,' and though the words 'right of inheritance,' contained in the residuary clause, look towards a relation by blood, yet it may have been the testator's intention, when giving to 'relatives or *connections*,' to include *connections* by marriage in default of there being any relations by consanguinity. The word 'or' in the clause may have been designed to effect a substitution of *connections* to the benefit of the bequest, in case there were no relatives." *Ennis v. Pentz*, 3 Bradf. (N. Y.) 385.

Consolidation of Causes of Actions. — A statute provided that the plaintiff might unite several causes of action in the same complaint when they are *connected*. In *Lapham v. Osborne*, 20 Nev. 173, the court said: "The word *connected* may have a broad signification. The *connection* may be slight or intimate, remote or near; and where the line shall be drawn, it may be difficult sometimes to determine." See also *Armstrong v. Hinds*, 8 Minn. 254. And see ENCYCLOPÆDIA OF PLEADING AND PRACTICE, title ACTIONS, vol. I, p. 163.

Connected with the Works of an Employer. — A statute provided that a master should be liable where a servant is injured because of defects in ways, works, or machinery *con-*

nected with or used in the business of the employer; it was held that this did not render a railroad liable for injuries to its employee, occasioned by the defective track of another company. *Trask v. Old Colony R. Co.*, 156 Mass. 298. In this case the court said: "The phrase *connected* with or used in the business of the employer (Stat. 1887, c. 270, § 1, cl. 1), cannot be taken literally, but when used in connection with 'ways, works, and machinery,' must be understood to mean ways, works, and machinery *connected* with or used in the business of the employer by his authority, and subject to his control. It is expressly stated in the report that the track of the defendant company was maintained and kept in repair by it, and that the track of the Boston and Maine was kept in repair by that company, and that the defend-

ant had nothing to do with maintaining and repairing the track of the Boston and Maine." See generally the title MASTER AND SERVANT.

Guilty Connection.—In *State v. George*, 7 Ired. L. (N. Car.) 324, it is said: "The words 'guilty *connection*' have no definite meaning, as descriptive of any particular offense. The combination of a parcel of smugglers is a guilty *connection*; so, to rob, or to commit an assault or battery, or to strike for higher wages, all these are guilty *connections*, punishable by law. But the words, in common parlance, when applied to a man and woman, mean a carnal *connection*. If A charge B, a woman, with having a guilty *connection* with C, ninety-nine men out of every hundred will understand it as a charge of incontinence on the part of B."

CONNECTING CARRIERS (OF GOODS).

BY H. DENT MINOR.

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CROSS-REFERENCES.

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For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see this work, title CARRIERS OF GOODS, vol. 5, p. 154, and the references there given.

For Connecting Carriers of Passengers, see the title TICKETS AND FARES.

I. DEFINITION. — A connecting carrier is one of the several common carriers whose lines, or parts thereof, united, constitute the route over which any particular shipment is to pass, and which participate in the transportation of such shipment. Speaking generally, the term embraces the initial line unless the contrary meaning is evident from the context.¹

Illustrations — Transfer Companies. — A mere transfer company employed by the consignee to remove the goods from a station is not within the term,² nor is a mere transfer company employed by one intermediate carrier to haul the goods to the depot of the next succeeding carrier in the same city.³

1. A Connecting Carrier is one whose route, not being the first one, lies somewhere between the point of shipment and the point of destination. It becomes such by virtue of the agreement between the consignor or shipper and the first carrier, whereby the latter undertakes to deliver the shipment at its ultimate destination, and thus makes the carrier beyond its own route its agent for continuing the transportation, or else undertakes only to deliver the goods safely to the next carrier on the route, who thus becomes the agent of the shipper for carrying them further. *Nanson v. Jacob*, 12 Mo. App. 125, *citing* *Lawson on Carriers*, 342.

2. *Nanson v. Jacob*, 93 Mo. 331, 3 Am. St. Rep. 531, 32 Am. & Eng. R. Cas. 553, *affirming* 12 Mo. App. 125. See also *Hooper v. Chicago*, etc., R. Co., 27 Wis. 81, 9 Am. Rep. 439.

3. **Transfer Companies Operating Between Connecting Railroads.** — In *Missouri Pac. R. Co. v.*

Young, 25 Neb. 651, the defendant railroad company received a piano for transportation to a point beyond its line, and gave a bill of lading reciting that it was to be carried to the end of its line and delivered to the next "connecting common carrier." The next railroad line and the defendant's road were connected by a "Y," but their freight depots were about one mile apart. It was the habit of the companies in transferring freights by the carload from one line to the other to use the "Y," but freights in less quantities were removed from the cars and transported by drays. In this case the defendant removed the piano from its car and delivered it to persons doing business as a transfer company, who let the piano fall in transporting it from one station to the other, and injured it. It was held that such transfer company was not "a connecting common carrier" within the meaning of the bill of lading, and that the defendant company was liable for

But a Railroad Company Switching Cars from the line of the last carrier to the warehouse of the consignee, which is on a spur track of such company, is a connecting carrier as to such goods, and liable as such for a loss of or injury to them.¹

Where the Lines of Two Connecting Carriers Do Not Immediately Join Each Other, so that the goods must be transferred from one to the other by a transfer company or similar means, the question as to which company is liable during such transfer must depend upon whether the transferring company is the agent of the first or second carrier. The obligation of the first carrier being to deliver to the second, the presumption would be that the transfer company acted as agent of the first carrier; but this may be rebutted by proof.²

II. RELATION OF CONNECTING CARRIERS TO EACH OTHER. — The common-law obligations of a railroad company or other carrier to a connecting carrier with respect to the reception, transportation, and delivery of freight are the same as those owing from the company to an individual shipper; whatever rights beyond those belonging to a natural person are claimed by one company against another operating a connecting line must arise out of special contracts or the peculiar provisions of the charters of the companies.³

Initial Carrier Contracts with Connecting Line as Shipper's Agent. — Under the general rule holding the initial carrier or any intermediate carrier liable only for losses or injuries on their own lines or directly attributable to their negligence, the initial carrier acts as the shipper's agent in delivering the goods to the next line, and the contract of shipment obtained by the initial carrier from the

the injury. See also *Western, etc., R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 35 Am. & Eng. R. Cas. 602.

In *Roach v. Canadian Pac. R. Co.*, 1 Manitoba 158, goods in transit passed over two lines of railroad. The second road admitted having received them, and at the place of destination undertook to deliver them to the consignee through a cartage company incorporated as a common carrier, by whom some of the goods were lost. It was held that an action would lie against the second railroad company, the cartage company being its agent merely, and not a connecting carrier.

1. Switching Company. — A carload of sugar sent from Louisiana was consigned to the plaintiff, a grocery company, at Wichita. It was shipped over the Texas and Pacific Company's line, and was brought to Wichita by the St. Louis and S. F. Company. It was there placed on the "Y," and switched by the defendant company over its track to the spur track in rear of the plaintiff's warehouse, for which service the St. Louis and S. F. Company paid it the regular switching charge of two dollars per car. The court held that the defendant was liable as a common carrier for a loss occurring after it had taken charge of the shipment and before the plaintiff had had a reasonable time in which to remove it; Allen, J., saying: "A railroad transporting a passenger or a carload of freight one mile, using a switch engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight or passenger train. The fact that compensation for this particular service was paid by the St. Louis and S. F. Ry. Company, while it might render that company also responsible, could not relieve the defendant company from its liability as a carrier." *Missouri Pac. R. Co. v. Wichita Wholesale Grocery Co.*, 55 Kan. 525.

2. Where Intermediate Short Line Intervenes Between Two Connecting Carriers. — *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 18 Am. St. Rep. 119; *Missouri Pac. R. Co. v. Young*, 25 Neb. 651.

The liability of the first carrier in such case does not necessarily terminate with the arrival of the goods at its own terminal depot, when there is a further duty to carry the goods over an intermediate short line between its own terminal depot and the other connecting road, especially when the intermediate short line is a part of its own road. *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 18 Am. St. Rep. 119.

In *Hooper v. Chicago, etc., R. Co.*, 27 Wis. 81, 9 Am. Rep. 439, it was held that a carter who takes goods from one railroad office at the end of its line and transfers them to a connecting line is not a common carrier, but a mere agent of the first road, although it was his practice to advance its freight charges and collect them, with his own charges, from the connecting line.

3. Relation of Connecting Carriers to Each Other. — *Shelbyville R. Co. v. Louisville, etc., R. Co.*, 82 Ky. 541, 21 Am. & Eng. R. Cas. 233. In this case the appellant company established a station at its point of junction with a connecting line, the defendant, and only half a mile from a station previously established by the connecting road. It was held that it could not maintain this proceeding to compel the connecting road to stop its trains at the new station and deliver and receive freight and passengers there; nor to compel such company to allow it to run its trains over its road, where there was no agreement for such a privilege and no provision in the defendant's charter creating it. See also *Pennsylvania R. Co. v. Baltimore, etc., R. Co.*, 60 Md. 263; *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667.

second carrier is admissible as showing the contract between the shipper and the latter line.¹

Through Rates and Routes. — The duty of any carrier to receive goods tendered by a connecting carrier does not extend so far as to require it to enter into a contract with the latter for a joint through rate and a joint through routing of freight and passengers, and a court of equity has no power, either at common law or under the interstate commerce act, to compel one company to enter into such a contract with another.²

III. NO CARRIER BOUND TO CARRY BEYOND ITS OWN LINE. — Ordinarily neither a railroad company nor any other common carrier is bound to receive goods to be delivered at a point beyond its line; but it may become bound to do so by a special contract or by a course or custom of business long practiced.³ And when a company does undertake to carry beyond its own line, either by special contract or by mere usage, it is under obligation to furnish means of transportation to the point of destination.⁴

IV. DUTY TO DELIVER TO SUCCEEDING CARRIER. — Upon the arrival of the goods at the point where they are to leave the initial line for that of the next carrier, it is the duty of the first company to deliver the goods to the succeeding carrier.⁵

1. Contract of Shipment Between First and Second Carrier Admissible in Shipper's Favor. — *Patterson v. Clyde*, 67 Pa. St. 500. In this case the goods were to be carried part of the way by rail and part by steamer. In transferring them to the steamship line, the railroad company took a receipt and bill of lading from the steamer in its own name. The court held that in so doing it acted as the agent of the consignee, and in a suit against the steamer for a loss of the goods, evidence as to the terms of such contract was proper. See also the title *CARRIERS OF GOODS*, vol. 5, p. 306.

2. Joint Through Rates and Routing — Equity Cannot Compel Contract for. — *Little Rock, etc., R. Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 559, 42 Am. & Eng. R. Cas. 490; *Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co.*, 3 I. C. C. Rep. 1.

"At common law a carrier is not bound to carry except on his own line, and we think it quite clear that, if he contracts to go beyond, he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ." *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667, 16 Am. & Eng. R. Cas. 57, reversing 15 Fed. Rep. 650. See also *Pullman Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587, 23 Am. & Eng. R. Cas. 537; *Chicago, etc., R. Co. v. Pennsylvania R. Co.*, 1 I. C. C. Rep. 86; *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567; *Chicago, etc., R. Co. v. Osborne*, 52 Fed. Rep. 915; *Little Rock, etc., R. Co. v. St. Louis, etc., R. Co.*, 63 Fed. Rep. 775; *St. Louis Drayage Co. v. Louisville, etc., R. Co.*, 65 Fed. Rep. 39; *Detroit, etc., R. Co. v. Interstate Commerce Commission*, 74 Fed. Rep. 838.

English Statutes. — Under the Railway and Canal Traffic Act, 1854, § 2, a shipper is given the right to require any number of railway companies in Great Britain to combine to form a continuous route by which his traffic may be sent at a single booking and for a single payment, such payment to be ascertained by adding together the local rates of the

various companies over whose line the traffic passes. *Great Western R. Co. v. Severn, etc., R. Co.*, 5 R. & C. T. Cas. 170; *Uckfield Local Board v. London, etc., R. Co.*, 2 Ry. & C. T. Cas. 214. See also *Pelsall Coal, etc., Co. v. London, etc., Co.*, 7 Ry. & C. T. Cas. 1. But by sections 11 and 12 of the Regulation of Railways Act, 1873, as amended by sections 25 and 26 of the Railway and Canal Traffic Act of 1888, any connecting carrier, and any shipper of through freights, is given the right to have through rates and routes over any other connecting road established by a procedure before the railroad commissioners, in case such other connecting carrier refuses to give through rates or routes. See *Swindon, etc., R. Co. v. Great Western R. Co.*, 4 R. & C. T. Cas. 349.

3. Points Beyond Line. — *Lotspeich v. Central R., etc., Co.*, 73 Ala. 306, 18 Am. & Eng. R. Cas. 490; *Cobb v. Illinois Cent. R. Co.*, 38 Iowa 601; *Southern Kansas R. Co. v. Duncan*, 40 Kan. 503; *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667, 16 Am. & Eng. R. Cas. 57.

Where a company holds itself out to the public as carrying such goods as were tendered to points where the shipper desires to send them, it is liable for refusing to receive and ship them, although such points may be beyond its lines. *Chicago, etc., R. Co. v. Wolcott*, 141 Ind. 267.

4. Where Undertaking Is to Carry Beyond Line Means of Transportation Must Be Furnished. — *Bussey v. Memphis, etc., R. Co.*, 4 McCrary (U. S.) 405, 13 Fed. Rep. 330; *Coles v. Central R., etc., Co.*, 86 Ga. 251, 45 Am. & Eng. R. Cas. 328. See *Deming v. Norfolk, etc., R. Co.*, 17 Phila. (Pa.) 540, 21 Fed. Rep. 25, 16 Am. & Eng. R. Cas. 232.

5. Delivery to Next Carrier. — "It is the duty of the carrier in the absence of any special contract to carry safely to the end of his line and to deliver to the next carrier in the route beyond." *Per Davis, J.*, in *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 324.

A Custom or Usage between the carriers at that point may be shown¹ which may affect the character of this duty, but no regulation or custom between the carriers can be allowed to relieve the carrier of its duty to make delivery, in some form, to the next line.²

It seems that where goods are shipped to a point beyond the line of the first carrier, and a bill of lading is given which shows the residence of the consignee to be beyond its line, the inference arises that the first carrier undertakes delivery to the next carrier along the route; but, however this may be, evidence is admissible, under such circumstances, to show a custom or contract that the initial carrier is to make such delivery. *Hooper v. Chicago*, etc., R. Co., 27 Wis. 81, 9 Am. Rep. 439, 5 Am. Ry. Rep. 302.

The delivery must be prompt when the shipment is of cattle which are liable to suffer from delay. *Rock Island, etc., R. Co. v. Potter*, 36 Ill. App. 590.

No Action by Second Carrier for Refusal to Deliver.—The G. railroad, whose line ran from Greenville, S. C., to Columbia, S. C., received a number of bales of cotton consigned to persons in New York City, and gave a bill of lading which specified that the cotton was to be shipped over the Atlantic Coast line. The G. railroad transported the cotton to Columbia, but failed to deliver it to the W. railroad, whose line ran from Columbia to Wilmington, N. C., and formed a portion of the Atlantic Coast line, and the W. railroad thereupon brought an action against the G. railroad for failure and refusal to deliver the cotton to it. But the court held that it was not entitled to recover upon the contract evidenced by the bill of lading, it not being privy to that contract; and it was not entitled to recover in tort, because the only duty of the G. railroad to ship by this route arose from the contract itself. *Wilmington, etc., R. Co. v. Greenville, etc., R. Co.*, 9 S. Car. 325, 30 Am. Rep. 23.

When Obligation Does Not Exist.—After a railroad company has safely carried goods to their place of destination, where the freight charges have been paid by the consignee after inspection of the goods, its liability as a common carrier is terminated, and it is under no obligation to transfer them to another carrier in the city for ultimate delivery to the consignee at his place of business, unless a valid usage or custom to that effect is shown. *Melbourne v. Louisville, etc., R. Co.*, 88 Ala. 443.

A railroad company cannot be made liable for a failure to deliver a shipment to a connecting line in the absence of a special contract, where there was no agent at the point where its line met that of the connecting carrier whose duty it was to receive the freight and carry it forward, and the two roads had not been connected for that purpose. *St. Louis, etc., R. Co. v. Marrs*, (Ark. 1895) 31 S. W. Rep. 42.

Special Contract to Deliver—Consideration.—An agreement by a railroad company after the goods have been safely carried to their destination, to transfer them to another company for more convenient ultimate delivery at the consignee's place of business, is without consideration and unenforceable; but if the railroad enters upon the performance of such

an agreement it is liable for loss or injury to the goods by its negligence in the performance. *Melbourne v. Louisville, etc., R. Co.*, 88 Ala. 443.

1. Usage Between Connecting Carriers.—*Hooper v. Chicago, etc., R. Co.*, 27 Wis. 81, 9 Am. Rep. 439, 5 Am. Ry. Rep. 302; *Hansen v. Flint, etc., R. Co.*, 73 Wis. 346, 9 Am. St. Rep. 791, 37 Am. & Eng. R. Cas. 628.

The burden is on the carrier to establish affirmatively the custom or regulation he relies on. *Irish v. Milwaukee, etc., R. Co.*, 19 Minn. 376, 18 Am. Rep. 340, 19 Am. Ry. Rep. 89.

Care Required in Delivery.—The delivery must be made in such a way as not to injure the goods or live stock shipped. Thus, the defendant company, the initial line, having received cattle for transportation over its own road and for delivery to a connecting line, and being about to transfer them to the cars of the connecting line, was bound to permit the consignor to put the cars in proper condition for the safe transportation of the cattle, as he had agreed to do, or to have that duty performed by its own servants with reasonable care and diligence, providing suitable bedding, necessary partitions, etc., and avoiding undue crowding of the animals in the cars; and for injury to the cattle resulting from the negligent performance of this duty by the defendant's servants, after the plaintiff had offered to discharge it himself, the defendant was liable. *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 18 Am. St. Rep. 119.

2. Effect of Usage or Custom.—The plaintiffs delivered to the defendant, at New York, goods "to be forwarded to Detroit only;" they were marked "D. & L., Dryden, Mich., *via* Ridgway." The G. T. Ry. Co. was the usual carrier from Detroit to Ridgway. It had a regulation to the effect that it would not accept goods for transportation unless the shipper would take a receipt limiting its common-law liability. Up to a short time prior to the shipment in question the G. T. Ry. Co. had not exacted of the defendant a compliance with this regulation. From the time of its enforcement the defendant had been accustomed to detain goods destined to points on the route of that road, and to notify consignees awaiting their directions; this was not known to the plaintiff. Upon arrival of the goods at Detroit they were deposited in the defendant's warehouse without being offered, or notice given of their arrival, to any other carrier beyond that point. Notice was given to the consignees, who gave no instructions. About twenty days thereafter they were destroyed by an accidental fire. In an action to recover damages it was held that the defendant was not excused from tendering the goods to the G. T. Ry. Co., on account of such regulation, as he would have been justified in delivering them, and in accepting the usual contract required of that company; that no custom was established superseding the general obligation to make delivery to the next carrier; and that the defendant held the goods as a com-

V. NOTICE OF ARRIVAL OF GOODS.—It is the duty of each connecting carrier to notify the succeeding carrier of the arrival of the goods at the point where the latter is to receive them; and until such notice is given, the former carrier remains liable for the safety of the goods. There is no complete delivery to the succeeding line and no liability on its part arises until after such notice.¹

To Whom Notice Given.—The notice must be given to some representative of the succeeding line authorized to receive it, and must indicate the destination of the goods,² and such instructions as were given the initial carrier by the shipper.³

Notice to Consignee Not Required.—The first or an intermediate carrier is not bound, however, to give notice to the consignee of the delivery to a succeeding carrier.⁴

VI. DUTY TO RECEIVE GOODS TENDERED BY A CONNECTING LINE.—1. In General.—The duty resting upon a common carrier to receive and carry all goods properly tendered for carriage extends to goods tendered by connecting carriers;⁵ and under proper circumstances a mandatory injunction may be had to compel the acceptance and transfer of freight so tendered.⁶

mon carrier and was liable. *Rawson v. Holland*, 59 N. Y. 611, 17 Am. Rep. 394, *affirming* 5 Daly (N. Y.) 155, 47 How. Pr. (N. Y.) 292.

Delay in Delivery to Connecting Line.—The initial line cannot be held liable for delay in delivering a cargo to the connecting line, where the delay was due to the inability of the latter to receive it. *Palmer v. Atchison, etc.*, R. Co., 101 Cal. 187.

1. *Sprague v. New York Cent. R. Co.*, 52 N. Y. 637; *infra*, this title, *What Constitutes Delivery to a Connecting Carrier*.

This duty to notify the next carrier exists particularly in cases where live stock are being carried, it being always important, in such cases, that close connections be made. See *Dunn v. Hannibal, etc.*, R. Co., 68 Mo. 268; and the title CARRIERS OF LIVE STOCK, vol. 5, p. 450. See also *Myrick v. Michigan Cent. R. Co.*, 9 Biss. (U. S.) 44 (duty to notify succeeding carrier of the terms of the contract of carriage).

2. *Selma, etc., R. Co. v. Butts*, 43 Ala. 385, 94 Am. Dec. 694.

3. See *infra*, this title, *Liability of Connecting Lines for Loss or Injury—Diverting Consignment from Proper Route*. See also the title CARRIERS OF GOODS, vol. 5, p. 422.

4. **Notice to Shipper of Delivery to Connecting Line.**—*Mason v. Grand Trunk R. Co.*, 37 U. C. Q. B. 163.

But the carrier is bound to give the shipper notice when the connecting line refuses to receive the goods. See *infra*, this title, *Liability of Connecting Lines for Loss or Injury—When Connecting Line Refuses to Receive*.

5. *Chicago, etc., R. Co. v. Wolcott*, 141 Ind. 267; *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 16 Am. St. Rep. 926. See also the title CARRIERS OF GOODS, vol. 5, p. 160.

In *Gulf, etc., R. Co. v. Godair*, 3 Tex. Civ. App. 514, which was an action for injuries to a shipment of cattle, it appeared that the defendant, a connecting carrier, received the cattle from the preceding line, and part of the injury occurred while they were in the pens of the latter company. The defendant insisted that it was not liable for such injuries, but the court

held that whether it had received the cattle or not it was liable; if it had not received them, it was its duty to have done so at the time when they were first tendered, and this neglect of duty could not be set up as a defense. The court, by Head, J., said: "It was certainly its [defendant's] duty to receive them when so tendered, unless it had a legal excuse for not so doing; and if it wrongfully refused, and this wrongful act on its part contributed in causing the injury, we think it would be liable to appellant for the whole damage, even though the Texas & Pacific may also have been guilty of negligence which aided in enhancing the damage."

6. **Mandatory Injunction to Compel Connecting Carrier to Receive Goods.**—*Beers v. Wabash, etc., R. Co.*, 34 Fed. Rep. 244, 35 Am. & Eng. R. Cas. 646; *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 730, 53 Am. & Eng. R. Cas. 307 (subject treated at length in opinion of Taft, J.); *Coe v. Louisville, etc., R. Co.*, 3 Fed. Rep. 775. See also *Chicago, etc., R. Co. v. New York, etc., R. Co.*, 24 Fed. Rep. 516, 22 Am. & Eng. R. Cas. 265.

The case of *Chicago, etc., R. Co. v. Burlington, etc., R. Co.*, 34 Fed. Rep. 481, was a suit for a mandatory injunction to compel the defendant company to receive freight and passengers from the plaintiff's line as required by the Interstate Commerce Act, and by the laws of Iowa. The defendant company resisted the application on the ground that a strike was then in progress by the engineers of the plaintiff's road, and that it would extend to defendant's line and interfere with its traffic, if such cars or freight were received by defendant. The court held, however, that this constituted no defense, and that the injunction should issue. See also *Payne v. Kansas, etc., R. Co.*, 46 Fed. Rep. 546, 47 Am. & Eng. R. Cas. 228, as to the practice in obtaining such injunctions and the jurisdiction of the federal courts to issue them. See further, in this connection, *Wolverhampton, etc., R. Co. v. London, etc., R. Co.*, L. R. 16 Eq. 433; *Denver, etc., R. Co. v. Atchison, etc., R. Co.*, 15 Fed. Rep. 650, 9 Am. & Eng. R. Cas. 374, *reversed* in 110 U. S. 667.

2. Same Cars Need Not Be Used. — There is no rule of law requiring that any carrier shall receive shipments from a connecting line and transport them in the same cars in which they were so tendered. Except in cases where the cars of the receiving company are all in use or where the shipments would suffer from being transferred to different cars, the question whether such shipments so tendered shall be transferred to the cars of the receiving line or carried in the original cars is one depending upon the contracts between the companies and resting, in other cases, in the discretion of the receiving line. And a bill in equity would not lie to compel the receiving carrier to act otherwise than its reasonable discretion dictates.¹

3. Where Goods Tendered Are in a Damaged State. — No connecting carrier is bound to receive goods tendered to it for transportation if, at the time, they are not in fit condition for shipment.² A carrier may adopt and enforce a regulation that it will not receive from another company goods which are in a damaged condition unless it is first indemnified against liability for damages. And no liability will exist on the part of such carrier for refusing to receive freight already damaged; the companies on whose lines the damage occurred are alone responsible.³

VII. LIABILITY FOR DELAY — 1. The General Rule — Where Contract Is to Deliver by Specified Time. — The initial line is responsible for a delay in the transportation and delivery of goods, whether the delay occurs on its own line or that of a connecting carrier, where it has expressly agreed to deliver by a specified time.⁴

Where There Is No Such Agreement, the liability of the initial line is governed by the same rules which determine its liability for loss of or injury to the goods shipped to a point beyond its line.⁵

1. Receiving Carrier Not Bound to Carry in Cars Used by Initial Line. — Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co., 61 Fed. Rep. 160, affirming 51 Fed. Rep. 465, 51 Am. & Eng. R. Cas. 145; McAlister v. Chicago, etc., R. Co., 74 Mo. 351, 7 Am. & Eng. R. Cas. 373. See also Little Rock, etc., R. Co. v. St. Louis, etc., R. Co., 59 Fed. Rep. 408.

2. Thus, one railroad company is not bound to receive cars from a connecting road loaded with hogs so crowded that they are in danger from suffocation; and if it does it makes the act of that road its own, and is bound for the damages resulting to the hogs from suffocation or improper loading. Paramore v. Western R. Co., 53 Ga. 383. See also the title CARRIERS OF GOODS, vol. 5, p. 164.

3. Missouri Pac. R. Co. v. Weisman, 2 Tex. Civ. App. 86.

4. Initial Carrier Contracting for Ultimate Delivery in Given Time. — Pereira v. Central Pac. R. Co., 66 Cal. 92, 18 Am. & Eng. R. Cas. 565; St. Louis, etc., R. Co. v. Edwards, 78 Fed. Rep. 745, 49 U. S. App. 52. See also McKay v. New York Cent., etc., R. Co., 50 Hun (N. Y.) 563; Cartwright v. Rome, etc., R. Co., 85 Hun (N. Y.) 517 (intermediate carrier held liable for delay in carrying perishable goods). See generally the title CARRIERS OF GOODS, vol. 5, p. 244.

Where a special contract is made for through shipment, and the initial carrier has in no way limited its liability by special stipulations therein, it is bound to deliver the goods at their destination within a reasonable time, and is liable for damages resulting from a failure to do so. Central R., etc., Co. v. Georgia Fruit, etc., Exch., 91 Ga. 389, 55 Am. & Eng. R. Cas. 606.

Intermediate Carrier Not Bound by Parol Agreement of Initial Line to Deliver by a Specified Time. — When the initial line contracted, by parol, with the shipper to carry the goods to their destination by a specified time, the second carrier receiving them from such line cannot be held liable on the theory that it had so agreed, when there is no proof showing that the initial line was its agent authorized to bind it by such a contract. St. Louis Southwestern R. Co. v. Cates, (Tex. Civ. App. 1897) 38 S. W. Rep. 648.

5. No Special Agreement. — For the authorities governing the liability of the initial carrier in such cases, see *infra*, this title, *Liability of Connecting Lines for Loss or Injury — Of Initial Carrier*.

Initial Carrier's Right to Selection of Route. — The initial carrier is not bound to ship over its own route in every case, but may select the route by which the goods shall be carried, where there is no express contract on the subject. But he is liable as for delay where the route selected is a roundabout one, requiring an unreasonable time for transportation. Wells, etc., Express Co. v. Fuller, 4 Tex. Civ. App. 213. See also Snow v. Indiana, etc., R. Co., 109 Ind. 425; U. S. Express Co. v. Kountze, 8 Wall. (U. S.) 342. If the shipment over a particular route will cause delay, it is the duty of the initial carrier so to inform the shipper. Inman v. St. Louis Southwestern R. Co., (Tex. Civ. App. 1896) 37 S. W. Rep. 37.

Second Carrier's Failure to Receive — Who Entitled to Sue. — The charterer of a vessel belonging to the plaintiff shipped by it a cargo to be delivered at a port where the defendant railroad owned a wharf and received shipments. The charterer contracted with the railroad to receive the cargo at this port and to transport

When the Delay Occurs on the Initial Carrier's Own Line, such carrier of course cannot escape liability merely because the goods are to pass over other lines.¹

Intermediate Carrier Liable for Its Own Acts. — An intermediate carrier is liable for a delay caused by its fault or neglect, as in case of other injuries.²

2. Delay from Unavoidable Obstruction. — The rule that a carrier cannot excuse a delay in delivery by showing an unavoidable obstruction on its line,

it thence. It was held that the shipowner could not recover damages from the railroad company for delay in receiving the cargo. The delay of the railroad company was a breach of its duty to the charterer, for which it was responsible to him, and not to the shipowner, who was not privy to the contract. The shipowner's claim should have been made against the charterer, who was responsible for the delay of its agent. *Freeman v. Louisville, etc., R. Co.*, 32 Fla. 420.

Stipulation Against Liability for Delay. — In *Jennings v. Grand Trunk R. Co.*, 52 Hun (N. Y.) 227, it was held that a stipulation by the initial line against any liability for a delay occurring on connecting lines would not relieve the first carrier from liability for a delay on a connecting line resulting from the negligence of the first carrier. This holding was affirmed in 127 N. Y. 438, 49 Am. & Eng. R. Cas. 98.

1. Initial Line Liable for Delay Resulting from Its Negligence. — *Ft. Worth, etc., R. Co. v. Byers*, (Tex. Civ. App. 1896) 35 S. W. Rep. 1082 (initial line held liable for decrease in market value of cattle, due to delay on both lines).

Delay on Initial Line — Loss by Freezing. — In *Fox v. Boston, etc., R. Co.*, 148 Mass. 220, 37 Am. & Eng. R. Cas. 632, a special contract was made with the shipper by which the carrier agreed to deliver certain goods, which were peculiarly liable to loss by freezing, at a point on a connecting line, by a specified date; the carrier knowing that the contract was so made in order to avoid danger of injury by freezing. It was held that the initial carrier was liable for injuries to the goods resulting from freezing, although it occurred on a connecting line, where there was a delay on the line of the initial carrier without which the loss would not have occurred. *Compare*, however, *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6. See *Reynolds v. Boston, etc., R. Co.*, 121 Mass. 291.

2. Delay in Intermediate Line. — *Sisson v. Cleveland, etc., R. Co.*, 14 Mich. 489, 90 Am. Dec. 252. Where goods subject to freezing are destroyed by the cold while in the hands of an intermediate carrier, by reason of negligence or unreasonable delay, or if, by such delay in transportation or in delivering to the next carrier in the line the latter cannot, by reasonable efforts, transport and deliver before they are destroyed by cold weather, the former carrier will be liable for the loss. *Michigan Cent. R. Co. v. Curtis*, 80 Ill. 324.

Goods were shipped to pass over two roads. The second road received them from the first, but held them for some time awaiting the settlement of certain claims for back charges claimed to be due it from the first road, and while so detained they were injured by an unusual and extraordinarily high water. It was held that there was negligence in detaining the

goods, and this having contributed to the injury, the carrier could not claim the exemption that the law would otherwise have given where a loss occurs from such cause. *Michaels v. New York Central R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415.

Where There Was Delay on Several Lines. — Where it appears that there was a delay on other connecting lines, but for which no loss would have occurred, a defendant cannot be made liable for damages caused by the loss of a market for the shipment, although some delay on its part may be shown. The question in such cases must be, what delay was the proximate cause of the loss. *Detroit, etc., R. Co. v. McKenzie*, 43 Mich. 609.

Shipment in Car with Other Goods. — In *Waite v. New York Cent., etc., R. Co.*, 110 N. Y. 635, 17 N. E. Rep. 730, it appeared that a boiler was shipped from Boston to Little Falls over the B. & A. road. At Albany, it was transferred from that company's car to one of the defendant's cars, in which was a lot of machinery consigned to East St. Louis. This latter car having to be taken to East St. Louis first, a delay was caused in the delivery of the boiler at Little Falls. Under these facts, it was held that the defendant company was liable for the delay.

Presumption as to Where Delay Occurred. — There is no presumption that the delay in transportation occurred in the last of the lines, and in the absence of any proof on the subject, a verdict charging the last line with the delay must be set aside. *Almand v. Georgia R., etc., Co.*, 95 Ga. 775.

Liability of Intermediate Line — Contract and Tort. — J. bought fertilizers at Charleston, to be shipped to them at a station on the E. T. V. & G. R. company's line. The fertilizers were delivered, in Charleston, to a railroad company which gave a bill of lading undertaking to ship them to the station named, but making no mention of the E. T. V. & G. R. Co. The latter company had no privity or contractual relation with the initial company, and no connection with this shipment until the fertilizers were delivered to it in Atlanta by an intermediate company. It was held that the trial court erred in charging that if the E. T. V. & G. R. company was one of the connecting lines over which the goods were to be shipped, it would be liable for an unreasonable delay of the shipment, whether such delay occurred on its own line or not, the suit being based on the contract of carriage. *East Tennessee, etc., R. Co. v. Johnson*, 85 Ga. 497. After the decision just referred to, the plaintiff brought another action for tort against the E. T. V. & G. R. company, based on the same state of facts. It was held that the defendant company, the last carrier, was liable for a delay occurring on its line and caused by its fault, notwithstanding there was no contract between it and

where it appears that it knew of the obstruction at the time the goods were received for transportation, and failed to notify the shipper thereof,¹ does not apply to a connecting carrier which receives goods from a connecting line, knowing, at the time, that its line is obstructed.²

3. Effect of Regulations or Usage of Business.—When the connecting carrier has accepted goods from a prior line its duty is to forward them immediately, and it cannot justify a delay by showing that, by a regulation, goods so received are not to be forwarded until the receipt of a bill for all back charges and that no such bill was received.³ But such a carrier may refuse to receive goods until the regulation has been complied with, and no liability will arise from such a refusal unless the regulation be shown to be unreasonable.⁴

4. Initial Carrier — Duty of as to Selection of Means of Reshipment.—A carrier, upon accepting goods for shipment under a contract which contemplates a reshipment by other agencies than its own, is not bound, however, to accept the first opportunity for reshipment that may offer; in the absence of a special contract it is bound only to deliver within a reasonable time, and is therefore held to the exercise of reasonable diligence only, in procuring reshipment by other agencies.⁵

5. Unusual Accumulation of Freight.—The delay cannot be considered as resulting directly from the wrongful act of a defendant, a connecting carrier, where its refusal to accept the goods for transportation immediately upon their being tendered by the initial line is due to an accumulation of freight on its own line necessitating the use of all its facilities for the transportation of freight already received, the pressure of business being unusual and unexpected.⁶

VIII. LIABILITY FOR LOSS OR INJURY — 1. Of Initial Carrier — a. LIABILITY HELD TO EXTEND OVER WHOLE ROUTE.—The English and Canadian courts and the courts of many of the United States have adopted the rule that

the shipper or between it and the connecting line. *Johnson v. East Tennessee, etc., R. Co.*, 90 Ga. 810, 55 Am. & Eng. R. Cas. 446.

1. As to the general rule mentioned, see the title *CARRIERS OF GOODS*, vol. 5, p. 255.

2. *St. Louis, etc., R. Co. v. Bland*, (Tex. Civ. App. 1896) 34 S. W. Rep. 675. In such a case the carrier has no option but to receive the goods tendered by the connecting line, and no unusual obligations arise from their acceptance.

3. *Liability of Connecting Line.*—*Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Dunham v. Boston, etc., R. Co.*, 70 Me. 164, 35 Am. Rep. 314.

4. *Regulation Requiring Receipt for Back Charges.*—Thus where it is the usage for one connecting road to deliver a freight bill and voucher for previous expenses with a car in transferring freights from one road to the other, the first carrier will be liable for a loss of perishable freights, which are being transported in cold weather, caused by a delay in a second carrier refusing to receive the car until such freight bill and voucher was furnished, it appearing that such usage and custom was reasonable, and necessary for further transportation and the collection of freights from the consignees. *Reynolds v. Boston, etc., R. Co.*, 121 Mass. 201.

5. *Bound Only to Exercise Reasonable Diligence in Securing Reshipment.*—In the case of *Frank v. Memphis, etc., R. Co.*, 52 Miss. 570, one F. shipped cotton by railroad from Holly Springs to New Orleans, *via* Memphis, to be transhipped at the latter point by steamboat. The

railroad agent at Memphis contracted with the M. Packet Co. for its shipment on the steamer Richmond, then descending the river. Before her arrival, the steamer Magenta offered to carry the cotton but was refused. When the Richmond arrived she refused to take the cotton, on account of a heavy load and the high water. The cotton was forwarded by the first boat after the Richmond. Several days' delay, however, had been thus caused and cotton in the meantime declined in price. In a suit by the shipper against the railroad company for damages for the delay, the court held that the defendant's action was sufficiently prudent and prompt under the circumstances and the plaintiff could not recover. See also *Merchants' Wharfboat Asso. v. Wood*, 64 Miss. 661, 60 Am. Rep. 76; *Arnold v. Shade*, 3 Phila. (Pa.) 82.

6. *Delay on Connecting Line Due to Unexpected Pressure of Business.*—In *Crawford v. Great Western R. Co.*, 18 U. C. C. P. 510, goods were shipped to a point on the line of the defendant's road and beyond the line of the initial carrier. The first carrier carried them to the end of its line, where it connected with the line of the defendant company, and notified the defendant company, requesting it to forward them immediately. Owing to an accumulation of freights caused by an unusual and unexpected pressure of business, the defendant company could not at once transport them and they were destroyed by fire on the next day, while in the warehouse of the initial company. It was held that the defendant company was not liable for the loss. See *CARRIERS OF GOODS*, vol. 5, p. 256.

the initial carrier, by receiving goods for transportation to a point beyond its line over connecting lines and issuing a through bill of lading, impliedly assumes responsibility for the safety of the goods over the entire route, and is therefore responsible for any loss or injury occurring on the journey, no matter on what line.¹

1. Rule Holding Initial Carrier Liable Over Whole Route—England.—*Muschamp v. Lancaster*, etc., R. Co., 8 M. & W. 421, 5 Jur. 656, 2 Eng. R. & C. Cas. 607; *Mytton v. Midland R. Co.*, 4 H. & N. 615, 28 L. J. Exch. 385; *Bristol*, etc., R. Co. v. *Collins*, 7 H. L. Cas. 194, 29 L. J. Exch. 41, 1 H. & N. 517, 11 Exch. 790, 38 Eng. L. & Eq. 593; *Bristol*, etc., R. Co. v. *Collins*, 5 H. & N. 909; *Crouch v. London*, etc., R. Co., 14 C. B. 255, 78 E. C. L. 255, 23 L. J. C. P. 73; *Wilby v. West Cornwall R. Co.*, 2 H. & N. 703, 27 L. J. Exch. 181, 4 Jur. N. S. 284.

Where a railway company receives goods at one place to carry them to another, it is answerable for any loss that may occur between the places, although it may be on a line of railway that does not belong to such company; and the receipt of goods so to be carried is *prima facie* evidence of such liability. *Watson v. Ambergate*, etc., R. Co., 15 Jur. 448; *Scothorn v. South Staffordshire R. Co.*, 8 Exch. 341, 7 Railw. Cas. 870, 22 L. J. Exch. 121.

The rule that where a railway company undertakes the carriage of goods to a specified place and the goods are lost at a point beyond the terminus of its line, the company is responsible, applies to a case where a portion of the transit is to be effected by water, even over the sea. *Wilby v. West Cornwall R. Co.*, 2 H. & N. 703, 4 Jur. N. S. 284, 27 L. J. Exch. 181.

Where one of two railways having arrangements with regard to through traffic is the agent of the other for making contracts for the transportation of live stock under conditions which do not protect its associate company, an action will lie against the latter company for the loss of the stock. *Gill v. Manchester*, etc., R. Co., L. R. 8 Q. B. 186, 42 L. J. Q. B. 89, 21 W. R. 525, 28 L. T. 587.

A railway company receiving from another railway company goods addressed by the sender to "A B, Argyle street, Glasgow," is not bound to regard markings by the latter company in the way-bill or invoice as to the carriers to be employed in the delivery. *Pickford v. Caledonian R. Co.*, 4 Sess. Cas. (3d ser.) 755, 1 Ry. & C. T. Cas. 252.

Canada.—See *Merchants' Despatch Transp. Co. v. Hatley*, 14 Can. Supreme Ct. 572, 35 Am. & Eng. R. Cas. 565, affirming 12 Ont. App. 201, 4 Ont. Rep. 723; *Grand Trunk R. Co. v. McMillan*, 16 Can. Supreme Ct. 543, 42 Am. & Eng. R. Cas. 468, allowing appeal from 15 Ont. App. 14, 12 Ont. Rep. 103; *Crawford v. Great Western R. Co.*, 18 U. C. C. P. 510. Compare *La Pointe v. Grand Trunk R. Co.*, 26 U. C. Q. B. 479. See also *Grant v. Northern Pac. R. Co.*, 22 Ont. Rep. 645; *Gordon v. Great Western R. Co.*, 34 U. C. Q. B. 224; *Richardson v. Canadian Pac. R. Co.*, 19 Ont. Rep. 369, 45 Am. & Eng. R. Cas. 413.

In the case of *Rennie v. Northern R. Co.*, 27 U. C. C. P. 153, goods sent C. O. D. were delivered to a railroad company addressed to a

point beyond its line, under a provision in the shipping note "that where goods are addressed to consignees beyond the places of the company's stations they will be forwarded by public carriers or otherwise, * * * but the delivery by the company will be complete and its responsibility cease when such carriers have received notice that the company is prepared to deliver to them goods for further conveyance." It was held that no claim could be made against the company on account of a delivery having been made to the consignee by the last carrier without the price having been first collected. See also *Grand Trunk R. Co. v. McMillan*, 16 Can. Supreme Ct. 543.

Alabama.—*Mobile*, etc., R. Co. v. *Copeland*, 63 Ala. 219, 35 Am. Rep. 13; *Montgomery*, etc., R. Co. v. *Culver*, 75 Ala. 587, 51 Am. Rep. 483, 22 Am. & Eng. R. Cas. 411; *Louisville*, etc., R. Co. v. *Meyer*, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44. Compare *Lotspeich v. Central R.*, etc., Co., 73 Ala. 306, 18 Am. & Eng. R. Cas. 490; *Montgomery*, etc., R. Co. v. *Moore*, 51 Ala. 394.

The Alabama courts maintain this view on the grounds assigned by the English courts, that the connecting carriers are not liable to the shipper because there is no priority of contract between them and him. *Alabama G. S. R. Co. v. Mt. Vernon Co.*, 84 Ala. 173, 35 Am. & Eng. R. Cas. 657. But see *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 18 Am. St. Rep. 119, 32 Am. & Eng. R. Cas. 464.

In one case the court observed: "Bills of lading by railroad companies are frequently given, binding the company to deliver at a point beyond their line. Such bills bind the company for safe delivery at the agreed point of destination. *Mobile*, etc., R. Co. v. *Copeland*, 63 Ala. 219, 35 Am. Rep. 13. This, however, is a question of contract; and, in the absence of a special contract to deliver, the receiving railroad is not liable for a loss or injury occurring after the freight has passed from its line. Nor can a railroad corporation be compelled to give a bill of lading for delivery beyond its line." *Lotspeich v. Central R.*, etc., Co., 73 Ala. 307, 18 Am. & Eng. R. Cas. 490. This case, however, was only an action for the statutory penalty for excessive charges, and did not involve any question of liability for the loss of or injury to the goods shipped.

Georgia.—In cases not covered by Ga. Code 1895, § 2298, the Georgia court adopts the English rule; that is, where there is a contract express or implied to transport to a point beyond the first carrier's line, he is responsible for safe transportation to the destination of the shipment. *Mosher v. Southern Express Co.*, 38 Ga. 37; *Southern Express Co. v. Shea*, 38 Ga. 519; *Cohen v. Southern Express Co.*, 45 Ga. 148; *Central R. Co. v. Dwight Mfg. Co.*, 75 Ga. 609; *Falvey v. Georgia R. Co.*, 76 Ga. 597, 2 Am. St. Rep. 58; *Savannah*, etc., R. Co.

The Reason for This Doctrine assigned in the English cases is that the contract is with the initial carrier alone, that there is no privity of contract between the shipper and the subsequent carriers, and for that reason the initial carrier alone is liable to an action. The decisions in the United States place the rule

v. Pritchard, 77 Ga. 412, 4 Am. St. Rep. 92; East Tennessee, etc., R. Co. *v. Johnson*, 85 Ga. 497; Central R. Co. *v. Hasselkus*, 91 Ga. 382.

As to the effect of the section of the code cited, see *infra*, this section, *Under Statutory Provisions*.

Illinois. — Illinois Cent. R. Co. *v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; Porter *v. Chicago*, etc., R. Co., 20 Ill. 407, 71 Am. Dec. 286; Baldwin *v. American Express Co.*, 23 Ill. 197, 74 Am. Dec. 190; Illinois Cent. R. Co. *v. Cope-land*, 24 Ill. 332, 76 Am. Dec. 749; Illinois Cent. R. Co. *v. Cowles*, 32 Ill. 117; Illinois Cent. R. Co. *v. Johnson*, 34 Ill. 389; Chicago, etc., R. Co. *v. People*, 56 Ill. 365, 8 Am. Rep. 690; U. S. Express Co. *v. Haines*, 67 Ill. 137; Chicago, etc., R. Co. *v. Montfort*, 60 Ill. 175; Milwaukee, etc., R. Co. *v. Smith*, 74 Ill. 197; Field *v. Chicago*, etc., R. Co., 71 Ill. 458; Adams Express Co. *v. Wilson*, 81 Ill. 339; Erie R. Co. *v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451; Wabash, etc., R. Co. *v. Jaggerman*, 115 Ill. 407, 23 Am. & Eng. R. Cas. 680; Illinois Cent. R. Co. *v. Carter*, 165 Ill. 570; Beard *v. Illinois Cent. R. Co.*, 79 Iowa 518, 18 Am. St. Rep. 381, 42 Am. & Eng. R. Cas. 445; Wabash R. Co. *v. Harris*, 55 Ill. App. 159. See also Illinois Cent. R. Co. *v. Jonte*, 13 Ill. App. 424 (question for the jury as to whether carrier has assumed such responsibility or not); Ohio, etc., R. Co. *v. Hamlin*, 42 Ill. App. 441; Anchor Line *v. Dater*, 68 Ill. 369 (initial carrier alone liable). Compare East St. Louis Connecting R. Co. *v. Wabash*, etc., R. Co., 123 Ill. 594, 32 Am. & Eng. R. Cas. 522; Toledo, etc., R. Co. *v. Lockhart*, 71 Ill. 627.

Iowa. — Angle *v. Mississippi*, etc., R. Co., 9 Iowa 487; Mulligan *v. Illinois Cent. R. Co.*, 36 Iowa 181, 14 Am. Rep. 514; Beard *v. St. Louis*, etc., R. Co., 79 Iowa 527, 42 Am. & Eng. R. Cas. 509. Compare Hewett *v. Chicago*, etc., R. Co., 63 Iowa 611, 18 Am. & Eng. R. Cas. 568.

Kansas. — Berg *v. Atchison*, etc., R. Co., 30 Kan. 561, 16 Am. & Eng. R. Cas. 229; Atchison, etc., R. Co. *v. Roach*, 35 Kan. 740, 57 Am. Rep. 199, 27 Am. & Eng. R. Cas. 257. See also Atchison, etc., R. Co. *v. Davis*, 34 Kan. 199, 25 Am. & Eng. R. Cas. 305 (initial carrier liable for losses on lines subject to its management).

But where a railroad company receives goods for a destination beyond its line, but names no express agreement to transport to such point, and does expressly provide that it is not to be responsible as carrier beyond its line, and that its liability is to terminate upon a delivery of the goods to the connecting carrier, it is not liable beyond its own line. Berg *v. Atchison*, etc., R. Co., 30 Kan. 561, 16 Am. & Eng. R. Cas. 229.

New Hampshire. — Nashua Lock Co. *v. Worcester*, etc., R. Co., 48 N. H. 339, 2 Am. Rep. 265; Gray *v. Jackson*, 51 N. H. 9, 12 Am. Rep. 1.

Ohio. — Baltimore, etc., R. Co. *v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617, 3 Am. & Eng. R. Cas. 246. Compare Brown *v. Mott*, 22 Ohio St. 149.

Tennessee. — Carter *v. Peck*, 4 Sneed (Tenn.) 203, 67 Am. Dec. 604; East Tennessee, etc., R. Co. *v. Nelson*, 1 Coldw. (Tenn.) 272; East Tennessee, etc., R. Co. *v. Rogers*, 6 Heisk. (Tenn.) 143, 19 Am. Rep. 589, 12 Am. Ry. Rep. 47; Western, etc., R. Co. *v. McEl-weep*, 6 Heisk. (Tenn.) 208; Louisville, etc., R. Co. *v. Campbell*, 7 Heisk. (Tenn.) 253; Louisville, etc., R. Co. *v. Weaver*, 9 Lea (Tenn.) 38, 42 Am. Rep. 654, 16 Am. & Eng. R. Cas. 218. See also East Tennessee, etc., R. Co. *v. Brum-ley*, 5 Lea (Tenn.) 401, 6 Am. & Eng. R. Cas. 356; Sumner *v. Southern R. Assoc.*, 7 Baxt. (Tenn.) 345, 32 Am. Rep. 565, 9 Am. & Eng. R. Cas. 18; Merchants' Despatch Transp. Co. *v. Bloch*, 86 Tenn. 393, 6 Am. St. Rep. 847.

A railroad company receiving goods for shipment, marked to an extra-terminal point, is liable for all losses occurring beyond its own line. In the absence of a special contract limiting its liability such contract will be presumed from the fact that a clause thus limiting liability is to be found printed in the bill of lading, even though the shipper's attention was not called to it, if it appears that he had previously shipped like articles and taken like bills of lading. East Tennessee, etc., R. Co. *v. Brumley*, 5 Lea (Tenn.) 401, 6 Am. & Eng. R. Cas. 356.

Wisconsin. — Candee *v. Pennsylvania R. Co.*, 21 Wis. 584, 94 Am. Dec. 566. Compare Blodgett *v. Abbot*, 72 Wis. 516, 7 Am. St. Rep. 873; Tolman *v. Abbot*, 78 Wis. 192.

Texas Cases. — The cases in Texas are not in accord upon this question.

In Hunter *v. Southern Pac. R. Co.*, 76 Tex. 195, 42 Am. & Eng. R. Cas. 501, it was held that a common carrier is not liable beyond the terminus of its own line unless it has assumed such liability, and a contract which contains a stipulation relieving the carrier from liability beyond the terminus of its own line is valid. The mere fact that the carrier received goods marked for a place beyond its own terminus does not import an agreement to transport the goods to the destination named as a common carrier. In that case the court said: "These facts did not establish a cause of action against the defendant, because a common carrier is not liable beyond the terminus of its own line, unless it has assumed such liability. Central Trust Co. *v. Wabash*, etc., R. Co., 31 Fed. Rep. 247; Ortt *v. Minneapolis*, etc., R. Co., 36 Minn. 396. And the fact alone that it received goods marked for a place beyond its own terminus does not import an agreement to transport to the destination named as a common carrier. Lawson on Carr., § 240. * * * The reason a railroad is not liable beyond its own line as a common carrier, in the absence of an express contract, is because it is not a common carrier beyond its own line. The law attaches

rather upon the basis of convenience and public policy, and the initial carrier is regarded largely as the agent of the other carriers in making the contract.

Right of Action Over by Initial Line. — In those jurisdictions where the initial carrier is held to a through liability, such carrier has a right of action over against the carrier on whose line the loss actually occurred.¹

to it no liability as a common carrier beyond the terminus of its own line, and does not compel it to act as a common carrier over other lines not within its control. *Gulf, etc., R. Co. v. Baird*, 75 Tex. 256."

In *Missouri Pac. R. Co. v. Weisman*, 2 Tex. Civ. App. 86, the court said: "Appellant cannot be held liable for delay which was caused by its connecting lines, in the absence of proof of negligence on its own part. No partnership between it and such other lines, nor any other facts, were shown under which it would be responsible for delay on the part of other carriers." The case of *Gulf, etc., R. Co. v. Baird*, 75 Tex. 256, is conclusive upon this point.

In *Houston, etc., R. Co. v. Park*, 1 Tex. App. Civ. Cas., § 333, it was said: "The fair weight of American cases limits the carrier's liability as such, where there is no special contract, to his own line, though there are cases which hold the liability as continuing the same throughout the whole route, and such is the English doctrine."

Simply charging a through rate of freight is not sufficient to make a carrier responsible for the acts of the other connecting carriers. *Gulf, etc., R. Co. v. Griffith*, (Tex. Civ. App. 1893) 24 S. W. Rep. 362; *Galveston, etc., R. Co. v. Short*, (Tex. Civ. App. 1894) 25 S. W. Rep. 142.

A common carrier is not liable beyond its own line unless it has assumed such liability. The mere fact that it has received goods marked for a place beyond its own line does not import an agreement to transport to the destination named as a common carrier. *Hunter v. Southern Pac. R. Co.*, 76 Tex. 195; *Wichita Valley R. Co. v. Swenson*, (Tex. Civ. App. 1894) 25 S. W. Rep. 47; *Miller v. Texas, etc., R. Co.*, 83 Tex. 518.

In *Missouri Pac. R. Co. v. Groesbeck*, (Tex. Civ. App. 1894) 24 S. W. Rep. 702, it was held that in a suit against connecting carriers for a breach of contract of carriage that one only is liable which committed the breach.

And in *Galveston, etc., R. Co. v. Van Winkle*, 3 Tex. App. Civ. Cas., § 443, it was said that to hold one carrier liable for the default of another, a partnership or agency must be established.

But in *Galveston, etc., R. Co. v. Allison*, 59 Tex. 103, 12 Am. & Eng. R. Cas. 28, it was said that where the carrier undertakes to transport goods not only over his own route but over connecting lines, he cannot contract that his responsibility may terminate at the end of his own line, but he will still be held responsible for the negligence not only of himself and his servants but of other connecting lines, they being considered his agents for carrying out the particular contract.

In *Texas, etc., R. Co. v. Fort*, (Tex. 1882) 9 Am. & Eng. R. Cas. 392, the rule is said to be: when several carriers unite to complete a line

of transportation and receive goods for freight and give a through bill of lading, each carrier is the agent of all the others to accomplish the carriage and delivery of the goods, and is liable for any damage to them on whatever part of the line the damage is received.

In *Missouri Pac. R. Co. v. Creath*, 3 Tex. App. Civ. Cas., § 84, the goods were shipped upon a through bill of lading providing for transportation over the entire route, the said route being over connecting lines of railway, and for the transportation full freight charges were received at the point of shipment. It was held that each of the connecting lines was responsible for the injury to the goods, without reference to the line on which the injury occurred, and the provision in the bill of lading, that the carrier in whose custody the goods were when injured should alone be liable, did not alter the rule.

In *Gulf, etc., R. Co. v. Golding*, (Tex. App. 1885) 23 Am. & Eng. R. Cas. 732, it was held that connecting carriers are jointly and severally liable for all injuries done during any part of the transit to through billed goods.

In *Gulf, etc., R. Co. v. Insurance Co. of North America*, (Tex. Civ. App. 1894) 28 S. W. Rep. 237, it was held that a carrier which has engaged to carry goods to a certain point is not relieved from responsibility by the circumstance that it has entrusted the performance of a part of the contract to a connecting carrier.

1. Initial Carrier Has Right of Action Over. — *Chicago, etc., R. Co. v. Northern Line Packet Co.*, 70 Ill. 217; *Richardson v. The Charles P. Chouteau*, 37 Fed. Rep. 532. See also *Gill v. Manchester, etc., R. Co.*, L. R. 8 Q. B. 186, 21 W. R. 525; *Baxendale v. London, etc., R. Co.*, L. R. 10 Exch. 35, 44 L. J. Exch. 20, 32 L. T. N. S. 330, reversing 28 L. T. N. S. 849.

Such a right of action is provided for, in *Missouri*, by statute. See *infra*, this section, *Under Statutory Provisions*.

Where a first carrier is made liable to the owner for a loss of goods at the end of its line while awaiting delivery to a connecting carrier, it may have a remedy against the connecting carrier if the latter has neglected to transfer them to its road in due time and according to the usual course of business. *Conkey v. Milwaukee, etc., R. Co.*, 31 Wis. 619, 11 Am. Rep. 630, 2 Am. Ry. Rep. 353.

The first carrier can recover only from the connecting carrier on whose line the loss actually occurred. Thus where it carries goods to the end of its line and delivers them to a packet company which agrees to deliver them, at a certain point, to a railroad company, which it does, and the goods are lost by the fault of the latter company, and the first carrier is then compelled to pay for them, it cannot recover from the packet company but must look to the railroad company to which they were delivered and by whose fault they

Effect of Judgment Against Initial Carrier. — The judgment against the initial carrier is not, however, conclusive as to the liability of the carrier on whose line the loss occurred, even though the latter carrier may have been notified of the action and requested to defend it. Such a judgment is evidence to show the fact of loss and the value of the goods lost, but it can have no further effect.¹

b. LIABILITY HELD TO BE LIMITED TO CARRIER'S OWN LINE. — Another and larger class of authorities support the view that the initial carrier is liable only for losses occurring on its own line; that its undertaking, even when through bills of lading are issued, is discharged by a safe transportation to the end of its line and a delivery in good condition to the next carrier; that the assumption of through liability will not be inferred from doubtful or equivocal provisions in the contract of carriage, but only from clear and satisfactory evidence.²

were lost. *Chicago, etc., R. Co. v. Northern Line Packet Co.*, 70 Ill. 217.

1. Effect of Judgment Against First Carrier. — *Chicago, etc., R. Co. v. Northern Line Packet Co.*, 70 Ill. 217.

2. Rule Limiting Liability to First Carrier's Line — *United States*. — The United States Supreme Court and the federal circuit courts, with isolated exceptions (see *Harp v. The Grand Era*, 1 Woods (U. S.) 186; *Richardson v. The Charles P. Choteau*, 37 Fed. Rep. 532), have always adhered to the American doctrine, holding that a carrier accepting goods for transportation to a point beyond its line becomes liable only for losses occurring on its own line and for failure to deliver in good order to the next carrier. *Ogdensburg, etc., R. Co. v. Pratt*, 22 Wall. (U. S.) 123; *St. Louis Ins. Co. v. St. Louis, etc., R. Co.*, 104 U. S. 146, 3 Am. & Eng. R. Cas. 260; *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 9 Am. & Eng. R. Cas. 25; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318; *Harding v. International Nav. Co.*, 12 Fed. Rep. 168.

A railroad company accepting for transportation goods marked to a point beyond its lines is not liable for injuries not occurring on its line unless some arrangement in the nature of a partnership exists between it and the connecting carriers. *Central Trust Co. v. Wabash, etc., R. Co.*, (Mo. 1887) 31 Am. & Eng. R. Cas. 103.

Each carrier on a through bill of lading, or on connecting lines, is liable only for the negligence that arises on its own line, unless some different understanding be shown, or circumstances from which such an understanding might be inferred. *Sumner v. Walker*, 30 Fed. Rep. 261. This, although the initial carrier may have accepted the goods with full knowledge of their destination being beyond its line, and may have collected in advance the freight charges for the entire distance. *Stewart v. Terre Haute, etc., R. Co.*, 3 Fed. Rep. 768, 1 McCrary (U. S.) 312.

Arkansas. — *St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, 7 Am. St. Rep. 104; *Packard v. Taylor*, 35 Ark. 402, 37 Am. Rep. 37.

California. — See *infra*, this section, *Under Statutory Provisions*.

Connecticut. — *Elmore v. Naugatuck R. Co.*, 23 Conn. 457, 63 Am. Dec. 143; *Naugatuck R.*

Co. v. Waterbury Button Co., 24 Conn. 468; *Converse v. Norwich, etc., Transp. Co.*, 33 Conn. 166. See also *Hood v. New York, etc., R. Co.*, 22 Conn. 502.

In the absence of any express contract, the law implies, from the delivery and acceptance of goods for carriage, a contract to carry according to the course and usage of the carrier's business, and, if marked for a point beyond his terminus, to deliver there to the next carrier on the route. *Converse v. Norwich, etc., Transp. Co.*, 33 Conn. 166.

Delaware. — See *Truax v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 233.

Florida. — The American doctrine is strongly upheld in Savannah, etc., *R. Co. v. Harris*, 26 Fla. 148, 23 Am. St. Rep. 551, 42 Am. & Eng. R. Cas. 457. The case of *Bennett v. Filyaw*, 1 Fla. 451, which is sometimes cited to the contrary, has nothing to do with connecting carriers.

Indiana. — *Pittsburgh, etc., R. Co. v. Morton*, 61 Ind. 539, 28 Am. Rep. 682; *Cummins v. Dayton, etc., R. Co.*, (Ind. 1882) 9 Am. & Eng. R. Cas. 36. See also *Michigan, etc., R. Co. v. Caster*, 13 Ind. 164.

Iowa. — See *Hewett v. Chicago, etc., R. Co.*, 63 Iowa 611, 18 Am. & Eng. R. Cas. 568.

Kentucky. — "The general rule is that a carrier is not liable beyond its own line unless by contract to that effect, express or implied." *Louisville, etc., R. Co. v. Tarter*, (Ky. 1897) 39 S. W. Rep. 698, citing *Bryan v. Memphis, etc., R. Co.*, 11 Bush (Ky.) 597.

Louisiana. — See *Vaughan v. Providence, etc., R. Co.*, 13 R. I. 578, 9 Am. & Eng. R. Cas. 41.

Maine. — *Perkins v. Portland, etc., R. Co.*, 47 Me. 573, 74 Am. Dec. 507; *Skinner v. Hall*, 60 Me. 477; *Plantation No. 4 v. Hall*, 61 Me. 517.

Maryland. — *Baltimore, etc., R. Co. v. Schumacer*, 29 Md. 176, 96 Am. Dec. 510.

Massachusetts. — *Nutting v. Connecticut River R. Co.*, 1 Gray (Mass.) 502; *Darling v. Boston, etc., R. Corp.*, 11 Allen (Mass.) 295; *Lowell Wire Fence Co. v. Sargent*, 8 Allen (Mass.) 189; *Burroughs v. Norwich, etc., R. Co.*, 100 Mass. 26, 1 Am. Rep. 78; *Pendergast v. Adams Express Co.*, 101 Mass. 120; *Pratt v. Ogdensburg, etc., R. Co.*, 102 Mass. 557; *Hill Mfg. Co. v. Boston, etc., R. Corp.*, 104 Mass. 122, 6 Am. Rep. 202; *Washburn, etc., Mfg. Co. v. Providence, etc., R. Co.*, 113

Mass. 490; *Aigen v. Boston, etc., R. Co.*, 132 Mass. 423, 6 Am. & Eng. R. Cas. 426.

So far as the carrier acts as the forwarding agent of the consignor, undertaking to have the goods forwarded by a connecting line, it is liable only as bailee and for the want of ordinary care. *Northern R. Co. v. Fitchburg R. Co.*, 6 Allen (Mass.) 254.

Michigan. — *McMillan v. Michigan Southern, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208; *Hope v. Delaware, etc., Canal Co.*, (Mich. 1896) 69 N. W. Rep. 487; *Marquette, etc., R. Co. v. Kirkwood*, 45 Mich. 51, 40 Am. Rep. 453, 9 Am. & Eng. R. Cas. 85 (in delivering goods to connecting carrier the initial carrier acts as agent of the owner).

In *Detroit, etc., R. Co. v. McKenzie*, 43 Mich. 609, 9 Am. & Eng. R. Cas. 15, it was held that a railroad company receiving and receipting goods for transportation to a point beyond the terminus of its road is not to be understood as undertaking to carry the goods beyond such terminus, unless there is an express promise to that effect. But if the company receipts the goods to be transported to a point beyond its line for a definite sum named, and the consignor is charged a larger sum therefor, the receipting company is responsible to the consignor for the excess. See *Rickerson Roller Mill Co. v. Grand Rapids, etc., R. Co.*, 67 Mich. 110, 32 Am. & Eng. R. Cas. 487.

Minnesota. — *Irish v. Milwaukee, etc., R. Co.*, 19 Minn. 376, 18 Am. Rep. 340; *Lawrence v. Winona, etc., R. Co.*, 15 Minn. 390, 2 Am. Rep. 130; *Ortt v. Minneapolis, etc., R. Co.*, 36 Minn. 396.

Mississippi. — *Crawford v. Southern R. Assoc.*, 51 Miss. 222, 24 Am. Rep. 626; *Mobile, etc., R. Co. v. Tupelo Furniture Mfg. Co.*, 67 Miss. 35, 19 Am. St. Rep. 262; *Illinois Cent. R. Co. v. Kerr*, 68 Miss. 14.

Although in such case the exaction by the receiving carrier of a guaranty by the shipper of the payment of through freight is an important circumstance to show a contract to convey to the point of destination, it is not conclusive evidence thereof. *Illinois Cent. R. Co. v. Kerr*, 68 Miss. 14.

An initial line is not liable for a delay occurring through the negligence of a connecting line, where the bill of lading stipulates against liability for the negligence of connecting lines. *Mobile, etc., R. Co. v. Francis*, (Miss. 1891) 9 So. Rep. 508.

Missouri. — The doctrine in Missouri, before the statute, was the American doctrine. *Crouch v. Louisville, etc., R. Co.*, 42 Mo. App. 248. As to the present rule, see *infra*, this section, *Under Statutory Provisions*. See also *Grover, etc., Sewing Mach. Co. v. Missouri Pac. R. Co.*, 70 Mo. 672, 35 Am. Rep. 444; *Freeburg Coal Co. v. Union R., etc., Co.*, 10 Mo. App. 596.

In the absence of any special contract a carrier receiving goods marked to a distant point is not liable for an injury occurring beyond its own line. The mere giving of a through rate to the shipper does not constitute an assumption on its part of such responsibility. But the giving of such a rate together with the contract between the initial and the connecting lines are circumstances from which an under-

taking throughout the journey may be found by the jury. *McCarthy v. Terre Haute, etc., R. Co.*, 9 Mo. App. 159.

Nebraska. — See *Missouri Pac. R. Co. v. Twiss*, 35 Neb. 267, 37 Am. St. Rep. 437, 55 Am. & Eng. R. Cas. 434. See also *Chicago, etc., R. Co. v. Gustin*, 35 Neb. 86; *Fremont, etc., R. Co. v. Waters*, (Neb. 1897) 70 N. W. Rep. 225.

New York. — In *Babcock v. Lake Shore, etc., R. Co.*, 49 N. Y. 491, *reversing* 43 How. Pr. (N. Y.) 317, it was distinctly held that where a carrier undertakes, for a specific commission, to transport over his own route and to deliver at the terminus thereof goods marked to a consignee beyond such terminus, a through contract will not be implied from the fact that, in the description of the goods in the contract, the marks showing the ultimate destination are given. Nor is such a contract extended or affected by the fact that, in making it, a printed blank is used adapted to a through contract extending over other and connecting lines, and making the contract to read ostensibly for and on behalf of all the carriers over whose lines the goods may pass. The written portions of the contract will control, and only so much of the printed matter in the blank form used as is consistent therewith is of any effect; all that is incompatible with or inappropriate to the intent of the parties, as indicated by the written portions, is to be rejected. "Its [the initial carrier's] whole duty would have been performed by transporting them to the extent of its own route and delivering them to the next connecting carrier; that is, the railway company would have been liable as a carrier over its own road and as a forwarder from the terminus of its line. This is the recognized rule in this and other states, although it is otherwise in England." This is the rule in New York, sustained by a long line of cases. *Van Santvoord v. St. John*, 6 Hill (N. Y.) 158; *Root v. Great Western R. Co.*, 45 N. Y. 524; *Maghee v. Camden, etc., R. Co.*, 45 N. Y. 514, 6 Am. Rep. 124; *Lamb v. Camden, etc., R. Co.*, 46 N. Y. 271, 7 Am. Rep. 327; *Reed v. U. S. Express Co.*, 48 N. Y. 462, 8 Am. Rep. 561; *Marshall v. New York Cent. R. Co.*, 45 Barb. (N. Y.) 502, 48 N. Y. 660; *Rawson v. Holland*, 59 N. Y. 611, 17 Am. Rep. 394, *affirming* 5 Daly (N. Y.) 155; *Sherman v. Hudson River R. Co.*, 64 N. Y. 254, *affirming* 5 Daly (N. Y.) 521; *Irwin v. New York Cent. R. Co.*, 1 Thomp. & C. (N. Y.) 473, *affirmed* in 59 N. Y. 653; *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, 49 Am. & Eng. R. Cas. 98, *affirming* 52 Hun (N. Y.) 227 (except where there is a special contract to carry the entire distance); *Klein v. Dunlap*, 16 Misc. Rep. (N. Y. Supreme Ct.) 34; *Dillon v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 231; *Hunt v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 228. See also *Le Sage v. Great Western R. Co.*, 1 Daly (N. Y.) 306 (where carrier expressly assumed through liability). Compare *Wilcox v. Parmelee*, 3 Sandf. (N. Y.) 610; *King v. Macon, etc., R. Co.*, 62 Barb. (N. Y.) 161; *Foy v. Troy, etc., R. Co.*, 24 Barb. (N. Y.) 382, holding that where a carrier receives goods marked to a point beyond its line, in the absence of proof to the contrary it will be deemed as having agreed to deliver at the place of destination. If, in such case, it de-

Question of Intention. — It is well settled that a carrier may contract for liability

sires to limit its liability to injuries occurring upon its own road, it must provide for such limitation by contract.

In *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500, 6 Am. Ry. Rep. 410, *affirming* 4 Lans. (N. Y.) 106, where a rule apparently opposed to that of the text was upheld, there was a special contract on the part of the initial carrier to carry over the whole distance.

Other cases apparently opposing the doctrine announced as the prevailing one were decided under the Act of 1847, c. 270, § 9. See *Burtis v. Buffalo, etc.*, R. Co., 24 N. Y. 269. But the statute has no application where the connecting line is a steamship line. *Green v. New York Cent. R. Co.*, 12 App. Pr. N. S. (N. Y. C. Pl.) 473, 4 Daly (N. Y.) 553.

In *King v. Macon, etc.*, R. Co., 62 Barb. (N. Y.) 761, a railroad company in Georgia whose road terminated at Atlanta, where it connected with the W. & A. road, received fifty-eight bales of cotton consigned to parties in New York, for which it gave the consignors a receipt specifying that the cotton was "to be transported in turn to K. & Co., New York." It was held that this was a special contract on the part of the company to carry the cotton to New York, and made it liable, not only for its own default, but for that of the other carriers on the line; it was liable therefore for the loss of a portion of the cotton by fire while in the possession of the W. & A. company, to which it had been delivered for transportation beyond Atlanta. It was further held that the Georgia statute, § 2084 of the code, did not affect the liability of companies beyond the state nor prevent a company from expressly assuming such liability.

North Carolina. — Where no association of partners exists, and no special contract is made, and goods are delivered to a road for transportation over it, though marked to a place beyond its terminus, the carrier discharges its duty by safely conveying over its own road and then delivering to the next connecting road in the direct and usual line of common carriers towards the point of ultimate destination. *Phillips v. North Carolina R. Co.*, 78 N. Car. 294, 16 Am. Ry. Rep. 206. See also *Weinberg v. Albemarle, etc.*, R. Co., 91 N. Car. 31, 18 Am. & Eng. R. Cas. 597; *Knott v. Raleigh, etc.*, R. Co., 98 N. Car. 73, 2 Am. St. Rep. 321, 32 Am. & Eng. R. Cas. 481.

In the absence of explanation as to how or where the loss or damage occurred, or which of the roads on the route is culpable, the receiving carrier must be held responsible for the injury; and nondelivery, or delivery in bad condition, by the last of the connecting lines, is *prima facie* evidence of default in the receiving carrier. *Lindley v. Richmond, etc.*, R. Co., 88 N. Car. 547, 9 Am. & Eng. R. Cas. 31. See also *Phifer v. Carolina Cent. R. Co.*, 89 N. Car. 311, 45 Am. Rep. 687; and see *infra*, *Presumption as to Where Injury or Loss Occurred*.

Oklahoma. — *Church v. Atchison, etc.*, R. Co., 1 Okla. 44.

Pennsylvania. — *Camden, etc.*, R. Co. *v.* *Forsyth*, 61 Pa. St. 81; *American Express Co.*

v. Titusville Second Nat. Bank, 69 Pa. St. 394, 8 Am. Rep. 263; *Pennsylvania Cent. R. Co. v. Schwarzenberger*, 45 Pa. St. 208, 84 Am. Dec. 490; *Mullarkey v. Philadelphia R. Co.*, 9 Phila. (Pa.) 114; *Hostetter v. Baltimore, etc.*, R. Co., (Pa. 1887) 32 Am. & Eng. R. Cas. 549; *New York Cent., etc.*, R. Co. *v. Eby*, (Pa. 1888) 12 Atl. Rep. 482, 32 Am. & Eng. R. Cas. 486.

In the absence of stipulation by a carrier to transport freight beyond its own line, it is not responsible for the default of those whom it employs to convey it the remainder of the distance. But if it makes itself responsible by contract, or if an agreement to be so can be fairly inferred from the bill of lading, it will be liable for a loss or misdelivery beyond its own line. Where a company holds itself out as a "through freight line," and contracts to carry as such, it will be held liable for all losses occurring up to the point of destination. *Clyde v. Hubbard*, 88 Pa. St. 358. See also *Baltimore, etc., Steamboat Co. v. Brown*, 54 Pa. St. 77. And see *Chouteaux v. Leech*, 18 Pa. St. 224, 57 Am. Dec. 602, holding that where goods are received by a carrier and a receipt and bill of lading are given, it is not error to refuse to admit parol evidence that the defendants were not common carriers for the whole distance stated in the bill of lading. The question of the defendant's liability must depend on the written contract.

Rhode Island. — *Knight v. Providence, etc.*, R. Co., 13 R. I. 572, 43 Am. Rep. 46, 9 Am. & Eng. R. Cas. 90; *Harris v. Grand Trunk R. Co.*, 15 R. I. 371, 26 Am. & Eng. R. Cas. 323. See also *Vaughan v. Providence, etc.*, R. Co., 13 R. I. 578, 9 Am. & Eng. R. Cas. 41.

South Carolina. — In the earlier cases it appears that the English doctrine was regarded as the law in the state. See *Bradford v. South Carolina R. Co.*, 7 Rich. L. (S. Car.) 201, 62 Am. Dec. 411; *Kyle v. Laurens R. Co.*, 10 Rich. L. (S. Car.) 382, 70 Am. Dec. 231. But in a later case, while these cases are not overruled, it is distinctly held that while the initial carrier may assume responsibility for the entire route, it is liable only for losses in its own line unless there is some usage of business or an express contract to the contrary. *Piedmont Mfg. Co. v. Columbia, etc.*, R. Co., 19 S. Car. 353, 16 Am. & Eng. R. Cas. 194. See also *Wallingford v. Columbia, etc.*, R. Co., 26 S. Car. 258, 30 Am. & Eng. R. Cas. 40.

Under a contract "to forward" goods to a point beyond the line of the receiving carrier, such carrier cannot be held responsible for damages occasioned by neglect of duty by the connecting carrier where it expressly "assumes no liability beyond its own rails," although the contract provides for the payment of the entire freight charges between the point of shipment and the destination of the goods. *Dunbar v. Port Royal, etc.*, R. Co., 36 S. Car. 110, 31 Am. St. Rep. 860, 55 Am. & Eng. R. Cas. 466.

The statute (Gen. Stat. S. Car., § 1513) provides that in the case of property shipped for transportation over several lines the initial line shall be liable for a loss wherever occurring, but that such line may discharge itself of all liability by the production of a written re-

throughout the entire journey,¹ or it may stipulate expressly that it shall not be liable for losses not occurring on its own line;² and, by the common law, no carrier was bound to accept goods for carriage beyond the terminus of its own line.³ It is, therefore, not a question of power, but a question of the intention of the parties as to what the original contract contemplated, and it is scarcely reasonable to presume the voluntary assumption on the part of the carrier of such an unusual responsibility.⁴

Negligence of Initial Carrier.—The general rule, however, does not relieve the initial carrier from liability for any loss directly attributable to its own negligence, although the loss may have occurred on a subsequent line.⁵

cept for the property from the line to which it was its duty to deliver; it also provides a penalty against any company refusing to give a receipt. The statute includes a steamship company which is one of the connecting lines in the route selected by the parties. *Miller v. South Carolina R. Co.*, 33 S. Car. 359. Compare, as to the Georgia statute, *infra*, this section, *Under Statutory Provisions*. See this case also as to sufficiency of receipts produced.

Rev. Stat. of South Carolina, § 1720, contains the same provisions as the statute just referred to. It is held that the statute applies to an action against the initial company for an injury to the property shipped over its line which occurred on a connecting line, although the contract may have been absolute and unconditional. *Hill v. Georgia, etc.*, R. Co., 43 S. Car. 461.

Vermont.—*Brintnall v. Saratoga, etc.*, R. Co., 32 Vt. 665; *Farmers', etc.*, Bank *v. Champlain Transp. Co.*, 23 Vt. 186, 56 Am. Dec. 68; *Noyes v. Rutland, etc.*, R. Co., 27 Vt. 110; *Sprague v. Smith*, 29 Vt. 426, 70 Am. Dec. 424; *Cutts v. Brainerd*, 42 Vt. 566, 1 Am. Rep. 353. See also *Newell v. Smith*, 49 Vt. 255, 17 Am. Ry. Rep. 100.

In the absence of a special contract a carrier receiving goods marked beyond his own line, and who has no special business connection with the next succeeding carrier, is not responsible for the safety of the goods after they leave his hands. It is no fraud to suppress a clause in the bill of lading limiting his liability to his own line from an ignorant and unlettered consignor, for such clause is only expressive of the common law. *Hadd v. U. S.*, etc., Express Co., 52 Vt. 335, 36 Am. Rep. 757, 6 Am. & Eng. R. Cas. 443.

Virginia.—A special contract by the initial carrier for responsibility over the entire route is not shown by proof that the carrier received the goods with knowledge of their destination and named the through rate therefor. In the absence of special contract to deliver the goods at a point beyond its line, the receiving carrier is not liable for loss or damage occurring to them after delivery to connecting carriers. *McConnell v. Norfolk, etc.*, R. Co., 86 Va. 248, 40 Am. & Eng. R. Cas. 155.

Statement of Rule.—In *Michigan Central R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 324, the court, by Mr. Justice Davis, referring to the conflict of opinion on this subject, said: "It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country, but the rule that holds the carrier only liable to the extent of his own route, and for the safe

storage and delivery to the next carrier, is, in itself, so just and reasonable that we do not hesitate to give it our sanction."

In a later case, the court, by Mr. Justice Field, said: "The general doctrine, then, as to transportation by connecting lines, approved by this court and also by a majority of the state courts, amounts to this: that each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence." *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 9 Am. & Eng. R. Cas. 25.

1. See *infra*, *Carrier May Contract for Through Liability*.

2. See *infra*, *Carrier May Limit Its Liability to Its Own Line*.

3. See *supra*, *No Carrier Bound to Carry Beyond Its Own Line*.

4. **Question of Intention.**—See *Pereira v. Central Pac. R. Co.*, 66 Cal. 92, 18 Am. & Eng. R. Cas. 565; *Wilby v. West Cornwall R. Co.*, 2 H. & N. 703; *Piedmont Mfg. Co. v. Columbia, etc.*, R. Co., 19 S. Car. 353, 16 Am. & Eng. R. Cas. 194. And see the cases *supra*, this subdivision.

5. **Initial Carrier Liable for Its Own Negligence.**—See *Norfolk, etc.*, R. Co. *v. Sutherland*, 89 Va. 703. Thus where there is a special contract with the carrier by which it agrees to deliver goods which are liable to injury from freezing at a point on a connecting line by a fixed date, the carrier knowing that the special contract is made in order to prevent the danger of injury by frost, it is liable for a loss caused by freezing while the goods are being carried over a connecting line where it appears that such loss would not have occurred had the initial carrier not been guilty of a negligent delay in delivering the goods to the next connecting carrier. *Fox v. Boston, etc.*, R. Co., 148 Mass. 220, 37 Am. & Eng. R. Cas. 632; *International, etc.*, R. Co. *v. Anderson*, 3 Tex. Civ. App. 8.

Injury Caused by Initial Carrier But Developing on Subsequent Line.—In *Galveston, etc.*, R. Co. *v. Herring*, (Tex. Civ. App. 1894) 24 S. W. Rep. 939, in which the defendant, the initial line, had contracted that it would be liable only for injuries occurring on its own road, it appeared that the stock were switched back

Duty in Case of Special Instructions as to Delivery. — Where the contract of shipment contains special conditions as to the delivery of the goods, the initial company discharges its duty upon transmitting the instructions to the next carrier on delivering to it the goods, and it is not liable for a delivery by the last carrier in violation of the terms of the shipping contract. But the rule is otherwise where the initial line fails to transmit the special instructions.¹

c. **UNDER STATUTORY PROVISIONS** — (1) *In Missouri* — **Former Rule.** — In this state the rule originally was that a carrier receiving goods for transportation to a point beyond its lines was liable, in the absence of special contract otherwise, only for losses occurring on its own lines.²

A Late Statute provides, in substance, that whenever a common carrier receives property to be transferred from one place to another, within or without the state, or when a railroad or other transportation company issues receipts or bills of lading for such property, such company shall be liable for any loss of or injury to such property resulting from its own negligence or from the negligence of another carrier to whom the goods were delivered or over whose lines they passed; and any carrier receipting for such goods shall be entitled to recover, in a proper action, the amount of any loss or damage for which it may be compelled to pay the owner of such property, from the company on whose line the loss occurred.³

Special Contract — Negligence of Connecting Line. — Under this it was at first held that a carrier could not avoid the liability thus imposed for losses on a connecting line by any special contract with the shipper, where the loss was caused

and forth before they were finally started; that while on their way to H., the point to which they were to go on the line of the next carrier, the shipper notified the carrier's agents that the stock needed food and water. The defendant did not water or feed them at H., though that was a feeding point, but transferred them directly to the next line which carried them on. It was held that the defendant was liable for losses occurring from its failure to feed and water, although such losses did not develop until the stock were on the next line. See also *Norfolk, etc., R. Co. v. Harman*, 91 Va. 601.

Failure to Furnish Suitable Cars. — In *Searles v. Alabama, etc., R. Co.*, 69 Miss. 186, 71 Miss. 744, the plaintiff had shipped three carloads of oats over the defendant's line to a point beyond its terminus. Owing to the bad condition of the cars, and their defective roofs, the oats were damaged from the rain while on a connecting line. In an action against the defendant company, the initial line, the jury having found that the cars furnished by the defendant were defective, it was held that it was liable for the damage, though it occurred on a subsequent line, its own negligence having been the proximate cause. In the first trial of the case it was also held that the presumption that the cars were in good order, arising out of evidence that the defendant's cars were universally inspected as provided by the rules of the company and would have been condemned had they been found in bad order, was not conclusive, but the question of their condition was for the jury.

The same rule of liability was applied where the initial carrier failed to furnish clean cars for the shipment of meal. *Hunt v. Nutt*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1031. See also *Shea v. Chicago, etc., R. Co.*, (Minn. 1896) 68 N. W. Rep. 608.

1. Wrongful Delivery — Initial Carrier Not Liable for Breach of Shipping Contract by Subsequent Carrier. — Thus where goods are shipped under a provision in the shipping contract that they are to be delivered to the consignee only upon the production of the bill of lading, and the initial company, upon delivering the goods to the next connecting carrier, informs such carrier of the special provision, its duty is discharged and it cannot be held liable for the damages resulting from a delivery by the latter or any other subsequent carrier to the consignee without requiring the production of the bill of lading. *Rickerson Roller Mill Co. v. Grand Rapids, etc., R. Co.*, 67 Mich. 110, 32 Am. & Eng. R. Cas. 487. See also *North v. Merchants', etc., Transp. Co.*, 146 Mass. 315.

2. See *supra*, this section, *Liability Held to Be Limited to Carrier's Own Line*.

3. Missouri Statute. — See Rev. Stat. of Missouri, (1879), c. 14, § 598; *Lawson's Contracts of Carriers*, § 238, note. Compare *Smith v. Missouri, etc., R. Co.*, 58 Mo. App. 80.

That this provision is constitutional, see *Nines v. St. Louis, etc., R. Co.*, 107 Mo. 475; *Dimmitt v. Kansas City, etc., R. Co.*, 103 Mo. 433, 46 Am. & Eng. R. Cas. 699. See also *Rice v. Indianapolis, etc., R. Co.*, 3 Mo. App. 27.

To charge a connecting carrier, it must be shown that the loss occurred on its line or that it assumed a special liability for all losses; and its soliciting agents have no authority to assume for it such special responsibility. *Crouch v. Louisville, etc., R. Co.*, 42 Mo. App. 248.

Interstate Commerce. — The statute applies to a contract made in Missouri for the transportation of goods from a point within that state to a point beyond its borders. *Watkins v. St. Louis, etc., R. Co.*, 44 Mo. App. 245.

by the negligence of the connecting carrier. But the present doctrine is the other way, and the right of the carrier to make such a limitation has been repeatedly recognized.¹

(2) *In Georgia*. — In this jurisdiction the English doctrine formerly prevailed.² It is now provided by statute that where goods are shipped over the lines of several connecting companies, each company shall be responsible only to its own terminus and until delivery in good order to the next carrier; and the last company receiving the goods "as in good order" shall be responsible to the shipper for any damage suffered by them, whether patent or concealed.³

Articles Received "In Good Order" — Connecting Carrier. — Under this no action will lie against the second or any subsequent carrier, unless it is averred and proved that such carrier received the goods in good order.⁴

1. Limitation of Statutory Liability for Loss Caused by Negligence of Connecting Carrier. — In the case of *Orr v. Chicago, etc., R. Co.*, 21 Mo. App. 333, a railroad company received goods for transportation beyond the terminus of its line. A bill of lading was given for the goods which guaranteed the transportation and delivery of the goods to the terminus of the line or (if they were to be forwarded beyond this point) to any company receiving "or which may receive freight from" said company. This was all the testimony bearing upon the question whether the defendant had received the goods under contract to transport them to the terminus of its own line or to a point beyond that terminus. It was held that a railroad company that receives goods for transportation beyond the terminus of its line cannot, by contract, avoid its statutory liability for the loss of the goods through negligence of the connecting carrier. A shipper cannot recover of the receiving carrier for a loss occurring beyond the terminus of its line without proving both a loss and a contract by the defendant to transport the goods beyond such terminus, where it proves that it delivered the goods in good order to the connecting carrier. *Orr v. Chicago, etc., R. Co.*, 21 Mo. App. 333. The same view was adopted in *Heil v. St. Louis, etc., R. Co.*, 16 Mo. App. 363; *Baker v. Missouri Pac. R. Co.*, 34 Mo. App. 112; *Craycroft v. Atchison, etc., R. Co.*, 18 Mo. App. 488.

But in a subsequent case before the Supreme Court the holding of these cases is reversed and the doctrine announced and upheld that, notwithstanding the statute, a carrier may, by special contract, limit its liability to losses occurring on its own line and stipulate that it shall not be liable for a loss on a connecting line, even where such loss is the result of the negligence of that line. *Dimmitt v. Kansas City, etc., R. Co.*, 103 Mo. 433, 46 Am. & Eng. R. Cas. 699. This case has been followed since. See *Hill v. Missouri Pac. R. Co.*, 46 Mo. App. 520, reviewing all the cases; *Historical Pub. Co. v. Adams Express Co.*, 44 Mo. App. 422; *F. A. Drew Glass Co. v. Ohio, etc., R. Co.*, 44 Mo. App. 416. Compare *McCann v. Eddy*, 133 Mo. 59.

2. See *supra*, this section, *Liability Held to Extend Over Whole Route*.

3. **The Georgia Statute.** — The provision of the statute is that "when there are several connecting railroads under different companies, and the goods are intended to be transported over more than one railroad, each company

shall be responsible only to its own terminus and until delivery to the connecting road; the last company which has received the goods as 'in good order' shall be responsible to the consignee for any damage, open or concealed, done to the goods, and such companies shall settle among themselves the question of ultimate liability." Code of Ga., § 2298.

Baggage. — The statute is said not to apply to actions by passengers for loss of or injury to their baggage. The rule in Georgia seems to be that a passenger may sue either the first or the last carrier, though no reason is perceived why the distinction should be made. *Wolff v. Central R. Co.*, 68 Ga. 653, 45 Am. Rep. 501; *Hawley v. Screven*, 62 Ga. 347, 35 Am. Rep. 126; *Savannah, etc., R. Co. v. McIntosh*, 73 Ga. 532, 27 Am. & Eng. R. Cas. 269. See the title *BAGGAGE*, vol. 3, p. 571.

Cumulative Remedy. — This section of the code does not change the rule of liability of railroad companies as common carriers as it existed at the time of its adoption, but merely declares the rule to be the same as that theretofore existing where there was no contract, express or implied, general or specific, by the first carrier, to transport the goods to their final destination, and it gives a cumulative remedy to the consignee. *Falvey v. Georgia R. Co.*, 76 Ga. 597, 2 Am. St. Rep. 58.

4. **It Must Be Averred That Goods Were Received in Good Order.** — *Western, etc., R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 35 Am. & Eng. R. Cas. 602; *Joseph v. Georgia R., etc., Co.*, 88 Ga. 426; *Evans v. Atlanta, etc., R. Co.*, 56 Ga. 498, holding that the indorsement of the company's agent on the bill of lading, that the goods were in good order when received, is no proof of such fact unless it is shown that it was his duty to act on a reference of the matter to him.

Express Contract for Through Carriage. — The statute does not apply to a case where there is an express contract for a through carriage by the initial carrier. See *Falvey v. Georgia R. Co.*, 76 Ga. 597, 2 Am. St. Rep. 58.

Steamship Line. — Nor does it apply to a case where the connecting carrier is not a railroad company, but is a steamship line. *Evans v. Atlanta, etc., R. Co.*, 56 Ga. 498. See also *Joseph v. Georgia R., etc., Co.*, 88 Ga. 426.

Under the Statute, the Presumption Is that the goods were received by the connecting carrier in good order. *Georgia R., etc., Co. v. Forrester*, 96 Ga. 428.

One railroad company is not responsible for

The Initial Carrier is not liable where it can show a delivery in good order to the next connecting line, particularly where the bill of lading contains a stipulation exempting the initial carrier from liability for losses not occurring on its own line.¹

Showing Condition of Goods Before Shipment.—The statute does not preclude the last carrier receiving the goods in "good order" from rebutting the presumption against it of liability by showing that the actual cause of the damage complained of was in the condition of the goods before they were originally shipped; it contemplates damages which result from injuries occurring on the line of one of the connecting carriers, and not those existing at the time of the shipment.²

Delay.—Nor does it embrace damages resulting from delay in delivering the goods.³

Unless the Suit Is Brought Under This Provision a recovery based in theory thereon is improper. Thus if the declaration is in the common form, stating the action as for a negligent failure to deliver in good order or for a breach of the carrier's undertaking as insurer, the special allegations being omitted, the statute has no application and the plaintiff cannot rely on it.⁴

a loss occurring on the line of another, and it is not error for the court so to charge where it was doubtful from the evidence whether the goods, for the loss of which the suit was brought, were ever received by the defendant company. *McCaffrey v. Georgia Southern R. Co.*, 69 Ga. 622.

The liability fixed by section 2084 of the Georgia Code applies where goods pass over all the lines in the same car, or are at any terminal point transferred or loaded from the car of one line to that of another; and it makes no difference whether the goods go all the way on the same bill of lading or whether new bills are substituted en route. *Central R. Co. v. Rogers*, 66 Ga. 251.

In *Baugh v. McDaniel*, 42 Ga. 641, it was held that under section 2058 of the Georgia Rev. Code, where goods were received for transportation over several connecting lines, not partners nor under the same general control, each company was liable only to its own terminus and until delivery to the connecting road. But this case was distinguished in *Hawley v. Screven*, 62 Ga. 347, 35 Am. Rep. 126, and finally overruled and the dissenting opinion followed in *Falvey v. Georgia R. Co.*, 76 Ga. 597, 2 Am. St. Rep. 58.

Express Contract.—In *King v. Macon, etc., R. Co.*, 62 Barb. (N. Y.) 161, which was a suit in New York against a Georgia railroad, it was held that the Georgia statute was merely intended to limit the liability of a railroad company to its own line where its contract was a general one, depending only on the delivery of the goods to be transported with directions to carry to the point to which they were marked, and did not affect the liability of the company under any special contract it might make. It was held also that where the carrier received cotton for transportation to New York and limited its liability for loss by fire to a burning on the cars, there was an express contract for through transportation by which it would be bound.

1. *Central R., etc., Co. v. Avant*, 80 Ga. 195, 32 Am. & Eng. R. Cas. 475.

2. Does Not Refer to Damages Existing in the

Goods When Shipped.—*Central R., etc., Co. v. Rogers*, 57 Ga. 336.

There must be some evidence to show either that the last company received the goods as in good order, or that some other railroad company connecting with it so received them; and in the absence of any legal evidence of either fact a nonsuit was properly awarded, especially as in this case there was no proof that the defendant received the corn from any other carrier, or how it was received, after the agent's indorsement upon the bill of lading was rejected as evidence. *Evans v. Atlanta, etc., R. Co.*, 56 Ga. 498.

Effect of Custom.—A custom between connecting roads that when the cars of one are switched off upon the track of the other the latter is responsible for the freight, although receipts are not given until the freight has been examined, is a good and valid custom as between the roads, but does not bind the owner of the goods. The company last receipting for them remains liable to the owner. *Wallace v. Rosenthal*, 40 Ga. 419. See also *Western, etc., R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 35 Am. & Eng. R. Cas. 602.

3. **Nor to Damages for Delay Merely.**—*East Tennessee, etc., R. Co. v. Johnson*, 85 Ga. 497. See *Johnson v. East Tennessee, etc., R. Co.*, 90 Ga. 810, 55 Am. & Eng. R. Cas. 446; *Savannah, etc., R. Co. v. Pritchard*, 77 Ga. 412, 4 Am. St. Rep. 92, 28 Am. & Eng. R. Cas. 57.

4. **Declaration Must Contain Allegations Bringing the Case Within the Statute.**—Thus where the declaration alleges that the defendant was only one of several connecting roads of a continuous line and received, from another railroad named, certain machinery easily injured by exposure and which it negligently transported in open cars, it states a common-law action and raises no question of the defendant's liability under section 2084. A plaintiff wishing to rely on the statute must put the defendant on notice of his intention thereof by proper allegation, as the proof and liability thereunder are entirely different from that in a common-law action. Among other things, the declaration must allege that the defendant received the consign-

The Last Carrier. — A company shifting freight gratis, from the depot at the place of destination to the suburban factory of the consignee, does not thereby become liable as the "last company," under the statute.¹

Receiving Cars of Another Line. — Another statute provides that any railroad company shall receive for transportation the cars of another line tendered to it, and that any such company shall, at its terminus or at any intermediate point, switch off and deliver to the connecting road having the same gauge all cars passing over its line, or any portion of them containing freight consigned to a point over or beyond such connecting line. Under this provision a railroad is not required to issue through bills of lading to points on connecting lines, and to deliver its own cars to such lines. And the mere fact that such company has issued to shippers at a certain point such through bills gives no right to shippers at other points to demand that they be treated likewise.²

(3) *In California.* — The California statute provides that the liability of any carrier accepting freight destined to a point beyond its line ceases on the delivery of such freight to the connecting line, unless it is stipulated otherwise in the contract of shipment.³

2. Liability of Intermediate Lines — a. TO WHAT EXTENT LIABLE. — The English Courts deny the right of the shipper to recover against any carrier except the initial line, on the ground that there is no privity of contract between him and any other line.⁴

Carrier on Whose Line Loss Occurs Liable. — But this view has never obtained in this country, and the shipper may hold any one of the connecting carriers responsible upon showing the loss to have occurred on its line.⁵

ment "in good order." *Western, etc., R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 35 Am. & Eng. R. Cas. 602.

A declaration against a common carrier alleged the delivery to it of a lot of bacon, and through its negligence, and while in its custody, the same became unsound and damaged; and upon the plaintiff refusing to receipt for the same in good condition the carrier converted it to its own use. The evidence showed that the goods were received from a connecting carrier, and almost conclusively that the injury occurred before reaching the defendants. It was held that it was error to give in charge section 2084 of the code. *Columbus, etc., R. Co. v. Tillman*, 79 Ga. 607.

1. Who Is "Last Carrier." — *Western, etc., R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 35 Am. & Eng. R. Cas. 602.

2. Statute Requiring Connecting Lines to Receive Cars. — *Coles v. Central R., etc., Co.*, 86 Ga. 251, 45 Am. & Eng. R. Cas. 328. In this case cotton was delivered to a railroad company for shipment to its own terminus and thence to another point over a connecting line of the same gauge of track, but the initial company refused to issue through bills of lading on full carload lots, though the shippers offered to pay commission rates for doing so. Upon this refusal the shippers took local bills of lading to the terminus of the initial company and then notified its agents to deliver the cotton to the connecting line all in carload lots; this not being done they were compelled to haul it on drays to the warehouse of the connecting line. It was held that there was no liability on the part of the initial company for damages, nor for the penalty prescribed in the Act of 1874, as amended by the Act of 1883.

3. California Statute. — See Civil Code of California, § 2201.

A provision in the contract of shipment that the carrier's responsibility shall end at the point where its line meets the connecting line is not nullified by a subsequent stipulation in the contract for "passenger service through." *Colfax Mountain Fruit Co. v. Southern Pac. Co.*, (Cal. 1896) 46 Pac. Rep. 668.

4. See *supra*, this section, *Liability Held to Extend Over Whole Route.*

5. Carrier Whose Negligence Caused the Injury Always Liable. — *Knowles v. Pittsburgh, etc., R. Co.*, 4 Biss. (U. S.) 466; *Packard v. Taylor*, 35 Ark. 402, 37 Am. Rep. 37; *St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, 7 Am. St. Rep. 104, 35 Am. & Eng. R. Cas. 635; *Johnson v. East Tennessee, etc., R. Co.*, 90 Ga. 810, 55 Am. & Eng. R. Cas. 446; *Chesapeake, etc., R. Co. v. Radbourne*, 52 Ill. App. 203; *Aigen v. Boston, etc., R. Co.*, 132 Mass. 423, 6 Am. & Eng. R. Cas. 426; *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415; *Erie R. Co. v. Lockwood*, 28 Ohio St. 358, 14 Am. Ry. Rep. 143; *International, etc., R. Co. v. Tisdale*, 74 Tex. 8; *Conkey v. Milwaukee, etc., R. Co.*, 31 Wis. 619, 11 Am. Rep. 630, 2 Am. Ry. Rep. 353.

"The connecting carrier, by receiving the goods from the contracting carrier, becomes its agent for the purpose of completing its contract with the shipper; and where, as in this case, the contract of the shipper contemplates the employment of connecting lines, the law will imply from this circumstance sufficient privity between the shipper and the connecting carrier to enable the shipper to maintain an action against such carrier on the contract" of shipment. *Halliday v. St. Louis, etc., R. Co.*, 74 Mo. 159, 41 Am. Rep. 311, *citing Hutch. on Carr.*, § 150.

Compare Lamb v. Camden, etc., R., etc., Co., 2 Daly (N. Y.) 454; *Barter v. Wheeler*, 49

What Constitutes Prima Facie Case. — And the shipper makes out a *prima facie* case upon proof of the loss or injury and of the defendant carrier's having received the goods in good order; upon such a showing, the burden of proof is shifted to the carrier to show a safe delivery, in good order, to the next carrier.¹ Thus the initial line may always be held liable upon proof of its having received the goods unless it can properly show a safe delivery to the second carrier.²

Receipt of Goods in Safe Condition by Carrier to Be Shown. — But it is an absolute essential to fixing the liability for a loss or injury to the goods upon any connecting carrier to allege and prove a receipt by it of the goods in safe condition; in the absence of such allegation and proof the action cannot be maintained.³

N. H. 9, 6 Am. Rep. 434, holding that the remedy of the owner of goods is not limited to an action against the carrier with whom he actually contracted, but that he may sue the particular carrier in whose custody and by whose negligence the goods were lost or injured, in which case the action is not upon any contract, but upon the obligation and duty which that carrier assumed from the public nature of his employment, and through whose negligence and omission the injury is presumed to have occurred, unless he shows that it arose from the act of God or of a public enemy. See also *Smith v. New York Cent. R. Co.*, 43 Barb. (N. Y.) 225, *affirmed* in 41 N. Y. 620. See further, as to the nature of such actions against carriers in general, 3 ENCYC. OF PL. AND PR., p. 817.

Negligence in Care of Cattle at Point of Transfer. — In *Bryant v. Southwestern R. Co.*, 68 Ga. 805, 6 Am. & Eng. R. Cas. 388, a shipment of live stock was received by the Central R. Co. to be transported to Americus over its own road and that of the defendant company. By a mistake on the part of the Central R. Co. company the shipment was consigned to a point beyond Americus, and was so received and carried by the defendant company, the connecting line. It was held that this fact would not relieve the defendant company from liability for damages resulting from its inattention to the stock at the point to which they were actually carried, and this although the bill of lading stipulated that the carriers should not be bound to feed and water the stock.

Defective Cars. — An intermediate carrier which has received for transportation perishable goods from a connecting line cannot justify its failure to transport them promptly by showing that they were in defective cars, and that, under the agreement between the lines, it was the duty of the preceding company to repair the cars. *Cartwright v. Rome, etc., R. Co.*, 85 Hun (N. Y.) 517.

Extent of Intermediate Carrier's Duty. — Where an intermediate carrier receives goods from a preceding one marked to a point beyond its line, in the absence of an express contract to carry to the place of destination its full duty is discharged by carrying to the end of its line and there delivering to a responsible carrier for further transportation, and giving to such connecting carrier proper instructions as to the further carriage; and in the absence of evidence to the contrary it will be presumed that such instructions were given. *Hempstead v. New York Cent. R. Co.*, 28 Barb. (N. Y.) 485.

1. Burden of Proof. — *Savannah, etc., R. Co. v. Harris*, 26 Fla. 148, 23 Am. St. Rep. 551; 42 Am. & Eng. R. Cas. 457.

In *Livingston v. New York Cent., etc., R. Co.*, 76 N. Y. 631, which was an action against an intermediate carrier for the loss of goods shipped from the initial point in its cars, the court held that the questions whether the sending of way-bills by the first carrier to the succeeding carrier did not put upon it the responsibility of taking charge of the goods and of seeing that they were forwarded, and whether there was unreasonable delay on its part (the custom of sending such way-bills on the arrival of goods at the terminus of the first carrier's line being proved), were for the jury.

2. Brintnall v. Saratoga, etc., R. Co., 32 Vt. 665.

3. No Company Liable Unless It Is Shown to Have Received the Goods. — *Western R. Co. v. Harwell*, 91 Ala. 340, *affirmed* 97 Ala. 341 (burden on plaintiff to show that shipment came into hands of defendant carrier); *Joseph v. Georgia R., etc., Co.*, 88 Ga. 426; *Chicago, etc., R. Co. v. Goldman*, 46 Ill. App. 625; *Gass v. New York, etc., R. Co.*, 99 Mass. 220, 96 Am. Dec. 742; *Church v. Atchison, etc., R. Co.*, 1 Okla. 44; *South Carolina R. Co. v. Bradford*, 10 Rich. L. (S. Car.) 307.

The Receipt of the Goods by a Connecting Carrier is Presumed when it is shown to have received the car in which they were when shipped. *Central R., etc., Co. v. Bayer*, 91 Ga. 115. See also *East Tennessee, etc., R. Co. v. Wright*, 76 Ga. 532, holding that when the damage occurred before the goods reached the defendant's line, the defendant cannot be held liable therefor unless, under the terms of the bill of lading, it would have a right of action over against the preceding carrier in whose hands the goods were when the injury was received.

In an action against the second carrier the declaration does not state a cause of action when it fails to allege that the defendant received the goods, or that the defendant and the initial line were partners. *Felder v. Columbia, etc., R. Co.*, 21 S. Car. 35, 53 Am. Rep. 656, 27 Am. & Eng. R. Cas. 264.

Unless Duty to Receive Was Violated. — In *Gulf, etc., R. Co. v. Godair*, 3 Tex. Civ. App. 514, where cattle were received by the defendant, a connecting road, and sustained injuries, part of which occurred while the cattle were in the yards of the latter company, but after they had been tendered by it to the defendant, the court held that the defendant was liable to the owner for damages for all the injuries sus-

Loss on Another Line — Partnership — Express Contract. — An intermediate carrier is never liable for a loss occurring on another line, before or after its own carriage of the goods, where no partnership exists as between it and the line on which the injury occurred,¹ except where it appears that the contract of carriage was made directly with the intermediate line, which thereby undertook to carry the goods over the entire route, using prior and subsequent connecting carriers as its own agents.²

b. FAILURE TO FURNISH PROPER CARS. — An intermediate carrier is not relieved from liability for damages resulting from a breach of its duty to furnish safe and suitable cars for the transportation of goods, by showing that it carried the goods in the same cars in which it received them from a prior line,³ nor

tained, whether received after it had taken charge of the stock or not, unless some excuse could be shown for not having taken charge of them at the time they were tendered by the prior line.

1. Liability of Intermediate Carrier for Injury Occurring on Another Line. — Chicago, etc., R. Co. *v.* Northern Line Packet Co., 70 Ill. 217; East St. Louis Connecting R. Co. *v.* Wabash, etc., R. Co., 123 Ill. 594; Carson *v.* Harris, 4 Greene (Iowa) 516; Hunt *v.* New York, etc., R. Co., 1 Hilt. (N. Y.) 228; South Carolina R. Co. *v.* Bradford, 10 Rich. L. (S. Car.) 307; Galveston, etc., R. Co. *v.* Van Winkle, 3 Tex. App. Civ. Cas., § 443; Missouri Pac. R. Co. *v.* Weisman, 2 Tex. Civ. App. 86 (where the defendant company was held not liable for refusing to receive from a connecting carrier goods already damaged).

The Provision of the New York Statute that "whenever two or more railroads are connected together, any company owning either of said roads receiving freight to be transported to any place on the line of either of said roads so connected shall be liable as common carriers for the delivery of such freight at such place," was intended to apply only to the company originally receiving and undertaking to convey and deliver the freight, and not to create any liability against any other company for an injury sustained by goods while in the possession of the company originally receiving them. Smith *v.* New York Cent. R. Co., 43 Barb. (N. Y.) 225, affirmed in 41 N. Y. 620.

Where There Is No Evidence as to Condition of Goods When Received. — An intermediate carrier is not liable for the loss of apples by freezing where there is no evidence showing that they were delivered to it before they became frozen, and there is evidence that the weather was severely cold before the defendant carrier received them from the preceding line. Sweetland *v.* Boston, etc., R. Co., 102 Mass. 276.

Cannot Set Off Damages Occurring on Prior Line Against Claim for Freight Charges. — Where a shipper of horses was present when the defendant, a connecting carrier, received them from the preceding line and, without interposing, allowed the defendant to pay the preceding carrier all back charges and thus acquire a lien on the horses for such charges and for future freight charges, he is estopped to set off against the defendant's claims for charges the damage caused to the horses while they were in charge of the preceding line. St. Louis, etc., R. Co. *v.* Lear, 54 Ark. 399.

Who is Intermediate Carrier. — The plaintiff applied to a railroad company which connected with the defendant's line to know the rate from a point on the defendant's line to a point beyond. The defendant furnished the information to the railway company's agent applying for it, but had no communication with the plaintiff. The plaintiff afterwards delivered to the first named company a lot of goods consigned to a point beyond the defendant's line, receiving a bill of lading therefor giving the rate stated by the defendant, as mentioned above. They were carried over the first line, over the defendant's, and by it delivered to the next carrier. In an action against the defendant it was held that it was an intermediate carrier merely, and was not liable for an injury occurring after the goods left its line. Hill *v.* Burlington, etc., R. Co., 60 Iowa 196.

2. Where Intermediate Carrier Undertakes Through Contract. — Thus where, in an action for goods lost, it appears that such a contract was made with the defendant, an intermediate carrier, whereby it undertook to carry the goods the entire distance, using the first line for carrying the goods to where its own line might receive them, it is proper to refuse to charge that the defendant is liable only for such goods as were received by it from such first carrier. Gulf, etc., R. Co. *v.* Lewine, (Tex. Civ. App. 1895) 29 S. W. Rep. 835. See also Grant *v.* Northern Pac. R. Co., 22 Ont. Rep. 645; Norfolk, etc., R. Co. *v.* Read, 87 Va. 185.

3. Must Furnish Proper Cars — Carrying Goods in Cars Received from Connecting Line. — Shea *v.* Chicago, etc., R. Co., (Minn. 1896) 68 N. W. Rep. 608; Wallingford *v.* Columbia, etc., R. Co., 26 S. Car. 258, 30 Am. & Eng. R. Cas. 40. See also Cartwright *v.* Rome, etc., R. Co., 85 Hun (N. Y.) 517.

The case of Beard *v.* Illinois Cent. R. Co., 79 Iowa 518, 18 Am. St. Rep. 381, 42 Am. & Eng. R. Cas. 445, was an action against an intermediate line for damages to a shipment of butter, caused by its failure to provide refrigerator cars or to pack ice in the car. The defendant company pleaded that it took the butter in the same cars in which it was shipped originally, and set up a custom under which it always took cars from connecting carriers without changing the goods in them, particularly where, as in this case, the cars were sealed. But it was held that such a custom was no defense, being itself based upon negligence. Compare McCarthy *v.* Louisville, etc., R. Co., 102 Ala. 193, 48 Am. St. Rep. 29.

by showing that the bill of lading for the goods was not signed by its agent.¹

c. **FACT THAT INITIAL CARRIER IS ALSO LIABLE IS NO DEFENSE.** — The liability of an intermediate carrier, where an injury to the goods occurs on its line, is not affected by the fact that the initial carrier, by express contract, assumed responsibility over the whole route, or was so liable by virtue of the rule of law existing in the state where the shipment was made.²

d. **UNDER THE ENGLISH DOCTRINE.** — The doctrine of the English courts that there is no privity of contract between the shipper and the subsequent lines, and therefore no recovery can be had as against any but the initial line,³ operates to relieve the intermediate carriers from any liability to the shipper unless it can be made to appear that they are really partners of the initial line.⁴ The initial carrier cannot rely upon a special contract relieving it from liability except for losses on its own line, unless it can show a delivery in good order to some line which the carrier can hold responsible; the result is that the initial line is, under the English doctrine, always liable except where a partnership exists between it and the subsequent lines.⁵

3. **Liability of Last Carrier.** — The liability of the last carrier is to be determined by the same rules that govern the liability of intermediate carriers. It is liable only upon proof of its having received the goods, but upon such proof being made, the burden then rests on it to prove that the loss or injury did not occur on its line, but occurred before delivery to it or in consequence of some cause set in operation before delivery to it, the effect of which it could not prevent.⁶

Presumption. — Where the last carrier delivers the shipment to the consignee in an injured condition, the presumption is that the injury occurred on its line; a consignment in good order when delivered to the initial line is presumed to remain so.⁷

1. **Failure of Agent to Sign Bill of Lading, No Defense.** — St. Louis, etc., R. Co. v. Henderson, 57 Ark. 402.

2. **Intermediate Carrier Liable Though Initial Carrier Is Also Liable.** — Aigen v. Boston, etc., R. Co., 132 Mass. 423, 6 Am. & Eng. R. Cas. 426; Johnson v. East Tennessee, etc., R. Co., 90 Ga. 810; Chesapeake, etc., R. Co. v. Radbourne, 52 Ill. App. 203.

An intermediate line, on whose road the injury to the goods occurred, cannot complain because the initial carrier is not made a party defendant. San Antonio, etc., R. Co. v. Moore, (Tex. Civ. App. 1897) 39 S. W. Rep. 960. Compare Anchor Line v. Dater, 68 Ill. 369.

3. **English Doctrine — No Intermediate Carrier Liable.** — Wilby v. West Cornwall R. Co., 2 H. & N. 703, 4 Jur. N. S. 284. See *supra*, this title, *Liability Held to Extend Over Whole Route*.

4. *Coxon v. Great Western R. Co.*, 5 H. & N. 274, 29 L. J. Exch. 165; *Foulkes v. Metropolitan District R. Co.*, 28 W. R. 526.

5. *Kent v. Midland R. Co.*, L. R. 10 Q. B. 1, 44 L. J. Q. B. 18; cases cited in note preceding. But see *Midland R. Co. v. Bromley*, 17 C. B. 372, 84 E. C. L. 372, 25 L. J. C. P. 94.

6. **Liability of Last Carrier.** — See *supra*, this section, *Liability of Intermediate Lines*; *Wolff v. Central R. Co.*, 68 Ga. 653, 45 Am. Rep. 501, 6 Am. & Eng. R. Cas. 441; *Hawley v. Screvens*, 62 Ga. 347, 35 Am. Rep. 126; *Georgia R. Co. v. Gann*, 68 Ga. 350; *Louisville, etc., R. Co. v. Tennessee Brewing Co.*, 96 Tenn. 577; *Ft. Worth, etc., R. Co. v. Williams*, 77 Tex. 121, 42 Am. & Eng. R. Cas. 464; *Roach v. Canadian Pac. R. Co.*, 1 Manitoba 158.

As to the liability of the last carrier for a misdelivery or for excessive charges, see *infra*, this section, *Misdelivery*; and *infra*, this title, *Rights and Liabilities as to Charges*.

7. **Burden of Proof as to Injury or Loss.** — See *infra*, this title, *Presumption as to Where Injury or Loss Occurred*; *Smith v. New York Cent. R. Co.*, 43 Barb. (N. Y.) 228, *affirmed* in 41 N. Y. 620; *Dixon v. Richmond, etc., R. Co.*, 74 N. Car. 538. See also *Gulf, etc., R. Co. v. Jones*, (Indian Ter. 1896) 37 S. W. Rep. 208.

Presumption. — Where the car in which the goods were originally shipped is received by the last carrier, the presumption is that it received the goods. *Central R., etc., Co. v. Bayer*, 91 Ga. 115. Particularly where it is shown that the car was sealed and that the seals were unbroken. *Newport News, etc., R. Co. v. Mendell*, (Ky. 1896) 34 S. W. Rep. 1081.

In *Laughlin v. Chicago, etc., R. Co.*, 28 Wis. 204, 9 Am. Rep. 493, goods packed in a box were shipped over connecting lines, consisting of three successive carriers, and finally, on delivery to the consignee, the box was found to have been opened, and various articles abstracted therefrom. It was held, in the absence of evidence to the contrary, that the jury might presume that the box remained unopened until it came into the custody of the last carrier, and that while in his custody the loss occurred. The last carrier was held liable accordingly.

Loss While Cars on Switch Being Unloaded by Consignee. — The last carrier is not liable for the loss of cars delivered to it by a connecting line, loaded with goods, where the loss occurs while the cars are on a switch being unloaded by the consignee. *Peoria, etc., R. Co. v. U.*

Loss by Negligence. — The last carrier is liable, without regard to the condition of the goods when received by it, when the loss or injury is shown to have resulted from its negligence.¹

Part of Damage Occasioned Before Goods Received by Carrier. — And where it appears that part of the damage to the goods occurred before they reached the last carrier, but the carrier is unable to show what proportion of the loss so occurred, it is liable for the whole damage.²

4. Liability for Diverting Consignment from Proper Route — Where There Are No Instructions. — Where the goods are delivered to the initial carrier for transportation, without any instructions from the shipper as to what route they shall be carried over, the carrier may adopt the route usually employed by it to the point of destination named; the absence of special instructions amounts to an assent that the carrier's usual course of business shall be followed.³

Where There Are Special Instructions. — But where the carrier accepts a consignment with special instructions from the owner to forward it by a particular route, it must be sent by that route, and if it is not so sent the carrier is liable, as for a conversion, for any delay or loss of the consignment.⁴

S. Rolling Stock Co., 136 Ill. 643, 29 Am. St. Rep. 348, 49 Am. & Eng. R. Cas. 81, reversing 28 Ill. App. 79.

When First Carriers Are Agents of the Last. — In *Grant v. Northern Pac. R. Co.*, 22 Ont. Rep. 645, a purchaser, in *V.*, of goods of the plaintiffs in *O.*, ordered the shipment through an agent of the defendant company in *V.*, the latter, on behalf of his company, furnishing a tag marked "via G. T. Ry. and Chicago & N. W., care N. Pac. R. R., St. Paul." The defendant company's agent in *V.* sent this order and the tag to their contracting freight agent in *T.*, who communicated with the plaintiffs at *O.*, and the latter, shipping the goods to their own order at *V.*, drew on the purchaser through a bank, attaching the shipping bill to the draft, marking the goods as above, with the addition, "Notify" the purchaser. They advised the defendant company's agent in Toronto, who undertook to have the shipment looked after. The goods went through safely, each successive company signing a fresh shipping bill and paying all charges up to the time of receipt by it to the company delivering to them. Before the goods reached the defendant's own line, owing to a mistake in copying the waybill, the word "order" was left out, and this mistake was made by all succeeding carriers, so that when the goods reached *V.* they were delivered to the purchaser, who refused to pay for them, and shortly afterwards he failed. It was held that the goods were received by the defendant company in Ontario by the G. T. Ry. as their agent, upon a through contract to deliver them to the order of the consignor at *V.*, and that they were liable to the plaintiffs for damages resulting from the wrongful delivery.

When Both Carriers Are Liable. — In *Northern Transp. Co. v. McClary*, 66 Ill. 233, goods were shipped to be carried over two connecting lines. The clerk of the first line represented to the representative of the second that the goods had arrived at the latter's warehouse, whereupon the latter gave the former a receipt. The fact was, however, that the goods were not in the warehouse, but had gone astray through a mistake in the marking of the car. It was held that both companies had been negligent, and the shipper was entitled to recover of the sec-

ond company, leaving the two companies to settle between themselves the question of their ultimate liability.

1. When Negligence Is Shown. — Thus in *Gulf, etc., R. Co. v. Edloff*, (Tex. 1896) 34 S. W. Rep. 414, the goods, when delivered to the consignee by the defendant company, the last of several connecting carriers, were in a damaged state resulting largely from the movement of the cars. It was held that it was no defense for the defendant to show, in a general way, that the goods were damaged when delivered to it by a connecting line, the facts showing that the defendant had not so packed the goods in the car as to prevent further injury.

2. When Goods Partly Injured on Another Line. — In *Texas, etc., R. Co. v. Brown*, (Tex. Civ. App. 1896) 37 S. W. Rep. 785, the last carrier had received for the goods to the next preceding carrier as in good condition. The plaintiff's uncontradicted testimony showed that the goods were injured to some extent before they reached the last carrier, but it nowhere appeared what part of the injury so occurred. It was held that the last carrier was liable for the entire damage.

3. Initial Carrier May Select Route Where No Instructions Are Given. — *Snow v. Indiana, etc., R. Co.*, 109 Ind. 425 (parol evidence of a verbal agreement by carrier to carry over a particular route not admissible); *Frank v. Memphis, etc., R. Co.*, 52 Miss. 570; *Southern Kansas R. Co. v. Duncan*, 40 Kan. 503; *Hostetter v. Baltimore, etc., R. Co.*, (Pa. 1887) 32 Am. & Eng. R. Cas. 549. See also *Le Sage v. Great Western R. Co.*, 1 Daly (N. Y.) 306.

Where a company contracts to carry goods to the end of its line, there to be delivered to a connecting carrier, and there are connecting carriers both by rail and boat, if the plaintiff sues, alleging a contract by which his goods were to go the whole distance by rail, the burden of proving the contract alleged is on him. *Dixon v. Columbus, etc., R. Co.*, 4 Biss. (U. S.) 137.

4. But Special Instructions Must Be Followed as to Route. — *Georgia R. Co. v. Cole*, 68 Ga. 623; *Michigan Southern, etc., R. Co. v. Day*, 20 Ill. 375, 71 Am. Dec. 278; *Congar v. Galena, etc., R. Co.*, 17 Wis. 477.

Transmission of Special Instructions. — In case of such special instructions as to the route over which the consignment is to go, it is a part of the initial carrier's duty to take it to the next line, and also to transmit to such line all special instructions received from the consignor; a failure to do so renders the initial carrier liable as for a diversion of the consignment from its proper route.¹

The deviation from instructions of the shipper works a forfeiture of the special contract of shipment under which the initial carrier was relieved of all liability for injuries occurring beyond its own line, and makes the initial carrier liable for a loss or injury wherever occurring, although the consignor may have known that the initial carrier had, in the contract, restricted its liability to its own line. *Uptegrove v. Central R. Co.*, 16 Misc. Rep. (N. Y. Supreme Ct.) 14.

In undertaking to forward goods marked to a point beyond its line, the carrier is bound to obey all reasonable instructions of the consignor not in conflict with the terms of the contract between them. And if the goods are lost in consequence of its disregard of such instructions, it is liable for their value although their loss may occur on another line. *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 18 Am. St. Rep. 119. See also *Johnson v. New York Cent. R. Co.*, 33 N. Y. 610, 88 Am. Dec. 416.

Carrier's Duty to Advise Shipper as to Routes. — Where the carrier knows that the sending of the shipper's consignment over a certain route will cause delay in its arrival at its destination, it is the carrier's duty so to inform him in order that he may be able to select a better route. The same duty of information exists where the prospect of delay arises after the shipment has begun. *Inman v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1896) 37 S. W. Rep. 37.

1. Duty of Initial Carrier to Transmit Special Instructions to Succeeding Carrier. — *Selma, etc., R. Co. v. Butts*, 43 Ala. 385, 94 Am. Dec. 695; *Colfax Mountain Fruit Co. v. Southern Pac. Co.*, (Cal. 1896) 46 Pac. Rep. 668. The initial carrier must so deliver the consignment to the connecting carrier that the latter will be under the same obligations to the shipper with respect to the goods as it would have been had it received them from the shipper directly. *Palmer v. Chicago, etc., R. Co.*, 56 Conn. 137, 35 Am. & Eng. R. Cas. 629; *Little Miami R. Co. v. Washburn*, 22 Ohio St. 324. See also *Booth v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1896) 37 S. W. Rep. 168.

As to special instructions concerning the conditions upon which delivery is to be made to the consignee, and the liability for failure to observe them, see *infra*, this title, *Misdelivery* — *Liability of Last Carrier for*.

In *North v. Merchants', etc., Transp. Co.*, 146 Mass. 315, goods were delivered to a carrier marked to a point beyond its line, but it was instructed to deliver them at the end of its line to the order of the consignor or his assigns. Instead, it forwarded them through intermediate carriers, without transmitting such instructions, to the place of destination, where they were delivered to the consignee without the presentation of the bill of lading. It was held that the initial carrier was liable for the value of the goods thus misdelivered, because of its failure to obey instructions or to transmit them.

Where a bill of lading provides that in forwarding goods beyond its line the company will act as agent only, and not as carrier, it is its duty as such agent to give correct information and instructions to the next carrier as to the delivery of the property; and if it fails to give such instructions it is liable for any loss that may occur by reason thereof. *Dana v. New York Cent., etc., R. Co.*, 50 How. Pr. (N. Y. Supreme Ct.) 428.

Burden of Proof. — When the carrier is sued for delay in the transportation resulting from its failure to advise the connecting carriers of the special conditions in regard to the manner of transportation, the burden is on the carrier to show that it performed its whole duty relative to notification, or else that the delay was not due to its failure in this particular. *Colfax Mountain Fruit Co. v. Southern Pac. R. Co.*, (Cal. 1896) 46 Pac. Rep. 668.

When Connecting Line Refuses to Carry under the Conditions in the Through Bill of Lading. — In *The Torgorm*, 48 Fed. Rep. 584, cotton was shipped over a railroad company's line under a through bill of lading to Germany, the bill providing that the cotton was to be delivered at the seaport "to the ship T. or some other steamship company or line, or to vessels chartered thereby." The T. received the cotton on board, but refused to sign the through bill of lading unless other conditions were inserted. It was held that the railroad company, by virtue of its rights as bailee, could maintain a libel against the vessel to recover possession.

Initial Carrier Liable Although It Had No Reason to Expect Special Damage. — In *Brown, etc., Co. v. Pennsylvania Co.*, 63 Minn. 546, the initial carrier had special instructions to deliver, at the end of its line, to certain connecting lines. The shipper had a special agreement with one of these connecting lines as to how delivery of the goods should be made at their destination. The initial line failed to follow instructions, and delivered the goods to other lines, in consequence of which the shipper lost the benefit of the special contract mentioned. It was held that the initial line was responsible for the damages thus occasioned, although it knew nothing of the special contract made by the shipper with one of the connecting lines.

Failure to Transmit Instructions Does Not Amount to a Conversion. — Under the decisions in *Texas*, such a failure, while it will render the initial carrier liable for damages caused to the goods by their being diverted from their proper route, will not constitute a conversion and render the carrier absolutely liable for their value. *Booth v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1896) 37 S. W. Rep. 168; *Southern Pac. Co. v. Booth*, (Tex. Civ. App. 1897) 39 S. W. Rep. 585.

What Constitutes Instructions as to Route. — Mere markings on the package, put there by the initial carrier and not by the owner, do not constitute instructions and bind a subsequent carrier to follow them in delivering to the next

Where There Are Marks or Labels on Packages Indicating Destination. — The mere fact that marks or labels on the packages consigned indicate the point to which they are to go will not excuse a failure to transmit instructions to the succeeding carrier; if the instructions are omitted from the shipping bills, the initial carrier is responsible for the failure of the next line to know of them.¹

Question of Fact. — Whether or not any special instructions were given to the initial carrier as to what route should be used for the transportation, is a question of fact to be determined like any other.²

Conflict Between Written and Printed Portions of Contract. — Where the contract is in writing, being printed forms with blank spaces filled in, and there is a conflict between the written and the printed portions, the former are to prevail.³

Right of Action Personal to Shipper. — The right of action arising out of the failure of the initial carrier to follow the shipper's instructions as to the route over which the goods should be carried belongs to the shipper alone; a carrier to whom the initial line was instructed to deliver the goods for further transportation can maintain no action against the initial line for a disobedience of such instructions whereby it lost the benefit of the traffic.⁴

5. Where Connecting Line Refuses to Receive Goods — Contract for Through Carriage. — Where the connecting line refuses to receive the goods or has failed to provide means of transporting them, the liability of the carrier must depend upon the nature of its undertaking. If it has assumed to carry the whole distance, either by a special expressed contract or, as in some jurisdictions, by implication of law arising from its having accepted such goods marked to a point beyond its line and issued a through bill of lading, it is liable for the failure of transportation; though, where there is a delay merely, it is liable only for so much of the delay as might have been avoided by the exercise of reasonable care and diligence on its part.⁵

line. *Pickford v. Caledonian R. Co.*, 4 Sess. Cas. (3d ser.) 755, 1 Ry. & C. T. Cas. 252.

Parol Contemporaneous Agreement. — Where a carrier receives for transportation goods marked to a point beyond its line, and a bill of lading is given specifying that the goods shall be delivered to any connecting carrier willing to receive them unconditionally, and that the initial carrier shall not be liable after delivery to the next carrier, it is not competent to prove a contemporaneous oral agreement to forward by rail only. *Hinckley v. New York Cent., etc., R. Co.*, 56 N. Y. 429.

1. *Little Miami R. Co. v. Washburn*, 22 Ohio St. 324.

There is no liability on the part of the subsequent carrier, nor is its lien for charges affected by the fact that the goods were intended to go over another line than its own, but did not owing to the failure of the initial line to transmit instructions. *Patten v. Union Pac. R. Co.*, 29 Fed. Rep. 590.

The carrier is under no obligations to transmit the goods otherwise than as directed by the shipper, in transferring them to another carrier, and where the directions given by the shipper as to the shipment fail to give the name of the consignor, the carrier cannot be held as for negligence because it fails to give the name of the consignor upon delivery to the second carrier. *Indianapolis, etc., R. Co. v. Murray*, 72 Ill. 128.

2. Whether Special Instructions Were Given Is a Question of Fact. — See *Bird v. Georgia R. Co.*, 72 Ga. 655, 7 Am. & Eng. R. Cas. 39, where it is added that the marks on the goods and other similar circumstances may be considered in determining the question.

Relative Value of Testimony. — In *Johnson v. New York Cent. R. Co.*, 39 How. Pr. (N. Y. Supreme Ct.) 127, it is said that in a conflict between the testimony of the shipper and the station agent as to instructions given at the time of the shipment, where both are of equal credibility, greater weight should be given to the testimony of the shipper, on the ground that where the transactions in which a person, such as a freight agent of a road, is engaged are both numerous and uniform, the probability of their being remembered is slight; but when the transactions are numerous but not of a uniform character, such as the shipper is liable to be engaged in, the chances of their being remembered are largely increased. But it is questionable whether this is a correct rule, and it is certainly without precedent.

3. Variance Between Written and Printed Instructions. — *Babcock v. Lake Shore, etc., R. Co.*, 49 N. Y. 491, 43 How. Pr. (N. Y.) 317.

4. Connecting Line Cannot Sue for Failure of Initial Line to Follow Shipper's Instructions. — *St. Louis, etc., Packet Co. v. Missouri Pac. R. Co.*, 35 Mo. App. 272.

5. Where Connecting Line Refuses to Receive Goods. — *Memphis, etc., R. Co. v. Stockard*, 11 Heisk. (Tenn.) 568. See also *Beers v. Wabash, etc., R. Co.*, 34 Fed. Rep. 244, 35 Am. & Eng. R. Cas. 646; *Southard v. Minneapolis, etc., R. Co.*, 60 Minn. 382; *St. Louis, etc., R. Co. v. Mars*, (Ark. 1895) 31 S. W. Rep. 42 (initial line not liable where connecting carrier cannot receive).

Where goods are delivered to a company to be shipped over its own line and that of another, the freight charges being prepaid, the remedy of the shipper for a failure to carry the

Where There Is No Contract for Through Transportation, the carrier is bound only to use reasonable diligence to secure further transportation by tendering the goods to the connecting line; if acceptance is refused, notice must be given to the consignee, and thereafter the carrier is entitled to hold the goods as a warehouseman.¹

If the Consignee or Owner Is Present and can take charge of his goods at the point where the connecting line should take charge of them, but refuses to do so, he must exercise reasonable diligence to prevent injury to them; he cannot abandon them and recover for all such loss as may be incurred, but his recovery will be limited to such damages as could not have been prevented by the exercise of reasonable care on his part.²

6. Misdelivery — Liability of Last Carrier for. — The duty of delivering the shipment to the person entitled to receive it devolves solely upon the last carrier, and it is liable for a wrong delivery.³ The rule is true even where the wrongful delivery is due to the negligence of the initial or an intermediate line in transmitting instructions,⁴ but in such case the last carrier would be entitled to maintain an action over against the prior carrier whose negligence was the cause of the loss.⁵

IX. LIABILITY AS AFFECTED BY SPECIAL CONTRACTS — 1. Generally. — The general rules of law previously stated have reference to the liability of the carrier as arising out of the mere acceptance for transportation of goods marked to a point beyond its line; there is no rule of law preventing a carrier from assuming a liability for the entire route if it chooses to do so.⁶

Rule of Construction — Intention Must Be Clear. — Where a special contract is made, the question arises whether or not the carrier assumes by it any special liability. The general rule of construction in this connection is that a carrier is not to be readily presumed as assuming so unusual a responsibility, and the contract is not to be construed as imposing such responsibility unless the intention is clear and unmistakable.⁷

goods is against the initial company and not the second carrier, where the latter has not, at the time of the injury, been paid its part of the charges nor been informed of the reception of the goods by the other company. *Randall v. Richmond, etc., R. Co.*, 108 N. Car. 612, 49 Am. & Eng. R. Cas. 74.

1. Liability if There Is No Through Contract. — Where the goods shipped are received under a contract limiting the liability of the company as a carrier to its own line, it is bound to deliver them to the next carrier with all reasonable speed, according to the usual course of business. If there is no one at the connecting point to receive the goods and forward them over the proper route, then the company must retain them and notify the owner. The company is not bound, in such a case, to transport the goods beyond its terminus upon any link, however short, of the connecting line, unless an established usage implies such an undertaking. *Louisville, etc., R. Co. v. Campbell*, 7 Heisk. (Tenn.) 253, 12 Am. Ry. Rep. 490. See also *Lesinsky v. Great Western Dispatch*, 10 Mo. App. 134.

2. Shipper's Duty. — *St. Louis, etc., R. Co. v. Neel*, 56 Ark. 279, 55 Am. & Eng. R. Cas. 428.

3. Duty of Delivery on Last Carrier Only. — *Cavallaro v. Texas, etc., R. Co.*, 110 Cal. 348. See the title CARRIERS OF GOODS, vol. 5, p. 154.

4. Although Mistake Was Due to Negligence of Intermediate Carrier. — In *Foy v. Chicago, etc., R. Co.*, 63 Minn. 255, the defendant company, the last of several connecting carriers, deliv-

ered the goods to one not the consignee, without any authority therefor from either the consignee or the consignor and without requiring the production and surrender of the bill of lading. It did so in consequence of instructions given it by the intermediate carrier from whom it received the goods. It was held that the defendant company was responsible for the loss.

5. Action Over Against Prior Line. — See *supra*, the first subdivision of this section.

6. Power to Assume Through Liability. — See *infra*, this section, *Carrier May Contract for Through Liability*; *King v. Macon, etc., R. Co.*, 62 Barb. (N. Y.) 167 (statute fixing liability of connecting lines does not affect liability under special contracts). See also the title CARRIERS OF GOODS, vol. 5, p. 154.

Special Contract Must Be Specially Pledged. — The party seeking to take advantage of any special contract for transportation is bound to plead it specially. *Missouri Pac. R. Co. v. Wichita Wholesale Grocery Co.*, 55 Kan. 525.

Limitation of Liability Must Be by Special Contract — General Notice Not Enough. — In those jurisdictions where the initial carrier is held liable for injuries or losses wherever occurring, unless it has stipulated specially that it shall be liable only for injuries occurring on its own line, a special contract must be shown; a mere general notice is not enough. See the title CARRIERS OF GOODS, vol. 5, p. 154.

7. Through Contract Not Readily Inferred. — *St. Louis Ins. Co. v. St. Louis, etc., R. Co.*, 104

Illustration. — Thus where a railroad company enters into an agreement by which it binds itself to receive, load and unload, deliver, and waybill such freight as shall be sent to it by a dispatch company, but does not expressly assume to be liable as a common carrier except while the goods are on its line or in its possession, the agreement does not impose on the railroad company any obligation to carry beyond its own line, or subject it to any liability for the negligence of subsequent carriers; nor can the dispatch company, in such a case, enter into any contract with a shipper whereby such an obligation or liability shall be imposed upon the railroad company.¹

Through Contract — Connecting Carriers Agents of Initial Carrier. — In case of a through contract the subsequent carriers become merely the agents of the initial carrier for the completion of the contract, and for all losses or injuries occurring on their lines the initial carrier is liable as a principal for the acts of an agent.²

Shipping Order as Evidence. — The shipping order, containing directions on the part of the shipper as to the shipment and the bill of lading, is admissible on behalf of the carrier, in an action against it for a loss occurring on a connecting line, on the question of the extent of the initial carrier's undertaking.³

In Case Special Contract Illegal. — If the special contract made by the initial carrier is illegal and void, as where it stipulates for an absolute exemption from all liability on the part of the carrier, subsequent connecting carriers are charged with notice of the illegality and cannot claim any benefit under such contract; their liability in such cases is to be determined from the principles of the general law.⁴

No Limitation of Liability for Negligence. — A stipulation in the original contract releasing the initial carrier from liability for losses not occurring on its own line will not affect the liability of such carrier for a loss resulting from its own negligence, although the loss may not have developed until the goods were in the custody of a connecting line.⁵

U. S. 146, 3 Am. & Eng. R. Cas. 260. In this case it was held that a carrier is not, in the absence of a special contract, liable for injuries occurring on a connecting road beyond its own line. A special undertaking to assume such liability cannot be inferred from: 1. The entry of the carrier into an arrangement with the connecting line to carry freight at tariff rates, or at any special rates furnished by the other lines. 2. The giving of a waybill which expressed the goods to be consigned to an extra-terminal point, but which purports to be a manifest of freight from one terminus of the road to another. See also *Stewart v. Terre Haute, etc., R. Co.*, 1 McCrary (U. S.) 312. See *infra*, this section, *Carrier May Contract for Through Liability*.

1. *St. Louis Ins. Co. v. St. Louis, etc., R. Co.*, 104 U. S. 146, 3 Am. & Eng. R. Cas. 260. See also *Deming v. Norfolk, etc., R. Co.*, 21 Fed. Rep. 25, 16 Am. & Eng. R. Cas. 232.

2. *Mallory v. Burrett*, 1 E. D. Smith (N. Y.) 234. See also *Fox v. Boston, etc., R. Co.*, 148 Mass. 220, 37 Am. & Eng. R. Cas. 632.

3. **Shipping Order Admissible as Evidence.** — *Pennsylvania Co. v. Fairchild*, 69 Ill. 260. In this case goods were delivered to the defendant company in Indiana, marked to a consignee in Kansas, its line of road terminating at Chicago. It appeared that on the next day after such delivery the company made out and delivered to the shipper a bill of lading containing an agreement to carry the goods to the company's freight station in Chicago, and limiting its liability to its own line. The goods reached Chicago in safety and were transferred

to the next company, in whose custody they were when destroyed by fire. In a suit against the company giving the bill of lading to recover for the loss, it was held that it was error to refuse to admit in evidence, on the request of the company, the shipping order containing directions as to the shipment and the bill of lading.

4. **Subsequent Carrier Charged with Knowledge of Illegality of Original Contract.** — *Woodburn v. Cincinnati, etc., R. Co.*, 40 Fed. Rep. 731, 42 Am. & Eng. R. Cas. 523.

5. **No Limitation of Liability for Negligence.** — *Fort Worth, etc., R. Co. v. Daggett*, 87 Tex. 322. In this case the initial carrier, upon receiving for transportation over its own and connecting lines a shipment of cattle, expressly stipulated that it should be relieved from "liability of every kind" after the stock should have left its line. It failed to feed and water the stock while they were being carried over its line, and, as a consequence of this neglect, some of them died while on the next line. The court held that the stipulation constituted no defense to an action against the first carrier. See also *Norfolk, etc., R. Co. v. Harman*, 91 Va. 601, where lambs delivered for shipment, before being put in the car, drank salt water which the company had negligently allowed to run through the pens, without the shipper's knowledge. The water caused many of the lambs to die, though their death occurred after the second connecting line had received them. It was held that the first carrier was responsible for the loss.

A stipulation that the initial carrier shall not

Ratification of Original Contract by Second Carrier. — Ordinarily the acceptance by an intermediate carrier, of goods tendered by a connecting line for transportation to a further point, constitutes a ratification by such line of the original contract made with the shipper by the initial line, and the intermediate carrier becomes bound by all its provisions.¹

Under Statutes Compelling Carriers to Accept Freight Offered. — But such a result does not follow when the statute expressly makes it the duty of every line to accept and carry freight tendered by a connecting line; the acceptance of goods under such circumstances, being compulsory, carries no presumption of ratification with it.² In such a case the liability of the connecting carrier is to be determined by the principles of the general law, without regard to the original contract.³

2. Carrier May Contract for Through Liability — *a.* **IN GENERAL.** — There is now no question but that a railroad company or similar corporation engaged in the transportation of goods for hire may contract for the carriage of goods to a point beyond its line, and may also undertake to be responsible for the safe carriage of such goods for the entire distance.⁴

be liable for delay does not protect it where the delay results from its own negligence. *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438.

1. Acceptance of Goods by Connecting Carrier a Ratification of the Original Contract. — *Harris v. Cheshire R. Co.*, (R. I. 1889) 16 Atl. Rep. 512.

In *Western R. Co. v. Harwell*, 97 Ala. 341, affirming 91 Ala. 340, the court said that the mere fact that the defendant, a connecting carrier, received and forwarded the goods from the initial carrier raised no presumption that it did so under the terms of the contract made with the initial carrier, and that in order for the defendant to take advantage of the terms of such contract stipulating against liability, a ratification of the contract by it must be shown; also, that a plea that the goods were shipped at a "release rate which was a reduced rate of freight" was insufficient as a basis for proof that the defendant ratified the contract. But it appearing, in addition to these facts, that the shipper made no contract other than that with the initial line, and that the rate charged was a reduced rate, allowed only when goods were shipped at the shipper's risk, it was held that there was enough proof to show an acceptance by the defendant of the original contract, and that it was therefore entitled to the benefit of the stipulations contained therein. Compare *Missouri, etc., R. Co. v. Stoner*, 5 Tex. Civ. App. 50, holding that the second carrier is not bound by a special contract as to rates made by the initial carrier merely because it accepts the shipment, if it was then ignorant of such contract.

2. Where Such Acceptance Not a Ratification — Statutes. — The case of *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 16 Am. St. Rep. 926, was an action to recover the statutory penalty against the defendant company for failure to deliver goods to the consignee. The company claimed the right to hold them for freight charges, and the consignee was offering to pay the charges fixed by the original bill of lading, but no more. In holding that the defendant company was not liable, since the statute compelled it to accept all freight offered by a connecting carrier, the court, by Gaines, J., said that in the absence of a statute requiring all

companies to accept and carry goods tendered for carriage by a connecting line "it might be proper to hold that a carrier who has received freight from another carrier upon a through bill of lading, without any express agreement as to the charges, should be presumed to have ratified the bill of lading, though made without its authority, and to have become a party to the contract. But certainly, when the carrier is bound by a statute to receive and transport the goods without delay upon tender by the connecting carrier, no such presumption should be indulged. Such a rule would be to force a contract upon a carrier to which he had not given his consent, and compel him to carry at a rate fixed by another company. The result of the construction of the law by the court below is that a railroad company is not permitted to refuse to receive the goods for transportation; yet if it does receive them it ratifies, by that act, a bill of lading made without its authority. This, in our opinion, cannot be tolerated." See also *Fort Worth, etc., R. Co. v. Williams*, 77 Tex. 121; *Gulf, etc., R. Co. v. Baird*, 75 Tex. 256, 40 Am. & Eng. R. Cas. 160; *Fort Worth, etc., R. Co. v. Fuller*, 3 Tex. Civ. App. 340.

The same rule is upheld and applied in *Wichita Valley R. Co. v. Nance*, 6 Tex. Civ. App. 34; *Fort Worth, etc., R. Co. v. Johnson*, 5 Tex. Civ. App. 24.

3. *Woodburn v. Cincinnati, etc., R. Co.*, 40 Fed. Rep. 731, 42 Am. & Eng. R. Cas. 523.

4. Contracts for Through Liability — England. — It is not *ultra vires* for a railroad company to contract to carry goods beyond its own line by sea, by coach, or otherwise. *Wilby v. West Cornwall R. Co.*, 2 H. & N. 703, 4 Jur. N. S. 284, 27 L. J. Exch. 181.

United States. — *Ohio, etc., R. Co. v. McCarthy*, 96 U. S. 258; *Ogdensburg, etc., R. Co. v. Pratt*, 22 Wall. (U. S.) 133; *Evansville, etc., R. Co. v. Androscoggin Mills*, 22 Wall. (U. S.) 594; *Woodward v. Illinois Cent. R. Co.*, 1 Biss. (U. S.) 403.

California. — *Pereira v. Central Pac. R. Co.*, 66 Cal. 92, 18 Am. & Eng. R. Cas. 566.

Georgia. — A carrier cannot, without authority, bind other connecting lines by a contract

A Contrary View was at one time entertained by the *Connecticut* court, but is not now accepted anywhere.¹

Proof Must Be Clear and Explicit. — Where it is attempted to render a company liable on the ground of its having undertaken to be responsible for the safe carriage of the goods over the entire route, the proof of such undertaking must be clear and explicit, as there is no presumption that such responsibility was assumed by the acceptance of the goods marked to a distant point.²

for transportation over their roads, but it can assume a through contract for itself. *Rome R. Co. v. Sullivan*, 25 Ga. 228.

Illinois. — *St. Louis, etc., R. Co. v. Larned*, 103 Ill. 203, 6 Am. & Eng. R. Cas. 436; *Wabash R. Co. v. Harris*, 55 Ill. App. 159.

Indiana. — *Cummins v. Dayton, etc., R. Co.*, (Ind. 1882) 9 Am. & Eng. R. Cas. 36.

Iowa. — *Robinson v. Merchants' Dispatch Transp. Co.*, 45 Iowa 470.

Kansas. — *Atchison, etc., R. Co. v. Fletcher*, 35 Kan. 236, 24 Am. & Eng. R. Cas. 34; *Atchison, etc., R. Co. v. Roach*, 35 Kan. 740, 57 Am. Rep. 199.

Kentucky. — *Bryan v. Memphis, etc., R. Co.*, 11 Bush (Ky.) 597, 14 Am. Ry. Rep. 395.

Massachusetts. — *Hill Mfg. Co. v. Boston, etc., R. Corp.*, 104 Mass. 122, 6 Am. Rep. 202.

Minnesota. — When not restrained by their charters, it is a power incident to railway corporations to enter into arrangements and contracts with other connecting carriers by land or water for through transportation; and such contracts, when made with the *bona fide* purpose of regulating traffic in a reasonable and just manner, are good; and it is the duty of such corporations, so far as they have authority, to increase their business by all usual and customary means and to furnish the public with all needful facilities for safe, cheap, and speedy transportation. *Stewart v. Erie, etc., Transp. Co.*, 17 Minn. 372, 5 Am. Ry. Rep. 333, 8 Am. Ry. Rep. 149.

Missouri. — *Wiggins Ferry Co. v. Chicago, etc., R. Co.*, 73 Mo. 389, 5 Am. & Eng. R. Cas. 1, 39 Am. Rep. 519, *reversing* 5 Mo. App. 347 (general freight agent may so contract, but not a mere station agent); *Davis v. Jacksonville Southeastern Line*, 126 Mo. 69; *Moore v. Henry*, 18 Mo. App. 35; *Cherry v. Kansas City, etc., R. Co.*, 1 Mo. App. Rep. 253; *Snider v. Adams Express Co.*, 63 Mo. 376; *Coates v. U. S. Express Co.*, 45 Mo. 238.

Nebraska. — *Missouri Pac. R. Co. v. Twiss*, 35 Neb. 267.

New Hampshire. — *Gray v. Jackson*, 51 N. H. 9, 12 Am. Rep. 1; *Nashua Lock Co. v. Worcester, etc., R. Co.*, 48 N. H. 339, 2 Am. Rep. 242.

New York. — A corporate carrier over a portion of a continuous line of transportation may (within reasonable limits and under such circumstances as are fairly incident to its legitimate corporate business) contract to carry from a point beyond its own terminus to its terminus, and thence over its own route, as well as to carry beyond the terminus of its own route, and such contract is not *ultra vires*. *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206, 30 Am. & Eng. R. Cas. 105; *Schroeder v. Hudson River R. Co.*, 5 Duer (N. Y.) 55; *Ogdensburg, etc., R. Co. v. Pratt*, 49 How. Pr. (U. S. Supreme Ct.) 84; *Condict v. Grand*

Trunk R. Co., 54 N. Y. 500; *Weed v. Saratoga, etc., R. Co.*, 19 Wend. (N. Y.) 534; *Burtis v. Buffalo, etc., R. Co.*, 24 N. Y. 269; *Lyon v. Western New York, etc., R. Co.*, 88 Hun (N. Y.) 27. See also *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, 49 Am. & Eng. R. Cas. 98, as to evidence justifying a finding of a contract for through transportation.

North Carolina. — A railroad company receiving goods for transportation may contract to carry them beyond the limits of its own road and of the state in which it is chartered, and may assume all the responsibilities incident to such an undertaking. *Lindley v. Richmond, etc., R. Co.*, 88 N. Car. 547, 9 Am. & Eng. R. Cas. 31; *Phillips v. North Carolina R. Co.*, 78 N. Car. 294. See also *Knott v. Raleigh, etc., R. Co.*, 98 N. Car. 73, 2 Am. St. Rep. 321, 32 Am. & Eng. R. Cas. 481.

Pennsylvania. — *Baltimore, etc., Steamboat Co. v. Brown*, 54 Pa. St. 77.

Tennessee. — *Western, etc., R. Co. v. McElwee*, 6 Heisk. (Tenn.) 208; *Merchants' Dispatch Transp. Co. v. Bloch*, 86 Tenn. 393, 6 Am. St. Rep. 847.

Texas. — *Houston, etc., R. Co. v. Park*, 1 Tex. App. Civ. Cas., § 332; *Gulf, etc., R. Co. v. Insurance Co. of North America*, (Tex. Civ. App. 1894) 28 S. W. Rep. 237.

Vermont. — The principle is well settled that railroad companies, as common carriers, may make valid contracts to transport property beyond the limits of their own roads, and when they do they are bound to deliver the property at its place of destination, according to their contract, and are liable for all injury to such property prior to its delivery, although such injury happens after the property has passed over their road on its way, and while in the charge of other carriers over whom they have no control. This contract may be either express or implied. *Morse v. Brainard*, 41 Vt. 550; *Noyes v. Rutland, etc., R. Co.*, 27 Vt. 110. See also *Hadd v. U. S.*, etc., Express Co., 52 Vt. 335, 36 Am. Rep. 757, 6 Am. & Eng. R. Cas. 443.

1. *Contra* — *Connecticut*. — The only case opposing the view of the text is that of *Hood v. New York, etc., R. Co.*, 22 Conn. 1, 502, where it was held that a contract for liability over the entire route could not be inferred from the sale of a through ticket to a passenger, for the reason that the company had no power to contract for carriage beyond its lines. But this case has not been followed anywhere.

2. **Proof of Such Contract Must Be Clear and Specific.** — *Pennsylvania R. Co. v. Berry*, 68 Pa. St. 272, 1 Am. Ry. Rep. 501; *Baugh v. McDaniel*, 42 Ga. 641; *Baltimore, etc., R. Co. v. Green*, 25 Md. 72; *infra*, this section, *What Circumstances Create a Through Contract*.

Whether such a contract was in fact made is a question for the jury, unless it is a mere mat-

Authority of Agent.—Such a contract must appear to have been made by an authorized agent; an agent empowered to contract for local freight merely has not necessarily authority to contract for the transportation of goods to a point beyond his company's lines.¹

b. DUTY OF CARRIER WHERE IT SO CONTRACTS.—Where a carrier undertakes, by special contract, to carry to the point to which the consignment is marked, it becomes its duty to provide the necessary means for accomplishing the transportation beyond its line, and it cannot excuse its failure to perform its undertaking by showing that the usual means of transportation beyond the terminus of its own line failed or refused to carry for it.²

c. WHAT CIRCUMSTANCES CREATE A THROUGH CONTRACT—(1) *Generally.*—There being no question that the carrier may contract for through liability, the question becomes whether or not there was such a contract.

Custom — Through Bill of Lading — Through Charges Collected in Advance.—The custom and usage of the carrier in regard to through freight, the extent to which it held itself out as undertaking to be liable throughout the journey, the fact that a through bill of lading was given and freight charges for the entire distance were collected in advance, and the character of association existing between the initial carrier and the connecting companies, are all circumstances to be considered and from which the jury may find an undertaking for through liability.³

ter of the construction of the bill of lading. *Pereira v. Central Pac. R. Co.*, 66 Cal. 92, 18 Am. & Eng. R. Cas. 565.

In the absence of a special agreement for through liability "such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence." *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 9 Am. & Eng. R. Cas. 25.

1. Contract Must Have Been Made by Competent Agent.—*Wait v. Albany, etc., R. Co.*, 5 Lans. (N. Y.) 475; *Moore v. Henry*, 18 Mo. App. 35; *Wiggins Ferry Co. v. Chicago, etc., R. Co.*, 73 Mo. 389, 5 Am. & Eng. R. Cas. 1, 39 Am. Rep. 519, reversing 5 Mo. App. 347. In this last case it was held that the general freight agent of a railroad company may bind his company by a contract for through transportation of goods, but that a mere station agent cannot unless he has express authority therefor from his proper superior officer, or unless there has been a previous course of dealing from which such authority on his part may be fairly inferred. See also *Riley v. New York, etc., R. Co.*, 34 Hun (N. Y.) 97; *Baugh v. McDaniel*, 42 Ga. 641.

Who Is Competent Agent.—An agent employed for the sole purpose of soliciting passengers, and who is not held out by the company as their agent for any other purpose, has no power to bind the company by a contract to receive freight from another railroad and transport it to the depot and there ship it forward, over the road for which he is such agent. *Taylor v. Chicago, etc., R. Co.*, 74 Ill. 86. Compare *Michigan Southern, etc., R. Co. v. Day*, 20 Ill. 375, 71 Am. Dec. 278.

A railroad company cannot, however, excuse its failure to carry goods to a point beyond its line, after having contracted to do so, on the ground that its agent had no authority to make such a contract, where the proof shows that the agent making the contract was the general

freight and transportation agent of the company and that the shipper had no notice of any limitation upon his powers. *Schroeder v. Hudson River R. Co.*, 5 Duer (N. Y.) 55.

2. Duty to Provide Means for Transportation Throughout the Journey.—*Arnold v. Shade*, 3 Phila. (Pa.) 82. See also *Frank v. Memphis, etc., R. Co.*, 52 Miss. 570.

Thus, where the transportation will require reshipment by water, it becomes the duty of the initial carrier undertaking the transportation to provide the necessary boats, and if it does so undertake, but is disappointed in securing the boats, it is nevertheless liable for the delay. *Bussey v. Memphis, etc., R. Co.*, 4 McCrary (U. S.) 405, 13 Fed. Rep. 330.

In another case the defendant railroad company received freight, agreeing to carry it to a point beyond its own road, with provisions in the contract of shipment that it should not be liable for a loss by fire nor for a loss beyond its own line. The company ran steamers from the end of its line to the place of destination of the goods, but they were not sufficient to carry all the goods. At the time of the shipment the defendant and connecting roads running to such destination had failed to agree on a division of freight rates, and the connecting roads therefore refused to receive the freight. The goods were thus delayed for six days at the end of the defendant's line, and, while there, were destroyed by fire. It was held that the defendant company was liable, since it had expressly agreed to carry beyond its own line, and could not contract against liability for the negligence through which the fire was caused. *Condit v. Grand Trunk R. Co.*, 54 N. Y. 500, 6 Am. Ry. Rep. 410, affirming 4 Lans. (N. Y.) 106.

3. Circumstances from Which Through Contract May Be Inferred.—*McCarthy v. Terre Haute, etc., R. Co.*, 9 Mo. App. 159; *Ogdensburg, etc., R. Co. v. Pratt*, 22 Wall. (U. S.) 123, 11 Am. Ry. Rep. 431; *Jennings v. Grand Trunk*

When for the Jury. — The question, where the facts are in doubt or where different conclusions may reasonably be drawn therefrom, is one for the jury under all the circumstances above stated.¹

R. Co., 127 N. Y. 438, 49 Am. & Eng. R. Cas. 98 (evidence held sufficient to show undertaking for through transportation). See also *Mallory v. Burrett*, 1 E. D. Smith (N. Y.) 234; *Dresbach v. California Pac. R. Co.*, 57 Cal. 462, 3 Am. & Eng. R. Cas. 281.

Illustrations. — In *Cummins v. Dayton, etc.*, R. Co., (Ind. 1882) 9 Am. & Eng. R. Cas. 36, three railroad companies, whose lines formed a continuous road between X and Y, held themselves out to the public as having formed a combination for the transportation of goods on the entire route. A, at X, shipped goods with one of the companies addressed to B, at Y, and took a receipt whereby the company undertook to forward as per directions. Said receipt contained numerous provisions limiting liability, and provided that all the carriers transporting the property as a part of the through line should be entitled to all the exceptions and conditions therein mentioned. It was held that said carrier had contracted to carry the goods through to Y, and was liable for a loss occurring in consequence of delay in said transit, although the same occurred beyond its own line.

Goods directed to Cleveland, Ohio, were delivered, in New York City, to the defendant, who was engaged as a common carrier only in carrying between New York and Troy; there were no directions to him except to the effect that the goods were to be forwarded by a particular line. It was held that his liability ended at Troy. *Jacobs v. Hooker*, 1 Edm. Sel. Cas. (N. Y. Cir. Ct.) 472.

In the case of *Toledo, etc.*, R. Co. v. *Merri-man*, 52 Ill. 123, 4 Am. Rep. 590, the conditions printed on the bill of lading contained the usual provisions to carry over the initial line and then to deliver to the connecting line or to the consignee, and then provided further: "The responsibility of this company as a common carrier, under this bill of lading, to commence on the removal of goods from the depot on the cars of the company, and to terminate when unloaded from the cars at the place of delivery." The goods proceeded to their place of destination over connecting lines, in the cars of the company receiving them. It was held that this was a through-freight contract, making the company liable beyond its own line.

A stipulation in the bill of lading that, in case of loss of or damage to any of the goods named therein for which any carrier under the same might be liable such carrier should have the benefit of any insurance by or on account of the owner, is strong evidence of an intention to make a through contract. *Wahl v. Holt*, 26 Wis. 703.

A railroad company having received goods marked to a point beyond its line, and having made out a bill therefor in the usual form of its waybills, it was held that there was evidence from which a jury might properly find a contract by it to carry the whole distance. *Webber v. Great Western R. Co.*, 3 H. & C. 771, 4 H. & C. 582, 13 W. R. 755.

In *Cutts v. Brainerd*, 42 Vt. 566, 1 Am. Rep. 353, a box was delivered to a railroad company for shipment, marked to a place beyond its line; a receipt was given which, after describing the goods by stating the name of the consignee and the point of destination, provided: "which the company promises to forward by its railroad and deliver to * * * at its depot in ——" This receipt was on a printed form and the blanks printed therein. It was held that it constituted an implied undertaking by the company to carry the box to its destination. See also *Morse v. Brainerd*, 41 Vt. 550. Compare *Alabama G. S. R. Co. v. Thomas*, 83 Ala. 343, 32 Am. & Eng. R. Cas. 464.

The defendant company, on receiving from the shipper certain articles for transportation, addressed to a point beyond its line, gave this receipt: "Received from J., in good order, the following articles for shipment to W., Cedar Keys, Fla.: 1 bdl. bedding. [Name.] Care R. agt., Callahan." In an action to recover of the defendant for a loss of the goods it was held that the words "care R. agt., Callahan," being ambiguous, parol evidence was admissible to explain their meaning; that if their meaning appeared to be that the goods were to be delivered to the railroad agent of another company at Callahan, the defendant's liability ended with such a delivery in good order. *Savannah, etc.*, R. Co. v. *Collins*, 77 Ga. 376, 4 Am. St. Rep. 87, 32 Am. & Eng. R. Cas. 496, note.

1. Question for the Jury. — Where the principal issue is as to whether a through contract was made, it is error to take from the jury the consideration of that question. See *Central R., etc., Co. v. Skellie*, 86 Ga. 686. Thus where the only evidence of the contract of carriage was that the foreman of the freight department at one of the defendant's stations agreed to have certain trees forwarded to a station not on the defendant's line, but on one connecting with it, such evidence must be submitted to the jury, who are to determine whether or not there was a contract for through shipment; it is error, in such a case, to direct a nonsuit. *McGill v. Grand Trunk R. Co.*, 19 Ont. App. 245. See also as holding that the question is one to be submitted to the jury where there is any evidence tending to show a through contract, *Ogdensburg, etc.*, R. Co. v. *Pratt*, 22 Wall. (U. S.) 123, 11 Am. Ry. Rep. 431; *McCarthy v. Terre Haute, etc.*, R. Co., 9 Mo. App. 159; *Pereira v. Central Pac. R. Co.*, 66 Cal. 92, 18 Am. & Eng. R. Cas. 565; *Philadelphia, etc.*, R. Co. v. *Ramsey*, 89 Pa. St. 474; *Central R., etc., Co. v. Georgia Fruit, etc.*, Exch., 91 Ga. 389, 55 Am. & Eng. R. Cas. 606.

When the question is as to whether the defendant, the initial line, made a contract, by its agent, to carry over the entire route without any trans-shipment of the goods, proof of an agreement of that kind with the defendant's agent, and of the payment to him of the entire freight charges, and that the defendant sent a car ordered by its agent over the con-

Point of Difference Between English and American Doctrines. — It has been held that the mere issuance of a through bill of lading, or the acceptance for transportation of goods marked to a distant point, or the mere failure of the initial carrier to stipulate that it shall be liable only for injuries occurring on its own line, is sufficient to require the inference of an undertaking for through liability,¹ but the better rule is the other way.² The difference in the holding of the

necting line, is sufficient to demand a submission of the question to the jury. Page *v.* Chicago, etc., R. Co., 7 S. Dak. 297.

1. Issuance of Through Bill of Lading. — St. John *v.* Van Santvoord, 25 Wend. (N. Y.) 660; Illinois Cent. R. Co. *v.* Johnson, 34 Ill. 389; Missouri Pac. R. Co. *v.* Twiss, 35 Neb. 267. See also Ogdensburg, etc., R. Co. *v.* Pratt, 22 Wall. (U. S.) 123, 11 Am. Ry. Rep. 431; Evansville, etc., R. Co. *v.* Androscooggin Mills, 22 Wall. (U. S.) 594, 11 Am. Ry. Rep. 113; Crouch *v.* Louisville, etc., R. Co., 42 Mo. App. 248. Compare McCarthy *v.* Terre Haute, etc., R. Co., 9 Mo. App. 159.

In Kyle *v.* Laurens R. Co., 10 Rich. L. (S. Car.) 382, 70 Am. Dec. 231, the defendant company gave receipts for cotton "to be delivered on presentation of this receipt at Charleston." The cotton passed over the defendant's road and was delivered to another road for transportation to Charleston, but was lost *en route*. It was held that the defendant was liable as on an undertaking to carry to Charleston.

When the law imposes a duty it raises an implied promise to perform that duty; and acceptance of goods by a carrier marked to a particular point implies the duty of carrying them to that point. So where a shipping receipt is silent as to any agreement on the part of the carrier in relation to forwarding the goods to the place of destination, it must be construed with reference to these implied duties. Illinois Cent. R. Co. *v.* Miller, 32 Ill. App. 259.

Absence of Limitation as Prima Facie Evidence. — The receipt of goods by a common carrier, directed to a point beyond its line of road, without any limitation of its liability, is *prima facie* evidence of an undertaking to carry the goods to the point to which they were directed, and renders the carrier liable for any failure of carriage to that point, whether caused by a loss or injury on its own line or that of a connecting carrier. Louisville, etc., R. Co. *v.* Weaver, 9 Lea (Tenn.) 38, 16 Am. & Eng. R. Cas. 218, 42 Am. Rep. 654; Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Fortier *v.* Pennsylvania Co., 18 Ill. App. 260.

Under Rev. Stat. of Missouri, § 944, the acceptance by a railroad company of goods marked to a point beyond its line is evidence from which a through contract may be inferred. Hance *v.* Wabash Western R. Co., 56 Mo. App. 476.

2. Contract for Through Transportation Not Implied from Issuance of Through Bill of Lading or Similar Circumstances. — Elmore *v.* Naugatuck R. Co., 23 Conn. 457, 63 Am. Dec. 143; Converse *v.* Norwich, etc., Transp. Co., 33 Conn. 166; Louisville, etc., R. Co. *v.* Tarter, (Ky. 1897) 39 S. W. Rep. 608; Ortt *v.* Minneapolis, etc., R. Co., 36 Minn. 396; Crawford *v.* Southern R. Assoc., 51 Miss. 222, 24 Am. Rep. 626; Piedmont Mfg. Co. *v.* Columbia, etc., R.

Co., 19 S. Car. 353, 16 Am. & Eng. R. Cas. 194; Hunter *v.* Southern Pac. R. Co., 76 Tex. 195, 42 Am. & Eng. R. Cas. 501; San Antonio, etc., R. Co. *v.* Mayfield, (Tex. App. 1890) 15 S. W. Rep. 503; Central Trust Co. *v.* Wabash, etc., R. Co., 31 Fed. Rep. 247; Stewart *v.* Terre Haute, etc., R. Co., 3 Fed. Rep. 768, 1 McCrary (U. S.) 312. See also International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, affirmed in 87 Tex. 311.

Where a shipper delivers freight to a railroad marked to a point which he knows is beyond the end of the road, requiring further shipment by steamer belonging to other carriers, the railroad company does not become a common carrier beyond the end of its line, nor liable for losses occurring on the steamer, though it has accepted freight charges for the entire distance, to be divided between the two carriers. Washburn, etc., Mfg. Co. *v.* Providence, etc., R. Co., 113 Mass. 490.

To show liability of a connecting line for damages to freight caused elsewhere than upon its line, something more must be shown than a freight contract for through shipment made by the railway company receiving the freight, and that it was shipped upon the route indicated by the contract. Ft. Worth, etc., R. Co. *v.* Williams, 77 Tex. 121, 42 Am. & Eng. R. Cas. 464.

Effect of Receipt — Adds Nothing to Contract. — In Nutting *v.* Connecticut River R. Co., 1 Gray (Mass.) 504, the court, by Metcalf, J., said: "But the plaintiff seeks to charge the defendants on the receipt given by Clarke, their agent, as on a special contract that the boxes should be safely carried the whole distance between Northampton and New York. We cannot so construe the receipt. It merely states the fact that the boxes had been received 'for transportation to New York.' And the plaintiff might have proved that fact, with the same legal consequences to the defendants, by oral testimony, if he had not taken a receipt. That receipt, in our opinion, imposed on the defendants no further obligation than the law imposed without it."

This case is followed in Elmore *v.* Naugatuck R. Co., 23 Conn. 472, 63 Am. Dec. 143, where the court, after stating the same rule, said: "And does the receipt add anything to the proof? We think not. It is a mere admission of the fact that the bales have been received, and is evidence for the plaintiff, which he will possess, of the purpose for which they were received, viz., to be transported, not to be sold or consumed or otherwise appropriated. But this does not touch the question of distance or duty beyond the defendant's road. The writing is just as consistent with the defendant's claim as the plaintiff's, and hence cannot be *prima facie* evidence of anything beyond the fact that the bales were received to be forwarded, and the receipt

authorities on this point is the difference between the English and the American doctrines heretofore adverted to.¹

Express Contract Confining Liability to Carrier's Own Line. — And certainly no inference of an undertaking for a through liability can be made where the contract expressly provides that the receiving carrier shall not be liable beyond its own line.²

(2) *Charging and Collecting Entire Freight in Advance.* — The fact that the initial carrier charged and collected the freight for the entire route in advance, coupled with the acceptance of the goods marked to a point beyond its lines, has been held to create, by implication, a contract for through liability.³ But according to other authorities this is but an incident to the transportation of all through freight, and does not imply any contract for through liability unless there are other circumstances showing plainly the

proves nothing more than what the law would imply from the reception alone."

Rule Declared by Judge Story. — The rule of the text is also sustained in Story on Bailments, § 538, note, where it is said: "The general American rule probably is that if the carrier receiving the goods has no connection in business with another line, and receives pay for transportation only on his own road, he is not liable, in the absence of any special contract, for a loss beyond his own line. * * * And the simple receipt of goods directed to a place beyond the carrier's own line does not, *prima facie*, create a contract to carry such goods to their final destination."

Waybills Indicating Separate Charge for Each Line. — Waybills which contain separate items of charges for the two lines over which the goods are to be carried cannot be taken as constituting a contract for through transportation. They rather indicate the opposite. *Taylor v. Maine Cent. R. Co.*, 87 Me. 299.

1. See *supra*, *Liability for Loss or Injury — Liability Held to Extend over Whole Route; Liability Held to Be Limited to Carrier's Own Line.*

The authorities cited in the second subdivision above referred to all hold that a contract for through transportation is not to be implied at all, but must be express. Those cited in the other hold that the mere acceptance by a carrier of goods marked to a point beyond its line creates, by implication, a contract to carry over the entire distance.

2. **No Inference Where There Is an Express Limitation.** — *Central R., etc., Co. v. Bridger*, 94 Ga. 471.

In the case of *Detroit, etc., R. Co. v. Farmers', etc., Bank*, 20 Wis. 122, the carrier, on receiving the goods, gave the shipper a receipt for through shipment at a fixed rate, stating on its face that the goods were to be subject to the railroad company's tariff, and "under the conditions stated on the other side." On the back of the receipt was a printed notice that goods to go beyond the carrier's line would be forwarded by public carriers, but that the responsibility of the company should cease when such connecting carrier received the goods for further conveyance, and that it would not be liable for loss or damage which might occur beyond its line. It was held that such printed conditions were a part of the shipping receipt, and did not constitute a con-

tract for through carriage, but only to carry to the end of the initial carrier's line and to deliver to the next carrier. See a similar case in *Dunbar v. Port Royal, etc., R. Co.*, 36 S. Car. 110, 31 Am. St. Rep. 860, 55 Am. & Eng. R. Cas. 466; *Chicago, etc., R. Co. v. Church*, 12 Ill. App. 17.

3. **Charging Freight in Advance — Held to Indicate Through Contract.** — See *Lamb v. Camden, etc., R., etc., Co.*, 2 Daly (N. Y.) 454; *Crouch v. Louisville, etc., R. Co.*, 42 Mo. App. 248. See also *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616, 3 Am. Ry. Rep. 390; *Central R., etc., Co. v. Georgia Fruit, etc., Exch.*, 91 Ga. 389, 55 Am. & Eng. R. Cas. 606.

In *Atlanta, etc., R. Co. v. Texas Grate Co.*, 81 Ga. 602, 40 Am. & Eng. R. Cas. 130, a company whose lines extended from Atlanta to West Point, Ga., having received, at Atlanta, goods consigned to Dallas, Tex., and having fixed by contract with the consignor the rate of freight for the whole distance, apportioning a part of the same among the carriers, itself included, to New Orleans, and assessing the balance for the transportation beyond New Orleans, it was held that the contract was *prima facie* a through contract and bound the initial company for transportation to Dallas, the point of destination. And this was true notwithstanding the rate named was made subject to change without notice, the effect being to limit the agreed special rate to the particular shipments with reference to which the rate was established, but not to allow any change, either along or at the terminus of the route, which would affect these shipments. See also *Central R., etc., Co. v. Georgia Fruit, etc., Exch.*, 91 Ga. 389, 55 Am. & Eng. R. Cas. 606. See also *Harris v. Cheshire R. Co.*, (R. I. 1889) 16 Atl. Rep. 512.

Proof that goods were billed through to a point on the line of a connecting carrier in accordance with the usual course of business on the receiving company's road, and of a receipt for through freight charges, was, without further proof, sufficient to warrant a submission to the jury of the question whether or not the initial carrier undertook to transport the goods to the place of destination. *Mann v. Birchard*, 40 Vt. 326.

Requiring a guaranty of the payment of the entire through freight will not justify the conclusion that the initial carrier thereby undertook to be liable over the whole route. *Illinois Cent. R. Co. v. Kerr*, 68 Miss. 14.

carrier's intention to undertake to answer for the safety of the goods over the entire route.¹

(3) *Last Carrier Collecting Entire Charges.*—Where an arrangement is made between several connecting lines, by which goods to be carried over the entire route are to be delivered by each to the next succeeding company, each company to pay the preceding company the amount of its charges, and the last one to collect the whole amount from the consignee, the receipt of the goods by the last company, the payment by it of all previous charges, and its collection of the entire charge from the consignee will not render it liable for any injury done to the consignment before this was received by it and while on the preceding lines; in the absence of a specific contract making each company liable for the default of any of the others, the general rule is that only the carrier on whose line the loss occurred will be liable.²

(4) *Arrangement with Dispatch Companies.*—An undertaking on the part of a railroad company to carry over the entire route cannot be implied from the fact of its entering into an arrangement with a dispatch company and other railroad companies whose lines connect with its own whereby it undertakes to carry, at certain special rates, all the goods for the transportation of which the dispatch company may contract. Nor can such an undertaking be implied from the company's giving a waybill on which it appears that the goods are for a point beyond its line, but which plainly purports to be a manifest of freight from one terminus of the road to the other.³

(5) *Accepting Goods "To Be Delivered."*—A receipt, by the initial carrier, for goods marked to a point beyond its line, containing an acknowledgment that the goods are received "to be delivered" to the consignee at the point designated as their destination, may imply an undertaking for through liability, though other accompanying circumstances are to be considered in determining its effect.⁴ When the initial carrier specifically undertakes to deliver the

1. The Contrary View.—*Piedmont Mfg. Co. v. Columbia, etc., R. Co.*, 19 S. Car 353, 16 Am. & Eng. R. Cas. 194; *McCarthy v. Terre Haute, etc., R. Co.*, 9 Mo. App. 159; *Gulf, etc., R. Co. v. Griffith*, (Tex. Civ. App. 1893) 24 S. W. Rep. 362. *Compare Fort Worth, etc., R. Co. v. McNulty*, 7 Tex. Civ. App. 321.

Giving Through Rate.—The giving of a through rate by the initial carrier does not render it liable for an injury occurring beyond its line, nor does a mere receipt for goods marked to a distant point imply a contract for through liability. *Goldsmith v. Chicago, etc., R. Co.*, 12 Mo. App. 479. *Compare Jennings v. Grand Trunk R. Co.*, 127 N. Y. 438, 49 Am. & Eng. R. Cas. 98, *affirming* 52 Hun (N. Y.) 227; *Atlanta, etc., R. Co. v. Texas Grate Co.*, 81 Ga. 602.

In the case of *Pontifex v. Hartley*, 4 Reports 245, 62 L. J. Q. B. 196, which was an action against the defendants, wharfingers and agents of a steamship line, for an injury to goods forwarded by them, the injury occurring on a connecting line, it appeared that the defendants, on an application by the plaintiff, quoted to him a through rate from London to Cork, the points inquired about, including freight and wharfage charges at both points. The plaintiff paid the through rate in advance and delivered his goods for shipment. The goods having been injured on a connecting line, the court held that the defendants were not liable; that the quoting of the through rate and receiving the entire charges in advance did not constitute the contract one for through liability.

2. Last Carrier Not Liable as on Through Contract from Its Collecting Entire Charges.—*Darling v. Boston, etc., R. Corp.*, 11 Allen (Mass.) 295; *Gass v. New York, etc., R. Co.*, 99 Mass. 220, 96 Am. Dec. 742; *Coxon v. Great Western R. Co.*, 5 H. & N. 274.

In such a case the last carrier has a lien in the consignment for the whole amount of his charges, including those paid to preceding carriers. And any damage to the goods cannot be set off against the charges where it appears that the injury did not occur on the last line. *Bowman v. Hilton*, 11 Ohio 303.

3. St. Louis Ins. Co. v. St. Louis, etc., R. Co., 104 U. S. 146, 3 Am. & Eng. R. Cas. 260.

4. Receipt for Goods "To Be Delivered."—A railroad company receiving cotton "to be transported in turn" to the ultimate destination, which would necessitate its passing over other lines, is liable as for an undertaking for through liability, and it cannot evade such responsibility by proof that the loss occurred on another line. *King v. Macon, etc., R. Co.*, 62 Barb. (N. Y.) 160.

In another case, which was an action to recover damages for the destruction of goods shipped over the defendant's line, it appeared that the bill of lading was in the following terms: "Shipped by R. P. & Co. the following articles, in good order, to be delivered in like good order as addressed, without unnecessary delay." They were consigned to O. It was held that the contract was one for the transportation of the goods to O., and that the defendant, the initial line, was not released from liability for a loss by the fact that the

goods at their destination by a specified time, it is liable for a delay occurring on a connecting line.¹

(6) *Accepting Goods "To Be Forwarded."*—Where goods are received by a carrier "to be forwarded" to a certain destination not on its line of road, some cases hold that no through contract is thereby made, and the initial carrier is liable only for such injuries as may occur on its own line or through its own negligence,² though other cases are to the contrary.³

(7) *Conflict Between Written and Printed Parts of Contract.*—Where there is a conflict between the written and the printed parts of the contract of shipment or bill of lading, the one indicating a through contract and the other not, the written portion is to prevail, though the two must be reconciled if possible.⁴

(8) *Rule in Federal Courts.*—In determining whether a contract for through transportation exists, the federal courts are not bound to accept the law of the state where the shipment was made, but will apply the general rule of law.⁵

goods were warehoused at the termination of its line for the purpose of being forwarded by the connecting carriers. *Hansen v. Flint, etc.*, R. Co., 73 Wis. 346, 9 Am. St. Rep. 791, 37 Am. & Eng. R. Cas. 628. See also *Wald v. Holt*, 26 Wis. 703; *Peet v. Chicago, etc.*, R. Co., 20 Wis. 594, 91 Am. Dec. 446. Compare *Wright v. Boughton*, 22 Barb. (N. Y.) 561, where the language of the bill of lading was exactly similar, but the court held that it implied no contract for through transportation and liability. Compare also *Parmelee v. Western Transp. Co.*, 26 Wis. 439.

In *Alabama G. S. R. Co. v. Thomas*, 83 Ala. 343, 89 Ala. 294, 18 Am. St. Rep. 119, 32 Am. & Eng. R. Cas. 464, it was held that the liability of a railroad company which had contracted to carry the goods to its terminus and there to deliver them to a connecting line was that of a forwarder only, and that it was therefore released from all liability after a safe delivery of the goods to a connecting line.

1. *Goods to Be Delivered by a Specified Time*—*Delay.*—*Pereira v. Central Pac. R. Co.*, 66 Cal. 92, 18 Am. & Eng. R. Cas. 566. See also *Savannah, etc.*, R. Co. v. *Pritchard*, 77 Ga. 412, 28 Am. & Eng. R. Cas. 57, 4 Am. St. Rep. 92.

2. *Goods Delivered "To Be Forwarded."*—See *Merchants' Dispatch, etc.*, Co. v. *Moore*, 88 Ill. 136, 30 Am. Rep. 541; *Crawford v. Southern R. Assoc.*, 51 Miss. 222, 24 Am. Rep. 626; *Blossom v. Griffin*, 13 N. Y. 575, 67 Am. Dec. 75; *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616, 3 Am. Ry. Rep. 390, *affirming* 5 Lans. (N. Y.) 480; *Phillips v. North Carolina R. Co.*, 78 N. Car. 294, 16 Am. Ry. Rep. 206; *Armstrong v. Grand Trunk R. Co.*, 18 New Bruns. 445. See also *Rogers v. Great Western R. Co.*, 16 U. C. Q. B. 389; *Wright v. Boughton*, 22 Barb. (N. Y.) 561.

When a company specially stipulates that after the goods have left its line it shall be held as a forwarder only, it is not liable for the conversion of the goods by a subsequent line. *McEacheran v. Michigan Cent. R. Co.*, 101 Mich. 264.

3. In *St. Louis, etc.*, R. Co. v. *Piper*, 13 Kan. 505, 8 Am. Ry. Rep. 204, the court, by *Brewer, J.*, said: "The company contracted to forward the cattle from Kansas City to Chicago; and the word 'forward,' as here used,

seems to us to mean the same as 'transport' or 'carry.' *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Smith (N. Y.) 121. Having contracted to carry the cattle to Chicago, a contract it was competent to make, even though the carriage involved transportation beyond its own line, it became responsible as a common carrier, except so far as it limited that responsibility by special contract."

In *Davis v. Jacksonville Southeastern Line*, 126 Mo. 69, the petition alleged that the defendant, the initial carrier, received certain goods to be transported to E., its terminal station, "and thence to be forwarded by defendant to plaintiffs, at the city of St. Louis." The court held that the petition stated a cause of action, for, admitting that the goods were lost between E. and St. Louis, the language used was such that the court might fairly infer an undertaking on the part of the defendant to carry through to the destination so that it would be liable for a loss wherever occurring. See also *And. L. Dict.*, "Forwarder;" *Christenson v. American Express Co.*, 15 Minn. 270, 2 Am. Rep. 122.

4. *Where Written and Printed Portions of Contract Are Inconsistent.*—*Peet v. Chicago, etc.*, R. Co., 19 Wis. 118; *Babcock v. Lake Shore, etc.*, R. Co., 49 N. Y. 491, *reversing* 43 How. Pr. (N. Y.) 317.

5. *Federal Courts Follow an Independent Rule.*—In *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 9 Am. & Eng. R. Cas. 25, a case coming up from Illinois, it was urged that whatever might be the general rule governing the liability of connecting carriers, yet where the contract was made in Illinois, the rule adopted by the Illinois court should govern; but the court refused to apply the Illinois rule, saying: What constitutes a contract of carriage is not a question of local law, upon which the decision of a state court must control. It is a matter of general law, upon which this court will exercise its own judgment. * * * If the doctrine of the Supreme Court of Illinois as to what constitutes a contract of carriage over connecting lines of roads is sound, it ought to govern, not only in Illinois, but in other states; and yet the tribunals of other states, and a majority of them, hold the reverse of the Illinois court, and coincide with the views of this court. Such is the case in

3. Carrier May Limit Its Liability to Its Own Line—*a. RIGHT TO MAKE THE LIMITATION.*—A carrier being under no obligation at common law, to undertake to carry to a point beyond its line, it is well settled, even in those states where the acceptance of goods marked to a point beyond the carrier's line is held to render it responsible for their safety throughout the entire route, that it is competent for the carrier, by special contract, to limit its liability to injuries occurring on its own line; in such a case its full duty is discharged by delivery of the goods in safety to the next connecting line.¹

Massachusetts. * * * If we are to follow on this subject the ruling of the state courts, we should be obliged to give a different interpretation to the same act—the reception of goods marked for a place beyond the road of the company, in different states, holding it to imply one thing in Illinois and another in Massachusetts.”

1. Right of Carrier to Confine Its Liability to Its Own Line—*England.*—*Garside v. Trent*, etc., Nav. Co., 4 T. R. 581; *Aldridge v. Great Western R. Co.*, 15 C. B. N. S. 582, 109 E. C. L. 582; *Fowles v. Great Western R. Co.*, 7 Exch. 699; *Kent v. Midland R. Co.*, L. R. 10 Q. B. 1.

Canada.—*Beaumont v. Canadian Pac. R. Co.*, 5 Montreal L. R. Super. Ct. 255; *Grand Trunk R. Co. v. McMillan*, 16 Can. Supreme Ct. 543, 42 Am. & Eng. R. Cas. 468, 15 Ont. App. 14, affirming 12 Ont. Rep. 103; *La Pointe v. Grand Trunk R. Co.*, 26 U. C. Q. B. 479; *Canadian Pac. R. Co. v. Charbonneau*, 6 Montreal L. R. Q. B. 287; *Brodie v. Northern R. Co.*, 6 Ont. Rep. 180.

United States.—*Deming v. Norfolk*, etc., R. Co., 21 Fed. Rep. 25, 16 Am. & Eng. R. Cas. 232; *Ogdensburg*, etc., R. Co. v. Pratt, 22 Wall. (U. S.) 123; *Evansville*, etc., R. Co. v. Androscoggin Mills, 22 Wall. (U. S.) 594; *St. John v. Southern Express Co.*, 1 Woods (U. S.) 615.

Alabama.—*Jones v. Cincinnati*, etc., R. Co., 89 Ala. 376, 45 Am. & Eng. R. Cas. 321 (although the shipper could not read and did not know the limitation was in the bill of lading when he accepted it). Compare *Alabama G. S. R. Co. v. Thomas*, 83 Ala. 343.

Arkansas.—*Taylor v. Little Rock*, etc., R. Co., 32 Ark. 393, 29 Am. Rep. 1, 17 Am. Ry. Rep. 251; *Little Rock*, etc., R. Co. v. Odom, 63 Ark. 326.

Georgia.—*Richmond*, etc., R. Co. v. Shomo, 90 Ga. 496; *Central R.*, etc., Co. v. Avant, 80 Ga. 195, 32 Am. & Eng. R. Cas. 475.

Illinois.—*Wabash*, etc., R. Co. v. Jaggerman, 115 Ill. 407, 23 Am. & Eng. R. Cas. 680; *Field v. Chicago*, etc., R. Co., 71 Ill. 458; *Wabash R. Co. v. Harris*, 55 Ill. App. 159; *Coles v. Louisville*, etc., R. Co., 41 Ill. App. 607; *Ohio*, etc., R. Co. v. Emerich, 24 Ill. App. 245; *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *Chicago*, etc., R. Co. v. Montfort, 60 Ill. 175; *U. S. Express Co. v. Haines*, 67 Ill. 137; *Erie R. Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451, 16 Am. Ry. Rep. 457. See also *Illinois Cent. R. Co. v. Miller*, 32 Ill. App. 259.

The rule is otherwise under the late statute. See *Chicago*, etc., R. Co. v. Simon, 57 Ill. App. 502 (wrongful delivery by last carrier).

Indiana.—*U. S. Express Co. v. Rush*, 24 Ind. 403; *Lake Erie*, etc., R. Co. v. Condon, 10 Ind. App. 536.

Iowa.—*Mulligan v. Illinois Cent. R. Co.*, 36 Iowa 181, 14 Am. Rep. 514.

Kansas.—*St. Louis*, etc., R. Co. v. Piper, 13 Kan. 505, 8 Am. Ry. Rep. 204; *Berg v. Atchison*, etc., R. Co., 30 Kan. 561, 16 Am. & Eng. R. Cas. 229; *Atchison*, etc., R. Co. v. Richardson, 53 Kan. 157.

Kentucky.—*Louisville*, etc., R. Co. v. Tarter, (Ky. 1897) 39 S. W. Rep. 698.

Louisiana.—*Oakey v. Gordon*, 7 La. Ann. 235.

Massachusetts.—*Sullivan v. Thompson*, 99 Mass. 259; *Pendergast v. Adams Express Co.*, 101 Mass. 120; *Pemberton Co. v. New York Cent. R. Co.*, 104 Mass. 144; *Burroughs v. Norwich*, etc., R. Co., 100 Mass. 26, 1 Am. Rep. 78. But see *Block v. Fitchburg R. Co.*, 139 Mass. 308, 21 Am. & Eng. R. Cas. 1.

Michigan.—*Black v. Ashley*, 80 Mich. 90, 42 Am. & Eng. R. Cas. 428; *Smith v. American Express Co.*, (Mich. 1896) 66 N. W. Rep. 479; *Hope v. Delaware*, etc., Canal Co., (Mich. 1896) 69 N. W. Rep. 487.

Minnesota.—*Ortt v. Minneapolis*, etc., R. Co., 36 Minn. 396.

Mississippi.—*Mobile*, etc., R. Co. v. Francis, (Miss. 1891) 9 So. Rep. 508.

Missouri.—*Nines v. St. Louis*, etc., R. Co., 107 Mo. 475; *Hill v. Missouri Pac. R. Co.*, 46 Mo. App. 517; *Minter v. Southern Kansas R. Co.*, 56 Mo. App. 282; *McCann v. Eddy*, 133 Mo. 59.

New York.—*Gibson v. American Merchants' Union Express Co.*, 1 Hun (N. Y.) 387; *Hinkley v. New York Central*, etc., R. Co., 3 Thomp. & C. (N. Y.) 281; *Witbeck v. Holland*, 55 Barb. (N. Y.) 443; *Ricketts v. Baltimore*, etc., R. Co., 61 Barb. (N. Y.) 18; *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616; *Reed v. U. S. Express Co.*, 48 N. Y. 462, 8 Am. Rep. 561; *Marmorstein v. Pennsylvania R. Co.*, 13 Misc. Rep. (N. Y. C. Pl.) 32; *Lamb v. Camden*, etc., R., etc., Co., 2 Daly (N. Y.) 454.

North Carolina.—*Weinberg v. Albemarle*, etc., R. Co., 91 N. Car. 31, 18 Am. & Eng. R. Cas. 597; *Phifer v. Carolina Cent. R. Co.*, 89 N. Car. 311, 45 Am. Rep. 687.

Ohio.—*Cincinnati*, etc., R. Co. v. Pontius, 19 Ohio St. 221, 2 Am. Rep. 391.

Pennsylvania.—*Pennsylvania Cent. R. Co. v. Schwarzenberger*, 45 Pa. St. 208, 84 Am. Dec. 490; *Camden*, etc., R. Co. v. Forsyth, 61 Pa. St. 81; *American Express Co. v. Titusville Second Nat. Bank*, 69 Pa. St. 394, 8 Am. Rep. 268; *Keller v. Baltimore*, etc., R. Co., 174 Pa. St. 62, 38 W. N. C. (Pa.) 152.

South Carolina.—*Hill v. Georgia*, etc., R. Co., 43 S. Car. 461 (may exact such an agreement as a condition precedent to receiving the goods for transportation).

A railroad company agreed to forward to a consignee in New York, “in accordance with

No Special Consideration Necessary. — Ordinarily no special consideration need be shown to support an agreement for such a limitation, the carrier being under

the provisions, stipulations, and exceptions of the general rules and regulations and freight tariffs of the company," a carload of watermelons, charges to be collected on delivery. The contract also contained these stipulations: "This company assumes no liability beyond its own rails. * * * This company will not be responsible for delays or damages from unavoidable causes nor guarantee any special dispatch in the transportation of any article." The watermelons were properly shipped, but the next connecting road refused to forward unless its charges were prepaid. The defendant at once notified the plaintiff, who refused to prepay, and afterwards the fruit was forwarded, reaching New York in a decayed condition by reason of the delay. It was held that the defendant did not contract to carry beyond its terminus, and was not liable for the loss. *Dunbar v. Port Royal, etc., R. Co.*, 36 S. Car. 110, 31 Am. St. Rep. 860.

Tennessee. — *East Tennessee, etc., R. Co. v. Brumley*, 5 Lea (Tenn.) 401, 6 Am. & Eng. R. Cas. 356; *T. & P. R. Co. v. Rogers*, (Tenn. 1887) 3 S. W. Rep. 660; *Merchants' Despatch Transp. Co. v. Bloch*, 86 Tenn. 393, 6 Am. St. Rep. 847.

Texas. — *Gulf, etc., R. Co. v. Baird*, 75 Tex. 256; *McCarn v. International, etc., R. Co.*, 84 Tex. 352, 31 Am. St. Rep. 51, 55 Am. & Eng. R. Cas. 406 (whether the shipment be local or interstate); *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89; *Texas, etc., R. Co. v. Adams*, 78 Tex. 372, 22 Am. St. Rep. 56; *Hunter v. Southern Pac. R. Co.*, 76 Tex. 195, 42 Am. & Eng. R. Cas. 501; *Fort Worth, etc., R. Co. v. Williams*, 77 Tex. 121; *International, etc., R. Co. v. Campbell*, 1 Tex. Civ. App. 509; *International, etc., R. Co. v. Thornton*, 3 Tex. Civ. App. 197; *Texas, etc., R. Co. v. Hawkins*, (Tex. Civ. App. 1895) 30 S. W. Rep. 1113; *Gulf, etc., R. Co. v. Crossman*, 11 Tex. Civ. App. 622; *Rogers v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1895) 28 S. W. Rep. 1024; *Gulf, etc., R. Co. v. Edloff*, (Tex. Civ. App. 1895) 34 S. W. Rep. 410; *Gulf, etc., R. Co. v. Malone*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1077; *Gulf, etc., R. Co. v. Tennant*, (Tex. Civ. App. 1893) 22 S. W. Rep. 761; *International, etc., R. Co. v. Mahula*, 1 Tex. Civ. App. 182; *Gulf, etc., R. Co. v. Wilbanks*, 7 Tex. Civ. App. 489; *New York, etc., Steamship Co. v. Wright*, (Tex. Civ. App. 1894) 26 S. W. Rep. 106; *San Antonio, etc., R. Co. v. Mayfield*, (Tex. App. 1890) 15 S. W. Rep. 503; *Galveston, etc., R. Co. v. Short*, (Tex. Civ. App. 1894) 25 S. W. Rep. 142 (carrier making the shipment under special contract limiting its liability is not liable for an injury occurring on a connecting line, although it may not have chosen the through route the shipper preferred); *Gulf, etc., R. Co. v. Thompson*, (Tex. Civ. App. 1893) 21 S. W. Rep. 186. *Compare Texas, etc., R. Co. v. Scrivener*, 2 Tex. App. Civ. Cas., § 328; *Gulf, etc., R. Co. v. Golding*, 3 Tex. App. Civ. Cas., § 33, 23 Am. & Eng. R. Cas. 732.

But not when the connecting lines are really partners. *Gulf, etc., R. Co. v. Wilson*, 7 Tex.

Civ. App. 128. See *infra*, *Connecting Lines as Partners*. Nor where the subsequent lines are leased by the initial line. *International, etc., R. Co. v. Anderson*, 3 Tex. Civ. App. 8.

In the case of *Gulf, etc., R. Co. v. Vaughan*, 4 Tex. App. Civ. Cas., § 182, it was held that the stipulation limiting the liability of each carrier to injuries occurring on its own line was invalid where the loss was the result of negligence anywhere. But this view was declared wrong in *McCarn v. International, etc., R. Co.*, 84 Tex. 352, 31 Am. St. Rep. 51, 55 Am. & Eng. R. Cas. 406.

One connecting carrier has no power to waive such a stipulation so as to affect a subsequent line. *Gulf, etc., R. Co. v. Williams*, 4 Tex. Civ. App. 294. Nor has the station agent of a connecting line the authority to waive such a stipulation. *Gulf, etc., R. Co. v. Clarke*, 5 Tex. Civ. App. 547.

Vermont. — *Farmers', etc., Bank v. Champlain Transp. Co.*, 23 Vt. 186, 56 Am. Dec. 68.

Wisconsin. — *Martin v. American Express Co.*, 19 Wis. 336; *Detroit, etc., R. Co. v. Farmers', etc., Bank*, 20 Wis. 122; *Tolman v. Abbot*, 78 Wis. 192.

Although Connecting Lines May Be Lessee or Lessor. — The Missouri Pacific R. Co., while operating the International & G. N. road, contracted to carry certain cattle from P., a station on the line of the latter road, to Chicago. In a suit against the International & G. N. R. Co. for an injury to the cattle alleged to have been caused at D., on the line of a third company, it was held that the shipping contract, providing that in case the cattle were shipped over other roads than the Missouri Pacific, the latter should be released from all liability after they should have left its road, protected the International & G. N. R. Co. against loss, regardless of its being the lessor of the road upon which the cattle were first shipped. The loss happening after the stock had left the line of the Missouri Pacific R. Co., it would be unjust to impose the burdens of the contract upon the lessor and not give it the benefit of its restrictions. *International, etc., R. Co. v. Thornton*, 3 Tex. Civ. App. 197. See also *Galveston, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1895) 29 S. W. Rep. 428.

Illinois Statute. — At common law, a carrier is under no obligation to receive goods to be carried beyond its own line; so that Ill. Rev. Stat. 1874, c. 114, § 82, providing that common carriers shall not limit their common-law liability, does not apply where goods are received for a point beyond the initial carrier's line. *Chicago, etc., R. Co. v. Church*, 12 Ill. App. 17.

Immaterial Whether Shipment Is Interstate or Not. — A carrier may, by contract, protect itself against liability for losses not occurring on its own line, regardless of whether the shipment is wholly within the state or is interstate. *McCarn v. International, etc., R. Co.*, 84 Tex. 352, 31 Am. St. Rep. 51, 55 Am. & Eng. R. Cas. 406.

An Association of Railroad Lines may limit the liability of each member of such an association

no duty to assume such through liability; ¹ if a consideration must be shown,

to such losses as occur on its own line. *Weinberg v. Albemarle, etc., R. Co.*, 91 N. Car. 31, 18 Am. & Eng. R. Cas. 597; *Shiff v. New York Cent., etc., R. Co.*, 16 Hun (N. Y.) 278, 52 How. Pr. (N. Y.) 91, affirmed in 81 N. Y. 638. *Compare International, etc., R. Co. v. Anderson*, 3 Tex. Civ. App. 8.

Detention of Goods.—A railroad company is not liable for the detention of goods on a connecting line, where a special contract, signed by the shipper, relieves it from all liability in respect of the goods after they have been delivered to a subsequent carrier for further transportation. *Aldridge v. Great Western R. Co.*, 15 C. B. N. S. 582, 109 E. C. L. 582, 33 L. J. C. P. 161. And it is held that this rule is not altered by the fact that the initial carrier stipulating for the exemption made one charge for the entire transportation. *Fowles v. Great Western R. Co.*, 7 Exch. 699, 7 Railw. Cas. 421, 22 L. J. Exch. 76.

Stipulation Failing to State Name of Station.—The fact that the stipulation does not state the name of the station where the liability of the initial line is to end is immaterial. *Minter v. Southern Kansas R. Co.*, 56 Mo. App. 282.

As to Negligence.—Common carriers cannot contract against liability for the consequences of their own negligence, but they may contract against liability for the negligence of other carriers to whom the goods may be delivered in course of transit. And in such a case, the initial carrier is responsible only for the exercise of reasonable care and diligence in the selection of proper connecting carriers. *American Express Co. v. Titusville Second Nat. Bank*, 69 Pa. St. 354, 8 Am. Rep. 268.

Recovery Allowed Notwithstanding Stipulation.—In the case of *Texas, etc., R. Co. v. Scrivener*, 2 Tex. App. Civ. Cas., § 328, it appeared that the plaintiff made a contract for a through shipment of stock from a point in Texas to Chicago. Certain sheep shipped under the contract were placed in cars with double decks. On reaching St. Louis a connecting line removed the sheep from the cars with double decks, and refused to carry them further, compelling the plaintiff to ship his sheep over a different line of railroad, under a new contract, and he brought suit against the company that he first contracted with for the wrongful taking and conversion of his double decks, for extra freight, extra expenses, and loss of time. It was held that the plaintiff had a right to recover, though the contract of shipment provided that the initial carrier's liability should cease at the end of its own line.

Stipulation Does Not Affect Rate.—A stipulation that the initial carrier shall not be liable for damages to the goods after they have left its line has no relation to that part of the contract which fixes and guarantees the rate of carriage. *Little Rock, etc., R. Co. v. Daniels*, 49 Ark. 352, 32 Am. & Eng. R. Cas. 479.

Dispatch Company—Subsequent Carriers Not Named in Bill of Lading.—In the case of *Block v. Fitchburg R. Co.*, 139 Mass. 308, 21 Am. & Eng. R. Cas. 1, goods were received by a "dispatch company" to be transported to a place which necessarily required passage over several lines, and a bill of lading was given

which did not disclose the names of the several companies forming the dispatch company, but did contain a provision that "that company shall alone be held answerable therefor in whose actual custody the same may be at the time" of the loss or damage. It was held that the shipper was not bound to sue only the company on whose line the loss occurred, but might sue the dispatch company.

Is a Matter of Contract.—In *McCarn v. International, etc., R. Co.*, 84 Tex. 352, 31 Am. St. Rep. 51, 55 Am. & Eng. R. Cas. 466, the court, by Stayton, C. J., in support of the rule of the text, said: "There is a general concurrence of opinion in the proposition that the carrier may, by special contract, exempt itself from liability for an injury to freight resulting after it has gone into the hands of another carrier to be transported to its destination. The ground of concurrence is contract, which in some jurisdictions it is held is necessary to relieve from liability for the act of a connecting carrier over whose line the freight must or does pass to its destination, while in the other it is held that in the absence of special contract, no such liability rests on the receiving carrier for injuries occurring after he has safely passed the freight to a connecting carrier." *Overruling Gulf, etc., R. Co. v. Vaughn*, (Tex. App. 1890) 16 S. W. Rep. 775, and *explaining Galveston, etc., R. Co. v. Allison*, 59 Tex. 193, 12 Am. & Eng. R. Cas. 28.

Burden of Proof.—Where the contract expressly provides that each carrier shall be liable only for losses or injuries occurring on its own line, the burden of proof is on the plaintiff to show affirmatively that the loss occurred on the line of the company attempted to be charged therefor. *Texas, etc., R. Co. v. Llano Live-Stock Co.*, (Tex. Civ. App. 1896) 33 S. W. Rep. 748.

1. No Consideration Necessary to Support Such Limitation.—*Hance v. Wabash Western R. Co.*, 56 Mo. App. 476.

"As the undertaking is for safe carriage beyond the road of the receiving carrier, and outside the obligation imposed by common law, it must, in its nature, be susceptible of such modifications and restrictions as are just and reasonable and not forbidden by public policy; and such, upon authority, is the condition underlying the contract with the plaintiffs. If any further consideration for the exemption were necessary, and we think none was necessary, outside of the contract itself, it will be found in the increased facilities and lessened expense received by the shipper in the transmission of his goods to a distant destination, requiring several lines to be traversed by means of such an arrangement among the carriers." *Smith, C. J.*, in *Phifer v. Carolina Cent. R. Co.*, 89 N. Car. 319, 45 Am. Rep. 687.

What Constitutes the Contract of Shipment.—The defendant company maintained a freight office in New York city, but did not own a road reaching the city, nor reaching, at the other end, the point to which the plaintiff wished to ship his goods. Upon inquiry as to the freight rate to the point, the defendant's agent gave a rate and instructed the plaintiff where to deliver and how to mark freights, but no

a reduced rate of transportation is a sufficient consideration for the shipper's assent to the limitation.¹

Statutes. — Even where the statute expressly provides that an initial carrier issuing a through bill of lading shall be liable for a loss of or injury to the consignment, wherever occurring, it is held that the carrier may stipulate, by express contract, that it shall not be liable for an injury occurring beyond its own line.²

b. ASSENT OF SHIPPER TO LIMITATION. — In order for such a limitation to be of any validity, it must appear that the shipper assented to it or acted with knowledge of it before shipment; in the latter event he will be conclusively presumed to have assented to it.³

Knowledge of Shipper After Shipment. — It is therefore of no effect where it is brought to the knowledge of the shipper after the goods have been shipped and it is too late for him to recede, as where it is contained in a bill of lading handed to the shipper after the goods have left.⁴

agreement was made to ship the goods. About nineteen days after the information had been furnished, the plaintiff bought goods and directed the parties from whom he bought to ship them according to the directions given by the defendant's agent. It was held that the conversation between the plaintiff and the agent did not constitute an agreement to ship, therefore the shipping could not be said to be an acceptance; but the contract must be determined from what was done at the time the goods were shipped, and was therefore contained in the receipt given. And in such a case, where the written receipt given limited the defendant's liability to the damages occurring while the goods were in its actual custody, it was not liable for an injury occurring beyond its line. *Ricketts v. Baltimore, etc., R. Co.*, 61 Barb. (N. Y.) 18.

1. *Western R. Co. v. Harwell*, 97 Ala. 341.

2. Where Statute Makes Carrier Liable over Entire Route. — *Dimmitt v. Kansas City, etc., R. Co.*, 103 Mo. 433, 46 Am. & Eng. R. Cas. 699; *supra*, *Liability for Loss or Injury — Under Statutory Provisions*.

Where the initial carrier is sued for delay in carrying goods destined to a point beyond its lines, it cannot establish a limitation of its liability by proof of a custom of which the shipper had no notice. *Little v. Fargo*, 43 Hun (N. Y.) 233.

3. Assent of Shipper. — *Louisville, etc., R. Co. v. Meyer*, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44; *Wabash R. Co. v. Harris*, 55 Ill. App. 159.

Such a Contract and the Shipper's Assent Thereto Will Be Presumed from the fact that a clause thus limiting the liability is to be found printed in the bill of lading, although the shipper's attention may not have been called to it, if it appears that he had previously shipped like articles under similar bills of lading. *East Tennessee, etc., R. Co. v. Brumley*, 5 Lea (Tenn.) 401, 6 Am. & Eng. R. Cas. 356.

If the Shipper Accepts and Acts on a Bill of Lading Containing Such a Limitation, it will be conclusively presumed, in the absence of fraud or mistake, that he knew of its terms, and he will not be permitted to plead his actual ignorance of its contents. *Mulligan v. Illinois Cent. R. Co.*, 36 Iowa 181, 14 Am. Rep. 514, 2 Am. Ry.

Rep. 322; *Chicago, etc., R. Co. v. Montfort*, 60 Ill. 175, 12 Am. Ry. Rep. 332; *Fortier v. Pennsylvania Co.*, 18 Ill. App. 260. Compare *Illinois Cent. R. Co. v. Carter*, 165 Ill. 570.

The rules in this connection are the same as those governing in regard to other limitations of liability provided for in bills of lading. See the title *CARRIERS OF GOODS*, vol. 5, p. 154.

Stipulation in Smaller Print. — Where every portion of the bill of lading is clearly legible, a shipper cannot evade a stipulation limiting the liability of a carrier to injuries or losses occurring on its own line merely by showing that the stipulation was printed in small type on the back of the bill, and that a portion of the back of the bill was stamped over with the word "original." *Patterson v. Kansas City, etc., R. Co.*, 56 Mo. App. 657.

4. Bill of Lading Delivered After Shipment. — If the consignor, contemporaneously with the delivery of the goods to the carrier, receives a bill of lading limiting the liability of the carrier to losses occurring on his own route, possibly he "would be conclusively presumed to have read it, and to have acquiesced in it;" but this principle does not apply where it is shown that the carrier receiving the freight for the entire route made out a bill of lading which, being incomplete as to the amount of the charges, was not delivered to the consignor at the time, but was afterwards forwarded to him by mail at the place of destination. *Louisville, etc., R. Co. v. Meyer*, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44.

A carrier undertook to carry goods from New York to a point in Iowa over a route passing through Chicago, and gave a shipping receipt which entitled the shipper to a bill of lading. The goods reached Chicago one day and were destroyed there by fire on the following day. Some ten days thereafter the shipping receipt was surrendered and a bill of lading was given which contained provisions undertaking to carry the goods to Chicago only, and relieving the company from liability for loss by fire, the company knowing at the time that the goods had already been destroyed, but the shipper not being aware of it. It was held that the conditions of the bill of lading did not affect the common-law liability of the carrier. *Wilde v. Merchants' Despatch Transp. Co.*, 47 Iowa 247, *distin-*

Jurisdictions Denying Through Liability. — In those jurisdictions where carriers are not held liable throughout the journey unless they specially undertake to be so, the shipper's assent to such a limitation is manifestly immaterial, the limitation itself being superfluous.

c. EXTENT OF LIMITATION — NEGLIGENCE. — Where the carrier undertakes, either expressly, or, as is the rule in some jurisdictions, impliedly by accepting the goods marked to a point beyond its line, to carry the goods over the entire route although the point of destination is beyond the terminus of its line, it is said that it cannot contract for an absolute exemption from liability for losses not occurring on its own line; that in such a case it can only limit its common-law liability as insurer, and remains liable for any loss caused by negligence, even on a connecting line.¹

4. Whether Limitations Inure to Benefit of Subsequent Carriers — a. VIEW THAT CONNECTING CARRIERS MUST BE EXPRESSLY NAMED. — In some jurisdictions the rule is said to be that where the connecting carrier which seeks to claim the benefit of a stipulation in the contract with the initial carrier by which its liability is limited has been designated in such contract as one of the intermediate carriers, or if the contract specially provides that its provisions shall inure to the benefit of connecting carriers, there is no question but that the subsequent connecting carriers may claim the benefit of the stipulations;² but that where the contract does not provide that its stipulations shall

guishing *Shelton v. Merchants' Dispatch Transp. Co.*, 59 N. Y. 258.

1. When Carrier Undertakes to Carry over Entire Route. — *Galveston, etc., R. Co. v. Allison*, 59 Tex. 193, 12 Am. & Eng. R. Cas. 28; *Halliday v. St. Louis, etc., R. Co.*, 74 Mo. 159, 41 Am. Rep. 311; *Cincinnati, etc., R. Co. v. Pontius*, 19 Ohio St. 221, 2 Am. Rep. 391; *Condict v. Grand Trunk R. Co.*, 54 N. Y. 500.

One of the conditions in the contract made by the defendant company to carry goods to a point beyond its terminus was that it should not be "responsible for any loss, misdelivery, damage, or detention," that might happen to goods sent by it, if occurring after said goods had arrived at the stations or places on its line "nearest to the points or places which they were consigned to," or beyond its limits. It was held that this did not relieve the company from liability for loss or damage occurring during the transit, although such loss might have occurred beyond the limits of the company's line. *Grand Trunk R. Co. v. McMillan*, 16 Can. Supreme Ct. 543, 42 Am. & Eng. R. Cas. 468, *allowing appeal from* 15 Ont. App. 14, *which affirms* 12 Ont. Rep. 103. *Compare* *La Pointe v. Grand Trunk R. Co.*, 26 U. C. Q. B. 479.

Bill of Lading Must Be Offered in Evidence. — Where a carrier is sued for damages to freight and the complaint sets forth the contract between the parties as contained in the bill of lading, the bill of lading must be introduced in evidence; and where it is a through bill, the rule is not affected by a provision therein that the liability of each carrier is limited to its own route, since such a provision is of no binding effect in such a case. *Texas, etc., R. Co. v. Logan*, 3 Tex. App. Civ. Cas., § 186.

Benefit of Stipulation Lost by Changing Cars En Route. — A railroad company, in receiving freight, stipulated against responsibility for damage occurring beyond its own line, but agreed to forward the goods through to Chi-

cago in the cars in which they were originally loaded. It was held that by changing the cars after they left the defendant company's line the company assumed the risk of the safe transportation of the goods, notwithstanding the stipulation against liability for damages occurring beyond its own line. *Galveston, etc., R. Co. v. Allison*, 59 Tex. 193, 12 Am. & Eng. R. Cas. 28.

"All Rail" Transportation — Sending Goods Part of Way by Ship. — In *Fatman v. Cincinnati, etc., R. Co.*, 2 Disney (Ohio) 248, goods were shipped by the defendant carrier's line to a point beyond its line, to go "all rail" and with a special proviso that each carrier's liability should end upon the goods being received for by the succeeding carrier in good order. The goods were carried part of the distance by rail and then forwarded to their destination by vessel. It was held that the carrier assumed the risk of safe transportation and was liable as insurer for any loss or damage occurring.

Construction of Limitation — Residence of Consignee. — See *La Pointe v. Grand Trunk R. Co.*, 26 U. C. Q. B. 479. In this case the bill of lading provided that the defendant company would not be liable for goods addressed to a consignee resident at a point beyond the terminus of its line. The plaintiff was at I., the point to which the goods were marked, and which was beyond the defendant company's terminus, when the goods, except the missing box sued for, arrived. It was held that he was a resident there within the condition, and that, having named himself as the consignee at that place, he was estopped to deny his residence there.

2. Carrier Entitled When Expressly Named. — *U. S. Express Co. v. Harris*, 51 Ind. 127; *Halliday v. St. Louis, etc., R. Co.*, 74 Mo. 159, 41 Am. Rep. 309, 6 Am. & Eng. R. Cas. 433; *Evansville, etc., R. Co. v. Androscoggin Mills*, 22 Wall. (U. S.) 594; *Levy v. Southern Express Co.*, 4 S. Car. 234.

inure to the benefit of subsequent carriers, being silent as to that matter, and does not designate any carrier in the line specifically, its provisions apply only to the initial carrier with whom the contract was directly made, and no subsequent carrier can claim the benefit of its special provisions; and the liability of such subsequent carriers is that existing under ordinary conditions.¹

b. VIEW THAT CONNECTING CARRIERS ENTITLED UNLESS EXPRESSLY EXCLUDED. — But the better rule appears to be that the subsequent connecting carriers are bound by the terms of the original contract made with the initial line by the shipper, and are entitled to the benefit of any and all stipulations therein contained, in the absence of an express provision to the contrary.²

1. Contract Held Not to Inure to Benefit of Subsequent Lines. — *Adams Express Co. v. Harris*, 120 Ind. 73, 16 Am. St. Rep. 315, 40 Am. & Eng. R. Cas. 151; *Bancroft v. Merchants' Dispatch Transp. Co.*, 47 Iowa 262, 29 Am. Rep. 482; *Wallingford v. Columbia, etc., R. Co.*, 26 S. Car. 258, 30 Am. & Eng. R. Cas. 40; *Martin v. American Express Co.*, 19 Wis. 336. See also *Burroughs v. Grand Trunk R. Co.*, 67 Mich. 351, 32 Am. & Eng. R. Cas. 467; *Crawford v. Great Western R. Co.*, 18 U. C. C. P. 510.

Statement of the Rule. — In *Adams Express Co. v. Harris*, 120 Ind. 73, 16 Am. St. Rep. 315, 40 Am. & Eng. R. Cas. 153, the court, by Elliott, C. J., said: "The rule declared by the decisions we have referred to is the only one that can be defended on principle, for where the contract designates only one carrier there is no privity between the owners and the undesignated carriers; but where the contract is a through one, by designated carriers, there is a privity of contract, for it is justly inferable that the contract was intended for the benefit of all who perform services under it. So, too, where the contract declares that it is for the benefit of intermediate carriers, it may be enforced, since it is a contract for the benefit of a third person; and as it is beneficial to him, it is natural to presume that its terms were assented to and formed the contract under which the goods were transported. Where, however, the contract is solely for the benefit of the original parties, it is not possible to apply this rule to it."

Void Limitation. — A contract exempting the carrier from all liability, however resulting, is void and can no more be relied on by the connecting carrier than by the initial carrier. *Woodburn v. Cincinnati, etc., R. Co.*, 40 Fed. Rep. 731, 42 Am. & Eng. R. Cas. 514. Particularly where its invalidity is apparent on its face. *St. Louis, etc., R. Co. v. Spann*, 57 Ark. 127.

Stipulation Requiring Consideration to Support It. — In *Central R., etc., Co. v. Bridger*, 94 Ga. 471, the court states the rule to be that in order for a connecting line to be entitled to the benefit of a provision in the contract with the initial line limiting its liability to a certain amount for each one hundred pounds of freight, it must appear that the contract was one binding the initial line for the entire route, so that the connecting line was its agent merely, or that the consideration for the exemption, in the way of reduced rates, was not confined to the initial line, but was equally

allowed by the connecting line. And this is the true rule where the limitations are such as are valid only upon a fair consideration therefor being shown. See the title *CARRIERS OF GOODS*, vol. 5, p. 154.

Stipulation for Benefit of Insurance. — When a contract is made for the carriage of goods partly by rail and partly by vessel, and a stipulation that a carrier liable for loss or damage shall have full benefit of any insurance that may have been effected upon the goods is inserted in the midst of the terms and conditions defining the liability of the railroad companies, and is omitted in those defining the liability of the steamship company, the latter company cannot claim the benefit of such stipulation. *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 37 Am. & Eng. R. Cas. 681.

Shipping Receipt by Initial Carrier — Connecting Carriers Not Named. — In *Burroughs v. Grand Trunk R. Co.*, 67 Mich. 351, 32 Am. & Eng. R. Cas. 467, where goods were shipped over several connecting lines, a shipping receipt was given by the initial carrier, limiting its liability for damage by delay, storms, etc., and expressly providing that it should not be liable after delivery of the goods by it to any other company; but it contained nothing to the effect that its conditions or agreements were to be binding upon anyone save the contracting company and the shipper. It was held that such a receipt would not affect the implied contract between the shipper and any of the connecting lines to which the goods were delivered by the first carrier; such a connecting carrier would be held to have received the goods as a common carrier, without any limitations or conditions as to its liability except such as the law itself created. *Citing McMillan v. Michigan Southern, etc., R. Co.*, 16 Mich. 121, 93 Am. Dec. 208.

So, also, special obligations assumed by the initial line in a receipt given by it to the shipper will not bind a connecting line which receives the goods without assent to or knowledge of such receipt. *Knott v. Raleigh, etc., R. Co.*, 98 N. Car. 73, 2 Am. St. Rep. 521, 32 Am. & Eng. R. Cas. 484.

2. View that Connecting Carrier Entitled to Benefit of Stipulation — England. — *Hall v. Northeastern R. Co.*, L. R. 10 Q. B. 437.

United States. — *Evansville, etc., R. Co. v. Androscoggin Mills*, 22 Wall. (U. S.) 594, 11 Am. Ry. Rep. 113; *Woodward v. Illinois Cent. R. Co.*, 1 Biss. (U. S.) 447; *Fairbank v. Cincinnati, etc., R. Co.*, 66 Fed. Rep. 471.

Expressly Confined to First Carrier. — Where the original contract specifically provides, as it may, that the limitations contained therein shall affect the initial carrier only, no subsequent carrier can claim the benefit of them.¹

Only Those Entitled Who Come Fairly Within Terms of Contract. — Such special limitations of liability inure only to the benefit of such carriers as come within the terms of the contract, and do not affect the liability of such carriers as are not embraced therein.²

Question of Privity. — Whether the initial carrier be regarded as the agent of the subsequent lines in making the contract for transportation, or the subsequent lines be taken as the agents of the initial carrier for completing the transportation, in either case there is a sufficient privity of contract between the shipper and the subsequent lines to entitle the latter to the benefits of the original contract made with the shipper.³

New Contract at Intermediate Point. — It is questionable whether any new contract of carriage can be made at an intermediate point between the connecting line and the initial line as agent of the shipper;⁴ but if the connecting line does

Alabama. — *Western R. Co. v. Harwell*, 91 Ala. 340, *affirmed* 97 Ala. 341, 45 Am. & Eng. R. Cas. 358; *Jones v. Cincinnati, etc.*, R. Co., 89 Ala. 376.

Arkansas. — *St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, 7 Am. St. Rep. 104, 35 Am. & Eng. R. Cas. 635; *St. Louis, etc., R. Co. v. Lesser*, 46 Ark. 236; *Taylor v. Little Rock, etc.*, R. Co., 39 Ark. 148, 18 Am. & Eng. R. Cas. 590.

Georgia. — *Southern Express Co. v. Palmer*, 48 Ga. 85.

Kansas. — *Kiff v. Atchison, etc.*, R. Co., 32 Kan. 263, 18 Am. & Eng. R. Cas. 618 (shipment at "owner's risk").

Missouri. — *Halliday v. St. Louis, etc.*, R. Co., 74 Mo. 159, 41 Am. Rep. 311.

New York. — *Ricketts v. Baltimore, etc.*, R. Co. 4 Lans. (N. Y.) 446, *affirmed* 59 N. Y. 637; *Lamb v. Camden, etc.*, R., etc., Co., 2 Daly (N. Y.) 454, 46 N. Y. 271, 7 Am. Rep. 327; *Whitworth v. Erie R. Co.*, 45 N. Y. Super. Ct. 602, *affirmed* 87 N. Y. 413, 6 Am. & Eng. R. Cas. 349; *Schiff v. New York Cent., etc.*, R. Co., 52 How. Pr. (N. Y. Supreme Ct.) 91. See *Etna Ins. Co. v. Wheeler*, 49 N. Y. 616.

Pennsylvania. — *Fairchild v. Philadelphia, etc.*, R. Co., 148 Pa. St. 527 (limitation of liability to an agreed valuation of the goods held to inure to benefit of connecting line). But see *Camden, etc., R. Co. v. Forsyth*, 61 Pa. St. 81.

Texas. — *International, etc., R. Co. v. Mahula*, 1 Tex. Civ. App. 182.

A contract made by a railroad company to transport and deliver at a point beyond the terminus of its own line contained the following clause: "Unavoidable accidents of the railroad and fire in depot excepted." It was held that in the absence of proof of any other or new contract, this exception would be held to extend to every other connecting carrier who shared the freight specified in the bill of lading, and that, in an action against such connecting carrier, the goods having been lost while in its possession, it could claim the benefit of the stipulation. *Maghee v. Camden, etc.*, R. Co., 45 N. Y. 514, 6 Am. Rep. 124.

Where goods are destroyed by fire while in the hands of a second carrier, it is entitled to the benefit of a provision in the bill of lading

made by a transportation company first receiving the goods, to the effect that the company shall not be liable for loss or damage by fire while the goods are in depots. *Manhattan Oil Co. v. Camden, etc.*, R., etc., Co., 54 N. Y. 197, 6 Am. Ry. Rep. 189, *affirming* 52 Barb. (N. Y.) 72, 5 Abb. Pr. N. S. (N. Y.) 289; *Deming v. Norfolk, etc.*, R. Co., 21 Fed. Rep. 25, 16 Am. & Eng. R. Cas. 232.

1. **Expressly Confined to First Carrier.** — *Bancroft v. Merchants' Despatch Transp. Co.*, 47 Iowa 262, 29 Am. Rep. 482; *Camden, etc., R. Co. v. Forsyth*, 61 Pa. St. 81; *Martin v. American Express Co.*, 19 Wis. 336; *Merchants' Despatch Transp. Co. v. Bolles*, 80 Ill. 473.

2. **Limitation Inures Only to Benefit of Those Fairly Embraced Within Terms of Contract.** — See *Western R. Co. v. Harwell*, 91 Ala. 340, 97 Ala. 341, 45 Am. & Eng. R. Cas. 358.

Thus, where a railroad company, having printed blanks for receipts for transporting over its road, and by other companies, to one place, received goods to be carried to a different place and at its terminus to be delivered to a different company, receipted for the goods, and, without erasing the names of the other companies, used words of exemption from liability, they being "between the shipper and the above-named companies," it was held that the company receiving the goods from the railway company, not being one of "the above-named companies," could not take the benefit of the exemptions in the receipt given. *Merchants' Despatch Transp. Co. v. Bolles*, 80 Ill. 473. See also, in this connection, *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 37 Am. & Eng. R. Cas. 681 (steam company not entitled to benefit of provisions allowed to railroad company, the initial carrier, as to insurance); *CARRIERS OF GOODS*, vol. 5, p. 154.

3. *St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, 7 Am. St. Rep. 104, 35 Am. & Eng. R. Cas. 635; cases cited *supra*, note 2, p. 644.

4. **Whether Initial Carrier Is Agent for Shipper to Make New Contract with Connecting Line.** — In *Babcock v. Lake Shore, etc.*, R. Co., 49 N. Y. 491, 3 Am. Ry. Rep. 381, *reversing* 43 How. Pr. (N. Y.) 317, it was held that where freight is shipped under a special contract limiting the carrier's common-law liability, by which the

make such a contract, by giving a receipt containing the limitations or otherwise, it is precluded thereby from claiming any exemption under the first contract, even where this first contract expressly provides that its limitations shall inure to the benefit of connecting carriers.¹

X. WHAT CONSTITUTES DELIVERY TO A CONNECTING CARRIER — 1. In General. — The liability of any carrier, except in those jurisdictions where the initial carrier is held to a liability throughout the entire journey, terminates only after a delivery of the goods to the succeeding carrier or to the consignee in the same condition in which it received them.²

Largely Dependent on Circumstances — Possession and Control. — What constitutes delivery in such a case is largely a matter of fact depending upon the circumstances accompanying the case; there must be such a transfer or handing over from the one carrier to the other as that the former abandons all possession and control and the other assumes possession and becomes itself responsible.³

initial carrier only undertakes to carry to the end of his line and there to deliver to the next carrier, the first carrier has no authority to enter into a special contract on behalf of the shipper with the next carrier, restricting his liability. See also *Lamb v. Camden, etc., R., etc., Co.*, 2 Daly (N. Y.) 454.

In a later case from the same state it appeared that oil was shipped without any specific agreement as to the limitation of the carrier's liability, but upon delivery to the next carrier a receipt was given providing that it would be further carried at the owner's risk of loss by fire or leakage. It was held that the initial carrier was the shipper's agent in delivering the oil to the second carrier; therefore the exemption was valid, and the second carrier not liable for a loss coming within the terms of the exemption. And in establishing the right of the second carrier to make such exemption it was competent for it to prove a uniform custom that it only held itself out as a carrier of oil where the same was shipped at owner's risk as to losses by fire or leakage. *Hinkley v. New York Cent. R. Co.*, 3 Thomp. & C. (N. Y.) 281, *affirmed* in 60 N. Y. 644.

In *Chicago, etc., R. Co. v. Northern Line Packet Co.*, 70 Ill. 217, it was held that where a carrier delivers goods to a forwarder who is its agent and the agent of the company to whom they are to be delivered, and he gives a bill of lading limiting the duty of the latter, his principal, to deliver them to another company, such bill of lading is a contract, binding upon the parties thereto, and the second carrier will be responsible only for injuries on its own line and not for nondelivery to the consignee by the last carrier.

1. New Contract Commencing with Intermediate Carrier. — *Browning v. Goodrich Transp. Co.*, 78 Wis. 391, 23 Am. St. Rep. 414.

In another case the plaintiff bought goods in the United States to be shipped to a point in Canada. The bill of lading issued by the line first receiving the goods contained a clause exempting that line and the lines and boats with which it connected from liability for loss by fire, and purported to give a through rate, but the rate was in fact only to the border of the United States on one of the great lakes; from there to the destination the goods were to be carried by the defendant company under a special contract containing no exemptions from liability for losses by fire. It was held

that the defendant company was liable for a loss by fire occurring while the goods were on its line. *Gordon v. Great Western R. Co.*, 25 U. C. C. P. 488.

2. General Rule as to Delivery to Connecting Line. — *Condon v. Marquette, etc., R. Co.*, 55 Mich. 218, 54 Am. Rep. 367, 18 Am. & Eng. R. Cas. 574; *Peterson v. Case*, 21 Fed. Rep. 885, 18 Am. & Eng. R. Cas. 578; *Erie R. Co. v. Lockwood*, 28 Ohio St. 358, 14 Am. Ry. Rep. 143.

Case Where Rule Does Not Apply. — The rule of the text does not apply where the goods are shipped by a railroad to a certain point from which they are to be removed by the owner to their final destination. In such a case the railroad is not an intermediate carrier, and the rules applicable are those which govern at a place of destination. *Fenner v. Buffalo, etc., R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709, *reversing* 46 Barb. (N. Y.) 103. See also *Conkey v. Milwaukee, etc., R. Co.*, 31 Wis. 619, 11 Am. Rep. 630.

3. What Constitutes Delivery Is a Question of Fact. — The defendant transportation company contracted to carry butter from Ontario to England, the butter to be carried by a railway company to S., where it was to be received by the defendant, carried to New York, and then delivered to the steamship company. The bill of lading provided that if damage should occur in the transit the company having the cargo at the time should be responsible. On the arrival of the butter in New York it was placed in lighters owned by the defendant, to be conveyed to the steamer D. On arriving at the pier where the steamer lay, the lighter could not get sufficiently near to unload, and the stevedore in charge of the steamer had it towed across the river, with instructions for it to remain until sent for. The D. sailed without the butter, which was sent by another steamer five days later, but was damaged by the heat while in the lighter. It was held that the defendant was liable, that there had never been any delivery of the butter by it to the steamer D., and that it therefore remained liable for all injuries up to the time of actual delivery to the steamer which carried it off. *Merchants' Dispatch Transp. Co. v. Hately*, 14 Can. Supreme Ct. 572, *affirming* 12 Ont. App. 201, 4 Ont. Rep. 723.

Transfer of Goods into Car Belonging to Next Carrier. — In view of the fact that one company

Custom Between the Carriers Dispensing with Actual Delivery. — Proof of a deposit of the goods in the first company's depot at the connecting point, and of a custom that the connecting company inspect the other's books in which goods are entered as received and take possession of the goods for transportation, is not sufficient proof of actual delivery to the second carrier to relieve the first from liability to the shipper for a loss resulting from the destruction of its warehouse; there must be an actual transfer of the possession of the shipment.¹ There may be, by express agreement, by usage and custom in a particular trade, or from a course of dealing between particular carriers, a constructive delivery from one carrier to the connecting carrier which may be binding as between such carriers, but this cannot affect the rights of the owner of the goods.²

frequently uses the cars of another, mere proof that the initial carrier delivered the goods into a car belonging to the next company is not sufficient to establish delivery to the second carrier, or notice to it that such goods were to be carried over its line. *Patten v. Union Pac. R. Co.*, 29 Fed. Rep. 590.

The delivery of the consignment by the initial carrier to the succeeding line may be made by a transfer of the goods to a car of the subsequent carrier, or by the delivery of the car itself containing the goods, in good order, to the subsequent carrier. To deliver the car in bad order is not sufficient, if the subsequent carrier refuses to receive it; and to delay the car containing the goods for repairs, before delivery, renders the company liable for damages caused by such delay. *Hewett v. Chicago, etc., R. Co.*, 63 Iowa 611, 18 Am. & Eng. R. Cas. 568.

Proof that the Goods Were Put into a Sealed Car and that the same car, still sealed, was delivered to a connecting line, is sufficient to show a delivery to the connecting line. *Newport News, etc., R. Co. v. Mendell*, (Ky. 1896) 34 S. W. Rep. 1081.

1. Must Be an Actual Transfer of Possession. — *Condon v. Marquette, etc., R. Co.*, 55 Mich. 218, 54 Am. Rep. 367, 18 Am. & Eng. R. Cas. 574. Compare *Pratt v. Grand Trunk R. Co.*, 95 U. S. 43. See also *Ladue v. Griffith*, 25 N. Y. 364, 82 Am. Dec. 360; *Bennitt v. Missouri Pac. R. Co.*, 46 Mo. App. 656.

2. Constructive Delivery — Not Binding on Shipper. — *Hutchinson on Carr.*, § 104. See also *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318; *Packard v. Taylor*, 35 Ark. 402, 37 Am. Rep. 37; *Reynolds v. Boston, etc., R. Co.*, 121 Mass. 291; *Irish v. Milwaukee, etc., R. Co.*, 19 Minn. 376, 18 Am. Rep. 340; *McDonald v. Western R. Corp.*, 34 N. Y. 497; *Erie R. Co. v. Lockwood*, 28 Ohio St. 358; *Louisville, etc., R. Co. v. Campbell*, 7 Heisk. (Tenn.) 253; *Conkey v. Milwaukee, etc., R. Co.*, 31 Wis. 619, 11 Am. Rep. 630. Compare *Converse v. Norwich, etc., Transp. Co.*, 33 Conn. 166; *Van Santvoord v. St. John*, 6 Hill (N. Y.) 157.

Common Warehouse at Point of Connection. — Where there is an agreement between two common carriers, operating connecting lines, for the carriage of freight over both routes at an agreed price, to be divided between them, and where they have, at the point of connection, a warehouse used in common for the transfer of freight from one line to the other, the expenses of handling being paid in com-

mon, a delivery at the warehouse, by one carrier, of freight destined to pass over the line of the other, with notice to the latter of its arrival and ultimate destination, places it in the possession of the latter and imposes upon him the duties and liabilities of a common carrier in reference thereto. *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616, 3 Am. Ry. Rep. 390.

Dual Agent. — A railway company is not responsible for an injury to stock shipped over its own and connecting lines resulting from their being placed in an infected stock-yard over night, where it appears that they were put there by a person in the employ of both companies at the junction of their lines, but who, in receiving the stock, acted only for the company who was to continue their transportation. *Smith v. Missouri, etc., R. Co.*, 58 Mo. App. 80.

Trans-shipment by Boat — Negligence. — Where a railroad carrier receives goods for a point beyond its line, on a watercourse, where the goods must be sent by boat, and where it maintains an agent for the purpose of receiving and delivering goods, it is negligence to merely put the goods off on the bank of the river when neither the agent nor the consignee is present. *Dresbach v. California Pac. R. Co.*, 57 Cal. 462, 3 Am. & Eng. R. Cas. 281.

Where There Are No Facilities for Public Transportation from the Terminus of the Carrier's Line to the destination of the goods, the terminus of the carrier's line will be considered the point of destination so far as the carrier is concerned. But the carrier's duty is not ended by a mere delivery of the goods to a wharfinger; he is further required to notify the consignee of their arrival, or to make some reasonable effort to do so. *Hermann v. Goodrich*, 21 Wis. 536, 94 Am. Dec. 562.

Storing Goods. — In the case of *Garside v. Trent, etc., Nav. Co.*, 4 T. R. 581, the defendants were common carriers between S. and M. The plaintiff's goods were received by them at S. to be carried to M., and from M., by another carrier, to their destination. By a special agreement the goods were to be kept in the defendant's warehouse, without charge, until called for by the last carrier. A part of the plaintiff's goods, while thus stored at M. after having been brought there by the defendants from S., were burned, with the warehouse, in an accidental fire. The plaintiff brought this action to recover for such loss, charging the defendants as common carriers. But the court held that the duty and responsibilities of the defendants, as common carriers, were ended

The Criterion seems to lie in the determination of the question whether or not the first carrier has still anything to be done by it before the second carrier must undertake the transportation of the goods. If nothing remains to be done by the first carrier, it seems that its liability is then at an end and the liability of the succeeding carrier begins.¹ But if something is to be done by the first carrier before the succeeding carrier can or is required to take the goods in charge, whether it be the payment of the accrued freight or the performance of any other condition precedent, the liability of the first carrier remains, and no delivery is considered as taking place until the performance of such condition.²

on the storing of the goods at M., and that they afterwards stood liable only as warehousemen; they were therefore not liable. The keeping of the goods in the warehouse was for the benefit of their owner, and not of the defendants. This holding is *cited with approval* in *Thomas v. Boston, etc., R. Corp.*, 10 Met. (Mass.) 478, 43 Am. Dec. 444. See also *Hyde v. Trent, etc., Nav. Co.*, 5 T. R. 389.

Effect of Usage of Business.—In *Gulf, etc., R. Co. v. Insurance Co. of North America*, (Tex. Civ. App. 1894) 28 S. W. Rep. 237, which was a suit against both carriers for the loss by fire of a car and its contents, it appeared that "the usage obtaining with these defendants was that the company having cars to be delivered to the other for transportation over its road placed them upon the transfer track, and if these cars, when inspected by the proper officer of the latter company, were found to be properly loaded they were considered delivered and bills of lading were executed by the receiving clerk; but if found to be not properly loaded, they were rejected, and, in railway parlance, 'set back' to the company proposing to deliver the cars." The second line moved all the lot of cars off the transfer switch on to its own line, but upon discovering that one car was improperly loaded, refused to receive it or to issue receipts for it, and set it back on the transfer track, where it was soon destroyed by an accidental fire. The objectionable car, being in the midst of a long train, had to be switched off the transfer track in order to separate it from the others. Under these facts the court held that the second carrier was not liable, as there had been no delivery of the car to it.

1. When Delivery to Connecting Line is Complete—Criterion.—See *Deming v. Norfolk, etc., R. Co.*, 17 Phila. (Pa.) 540. In *Pratt v. Grand Trunk R. Co.*, 95 U. S. 43, an understanding or agreement existed between two connecting lines for an interchange of through freights, by which the first carrier should deposit freights intended for further shipment over the line of the second carrier in a certain part of the latter's freight depot, without giving any special notice, whence they would be taken up and forwarded to their destination. It was held that such a deposit was a sufficient delivery by the first carrier to terminate its liability for the loss of the goods when destroyed by the burning of the second carrier's depot.

In *Converse v. Norwich, etc., Transp. Co.*, 33 Conn. 166, a railroad company and a steamboat company had a common wharf and depot at their common terminus, the established usage being for the steamboat company to land goods for the railroad in the night, upon

a particular place, whence they were taken by the railroad company the next morning. Freight was so landed by the steamboat company during the night of Saturday, and the depot was burned Sunday, the railroad company having done no act in the meantime accepting delivery. It was held that this amounted to a delivery by the steamboat company so as to relieve it from further liability. See *Hot Springs R. Co. v. Trippe*, 42 Ark. 465, 48 Am. Rep. 65, 18 Am. & Eng. R. Cas. 562. See also *Truax v. Philadelphia, etc., R. Co.*, 3 Houst. (Del.) 233, holding that delivery of a loaded car to a connecting carrier is complete the moment the cars of the initial line reach the point of connection with the second line and the engine is detached from the train. Compare, as to this view, *Kentucky M. & F. Ins. Co. v. Western, etc., R. Co.*, 8 Baxt. (Tenn.) 268.

2. Delivery Not Complete When Something Remains to Be Done by First Carrier.—*Mt. Vernon Co. v. Alabama G. S. R. Co.*, 92 Ala. 296.

Car to Be Delivered at Platform—Freight Examined and Checked.—In *Kentucky M. & F. Ins. Co. v. Western, etc., R. Co.*, 8 Baxt. (Tenn.) 268, it appeared that cotton was shipped to pass over two roads. The first road carried it to the end of its line on open cars, and placed it on a side track which belonged to the second road, but which was used by various connecting lines, and while on the side track it was burned. The question was as to which road was liable, there being a dispute as to what constituted a delivery by one road to the other; but there was a preponderance of evidence tending to show that the delivery was not regarded as complete till the car containing the freight was delivered at the platform of the receiving road, and the freight examined and checked off by a bill of lading by a clerk of the receiving road. It was held that there was not such a delivery by the first carrier as would relieve it from liability.

Where No Shipping Directions Are Given to Next Carrier.—See also *Alabama G. S. R. Co. v. Mt. Vernon Co.*, 84 Ala. 173, 92 Ala. 296, 35 Am. & Eng. R. Cas. 657, where it was held that the mere fact that the company which received cotton for shipment put the car on the side track of the defendant company, according to a custom existing between the two companies, and that the defendant's agent reported the car to the car accountant, did not create a presumption that the defendant accepted the car, as a carrier, where it did not appear that it had received any shipping directions from the first company or that it knew the consignee or the destination of the car.

Special Contract. — The special contract expressed in the bill of lading may fix the time at which the liability of the initial company shall come to an end, as where it is provided that the receiving company's liability shall terminate with the unloading of the goods from the cars.¹

Under the South Carolina Statute, the company receiving freight for transportation to a point beyond its line can discharge itself from liability only by producing a receipt in writing from the next succeeding carrier.² Any written acknowledgment which identifies the goods and admits their delivery by the initial company is a sufficient receipt under the statute.³

2. Notice of Arrival to Connecting Line. — On the arrival of the consignment at the point of the junction of the initial carrier's line with that of the con-

Agreement as to Prepayment or Guaranty of Freight Charges. — Where two connecting railroads are under a mutual agreement that no freight shall be considered as delivered for transportation from one to the other unless the freight is prepaid, or guaranteed by indorsement on the waybill, one of them cannot relieve itself from liability for injury to freight by placing the car in which it is stowed on a track used in common by both railroads and notifying the through railroad thereof, without payment or guaranty of payment of the freight. *Palmer v. Chicago, etc., R. Co.*, 56 Conn. 137, 35 Am. & Eng. R. Cas. 629.

Delivery of Bill of Expenses by First Carrier. — In *Judson v. Western R. Corp.*, 4 Allen (Mass.) 520, 81 Am. Dec. 718, an arrangement or course of business existed between two railroad companies whose roads were along the same general route but did not actually connect with each other, by which goods which had been carried to the terminus of one road, and which were destined for some point on or beyond the line of the other, were delivered to the second company, with a bill of the expenses already incurred, from which, if found to be correct, a waybill was made out and the transportation then resumed. Under this the second company is responsible only as warehouseman, and not as insurer, for goods so received and stored by it, until the delivery of the bill of expenses by the first carrier. See also *Livingston v. New York Cent., etc., R. Co.*, 76 N. Y. 631.

Goods Stored by Request Are for Convenience of Second Carrier. — The defendant company received cotton for transportation and carried it safely and promptly to Norfolk, where it was tendered to the steamship company, the next link in the chain of connecting carriers. The steamship company, owing to an unusual press of business, was unable to receive or forward it, and requested the defendant company to store the cotton on one of its own wharves and to insure it, promising to charter an extra steamer and send it to the railroad wharf within a short time to be loaded. This was done. There was a delay in the arrival of the steamer, and before it was sent the cotton was destroyed by fire. It was held that the defendant company had done everything that could have been done and that it was in no wise liable, it appearing that there was no way of forwarding the cotton over other lines open to the defendant company. *Deming v. Norfolk, etc., R. Co.*, 17 Phila. (Pa.) 540.

Delivery to Drayman to Be Sent to Second Car-

rier. — In *Missouri Pac. R. Co. v. Young*, 25 Neb. 651, the defendant company, the initial line, had received a piano for transportation to L. and there to be delivered to a connecting line. The tracks of the defendant company connected with those of the connecting line by a "Y," but the defendant delivered the piano to a drayman to be by him delivered at the depot of the connecting line. While being carried on the dray, the piano was injured by a fall. It was held that the defendant company was responsible, the delivery to the connecting line not being complete.

1. Where Special Contract Fixes Termination of Liability. — In *McCann v. Baltimore, etc., R. Co.*, 20 Md. 202, goods were delivered to a railroad company marked to a point beyond its line, and a receipt given reciting that "the responsibility of the company under this receipt [is] to terminate when the goods are unloaded from the cars," and also that "goods intended for all rail must be marked 'through by rail;' river goods *via* W. or P. must be marked on this ticket." It was held that the responsibility of the company ended upon the unloading of the cars at the terminus of its road, the provision that the goods might, in certain contingencies, be transported part of the distance by boat forbade that the words "unloading of the cars" could mean unloading them at the place of destination instead of at the point where they were taken from the cars.

2. South Carolina Statute — "Receipt in Writing." — Gen. Stat. of S. Car., § 1513. Under this a railroad company to which goods are delivered by their owner for shipment must, on demand, produce the written receipt of the steamship company and not that of the company to which they were delivered by the steamship company. But the statute is not to be construed as charging the initial road with "wilful failure or refusal" to furnish such proper receipt, where, in reply to a demand from the consignor for a receipt from the corporation to which the goods were delivered, it procured and furnished the receipt only of the railroad company to which the intermediate steamboat carrier had made delivery. And there having been no such "wilful failure or refusal," the initial company, when sued for these goods, could produce at the trial, in its defense, the receipt of the steamship company. *Miller v. South Carolina R. Co.*, 33 S. Car. 359, 45 Am. & Eng. R. Cas. 332.

3. Miller v. South Carolina R. Co., 33 S. Car. 359, 45 Am. & Eng. R. Cas. 332.

necting carrier, the latter is entitled to notice of such arrival before it can be charged with any liability.¹

Actual Notice Not Always Necessary. — But actual notice is not always essential. Thus where the uniform custom of business between the carriers is for the first carrier to deposit a written notice of the arrival of such freight in a special box in its own depot, to which the next carrier has constant access and in which it is accustomed to look for such notices, such deposit constitutes sufficient notice and operates, after the lapse of a reasonable time, as a delivery to the second carrier.²

3. Continuous Liability. — In a Wisconsin Case it was held that where a common carrier in accordance with his contract conveys goods over only a portion of the route between the points of shipment and consignment, and holds them for delivery to some intermediate line, the latter is the owner's or consignee's agent to receive the delivery, and the liability of the former as a common carrier continues until the goods are ready for delivery to such agent, and he has had a reasonable time to take them away; but that after the lapse of such time his liability is that of a warehouseman simply.³

Prevailing Rule. — But in a subsequent case⁴ in this jurisdiction the foregoing view was repudiated, and the prevailing doctrine approved, namely: that the goods are to be considered in transit until they arrive at their future destination, and the peculiar liability of a common carrier exists continuously, although for the convenience of the successive carriers the goods may be temporarily warehoused *en route*, and the carrier in whose possession they are when destroyed or injured is liable as such to the owner or consignee.⁵

1. Notice to Next Line. — McDonald *v.* Western R. Corp., 34 N. Y. 497; Louisville, etc., R. Co. *v.* Bourne, (Ky. 1895) 29 S. W. Rep. 975. See Hempstead *v.* New York Cent. R. Co., 28 Barb. (N. Y.) 485 (presumption in favor of notice having been given).

The carrier is not relieved from his liability as insurer of the goods by simply unloading the goods at the end of his route and storing them in a warehouse, without delivery or notice, or any attempt to deliver to the next carrier. Irish *v.* Milwaukee, etc., R. Co., 19 Minn. 376, 18 Am. Rep. 340, 19 Am. Ry. Rep. 89.

2. Mills *v.* Michigan Cent. R. Co., 45 N. Y. 622, 6 Am. Rep. 152. See also Bennett *v.* Missouri Pac. R. Co., 46 Mo. App. 656; Shelton *v.* Merchants' Dispatch Transp. Co., 59 N. Y. 258.

3. Wood *v.* Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 465. See also Wood *v.* Crocker, 18 Wis. 345, 86 Am. Dec. 773.

4. Prevailing Rule. — Conkey *v.* Milwaukee, etc., R. Co., 31 Wis. 619, 11 Am. Rep. 630. Lyon, J., who delivered the judgment in the case first mentioned, concurred in the latter judgment, but was "inclined to adhere to the doctrine asserted" in the case of Wood *v.* Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 465. See also the case of Hooper *v.* Chicago, etc., R. Co., 27 Wis. 81, 9 Am. Rep. 439.

5. United States. — Michigan Cent. R. Co. *v.* Mineral Springs Mfg. Co., 16 Wall. (U. S.) 318; Petersen *v.* Case, 21 Fed. Rep. 885.

Arkansas. — Packard *v.* Taylor, 35 Ark. 402, 37 Am. Rep. 37.

Illinois. — Illinois Cent. R. Co. *v.* Mitchell, 68 Ill. 471, 18 Am. Rep. 564.

Iowa. — Bancroft *v.* Merchants' Despatch Transp. Co., 47 Iowa 262, 29 Am. Rep. 482.

Kansas. — See North Missouri R. Co. *v.* Akers, 4 Kan. 453, 96 Am. Dec. 183.

Michigan. — The liability of the carrier continues until the delivery to the connecting line, or at least until such notification has been given to the latter as amounts to a tender of delivery. If the first carrier merely stores the goods in its own warehouse where the other is in the habit of taking it at its convenience, and the goods while so stored are destroyed, the first carrier is liable for their value. Condon *v.* Marquette, etc., R. Co., 55 Mich. 218, 54 Am. Rep. 367. Compare Michigan Cent. R. Co. *v.* Hall, 6 Mich. 243; Michigan Cent. R. Co. *v.* Lantz, 32 Mich. 502.

Minnesota. — Irish *v.* Milwaukee, etc., R. Co., 19 Minn. 376, 18 Am. Rep. 340. See Lawrence *v.* Winona, etc., R. Co., 15 Minn. 390, 2 Am. Rep. 130.

Missouri. — In Bennett *v.* Missouri Pac. R. Co., 46 Mo. App. 656, it was held that a carrier holds goods as such and not as a bailee while he holds them for delivery to a connecting carrier, and although the latter refuses or unreasonably delays to receive them, the former will still hold them in his capacity as carrier until by warehousing them or otherwise, he does some unequivocal act indicating a purpose to change his capacity from that of carrier to that of a mere custodian for safe keeping. So long as he holds the goods in his vehicles of transportation awaiting the pleasure, the convenience, or the necessities of the succeeding carrier, his liability as carrier continues.

In Larimore *v.* Chicago, etc., R. Co., 65 Mo. App. 167, it was held that a carrier which receives for transportation stock consigned to a point beyond its own line, but limits its liability to losses occurring on its own line, may,

XI. PRESUMPTION AS TO WHEN INJURY OR LOSS OCCURRED.—In the Case of a Mere Injury to the goods, no failure to deliver being shown, if the last carrier is sued for the damage resulting from the injury, the burden of proof will be

on the refusal of the next carrier to receive the stock for further transportation, place them in pens and by so doing change its responsibility from that of carrier to that of warehouseman or forwarding agent.

New York.—Fenner v. Buffalo, etc., R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Goold v. Chapin, 20 N. Y. 266, 75 Am. Dec. 398; Ladue v. Griffith, 25 N. Y. 364, 82 Am. Dec. 360; McDonald v. Western R. Corp., 34 N. Y. 497; Miller v. Steam Nav. Co., 10 N. Y. 431; Mills v. Michigan Cent. R. Co., 45 N. Y. 622, 6 Am. Rep. 152.

Ohio.—Erie R. Co. v. Lockwood, 28 Ohio St. 358.

Vermont.—Brintnall v. Saratoga, etc., R. Co., 32 Vt. 666.

Canada.—Mason v. Grand Trunk R. Co., 37 U. C. Q. B. 163.

In Lawrence v. Winona, etc., R. Co., 15 Minn. 390, 2 Am. Rep. 130, the court observed: "But though he is not liable beyond his own route, yet if, at the end of the route, the carrier stores the goods in his own warehouse, without delivery or notice, or attempt to deliver to the next carrier, he is not, by such mere act of storage, released from liability as a carrier."

Delivery to Warehouseman to Be Transferred to Next Carrier.—In the case of Merchants' Wharfboat Assoc. v. Wood, 64 Miss. 661, 60 Am. Rep. 76, it appeared that it was the custom of a railroad company to carry goods to the end of its line and there deliver to a warehouseman, who in turn delivered to a steamboat line for further carriage. Cotton was shipped, and, while in the warehouse, was destroyed by fire. It was held that the railroad company could not contract with the warehouseman so as to relieve him from his own negligence; and if there was an unreasonable delay in forwarding the cotton, whereby it was exposed to fire, he was liable to the shipper; but not if he did not know of such exposure, and there was no unreasonable delay.

Special Contract—Final Destination Intended.—On receiving goods for transportation, the defendant company gave a receipt stating, among other conditions, that it would not be liable as a common carrier for articles of freight after their arrival at the place of destination and unloading at the company's warehouse or depot. The goods in question were marked for a point beyond the receiving company's line and were carried to the end of its line, and three days afterward were destroyed in its warehouse by an accidental fire. No notice of the arrival of the goods had been given to the next connecting carrier. It was held that the place of destination mentioned in the receipt meant the ultimate destination of the goods, therefore the exemption provided for did not apply, and the company was liable. Ayres v. Western R. Corp., 14 Blatchf. (U. S.) 9.

Contract to Deliver Goods "On Board."—In Moore v. Michigan Cent. R. Co., 3 Mich. 23, a railroad company received goods which were to be transported by water to a point beyond

its line. It contracted to carry the goods to the terminus of its line and to deliver them "on board." The goods were carried to the terminus of its line and placed in its depot, where they were soon afterwards destroyed by fire. It was held that the words "on board" meant that the goods were to be carried to the terminus of the company's line and there delivered on board some suitable vessel; and therefore the company's liability as a common carrier had not terminated at the time of the fire.

Special Stipulation as to Liability During Trans-shipment.—Provisions in the bill of lading that "no carrier shall be liable for a loss by fire while the goods are awaiting trans-shipment at any port," will release the carrier from liability for a loss sustained by the goods from a fire while they were awaiting trans-shipment from one railroad to another. The provisions will not be limited to trans-shipments from a railroad to a steamship line. Brown v. Louisville, etc., R. Co., 36 Ill. App. 140.

Connecting Carrier's Misconduct.—In Southard v. Minneapolis, etc., R. Co., 60 Minn. 382, the bill of lading stipulated that "in case of loss or damage done to or sustained by any of the property herein receipted for during such transportation, that company alone shall be answerable therefor in whose actual custody the same may be at the time of such loss." The goods were carried by the defendant, the initial line, to the end of its line, and there tendered to the next connecting carrier, who failed and neglected to receive and carry them; the defendant thereupon deposited the goods in its warehouse there and held them ready for delivery whenever the connecting line would receive them. While in that state, they were destroyed by an accidental fire. The court held that the defendant was liable for the loss, whatever might be the remedies it might be entitled to as against the connecting line; that the carrier in actual possession could not escape liability on the ground of the misconduct of a connecting carrier. The shipper was entitled to an uninterrupted and continuous carrier's duty from the point of shipment to that of destination, and the contract amounted to a guaranty by the initial line that the subsequent carriers would accept and carry. Compare St. Louis, etc., R. Co. v. Marrs, (Ark. 1895) 31 S. W. Rep. 42.

Entire Consignment to Be Delivered.—The liability of the second carrier does not commence until that of the first terminates; and in the case of a shipment of a large quantity of goods at one time, the liability of the first carrier is not ended until the whole of them have been delivered to the succeeding carrier. Gass v. New York, etc., R. Co., 99 Mass. 220, 96 Am. Dec. 742; Vannatta v. Central R. Co., 154 Pa. St. 262. See also Darling v. Boston, etc., R. Corp., 11 Allen (Mass.) 295.

Delivery of Stock to Stock Yard.—Where the contract exempted the carrier from liability only when delivery or tender of shipment of the stock was made to the connecting line, and

upon it to show that the goods were delivered by it in the same condition in which they were received by it, the presumption being that the goods remained in the same state when delivered to it as when originally shipped. And the same rules would apply where any intermediate carrier was sued for the injury.¹

the stock was transferred to a stock-yard company to be by it delivered to the connecting road, the carrier was held liable for injuries suffered by the stock while in the yards. *Gulf, etc., R. Co. v. Eddins*, 7 Tex. Civ. App. 116.

If There Are No Public Means of Further Transportation, it has been held that the end of the first carrier's line must be regarded as the place of destination, and it is his duty on transferring the goods to the warehouseman or wharfinger to notify the consignee of their arrival. *Hermann v. Goodrich*, 21 Wis. 536, 94 Am. Dec. 562.

Interruption of Transportation — Notice. — Where the connecting line notifies the preceding carrier that, on account of a block in freight, it is unable to receive and convey the goods to their destination, the first carrier will still be liable for damages resulting from delay, unless it notifies the shipper so that he may have an opportunity to protect himself. *Petersen v. Case*, 21 Fed. Rep. 885. See also *Deming v. Norfolk, etc., R. Co.*, 21 Fed. Rep. 25; *Louisville, etc., R. Co. v. Odil*, 96 Tenn. 61; *Louisville, etc., R. Co. v. Campbell*, 7 Heisk. (Tenn.) 253; *Johnson v. New York Cent. R. Co.*, 39 How. Pr. (N. Y. Supreme Ct.) 127.

1. Presumption that Injury Occurred on Line of Last Carrier — *Florida*. — *Savannah, etc., R. Co. v. Harris*, 26 Fla. 152, 23 Am. St. Rep. 551, 42 Am. & Eng. R. Cas. 457.

Georgia. — *Central R., etc., Co. v. Bayer*, 91 Ga. 115; *Georgia R. Co. v. Gann*, 68 Ga. 350; *Central R. Co. v. Rogers*, 66 Ga. 251.

Illinois. — *Lake Erie, etc., R. Co. v. Oakes*, 11 Ill. App. 489.

Iowa. — *Beard v. Illinois Cent. R. Co.*, 79 Iowa 518, 18 Am. St. Rep. 381, 42 Am. & Eng. R. Cas. 445.

Minnesota. — *Shriver v. Sioux City, etc., R. Co.*, 24 Minn. 506, 31 Am. Rep. 353; *Leo v. St. Paul, etc., R. Co.*, 30 Minn. 438, 12 Am. & Eng. R. Cas. 35.

Mississippi. — *Mobile, etc., R. Co. v. Tupelo Furniture Mfg. Co.*, 67 Miss. 35, 19 Am. St. Rep. 262, 42 Am. & Eng. R. Cas. 497.

Missouri. — *Flynn v. St. Louis, etc., R. Co.*, 43 Mo. App. 424.

New York. — *Smith v. New York Cent. R. Co.*, 43 Barb. (N. Y.) 225, affirmed 41 N. Y. 620.

North Carolina. — *Dixon v. Richmond, etc., R. Co.*, 74 N. Car. 538; *Lindley v. Richmond, etc., R. Co.*, 88 N. Car. 547, 9 Am. & Eng. R. Cas. 31.

Tennessee. — *Louisville, etc., R. Co. v. Tennessee Brewing Co.*, 96 Tenn. 677.

Texas. — *Texas, etc., R. Co. v. Barnhart*, 5 Tex. Civ. App. 601; *Texas, etc., R. Co. v. Adams*, 78 Tex. 372, 22 Am. St. Rep. 56; *International, etc., R. Co. v. Wolf*, 3 Tex. Civ. App. 383.

Wisconsin. — *Laughlin v. Chicago, etc., R. Co.*, 28 Wis. 204, 9 Am. Rep. 493, 5 Am. Ry. Rep. 323.

See also *Paramore v. Western R. Co.*, 53 Ga. 385; *Brintnall v. Saratoga, etc., R. Co.*, 32 Vt. 665. Compare *Marquette, etc., R. Co. v. Kirk-*

wood, 45 Mich. 51, 40 Am. Rep. 453, 9 Am. & Eng. R. Cas. 85; *Swetland v. Boston, etc., R. Co.*, 102 Mass. 276.

"The presumption of law being that the delivering carrier has damaged the property, in an action by the owner against him the plaintiff need only prove the shipment in good condition and the delivery in damaged condition." *Louisville, etc., R. Co. v. Jones*, 100 Ala. 263. See also *Cooper v. Georgia Pac. R. Co.*, 92 Ala. 329, 25 Am. St. Rep. 59; *Montgomery, etc., R. Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 483. In the first case above cited the court, by Maxwell, J., said: "The loss of a portion of the goods and the value of the same is also shown, but where the loss occurred, whether on defendant's line or some other, is not shown. In such case, there being several carriers, and no contract except with the initial one, the law is, if the last carrier be sued, that it will be held liable on the presumption that when the car was delivered to it the contents were the same as when started by the first carrier. And this presumption applies also to the condition of the goods the car contained." *Savannah, etc., R. Co. v. Harris*, 26 Fla. 153, 23 Am. St. Rep. 551, 42 Am. & Eng. R. Cas. 457.

In a note to *Knight v. Providence, etc., R. Co.*, 13 R. I. 572, 43 Am. Rep. 46, 9 Am. & Eng. R. Cas. 90, the annotator in the last series, referring to the cases above cited, observes: "They are based on the soundest principles of public policy. When a shipper consigns his goods to a line of connecting carriers, to be carried to the point of destination, he of course loses all right and control of them. If an injury occurs or a loss is occasioned while *en route* he has no conceivable means of proving in whose hands they were at the time of the loss or injury. It is therefore perfectly proper to shift the burden of proof on the carrier who is sued."

No Presumption that Loss or Injury Occurred on the Line of the Initial Carrier. — That there is no such presumption, see *Farmington Mercantile Co. v. Chicago, etc., R. Co.*, 166 Mass. 154.

In Case of Delay. — The presumption against the last carrier does not arise where the wrong complained of is a delay merely. *Almand v. Georgia R., etc., Co.*, 95 Ga. 775.

The Rule Applied — Presumption Against Last Carrier. — In *Laughlin v. Chicago, etc., R. Co.*, 28 Wis. 204, 9 Am. Rep. 493, 5 Am. Ry. Rep. 323, the goods were shipped by three successive carriers, and when delivered to the consignee the box, although there were no external indications of the fact, was found to have been opened and certain goods abstracted therefrom. It was held that the jury might presume, in the absence of evidence to the contrary, that the box remained unopened until it came into the possession of the last carrier, and that the loss occurred through its fault.

The rule of the text is not affected by the fact that the last carrier transports the goods over its line in the same cars in which it received them. *Leo v. St. Paul, etc., R. Co.*, 30 Minn.

Basis of Presumption. — The rule rests upon the recognized principle in the law of evidence by which the burden of proof of a negative averment is cast upon a party purely because of his better ability to adduce proof on the subject.¹

Initial Carrier Must Show Safe and Proper Delivery. — In the event of a loss or injury while the goods are *en route*, the burden is on the initial carrier to show a safe and proper delivery to the next connecting line, but having done so it is discharged from liability, it being under no obligation to show where or when the loss occurred after leaving its line.²

In Case of Through Liability. — The rule is otherwise, however, in those jurisdictions where the initial carrier is held to a through liability.³

Shipper Must Show Receipt of Goods by Carrier. — Where any subsequent carrier is sued, the burden of proof is on the shipper to show a receipt by such carrier, and, this being done, the burden is upon the defendant carrier to show a delivery in good order to the next line.⁴ When such receipt by any intermediate carrier is shown, it is presumed that the goods were then in the same order as when received by the initial carrier, and if the intermediate carrier defends on the ground that the goods were damaged before being delivered to it the burden is upon it to show the fact.⁵

Defective Cars — Custom. — In an action against an initial carrier for damage caused to a consignment of goods by loading them in unsafe cars, by reason of which they reached their destination on a connecting line greatly damaged by being wet, proof of the defendant company's universal custom of carefully inspecting cars before sending them out will not justify a peremptory instruction for the company where there is evidence that the goods were received by it in good condition and loaded into cars, the seal of which remained unbroken and the contents undisturbed on the journey, and were damaged by being wet on reaching their destination. In such a case, the presumption of the fitness of

438, 12 Am. & Eng. R. Cas. 35; *Faison v. Alabama, etc.*, R. Co., 69 Miss. 569, 30 Am. St. Rep. 577. Particularly where the last carrier knows the goods are liable to be injured by heat or cold and has a right to open the cars to inspect the goods therein. *Beard v. Illinois Cent. R. Co.*, 79 Iowa 518, 18 Am. St. Rep. 381, 42 Am. & Eng. R. Cas. 445.

The last of a series of connecting lines of railroad is responsible for a loss of goods occurring during the transportation, subject to the limitations contained in the contract between the shipper and the company to which the goods were delivered, unless the company sued can show that the loss did not occur on its road. *Memphis, etc., R. Co. v. Holloway*, 9 Baxt. (Tenn.) 188; *Faison v. Alabama, etc.*, R. Co., 69 Miss. 569, 30 Am. St. Rep. 577.

The presumption holds good even in a case where perishable freight, *e. g.*, watermelons, are shipped; the burden is on the last carrier to show they were in the same order when received as when delivered, although a mere lapse of time would affect the condition of the property. *Forrester v. Georgia R., etc., Co.*, 92 Ga. 699.

1. Reason for Rule. — See 1 Greenleaf on Ev. (14th ed.), § 79; *Smith v. New York Cent. R. Co.*, 43 Barb. (N. Y.) 225; *Savannah, etc., R. Co. v. Harris*, 26 Fla. 155, 23 Am. St. Rep. 551, 42 Am. & Eng. R. Cas. 457. See also the title **BURDEN OF PROOF**, vol. 5, p. 24.

2. First Carrier to Show Proper Delivery to Connecting Line. — *American Express Co. v. Titusville Second Nat. Bank*, 69 Pa. St. 394, 8 Am.

Rep. 268. See also *Crouch v. Louisville, etc., R. Co.*, 42 Mo. App. 248; *Orr v. Chicago, etc., R. Co.*, 21 Mo. App. 333.

The general rule is that the burden of accounting for a loss of goods while in transportation is upon the carrier; but this rule does not apply where the carrier has only agreed to carry to the end of his line and deliver to a connecting carrier, and where the loss occurs after such delivery. The first carrier is not required to account for a loss beyond its own line. *Dixon v. Columbus, etc., R. Co.*, 4 Biss. (U. S.) 137.

When a railroad company receives goods for transportation, consigned to a point on another connecting road, the bill of lading containing a stipulation that each carrier shall only be liable for losses or injuries while the goods are in its control; if the goods fail to reach their destination, the onus is on the receiving carrier to show that they were safely carried over its own road, and safely delivered to the connecting road. *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36.

3. See *infra*, this title, *Liability for Loss or Injury — Liability Held to Extend Over Whole Route*.

4. See *infra*, this title, *Liability of Intermediate Lines*.

5. See *supra*, the first note to this subdivision. Under the *Georgia Code*, § 2084, making the last connecting carrier liable, the presumption, in the absence of proof to the contrary, is that the goods were received by the connecting line in good order. *Georgia R., etc., Co. v. Forrester*, 96 Ga. 428.

the cars arising out of the proof of inspection is opposed by the presumption of unsuitableness arising from the fact of the injury under the circumstances, and the question should be submitted to the jury.¹

XII. CONNECTING LINES AS PARTNERS — 1. Effect of a Partnership. — Where it can be shown that the connecting lines constituting the route for transportation between two points sustain to each other the relation of partners, any one of them may be held liable for the loss of or injury to goods shipped over the route, whether such loss or injury occurred on its own line or on that of another of the partners.²

Special Stipulation. — Where a partnership is shown, the joint liability exists, notwithstanding a stipulation seemingly to the contrary in the bill of lading, where the stipulation admits of another construction; the contract is not to be construed as releasing the members of a partnership from their common-law liability unless no other reasonable construction is possible.³

Power to Form Partnerships or Associations. — Some question has been made as to the power of railroad companies, under their charters, to form a partnership or association for the purpose of through freight and passenger traffic.⁴ But while such companies may have no power to form pools or an association for the purpose of suppressing competition,⁵ mere partnership arrangements for

1. Question for the Jury. — *Searles v. Alabama, etc., R. Co.*, 69 Miss. 186. See also, as to presumption arising from the fact that the goods are injured on reaching their destination, *New York Cent., etc., R. Co. v. Eby*, (Pa. 1888) 12 Atl. Rep. 482; *Faison v. Alabama, etc., R. Co.*, 69 Miss. 569, 30 Am. St. Rep. 577.

Sufficiency of Proof as to Where Loss Occurred. — In the case of *Green v. Boston, etc., R. Co.*, 128 Mass. 221, 35 Am. Rep. 370, a case of goods was shipped with others, filling two cars, to be carried to the end of the defendant's line, and there delivered to a steamship line. The proof showed that the agent of the steamer received the cars unopened, and that they were kept on its wharf, carefully watched and guarded, until ready to be transferred to the steamer, when the cars were then opened, but the case of goods was not to be found in either car. It was held that the trial court was right in refusing to charge the jury that there was no evidence that the loss occurred while the goods were in the possession of the defendant railroad company.

2. Effect of Partnership — *England*. — *Gill v. Manchester, etc., R. Co.*, L. R. 8 Q. B. 186; *Hayes v. South Wales R. Co.*, 9 Ir. C. L. R. 474. *Iowa*. — *Independence Mills Co. v. Burlington, etc., R. Co.*, 72 Iowa 535, 2 Am. St. Rep. 258, 32 Am. & Eng. R. Cas. 456.

Missouri. — *Rice v. Indianapolis, etc., R. Co.*, 3 Mo. App. 27; *Wyman v. Chicago, etc., R. Co.*, 4 Mo. App. 35; *Barrett v. Indianapolis, etc., R. Co.*, 9 Mo. App. 226; *Coates v. U. S. Express Co.*, 45 Mo. 238.

Nebraska. — *Missouri Pac. R. Co. v. Twiss*, 35 Neb. 267, 55 Am. & Eng. R. Cas. 434.

New Hampshire. — *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434.

New York. — *Wylde v. Northern R. Co.*, 14 Abb. Pr. N. S. (N. Y. Ct. App.) 213; *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206, 30 Am. & Eng. R. Cas. 105.

North Carolina. — *Phillips v. North Carolina R. Co.*, 78 N. C. 294, 16 Am. Ry. Rep. 206; *Washington v. Raleigh, etc., R. Co.*, 101 N. C. 239, 37 Am. & Eng. R. Cas. 25.

Texas. — *Miller v. Texas, etc., R. Co.*, 83 Tex. 518; *Gulf, etc., R. Co. v. Golding*, 3 Tex. App. Civ. Cas., § 33, 23 Am. & Eng. R. Cas. 732; *Missouri Pac. R. Co. v. Creath*, 3 Tex. App. Civ. Cas., § 83; *Gulf, etc., R. Co. v. Wilson*, 7 Tex. Civ. App. 128; *Atchison, etc., R. Co. v. Grant*, 6 Tex. Civ. App. 674.

3. Effect of Stipulation. — In the case of *Block v. Fitchburg R. Co.*, 139 Mass. 308, 21 Am. & Eng. R. Cas. 1, by a bill of lading, the Erie & North Shore Dispatch contracted to carry the plaintiff's goods from Boston by the Fitchburg Railroad, and thence by the dispatch company to Chicago, and there to deliver them to connecting lines for Denver, their destination. The bill did not name the several railroad companies forming the association, but provided that in case of loss or damage to the goods, "that company shall alone be answerable therefor in whose actual custody the same may be at the time of the happening thereof." It was held that the words "that company" referred only to the several companies named in the contract, and not to those constituting the dispatch line; that the plaintiff was not bound to sue that member of the dispatch line on whose road the loss occurred, the members of that line being partners, and each liable for the defaults of the others.

4. Charter Power of Railroad Company to Form Partnership. — See *Burke v. Concord R. Corp.*, 61 N. H. 160, 8 Am. & Eng. R. Cas. 552, holding that the defendant company was authorized to make with the N. & L. Company such a business connection as would give the public a continuous line to Boston for Concord, but not to form a general partnership with the company named for the operation of both roads as joint principals. See also *State v. Concord R. Corp.*, 62 N. H. 375, 13 Am. & Eng. R. Cas. 94; *Philadelphia, etc., R. Co. v. State*, 58 Md. 372, 10 Am. & Eng. R. Cas. 792.

As to the rule under the English statutes, see *Campbell v. Northern R. Co.*, 26 Grant's Ch. (U. C.) 522.

5. See the titles RAILROAD POOLS; ULTRA VIRES. *Pearce v. Madison, etc., R. Co.*, 21

through freights are recognized and enforced in every jurisdiction.¹

2. What Constitutes a Partnership — *a.* IN GENERAL — If the Several Lines Are Under One Management and Control so as to constitute a "system," or have contracts by which their continuous roads are held out to the public as a "line" for through transportation, the roads constituting the line or system are jointly liable for injuries occurring to goods while being carried over their through line.²

Wherever There Is an Identity of Interest, or the companies have placed certain features of their business under one general control, although the general management of each road is retained by its owners, the companies are, as to such features of their business, partners, and liable as such.³

How. (U. S.) 441; Bissell v. Michigan Southern, etc., R. Co., 22 N. Y. 259.

1. See the cases throughout this section.

Though Freight Line Partnerships involve considerations entirely different from those involved in pooling cases. Such a partnership does not involve a joint management of the road in any sense. The management of each road is kept distinct, and is in no way affected by the partnership arrangement. The partnership relates only to through business, and each member merely contributes to the partnership its services as carrier over its line. See Philadelphia, etc., R. Co. v. State, 58 Md. 372, 10 Am. & Eng. R. Cas. 792. The objection that one company has no authority to assume liability for losses caused by another is of no force, it being well settled that a railroad company or other corporation carrier may contract to be liable over the entire route extending over various connecting lines. See *supra*, this title, *Carrier May Contract for Through Liability*. Nashua Lock Co. v. Worcester, etc., R. Co., 48 N. H. 339, 2 Am. Rep. 265; Stewart v. Erie, etc., Transp. Co., 17 Minn. 372.

Partnership Terminated by Any Member. — Where two carriers enter into a contract for the interchange of freights, but not for any fixed time, either one of the carriers may terminate it at will without previous notice to the other. Investment Co. v. Ohio, etc., R. Co., 41 Fed. Rep. 378.

2. Companies Constituting a "Line." — In Wyman v. Chicago, etc., R. Co., 4 Mo. App. 37, it appeared that several companies, of which the defendant was one, put into the "line," conspicuously advertised as the "Blue Line" to New York, certain cars painted blue, and that these cars were used as through cars, running over the roads of these companies without breaking bulk; that the companies constituting the line employed a common agent at Detroit who acted as an adjuster, keeping the mileage of the cars and settling the balances for their use; that, with the exception of this general manager of the Blue Line, the agent of each road acted for the line as did the agent in this particular case. It further appeared that the bill of lading here given was in the form then used by the line; that the freight due each road was apportioned and paid to that road out of the gross freights charged; that the defendant's agent at St. Louis (the point of shipment) had the words "Blue Line" conspicuously displayed over his office; that he used the "Blue Line" headings as advertisements, and issued through bills to the east; the bill of lading was headed, "Blue

Line," and contained a notice of the joint arrangement of the roads by which the goods were sent to the east, through, without change of cars. It was held that the facts showed clearly a partnership between the various roads constituting the line, and each was liable for a loss or injury occurring anywhere on the line. See also Phillips v. North Carolina R. Co., 78 N. Car. 294, 16 Am. Ry. Rep. 206; Rocky Mount Mills v. Wilmington, etc., R. Co., 119 N. Car. 693 ("fast freight line").

Several railroad companies forming a continuous line from an inland city to the seashore entered into an arrangement to transport cotton to the seacoast at a specified rate. The defendant company, being the one reaching the coast, published a notice stating the arrangement, and requesting shippers to take duplicate receipts and forward one of them to its agent at a designated place, "in order to fix the responsibility on this company," and guaranteeing satisfaction to all concerned. It was held that the different companies forming the line were jointly liable to one who had shipped cotton and complied with the above notice, making the defendant company liable for a loss occurring before the cotton reached its road. There being some parol evidence in which there was some conflict, it was also held that the trial court was right in submitting the case to the jury. Bradford v. South Carolina R. Co., 7 Rich. L. (S. Car.) 201, 62 Am. Dec. 411. See also Felder v. Columbia, etc., R. Co., 21 S. Car. 35, 53 Am. Rep. 656, 27 Am. & Eng. R. Cas. 264.

Where goods are accepted by a railroad company as a member of an association of lines, under a contract for through carriage, proof that it accepted a regular division of freights is sufficient to warrant a finding that it is liable on such a contract, whether it was a member of the association or not. Harris v. Cheshire R. Co., (R. I. 1889) 16 Atl. Rep. 512.

Where it appears that the contract of shipment was made with the vice-principal and agent of two connecting lines for a through shipment, and that subsequently, on receipt of the goods, bills of lading were issued by the joint agent of the two companies at the point where they were received, and also that the two companies divided the proceeds received for through shipments, there is enough to warrant a jury in finding that there was a joint contract on the part of the two companies. Swift v. Pacific Mail Steamship Co., 106 N. Y. 206, 30 Am. & Eng. R. Cas. 105.

3. Identity of Interest the Criterion. — Cincinnati, etc., R. Co. v. Spratt, 2 Duv. (Ky.) 4;

b. PARENT AND BRANCH LINES. — A parent line is liable for all losses occurring on any of its branches over which it exercises a control, but the mere fact that one company is a stockholder in the company owning and operating a connecting line does not render it liable for losses on such line, either on the theory that it controls such line or that it is a part owner.¹

c. STIPULATION AGAINST LIABILITY. — Whether any one of several lines in a partnership association may relieve itself from liability by an express stipulation in the bill of lading that it will not be liable except for losses

Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; *Wylde v. Northern R. Co.*, 14 Abb. Pr. N. S. (N. Y. Ct. App.) 213; *Barrett v. Indianapolis*, etc., R. Co., 9 Mo. App. 229; *Gulf*, etc., R. Co. *v. Edloff*, (Tex. Civ. App. 1895) 34 S. W. Rep. 410, (Tex. 1896) 35 S. W. Rep. 144. See also *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206, 30 Am. & Eng. R. Cas. 105, *affirming* 36 Hun (N. Y.) 643.

Illustrations. — Where two connecting roads have entered into and are concerned in a contract for the carrying of goods, and are jointly interested in the running of the road, in operating and managing the trains, and both share in the profits, they are liable jointly for an injury occurring on either line. *Wylde v. Northern R. Co.*, 14 Abb. Pr. N. S. (N. Y. Ct. App.) 213.

Where a steamship owner and a railway company make an arrangement for the running of the boat in connection with the railway, and dividing the through freights, and the steamship owner has the sign of the railway company over his office door, they are joint contractors with respect to through freight, and the railway company is liable for breaches of contract in the course of transportation by the steamer. *Hayes v. South Wales R. Co.*, 9 Ir. C. L. R. 474. Compare *Burroughs v. Norwich*, etc., R. Co., 100 Mass. 26, 1 Am. Rep. 78.

In an action against two railroad companies it appeared that a carload of wheat was shipped by contract with one of the defendant companies, to be transferred at a given point to another road, but in violation of the contract was transferred to the other defendant company. The complaint stated these facts, and also showed that the wheat was destroyed while in possession of the latter defendant. It was held that the averments of the complaint were sufficient to sustain the action, and that as the evidence showed that the defendants had a joint interest in the contract of transportation, a verdict and judgment against both should be sustained. *Independence Mills Co. v. Burlington*, etc., R. Co., 72 Iowa 535, 2 Am. St. Rep. 258, 32 Am. & Eng. R. Cas. 456.

In *International*, etc., R. Co. *v. Tisdale*, 74 Tex. 8, the petition, which was sworn to and not denied under oath, alleged that there was a contract for the transportation of certain freight made with the plaintiff by an agent of an initial line who was also agent for the defendants; that the defendants were connecting carriers with the initial line and had arrangements by which each acted as agent for the others in making contracts for through transportation. It appeared in proof that the initial line gave a through bill of lading; that through charges were made and were collected by the

agent of the defendants at the end of the route; and that the freight was to be carried in the same car the entire distance. It was held that the facts alleged in the petition need not be proved; that all the facts stated showed a partnership and established a joint liability on the part of the defendants with the initial line.

Statement of Rule. — In the case of *Wyman v. Chicago*, etc., R. Co., 4 Mo. App. 39, the court, after referring to the principle that a carrier may contract for transportation to a point beyond its line, said: "It may be regarded as equally well settled upon authority that if several common carriers, having each its own line, associate and form what, to the shipper, is a continuous line, and contract to carry goods through for an agreed price, which the shipper or consignee pays in one sum and which the carriers divide among them, then, as to third parties with whom they contract, they are liable jointly for a loss taking place on any part of the whole line." And the word "partners" or any particular similar word to describe the relation of the companies need not be used in the declaration or petition. Citing *Barter v. Wheeler*, 49 N. H. 25, 6 Am. Rep. 434. See also *Barrett v. Indianapolis*, etc., R. Co., 9 Mo. App. 229.

1. Parent and Branch Lines — One Company Holding Stock in Connecting Line. — *Atchison*, etc., R. Co. *v. Davis*, 34 Kan. 209, 25 Am. & Eng. R. Cas. 312, note, *overruling* 34 Kan. 199, 25 Am. & Eng. R. Cas. 305; *Atchison*, etc., R. Co. *v. Cochran*, 43 Kan. 225, 19 Am. St. Rep. 129, 41 Am. & Eng. R. Cas. 48.

In the first of these cases the court, on rehearing, held that: "Where a parent company, operating a long line of road in the state, takes the necessary steps to construct an auxiliary railroad for the purpose of a local line, in the name of another company, and in strictly pursuing the provisions of the statute merely furnishes aid as a stockholder or bondholder, or a guarantor of bonds to the auxiliary company, and such auxiliary company constructs its road in its own name, it is not the servant or agent, in such construction, of the parent company; and the parent company is not, on account of being a stockholder or bondholder or guarantor of bonds of the auxiliary company, responsible for the negligence or other default of the auxiliary company in constructing its road in its own name."

Thus, with respect to the Missouri Pacific Railway Company, every line of road operated by it is to be regarded as a part of "the line of the Missouri Pacific Railway Company" in a contract limiting its liability to such line; the restriction is of no force except as to lines not controlled by such company. *International*, etc., R. Co. *v. Anderson*, 3 Tex. Civ. App. 8.

occurring on its own line, is a question on which the authorities differ. It seems that such a limitation of liability is not unreasonable or unlawful, even where the carrier is a partner of the other lines,¹ but there is strong authority for the other view.²

d. JUDICIAL NOTICE OF ASSOCIATION OF LINES. — A court will not take judicial notice of the fact that a particular railroad is a part of a certain system of lines, where there is no proof of the contract creating the system. The locality of railroads may be so notorious and indisputable that a court will take notice of it as a physical and geographical fact of undisputed notoriety; but a court cannot judicially know what companies constitute a particular system unless the contract creating it or some similar evidence is adduced.³

2. What Does Not Constitute a Partnership — **Traffic Arrangements for Division of Receipts.** — In order to constitute an agreement between connecting lines a partnership agreement, it must be something more than a mere traffic arrangement for providing for a proper division of freight charges. Traffic arrangements for the division of freight charges, for the transfer of consignments or of cars, and for switching and similar privileges, exist between all companies whose lines meet, and in no way affect the independence of each line.⁴

1. Whether Carrier May Stipulate Against Liability for Loss on Line of a Partner. — *Phifer v. Carolina Cent. R. Co.*, 89 N. Car. 311, 45 Am. Rep. 687; *Weinberg v. Albemarle, etc., R. Co.*, 91 N. Car. 31, 18 Am. & Eng. R. Cas. 597. In the first of these cases the opinion of the court discusses the validity of such a stipulation at great length.

2. *Milne v. Douglass*, 4 McCrary (U. S.) 368, 13 Fed. Rep. 37.

3. Judicial Notice that a Company Is Part of a Particular System. — In *Miller v. Texas, etc., R. Co.*, 83 Tex. 518, which was an action against the second of several carriers to recover for the detention of goods after a tender of the freight charges due, the plaintiff introduced the deposition of one P. to show a joint undertaking between the defendant and the initial line to transport the goods from Indiana to Orange, Tex. The witness testified to an arrangement between the initial line and the Southern Pacific system for through rates. As a matter of fact, the defendant was a part of the said system, but the witness did not testify as to that fact. On motion of the defendant's counsel, the deposition was suppressed, the court holding that it could not take judicial notice of the fact that any line of railroad was a part of a general system. See also *Brown v. Piper*, 91 U. S. 37; *Georgia Pac. R. Co. v. Gaines*, 88 Ala. 377; *South, etc., Alabama R. Co. v. Pilgreen*, 62 Ala. 305; *Evansville, etc., R. Co. v. Smith*, 65 Ind. 92; *Guif, etc., R. Co. v. State*, 72 Tex. 404, 13 Am. St. Rep. 815.

4. Mere Traffic Arrangement for Division of Receipts, etc., Does Not Create a Partnership. — *St. Louis, etc., R. Co. v. Neel*, 56 Ark. 279, 55 Am. & Eng. R. Cas. 428; *Converse v. Norwich, etc., Transp. Co.*, 33 Conn. 166; *Burroughs v. Norwich, etc., R. Co.*, 100 Mass. 26, 1 Am. Rep. 78; *Wehmann v. Minneapolis, etc., R. Co.*, 58 Minn. 22; *Watkins v. Terre Haute, etc., R. Co.*, 8 Mo. App. 570; *Washington v. Raleigh, etc., R. Co.*, 101 N. Car. 239, 37 Am. & Eng. R. Cas. 25; *Fort Worth, etc., R. Co. v. Fuller*, 3 Tex. Civ. App. 340; *Fort Worth, etc., R. Co. v. Johnson*, 5 Tex. Civ. App. 24; *Galveston, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1896)

37 S. W. Rep. 243. See also *Merrick v. Gordon*, 20 N. Y. 96; *Croft v. Baltimore, etc., R. Co.*, 1 McArthur (D. C.) 492; *Straiton v. New York, etc., R. Co.*, 2 E. D. Smith (N. Y.) 184.

Illustrations. — In *Deming v. Norfolk, etc. R. Co.*, 21 Fed. Rep. 25, 16 Am. & Eng. R. Cas. 232, it was held that an agreement between connecting lines on a through route, each having exclusive control and ownership of its line, with arrangements for continuous transportation in through bills of lading at settled rates of compensation, each being, by special provisions in the bills of lading, responsible only for its own acts or omissions, does not make the carriers partners or render any one of them responsible for losses occurring not on its line. *Butler, J.*, said: "The agreement between the several railroad companies did not make them partners, nor responsible in any respect for each other's acts or contracts. They were connecting carriers on a through route, each having the exclusive ownership and control of its line, with arrangements for continuous transportation on through bills of lading, at settled rates of compensation, each being alone responsible for its own acts or omissions, as specified in the bill before us. That such agreements do not render intermediate carriers responsible for the undertakings, representations, or misconduct of the carrier who receives merchandise from a shipper seems to be so fully settled by the authorities as to leave nothing for discussion. It was the point directly involved and decided in *St. Louis Ins. Co. v. St. Louis, etc., R. Co.*, 104 U. S. 146, 3 Am. & Eng. R. Cas. 260."

In another case, there was an arrangement between several railroad companies whose lines connected with each other, by which each company agreed to carry the cars of the others having the name "Green Line" painted thereon over its own road without breakage of bulk, at such rates as might be agreed on, each company fixing its own rates of freight passing over its own road, and collecting the same as the freight passed over its road, and having no interest in freights not reaching its road. Each road desirous of making a through rate over

Association for Transportation of Through Freights. — An association between railroad companies for the transportation of through freights, the issuance of through bills of lading, and for a division of the receipts in prescribed proportions, does not constitute the companies partners nor render any one of them liable for loss or injury to a consignment occurring on another line.¹

other roads *via* these "Green Line" cars would ascertain the rates the intermediate road or roads charged, and, adding the same to its own rates, fix its own schedule of through rates, which it termed "Green Line rates." There was no joint expense, loss, or profit except that where a loss could not be located on any particular road a *pro rata* share of the loss was borne by all that carried the freight. It was held that the agreement did not constitute the companies partners; that the fact that the words "Green Line" were printed on the roof of a wharfboat and were printed also at the head of the bills of lading, the name of the railroad company being also printed on the bill, would not be material and would not estop such company from denying that there was any partnership. *Irvin v. Nashville, etc., R. Co.*, 92 Ill. 103, 34 Am. Rep. 116.

Where a Contract Between a Dispatch Company and a Railroad Company whose route, in connection with those of other companies, formed a continuous line, stipulated that the railroad should receive, load, unload, deliver, and waybill all freight sent to it by the dispatch company at such rates for the transportation as might be established by the railroad companies, and should, while assuming all the risks of a common carrier, pay for all damage to or loss of property while on its road or in its possession; and where the dispatch company entered into a similar arrangement with each of the other companies, between which there was an agreement that the amount charged for the through freight should be divided between them according to the length of their respective roads, and that on such freight the last carrier should collect the charges from the consignee, deduct its share thereof, account in the same way to the next company, and so on to the first, and that settlements were to be made by the railroad company periodically upon accountings between them, and each settled separately with the dispatch company — it was held that by the agreement the dispatch company imposed upon the railroad company neither an obligation to carry freight beyond its own road nor a liability for the negligence of either of the other companies; and that such arrangement did not constitute them partners, either as between themselves or as to third persons. *St. Louis Ins. Co. v. St. Louis, etc., R. Co.*, 104 U. S. 146, 3 Am. & Eng. R. Cas. 260.

One Company Furnishing Facilities to Another. — The defendant entered into an agreement with a short line to furnish the latter facilities for running its engines and cars over the defendant's track from R. to P., stations on the defendant's line. The plaintiff shipped certain cotton over the short line, consigned to himself at P., taking bills of lading therefor. In consequence of defendant's failure to comply with its contract, the short line was unable to carry the cotton to P., but had to throw it

off at R., where it was exposed to the weather and damaged. It was held that the contract between the companies did not constitute them partners nor make the short line the agent of the defendant to receive freight. *St. Louis, etc., R. Co. v. Neel*, 56 Ark. 279, 55 Am. & Eng. R. Cas. 428.

1. Association for Transportation of Through Freights, etc. — *Hot Springs R. Co. v. Trippe*, 42 Ark. 465, 48 Am. Rep. 65, 18 Am. & Eng. R. Cas. 562; *Gass v. New York, etc., R. Co.*, 99 Mass. 220, 96 Am. Dec. 742; *Phifer v. Carolina Cent. R. Co.*, 89 N. Car. 311, 45 Am. Rep. 687; *Fremont, etc., R. Co. v. Waters, (Neb. 1897)* 70 N. W. Rep. 225 (a "system" not a partnership).

In *Darling v. Boston, etc., R. Corp.*, 11 Allen (Mass.) 295, a similar arrangement existed. In that case several connecting carriers entered into an agreement for the through carriage of freights, providing that each succeeding carrier should pay the freight charges due the next preceding carrier, and that the last carrier should collect the whole of the charges, the accounts to be settled between the companies at stated times according to certain stipulated rates. It was held that such arrangement did not constitute a partnership between the companies, and that each company was only liable for loss or injury occurring on its own line or through its own negligence. *Darling v. Boston, etc., R. Corp.*, 11 Allen (Mass.) 295. See also *Burroughs v. Norwich, etc., R. Co.*, 100 Mass. 26, 1 Am. Rep. 78.

The case of *Bradford v. South Carolina R. Co.*, 10 Rich. L. (S. Car.) 221, was an action brought against one of three railroad companies as joint contractors for damage done to goods being transported in November, 1852. Three years previously the defendant, one of the companies, published a notice by which it made itself liable as a joint contractor with the other two. One month before the injury occurred it published another notice that it would be liable for damage to cotton after it came into its possession, but no further. The receipt given by the initial line provided: "Roads liable for such injuries only as shall be established to have occurred while in their possession." It was held that the defendants were not liable as joint contractors, and a nonsuit was ordered.

In *Ft. Worth, etc., R. Co. v. Williams*, 77 Tex. 121, 42 Am. & Eng. R. Cas. 464, the contract between the shipper, the plaintiff, and the initial company provided that the plaintiff's cattle should be shipped to a point beyond the company's line, the liability of the company to cease at the terminus of its road. From that point on, the cattle were to be carried over other lines in the same cars in which they were shipped. It was provided by statute in that state that a railroad company must, on reasonable compensation being tendered, haul the cars from other lines. It was held that

Each Company to Pay Damages in Certain Proportions, in Certain Cases. — Nor will an agreement between several distinct companies to the effect that any injury to property or persons should be paid for by the company on whose line it might occur, but if it could not be ascertained where the injury occurred then each company should pay therefor in proportion to its interest in the through charge, constitute the company partners; and in such a case, where damage occurs to freight shipped through, only the company in whose possession the goods were at the time of the injury can be held liable.¹

Continuous Lines — Shipping Association. — A company cannot be held liable as the partner of another road by which the goods were shipped, merely upon proof of the fact that the roads were continuous and that an association was engaged in shipping goods between points connected by these roads, using its own cars and employing agents distinct from those of these companies, and was in the habit of giving a through bill of lading between these points and distributing the freight receipts among the roads actually engaged in the transportation, in proportion to the amount earned by each road. Proof of such facts is no evidence of a partnership between the companies, nor is it proof that the shipping association made the contract

under these facts the defendant, the last company, was not liable for an injury occurring on another line; its action in hauling the cars would not constitute it a partner with the initial line, nor ratify the original contract, since the statute compelled it to haul such cars. See also *Gulf, etc., R. Co. v. Baird*, 75 Tex. 256.

A railroad company receiving goods for a destination beyond its line and agreeing to carry the same to the end of its line, "ready to be delivered to the party entitled to the same," and expressly providing that it will not be liable for loss or injury occurring on any other line and after the goods have left its road, is not liable for an injury not occurring on its line merely because it is a member of an association of roads over which the goods are transported where the roads and the cars therein are not owned in common and the freight receipts are divided *pro rata* per mile. *Irwin v. New York Cent. R. Co.*, 1 Thomp. & C. (N. Y.) 473, *affirmed* in 59 N. Y. 653.

Testimony by the plaintiff that the two roads in question "were connecting lines" and were "acting together at the time of shipment" is too indefinite to establish a partnership or other relation between them such as to enable the agents of one to bind the other. *Gulf, etc., R. Co. v. Williams*, 4 Tex. Civ. App. 294.

Collection of Entire Freight Charges by One Line. — In *Miller v. Texas, etc., R. Co.*, 83 Tex. 518, the petition alleged that the goods detained were delivered to a certain company which executed a bill of lading therefor by which it agreed to carry the goods to a certain station on the defendant's road; that said company and the defendant were engaged in the business of transporting freight for hire, and that, by the contract, as set out in the bill of lading, both agreed to carry the goods to the point of its destination. The court held that a joint liability on the part of the defendant with the initial line would not be presumed from the fact that the defendant received and hauled the car containing the goods and was authorized to collect the entire freight. It was held also that the allegations

of the petition, which were sworn to and were not denied under oath, would not support a finding that the defendant was a partner of the initial line. See also *Gulf, etc., R. Co. v. Baird*, 75 Tex. 256; *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 16 Am. St. Rep. 926; *International, etc., R. Co. v. Tisdale*, 74 Tex. 8.

Agreement to Share Expenses and Warehouse Facilities. — In the case of *Mohawk, etc., R. Co. v. Niles*, 3 Hill (N. Y.) 162, which was an action of assumpsit to recover of the defendants a share in transportation charges, the defendants, being engaged in the transportation of freight, etc., between New York city and various places west by way of the Hudson river and the canals, made an arrangement with the plaintiff, a railroad company, by which it was agreed that the defendants should deliver their up freight to the plaintiff at Albany and their down freight at Schenectady, the termini of the road; the company to transport the freight and passengers over its road and the defendants to pay therefor in the proportion which that thirty miles bore to the whole distance of canal transportation west of Albany, assuming the contract price fixed between the owner of the freight and the defendants as the basis of the calculation. It was held that although it was further agreed that the company should furnish "warehouse facilities" and pay a portion of the expenses of the offices at each end of its road, the arrangement did not constitute a partnership between the parties.

Evidence. — In an action against a connecting carrier for delay in the transportation of certain goods, the plaintiff having attempted to prove that the first line was merely the defendant's agent, the defendant may show in rebuttal that it charges such line full rates for shipments received from it, and this although the contract between the plaintiff and the initial line may show otherwise. *Wells v. Battle*, 5 Tex. Civ. App. 532.

1. *Aigen v. Boston, etc., R. Co.*, 132 Mass. 423, 6 Am. & Eng. R. Cas. 426. See also *Shiff v. New York Cent., etc., R. Co.*, 16 Hun (N. Y.) 278.

of shipment as agent for the defendant company.¹

Community of Profits. — In all such cases, although in some of them the companies were doing business through a common agent,² or were regulating some features of their business by a joint committee,³ there was no joint expense, no joint property, no joint funds, nor any agreement to share profits or losses. A community of profit being the essence of a contract of partnership, no such contract exists where it is wanting.⁴

XIII. RIGHTS AND LIABILITIES AS TO CHARGES — Rule Stated. — The rule in regard to charges seems to be that each connecting carrier is entitled to charge its regular rates for transportation over its line, and is not bound by the action of any previous carrier unless it had authorized such carrier, by special agreement or otherwise, to act for it.⁵

Nor Is the Lien of the Last Carrier Affected by the wrongful action of prior lines of which it was ignorant, where it appears to have acted in good faith.⁶

1. *Watkins v. Terre Haute, etc., R. Co.*, 8 Mo. App. 569, 1 Am. & Eng. R. Cas. 614.

2. See *Ellsworth v. Tartt*, 26 Ala. 733, 62 Am. Dec. 749.

3. *Straiton v. New York, etc., R. Co.*, 2 E. D. Smith (N. Y.) 184.

4. *Irvin v. Nashville, etc., R. Co.*, 92 Ill. 103, 34 Am. Rep. 116.

5. *Wells v. Thomas*, 27 Mo. 17, 72 Am. Dec. 228 (last carrier allowed to recover his charges although in excess of the amount fixed by the first carrier in the contract with the shipper).

Rights of Connecting Carriers Inter Se as to Charges. — In the case of *New York, etc., R. Co. v. National Steamship Co.*, 137 N. Y. 23, *affirming* (Supreme Ct.) 17 N. Y. Supp. 28, 14 N. Y. Supp. 253, 60 Hun (N. Y.) 577, the defendant steamship company, one of several connecting carriers carrying cotton from Texas to Liverpool, was sued by the plaintiff, the last of the land carriers, in an action brought to recover the freight charges advanced by it to prior carriers and also those due it for its own share. It appeared that the plaintiff had carried the cotton and deposited it on the wharf, preparatory to delivering it to the defendant, but the cotton was burned before actual delivery. It appeared further that the defendant had never undertaken to become liable for freight charges advanced by the preceding carriers until the goods had been loaded on its vessel, and that such was the usage and custom of the port. It was held that the plaintiff was not entitled to recover anything under such circumstances and that the defendant was entitled to a peremptory charge.

In *Georgia, R., etc., Co. v. Smith*, 83 Ga. 626, S., the proprietor of a railroad company (the W. & A. Ry.), agreed with the defendant, the Georgia R. & B. Co., for the shipment of iron over the two roads at a fixed rate during a year. S. then contracted with the shipper of the iron to give him that rate indefinitely. At the expiration of the year the defendant restored its former rate and S. then brought this action to recover the charges made by the defendant in excess of that fixed by the original contract. It was held that the defendant was not bound by the contract of S. with the shipper, but only by its own agreement, which was for one year only, and that S. could not recover.

6. **Lien of Connecting Carriers.** — See the title *CARRIERS OF GOODS*, vol. 5, p. 154. See also *Patten v. Union Pac. R. Co.*, 29 Fed. Rep. 590; *Price v. Denver, etc., R. Co.*, 12 Colo. 402.

Though a shipper may have entered into a contract with the initial carrier for the through transportation of live stock at an agreed rate for the entire distance, he cannot insist upon the stock being delivered to him by a connecting carrier at the place of destination upon tendering merely the amount of the agreed rate unless he can show that the initial carrier was authorized to make the contract fixing the rate for itself and the connecting line. *Lewis v. Richmond, etc., R. Co.*, 25 S. Car. 249.

A shipper of horses who is present and permits a carrier to receive his horses from a preceding carrier and advance the charges due thereon to the preceding carrier, so as to acquire a lien on the horses for that amount, cannot set off against such lien damages sustained by the horses through the fault of the prior line, although the connecting carrier may have known of such damages and may have known that the shipper intended to demand compensation therefor of the prior carrier. *St. Louis, etc., R. Co. v. Lear*, 54 Ark. 399, 55 Am. & Eng. R. Cas. 414.

In *Southern Kansas R. Co. v. Duncan*, 40 Kan. 503, which was an action of replevin to recover a desk held by the defendant company for freight charges, it appeared that the desk had been shipped from Pittsburg to H. via a named road. It was not delivered to this last road, but to the defendant instead, who received and carried it in good faith. It was held that the defendant company had received the desk in due course of business, although it was not originally intended to go over its line, and that it could assert its lien for charges.

Prepayment of Freight. — Under the *North Carolina* statute (Code, § 1963) providing that carriers may insist upon the payment of freight charges in advance, a railway company may refuse to receive a shipment tendered by a connecting line unless the freight charges are first paid. And this right is not affected by the fact that the company insisting upon it has accepted such shipments from other lines without requiring prepayment, if the prior line had notice that prepayment would be required. *Randall v. Richmond, etc., R. Co.*, 108 N. Car. 612.

Special Agreements as to Through Traffic now exist between nearly all lines of railway, but in the absence of such an agreement any subsequent connecting line has a right to fix its own charges for the transportation over its line, and the owner of the goods cannot recover of it an excess of such charges over the charges fixed in the bill of lading, nor can he insist upon a delivery of his goods upon his tendering merely the charges named in the bill issued by the initial line.¹

Payment of Preceding Carrier's Charges — Recovery of Whole Amount from Owner. — Any carrier along the route may pay to the preceding carrier all charges due up to that point and recover the amount of such advances, together with its own charges, from the owner of the goods shipped.² But no intermediate carrier is obliged to advance charges due to a preceding line, or to assume the payment of such charges, unless bound by some usage or custom to which it has assented.³

Guaranty of Through Rate by First Carrier. — Where a railroad company delivers to a shipper a bill of lading guaranteeing a certain rate over connecting lines, it holds itself out to the shipper as authorized to enter into a binding contract on behalf of the connecting carriers, and if their charges exceed the rate guaranteed, it is liable for the amount of the excess.⁴

1. Recovery of Charges in Excess of Those Agreed Upon with the Initial Carrier. — In the absence of proof that the first company was authorized to bind the connecting carrier by a contract to carry at a fixed price, a consignee who is charged freight in excess of that specified by the bill of lading issued by the initial carrier cannot maintain an action to recover back the excess from the final carrier. *Mt. Pleasant Mfg. Co. v. Cape Fear, etc., R. Co.*, 106 N. Car. 207, 42 Am. & Eng. R. Cas. 498; *Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56 (remedy of consignee is against the initial company). See also *Little Rock, etc., R. Co. v. Daniels*, 49 Ark. 352, 32 Am. & Eng. R. Cas. 479; *Detroit, etc., R. Co. v. McKenzie*, 43 Mich. 609, 9 Am. & Eng. R. Cas. 15.

The Texas Statute (Laws 17th Leg., 35) imposes a penalty upon any railroad company for refusing to deliver a shipment to a consignee upon his tendering the charges specified in the bill of lading. Such a statute is not unconstitutional as being a regulation of interstate commerce, although applied to a shipment passing through several states. In an action by a consignee to recover the penalty named, the defense was that the defendant company, the last carrier, was not bound by the bill of lading issued by the initial carrier, it having received the goods in ignorance of the terms of the bill, and the initial carrier being without any authority to contract for it. It appearing that the Rev. Stat. Texas, art. 4251, compels a railroad company to receive and carry all freight tendered by a connecting line, the court held that the defendant company was not liable for the penalty; that it was not bound by the through bill of lading, the initial line having no power to bind it, and that the acceptance and transportation of the goods, being compulsory under the statute, could not be considered as a ratification by it of the original bill of lading. *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 16 Am. St. Rep. 926, 84 Tex. 194, 55 Am. & Eng. R. Cas. 442, reversing 32 Am. & Eng. R. Cas. 461. See also the title CARRIERS OF GOODS, vol. 5, p. 154.

Division of Charges. — When one of two connecting carriers collects the charges for the entire distance at the rate allowed by law, the sum so collected should be divided between the two carriers upon equitable principles, the relative proportion of the transportation done by each being an important factor in determining how the division should be made. See *Ackley v. Chicago, etc., R. Co.*, 36 Wis. 252, 9 Am. Ry. Rep. 112.

Payment of Charges Due Preceding Carrier. — In *Canfield v. Northern R. Co.*, 18 Barb. (N. Y.) 586, it was held that where goods are shipped to a certain party in care of a railroad company, the company receiving them is liable to the first carrier for the freight thereon; and when the owner of the goods refuses to pay the freight on account of the loss of a portion of the goods, the railroad company cannot adjust the matter of damages, but must pay the freight actually earned on the goods delivered to it. But see the second note following.

2. May Pay Back Charges and Recover Same of Owner. — *Bissel v. Price*, 16 Ill. 408; *White v. Vann*, 6 Humph. (Tenn.) 70, 44 Am. Dec. 294.

An intermediate carrier, having advanced the charges of a preceding carrier who transported the goods under an independent contract, becomes subrogated to the rights of the latter and may recover such advances although he fails to perform his own contract; and the fact that his bill of lading is for transportation and delivery upon payment of freight and charges does not affect his right. *Western Transp. Co. v. Hoyt*, 69 N. Y. 230, 25 Am. Rep. 175.

3. Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co., 51 Fed. Rep. 465, 51 Am. & Eng. R. Cas. 145. See also *New York, etc., R. Co. v. National Steamship Co.*, 137 N. Y. 23, affirming 62 Hun (N. Y.) 621, 43 N. Y. St. Rep. 361.

4. Initial Carrier Guaranteeing a Rate Over Connecting Lines. — *Little Rock, etc., R. Co. v. Daniels*, 49 Ark. 352, 32 Am. & Eng. R. Cas. 479. In this case the bill of lading provided:

CONNIVANCE. (See also the title **DIVORCE**.) — “Connivance” is an agreement or consent, directly or indirectly given, that something unlawful shall be done by another.¹

CONQUEST. — See note 2.

CONSANGUINITY. (See also the titles **INCEST**; **MARRIAGE**; **SUCCESSION**. And see **AFFINITY**, vol. 1, p. 911; **KINDRED**; **RELATIONSHIP**.) — “Consanguinity” is the relation of persons descended from the same stock or common ancestor.³

CONSCIENCE. — “Conscience” is internal or self knowledge, or judgment of right and wrong; or the faculty, power, or principle within us, which

“It is understood that railroads connecting with this line recognize this bill of lading and will settle freight bill accordingly.” It further provided: “Rates and delivery guaranteed only from Fort Smith to Waterville, Me. Cotton \$1.07 per 100 lbs.” The court held that this was an unqualified guaranty and rendered the carrier making it liable for the failure of the connecting lines to make the rate agreed. *Citing Killian v. Ashley*, 24 Ark. 517, 91 Am. Dec. 519. *Compare Fry v. Louisville, etc., R. Co.*, 103 Ind. 265, 22 Am. & Eng. R. Cas. 442. See also *Baltimore, etc., R. Co. v. Wilkens*, 44 Md. 11, 22 Am. Rep. 26.

Where the connecting line refuses to accept the goods at the guaranteed rate the initial carrier making the rate is entitled to notice of the refusal, and if no such notice is given it is liable only for the difference between the agreed rate and that demanded by the connecting carrier. *Tardos v. Chicago, etc., R. Co.*, 35 La. Ann. 15.

Compare Little Rock, etc., R. Co. v. Odom, 63 Ark. 326. In this case, the contract of shipment provided that the defendant, the initial line, should not be liable “for anything beyond” its own line “excepting to protect the through rate of freight named herein.” The last connecting carrier refused to deliver the consignment except upon the payment, by the consignee, of a greater rate of freight. It was held that the defendant was not liable for this conversion of the consignment by the last carrier. See also *Sherman, etc., R. Co. v. Beebe*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1102. In that case the defendant company, the initial line, had guaranteed a fixed rate of freight. While the goods were in transit they were sold by the shipper, and, by his order, diverted to a new destination. It was held that the shipper had no right of action to recover for charges made in excess of the guaranteed rate.

1. *Oakland Sav. Bank v. Wilcox*, 60 Cal. 137.

3. **Scotch Law.** — *Conquest*, when used as a verb active, and not as a noun, has a wide and flexible signification. Where a woman, by antenuptial settlement, had conveyed to trustees whatever she might ‘conquest or acquire’ during her marriage, it was held that those words passed property of every kind which came to her during the marriage by succession. *Diggins v. Gordon*, L. R. 1 H. L. Sc. 136.

3. 2 Black. Com. 203, quoted in *Rector v. Drury*, 3 Pin. (Wis.) 302.

Consanguinity is the having the blood of some common ancestor. *Blodget v. Brinsmaid*, 9 Vt. 30.

Succession. — In holding that, by the civil law, the rules of which are to be used in determining who are the next of kin, the grandfather of the decedent is in the second degree, and the aunt in the third, the court, Bradford, surrogate, said: “*Consanguinity* is the connection or relation of persons descended from the same stock or common ancestor.” *Swezey v. Willis*, 1 Bradf. (N. Y.) 495.

Same — Collateral and Lineal. — So Woodward, C. J., held that in *Pennsylvania*, under the Intestate Act of April 8, 1833, the next of kin are to be ascertained by the rules of the civil law, saying: “*Consanguinity* is either lineal or collateral. Lineal is that which subsists between persons of whom one is descended in a right line from the other. Every generation in this direct lineal *consanguinity* constitutes a degree. * * * Collateral *consanguinity* is that which subsists between persons who lineally descend from the same ancestor, who is the *stirps* or root, but who do not descend the one from the other.” *McDowell v. Adams*, 45 Pa. St. 430.

Consanguinity and Affinity Distinguished. — In dissenting from the general opinion of the court that a father-in-law is a competent witness, under the Civ. Code, 312, art. 248, which declares “that all persons above fourteen years of age, free, of a sound mind, and not rendered infamous, may be witnesses of any fact, * * * provided that the husband cannot be a witness for or against the wife, nor the wife for or against the husband, neither can ascendants with respect to their descendants, nor descendants with respect to their ascendants,” Martin, J., said: “*Consanguinity* is the basis of the laws which regulate the degrees between which marriage is forbidden, the rules of succession and tutorship, the recusal of judges, and the admission or rejection of persons who are offered as witnesses. Affinity is the basis of the same laws, with the exception of those which regulate successions.” *Bernard v. Vignaud*, 10 Martin (La.) 482.

Judge. — In *Arkansas* it has been held that degrees of affinity are computed in the same way as those of *consanguinity*, and that therefore a judge whose wife is the aunt of the wife of one of the parties to a cause cannot sit at the trial of the cause, under the 16th section of chapter 50 of the Digest, which declares that “No judge of the circuit court, etc., shall sit on the determination of any cause or proceeding in which he is interested, or related to either party within the fourth degree of *consanguinity* or affinity, or shall have been of counsel, without consent of parties.” *Kelley v. Neely*, 12 Ark. 657. See also the title **JUDGE**.

decides on the lawfulness or unlawfulness of our own actions and affections, and instantly approves or condemns them. Conscience is called by some writers the moral sense, and considered as an original faculty of our nature.¹

CONSCIOUS. — Having a knowledge of anything in a way to enable an opinion to be formed of its character.²

CONSENT. (See the titles **CONTRACTS**; **WAIVER**. As to consent to surgical operations, see the title **PHYSICIANS AND SURGEONS**. As to jurisdiction by consent, see the title **JURISDICTION**.) — Consent means unity of opinion, the accord of minds, the agreement to something proposed.³

1, *People v. Stewart*, 7 Cal. 144, in which case it was held, where a juror was asked if he had *conscientious* scruples against capital punishment, and he answered that he was opposed to capital punishment on principle, that it was error to sustain the challenge for cause; the court holding that there was a distinction between *conscience* and principle. See also the title **JURY AND JURY TRIALS**; and see **PRINCIPLE**.

Rights of Conscience. — See the titles **CONSTITUTIONAL LAW**; **RELIGIOUS LIBERTY**.

2, **Conscious of What He Is Doing.** — A charge of the lower court as follows: "If he [the prisoner] had power of mind enough to be *conscious* of what he was doing at the time, then he was responsible to the law for that act," was held not to be error; the court, Agnew, C. J., saying: "It is contended this language was incorrect, and was liable to mislead the jury, because the prisoner might be *conscious* of what act he was doing, and yet, in consequence of mental disability or disease, be incapable of refraining from its commission. But the charge has a plain English meaning, referring to the nature of the act, and when taken in connection with other parts of the charge, this portion is not susceptible of misconstruction. All the judge said referred plainly not to the mere act, but to the prisoner's *consciousness* of what he did as a crime. The phrase '*conscious* of what he was doing' is idiomatic, and is understood to mean the real nature and true character of the act as a crime, and not to the mere act itself. As used by the judge in connection with what else he said, it was not contradictory or misleading. A memorable instance of this idiomatic use of the word 'what' is found in the language of our Saviour on the cross, when he said, 'Father, forgive them; for they know not what they do.' Clearly the Jews knew well that they were crucifying Jesus, but their darkened minds were unconscious of the great crime they were committing." *Brown v. Com.*, 78 Pa. St. 122. See also the title **INSANITY**.

3, *Huntley v. Holt*, 58 Conn. 449; *Geddes v. Bowden*, 19 S. Car. 1; *Plummer v. Com.*, 1 Bush (Ky.) 78.

In *Dicken v. Johnson*, 7 Ga. 492, it is said: "*Consent*, says Story, is an act of reason, accompanied with deliberation; the mind weighing, as in a balance, the good and evil on both sides."

Duress, Fraud, etc. (See also the titles **DURESS**; **FRAUD**; **MISTAKE**.) — In *Butler v. Collins*, 12 Cal. 463, the court said: "It is said that the owner *consented* to the taking; and, were that so, it would undoubtedly be a sufficient answer. But *consent*, in law, is more than a mere formal act of the mind. It is an

act unclouded by fraud, duress, or sometimes even mistake."

Consent Distinguished from Submission. (See also **SUBMISSION**.) — In *State v. Cross*, 12 Iowa 70, the court said: "And then again there is a wide difference between *consent* and *submission*. *Consent* involves submission, but a mere submission by no means necessarily involves *consent*. For it might be admitted, in most cases, that the submission of an adult female to such an outrage, necessarily proved *consent*. The mere submission of a child, however, in the power of a strong man, can by no means be taken to be such *consent* as to justify the prisoner in point of law."

Assent and Consent. — In *Omer v. Com.*, 95 Ky. 353, the appellate court in an instruction which used the word "assent" with the *consent* of the defendant to the commission of the crime, said that the distinction between the words "assent" and *consent* in this connection was imperceptible.

And that *consent* is a synonym of "assent," see *Hawkins v. Carroll County*, 50 Miss. 758.

In *Clem v. State*, 33 Ind. 431, it is said: "*Consent*, as a substantive, is the synonym of 'assent,' 'acquiescence,' 'concurrence,' and means an agreement or harmony of opinion or sentiment."

But in *Kornegay v. Styron*, 105 N. Car. 18, and in *Geddes v. Bowden*, 19 S. Car. 1, it is said that *consent* and "assent" are not synonymous.

Active Consent — Divorce. (See also the title **DIVORCE**.) — A statute provided that the party deserted should not be entitled to a divorce unless the desertion was without his or her *consent*. In *Ford v. Ford*, 143 Mass. 578, the court said: "But we apprehend that, in the one case as in the other, 'without the *consent*' means without the manifested *consent*, and that the undisclosed emotions of the deserted party do not affect his rights."

Same — Consent of Qualified Voters. (See the titles **CONSTITUTIONAL LAW**; **COUNTIES**; **ELECTIONS**; **MUNICIPAL AID**, etc.) — The Constitution of Tennessee provided that no part of a county should be taken off without the *consent* of two-thirds of the qualified voters in such part. In *Cocke v. Gooch*, 5 Heisk. (Tenn.) 310, the court said: "The word *consent* here means the active concurrence, and cannot be substituted for by a passive acquiescence."

Implied Consent — English Statute. — An act for the ease of debtors with respect to the imprisonment of their bodies provided that the sheriff should not take a person arrested to a tavern, without his free and voluntary *consent*, so as to charge him. It was held that *consent* in this connection meant active and not an implied

CONSENT JUDGMENTS AND DECREES.—See the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, titles *DECREES*, vol. 5, p. 960; *JUDGMENTS*.

consent. Dewherst *v.* Pearson, 2 L. J. Exch. 143; 1 Crompt. & M. 365; 3 Tyrw. 342; 1 Dowl. 664. So, where a debtor was being conveyed illegally to jail, and, to avoid imprisonment, consented to go, it was held that the consent was not free and voluntary. Barsham *v.* Bullock, 10 Ad. & El. 23, 37 E. C. L. 23. See also *VOLUNTARY*. See generally the title *IMPLIED CONTRACTS*.

Subsequent Consent — Approbation.—Where a testator provided that if his daughter should marry with the *consent* and approbation of A. his property should go to her husband, but made a different disposition of the property if she should marry without such *consent* or approbation, it was held that the *consent* could not be subsequent to the marriage though the approbation might. Clarke *v.* Parker, 19 Ves. Jr. 21.

Same — Joint Consent — Homestead. (See also the title *HOMESTEAD*.)—A statute provided that the homestead should not be alienated without the *consent* of both husband and wife. In construing this statute the court, in Howell *v.* McCrie, 36 Kan. 645, said: "Is this the act of 'joint *consent*' as required? The usual and legal signification of the word *consent* implies assent to some proposition submitted. In cases of contract it means the 'concurrence of wills.' *Consent* supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of these powers. In the very nature of things, *consent* to the alienation must precede the act of conveyance. The husband must have made a proposition to the wife, or the wife to the husband, or a purchaser to both, to alienate the homestead, and the mind of the husband and of the wife must have concurred, and they must have jointly consented to the execution of the conveyance, or the creation of the lien, both assenting and both signing the instrument before delivery." See also Ott *v.* Sprague, 27 Kan. 620.

Carriers of Goods — Absolute Consent.—In Missouri, etc., *R. Co. v. Carter*, 9 Tex. Civ. App. 677, it is said: "The law, as we have seen, deems it the best policy that the carrier should bear the general liability of an insurer, except where his customer *consents* to bear a part of the risk, in which case it seems to contemplate that the terms upon which such *consent* is given will guard and preserve the public interest. But the *consent* meant is certainly not a constrained submission to terms imposed — not a *consent* extorted by what the law characterizes as 'duress,' nor what is practically, as society is organized, the same thing; but it is what Mr. Pomeroy calls an 'absolute *consent*;' a *consent* that implies a physical, intellectual, and moral power, freely and deliberately exercised. *Consent* of a different kind may be, and often is, all that is required to make a contract binding at law, and even in equity; but it cannot make a contract fair, just, or reasonable." See also the title *CARRIERS OF GOODS*, vol. 5, p. 288.

Mechanics' Liens — Consent of Owner. (See the title *MECHANIC'S LIEN*.)—A statute provided for a lien where services are rendered or ma-

terials furnished by *consent* of the owner of the land. The court said: "*Consent* means the unity of opinion, the accord of minds; to think alike, to be of one mind. *Consent* involves the presence of two or more persons; for without at least two persons there cannot be an unity of opinion, or an accord of minds, or any thinking alike. When the statute uses the words, 'by the *consent* of the owner of the land,' it means that the person rendering the service or furnishing the materials, and the owner of the land on which the building stands, must be of one mind in respect to it." Huntley *v.* Holt, 58 Conn. 449.

Same — Sub-Contract.—Where a contractor sublets a contract it has been held that the materials and services rendered under the latter contract are furnished by *consent* of the owner. Moore *v.* Erickson, 158 Mass. 71; Eastwood *v.* People, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 25, affirmed in 14 N. Y. 562; Carroll *v.* State, 5 Neb. 31.

But in Geddes *v.* Bowden, 19 S. Car. 1, it was held that the owners of railroad property could not be said to have given their *consent* to the furnishing of labor and materials by a sub-contractor. The court said: "If the labor or materials are furnished by virtue of an agreement with the owner, there is no difficulty in the way. What is *consent* in the sense of the Act? There must be a debt by *consent* of the owner. '*Consent* is an agreement to something proposed, and differs from assent.' Bouvier's Law Dict., '*Consent*.' 'We generally use this word in cases where power, rights, and claims are concerned. We give *consent* when we yield that which we have a right to withhold.' Webster's Dict. It seems to me, therefore, that in this section the word *consent* is used in the sense of agreement or contract, if not express, at least implied. Any other construction of the Act would seem to be injurious to the interest of those whom the law was intended to protect, and work great hardships to those who are making improvements on their lands."

Consent in Criminal Law.—See the title *CRIMINAL LAW*. For its application to special crimes, see the particular criminal titles, such as *ASSAULT AND BATTERY*, vol. 2, p. 986; *PRIZE FIGHTING*; *RAPE*, etc.

Aid and Abet — Consent to a Crime. (See also the title *AIDER AND ABETTOR*, vol. 2, p. 32. In True *v.* Com., 90 Ky. 651, it was held that the words "*consent* to" did not suitably express the idea of aiding and abetting. The court said: "The words 'approve of' and '*consent* to' do not, singly or combined, express the idea of wilful contribution to or procurement of a felonious act, which is necessary to constitute guilt."

In White *v.* People, 81 Ill. 337, the court said: "By the second instruction the jury are told that one who stands by when a crime is committed in his presence by another, and *consents* to the perpetration of the crime, is a principal in the offense, and must be punished as such. The law is, that one who 'stands by and aids, abets or assists * * * the perpe-

CONSEQUENCES.—See note 1.

CONSEQUENTIAL.—See note 2

CONSEQUENTIAL DAMAGES.—See the titles DAMAGES; EMINENT DOMAIN.

CONSERVATOR OF THE PEACE.—See such titles as JUSTICE OF THE PEACE; POLICE DEPARTMENT; SHERIFFS, etc.

CONSIDER.—“Consider” is defined as, “to fix the mind on with a view to a careful examination; to revolve, to think over, to ponder.”³

tration of the crime,’ is an accessory, and ‘shall be considered as principal,’ etc. Rev. Stat. 1874, p. 393, § 274. There is a plain distinction between *consenting* to a crime and ‘aiding, abetting, or assisting’ in its perpetration. Aiding, abetting, or assisting are affirmative in their character. *Consenting* may be a mere negative acquiescence, not in any way made known at the time to the principal malefactor. Such *consenting*, though involving moral turpitude, does not come up to the meaning of the words of the statute. The words of the statute are stronger than those of the instruction.”

1. **A Marine Policy** contained the following warrant: “Warranted free from capture, seizure, and detention, and all the *consequences* thereof, or of any attempt thereat, and free from all *consequences* of hostilities, riots, or commotions.” It was held that *consequences* meant proximate *consequences*. *Ionides v. Universal Marine Ins. Co.*, 14 C. B. N. S. 259, 108 E. C. L. 259. See the title MARINE INSURANCE.

Natural Consequences.—In *Skinner v. Hughes*, 13 Mo. 440, the court said: “By natural *consequences*, it is not meant that they should be such as would upon calculation of chances be likely to occur, or such as extreme prudence might anticipate; but ‘such as have actually ensued without the occurrence of any such extraordinary conjunction of circumstances, as that the usual course of nature has been departed from.’” As to the liability of one for the natural consequences of his acts, see the titles CRIMINAL LAW; NEGLIGENCE.

Proximate Consequences.—See the titles DAMAGES; PROXIMATE AND REMOTE CAUSES.

2. **Consequential Injuries—Eminent Domain.** See the title EMINENT DOMAIN.)—In *Pennsylvania R. Co. v. Marchant*, 119 Pa. St. 541, it is said: “Just here it is proper to say there is not a word about *consequential* injuries in the constitution. The word itself has acquired a broad, popular meaning, by which many persons may be misled. In judicial proceedings it should be used intelligently, and with due regard to its proper meaning. In its application to the constitution, we understand it to mean an injury to a man’s property, the natural and necessary result of the construction or enlargement of its works by a corporation; an injury of such certain character that the damages therefor can be estimated, and paid or secured in advance, as provided in the constitution.”

Trespass and Trespass Vi et Armis. (See ENCYC. OF PLEADING AND PRACTICE, title TRESPASS.)—It has been said that if an injury occasioned by an act be immediate and direct it is trespass *vi et armis*; if *consequential*, tres-

pass on the case. Upon the meaning of the terms “immediate” and *consequential*, the court, in *Jordan v. Wyatt*, 4 Gratt. (Va.) 154, says: “The terms ‘immediate’ and *consequential* should, as I conceive, be understood not in reference to the time which the act occupies, or the space through which it passes, or the place from which it is begun, or the intention with which it is done, or the instrument or agent employed, or the lawfulness or unlawfulness of the act; but in reference to the progress and termination of the act, to its being done on the one hand, and its having been done on the other. If the injury is inflicted by the act, at any moment of its progress, from the commencement to the termination thereof, then the injury is direct or immediate; but if it arises after the act has been completed, though occasioned by the act, then it is *consequential* or collateral, or, more exactly, a collateral *consequence*.”

3. *McLorinan v. Bridgewater Tp.*, 49 N. J. L. 616. In that case it was held, where a statute provided that any person who should have resided in any township for the period of ten years should be *considered* legally settled in said township, that the legislature expressed the design to introduce a new condition upon which a legal settlement might be acquired; and that when such condition was found to exist, an absolute settlement, and not one *prima facie*, was established. The court, after quoting the definition given in the text, said further: “But the legislature is not required to use words in a law in their stricter and more accurate sense. They are supposed to use words as they are commonly used and understood. But if they disregard the lexicographer, or use words inappropriately, still, if they in their context convey a clear meaning to those charged with the duty of interpretation, that meaning is the expression of the law. It is, however, by no means to be conceded that the term subjected to *consideration* is ill-chosen. The Act speaks to those whose duty it is to pass judgment upon the question of settlement, and in declaring what shall be the determination upon certain facts found, it cannot be amiss to do so in language such as courts of record uniformly adopt in recording their solemn judgments. ‘*Ita consideratum est per curiam*,’ serves to conclusively determine issues of law and fact.”

Warranty.—The bill of sale of a horse contained the words “*considered* sound.” It was held that the words did not import a warranty of soundness. The court said: “It would be putting a very liberal construction upon words, and giving great latitude to construction, to say that that was an assertion or undertaking that the horse was sound.” *Wason*

CONSIDERABLE. — See note 1.

v. Rowe, 16 Vt. 528. See also the title HORSES.

Consider — Construction. — On the question of the maturity of a corn crop a witness was asked whether he *considered* the corn ripe at a certain time. The court said: "The argument upon the two objections above cited is that the question was, not what was *considered* by farmers, but what the fact was as to the maturity of the crop. It is apparent that there should be no reversal on account of these rulings. The use of the word *consider* neither misled the jury nor the witnesses. In the connection in which the word occurs in the questions it is used as synonymous with 'thought' or 'believed,' and is not objectionable." *Richards v. Knight*, 78 Iowa 71. See generally the title EXPERT AND OPINION EVIDENCE.

1. Instruction — Considerable. (See the titles HOMICIDE; SELF-DEFENSE.) — An instruction that the provocation necessary to reduce a killing to manslaughter must be *considerable*, was held not erroneous, although the court did not define the term *considerable*. *Lewis v. Com.*, 93 Ky. 238.

Considerable Provocation. — Mere words, however opprobrious, cannot be said to constitute the *considerable* provocation contemplated by the statute relating to assaults to murder, and to inflict bodily harm. If, therefore, words used will not reduce a homicide from murder to manslaughter, they will not constitute such a provocation as to destroy the intent necessary to the commission of an assault with intent to murder. *Steffy v. People*, 130 Ill. 98.

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CROSS-REFERENCES.

As to matters of PROCEDURE, see the following titles in the ENCYCLOPÆDIA OF PLEADING AND PRACTICE: *ASSUMPSIT*, vol. 2, p. 987; *BONDS*, vol. 3, p. 635; *CARRIERS*, vol. 3, p. 812; *CONTRACTS*, vol. 4, p. 913; *COVENANT*, vol. 5, p. 342; *DEBT*, vol. 5, p. 894; *DEFINITENESS AND CERTAINTY IN PLEADINGS*, vol. 6, p. 246; *NEGOTIABLE INSTRUMENTS*; *REAL PROPERTY*.

As to other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 65; CONTRACTS; DEEDS; EVIDENCE; ILLEGAL CONTRACTS; IMPLIED CONTRACTS; IMPOSSIBLE CONTRACTS; PAROL EVIDENCE; SEALS.

I. DEFINITION AND GENERAL PRINCIPLES — 1. Definition. — The consideration of a contract or deed is that which the law regards as the motive or inducement for the making of it.¹

2. Consideration and Motive Distinguished. — But the consideration of the contract may be very different from the true motive which actuated the parties in making it. Although the receipt of the consideration is the usual motive, it is not always the only motive and sometimes constitutes no part of it at all. This will be readily seen from a casual perusal of the following pages. But motive, pure and simple, is in law no part of the consideration. Feelings of affection, gratitude, or beneficence may be the moving cause of a contract, and yet the receipt of the nominal consideration by the promisor will be regarded by the law as his only motive.²

3. Different Kinds of Consideration. — Considerations may be variously distinguished according to their nature, their power to sustain contracts, and the time of their rendition or performance.

In Respect to Their Nature, considerations are either valuable, equitable or moral, or good: Valuable, when they consist of something which the law deems of value;³ equitable or moral, when founded upon a legal obligation which has become unenforceable;⁴ good, when founded upon love or affection between

1. Definition of Consideration. — The consideration is the reason which moves the contracting party to enter into the contract. 2 Bl. Com. 443.

A consideration is a cause or occasion meritorious requiring a mutual recompense in deed or in law. 5 Vin. Abr., p. 405.

The consideration of a promise is a thing given or done by the promisee in exchange for the promise. Langdell's Summary of the Law of Contracts, § 45.

The inducement or compensation for something promised or done; the material cause which moves a party to agree; something that deserves and is to receive a recompense. Abbott's Law Dict.

2. Consideration and Motive Distinguished. —

"It is, however, not to be doubted that there is a clear distinction sometimes between the motive that may induce to entering into a contract, and the consideration of the contract. Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promisor's undertaking. An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is 'the cause or meritorious occasion requiring a mutual recompense in fact or in law.' Surely a creditor may do a favor to his debtor, or may enter into a new and independent contract with him, induced by which the debtor may assent to giving a note for the previously existing indebtedness. Without the favor or the new contract there is in such a case a full consideration for the note, and the parties may not have contemplated that the favor or the new contract was to be paid for. To regard them as entering into the consideration of the note would be to make a contract for the parties to which their

minds never assented." *Per* Strong, J., in *Philpot v. Gruninger*, 14 Wall. (U. S.) 570.

In debt there is practically no distinction between consideration and motive, but in assumpsit the consideration need not in fact constitute the whole, or even any part, of the motive for making the promise. Thus, in the common case where the consideration is received by a third person and inures wholly to his benefit, it would be an abuse of terms to say that the consideration is the promisor's motive for making the promise; his true motive being a desire either to confer a benefit upon the person who receives the consideration, or to obtain from the latter some advantage for himself. But even when the consideration is received directly by the promisor, the latter may be induced to make the promise by something wholly different. In other words, it may be clear that the promise would never have been made if the consideration had been the only inducement to make it. It must not be supposed, however, that motive, as distinguished from consideration, can constitute any element of a contract, or that it is a thing of which the law can strictly take any notice. On the contrary, as every consideration is in theory equal to the promise in value, so it is in theory the promisor's sole inducement to make the promise. As the law cannot see any inequality in value between the consideration and the promise, so it cannot see any motive for the promise except the consideration. Langdell's Summary of Law of Contracts, § 60.

3. See *infra*, this title, *Valuable Considerations*.

4. See *infra*, this title, *Necessity and Sufficiency of Consideration — Simple Contracts — Moral Considerations — Sufficiency When Founded upon an Antecedent Legal Obligation*.

near relations.¹

In Respect to the Time of Their Rendition or Performance, considerations are either concurrent, executory, executed, or continuing: Concurrent, when the passing of the consideration and the giving of the promise are simultaneous; executory, when the consideration is to arise after the making of the promise; executed, when the consideration precedes the promise; and continuing, when it both precedes and succeeds it.²

Other Classifications. — Considerations may be also divided according to the medium of their proof, into express considerations and implied considerations;³ in respect to their legality, into legal considerations and illegal considerations;⁴ and in respect to their capability of performance, into possible considerations and impossible considerations;⁵ but these classifications are too obvious to require definition.

II. NECESSITY AND SUFFICIENCY OF CONSIDERATION — 1. Simple Contracts — a. NECESSITY OF CONSIDERATION — (1) *In General*. — It is a fundamental principle of the law of contracts that every simple promise or agreement, in order to be enforceable, must have a consideration to support it, for, however strongly a man may be bound in conscience to fulfill his engagements, the law recognizes not their sanctity nor supplies any means to compel their performance, except when founded upon a sufficient consideration.⁶

1. See *infra*, this title, *Good Considerations*.
2. See *infra*, this title, *Time of Rendering or Performing the Consideration*.
3. See *infra*, this title, *Evidence*.
4. See *infra*, this title, *Illegal Considerations*.
5. See *infra*, this title, *Impossible Considerations*.
6. *Necessity of Valuable Consideration — Simple Contracts — England*. — Rann v. Hughes, 7 T. R. 346, note a; Forth v. Stanton, 1 Saund. 210; Britten v. Webb, 3 D. & R. 650, 2 B. & C. 483, 9 E. C. L. 154.
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H. 493; Lang v. Johnson, 24 N. H. 302; Gordon v. Gordon, 56 N. H. 170.
New Jersey. — Perrine v. Cheeseman, 11 N. J. L. 174, 19 Am. Dec. 388; Drake v. Lanning, 49 N. J. Eq. 452.
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North Carolina. — Ray v. Wilcoxon, 107 N. Car. 514.
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Ohio. — Hunter v. Field, 20 Ohio 340.
Pennsylvania. — McPherson v. Rees, 2 P. & W. (Pa.) 521; Kennedy v. Ware, 1 Pa. St. 445, 44 Am. Dec. 145; Thum's Estate, 5 Pa. Dist. Rep. 739.
South Carolina. — M'Kinney v. Quilter, 4 McCord L. (S. Car.) 409; Pope v. Fort, 2 McMull. L. (S. Car.) 60; Sanders v. Bagwell, 32 S. Car. 238; Coggeshall v. Coggeshall, 1 Strobh. L. (S. Car.) 43; Singleton v. Bremer, Harp. L. (S. Car.) 201.
Tennessee. — Roper v. Stone, Cooke (Tenn.) 497; Whitson v. Fowlkes, 1 Head (Tenn.) 533, 73 Am. Dec. 184; Clark v. Small, 6 Yerg. (Tenn.) 418; Tagg v. State Nat. Bank, 9 Heisk. (Tenn.) 479.
Texas. — Chevallier v. Wilson, 1 Tex. 161.
Vermont. — Sowles v. Sowles, 10 Vt. 181; Card v. Curtis, 14 Vt. 236; Manwell v. Briggs, 17 Vt. 176.

The Reason of the Rule rests upon expediency, for, when it is considered how lightly and thoughtlessly gratuitous promises are often made, it is deemed better to let them rest upon the mere integrity and good faith of the parties who made them, rather than by subjecting them to the compulsory authority of the law to bind men to ruinous engagements into which they may have been hastily and inconsiderately drawn.¹

Virginia. — *Mosby v. Leeds*, 3 Call (Va.) 439; *Beverleys v. Holmes*, 4 Munf. (Va.) 95; *Colgin v. Henley*, 6 Leigh (Va.) 85.

West Virginia. — *Sturm v. Parish*, 1 W. Va. 125.

Hawaii. — *Bankruptcy of Spencer*, 6 Hawaiian 134.

For other authorities, see the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 186.

A consideration of some sort or other is so absolutely necessary to the forming of a contract that a *nudum pactum*, or agreement to do or pay anything on one side without any compensation on the other, is totally void in law; and a man cannot be compelled to perform it.

As, if one man promises to give another £100, here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however a man may or may not be bound to perform it in honor or conscience, which the municipal laws do not take upon themselves to decide, certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for; and therefore our law has adopted the maxim of the civil law, that *ex nudo pacto non oritur actio*. 2 Bl. Com. 445.

In *Mills v. Wyman*, 3 Pick. (Mass.) 207, Parker, C. J., delivering the opinion of the court, says: "If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the interior forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well-disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity. Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect

obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them. A deliberate promise in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity."

Louisiana—Civil-law Doctrine.—In Louisiana, where the civil law of France is followed, a contract to be enforceable need not have a consideration, but must have a cause. Art. 1887 of the Civil Code provides that "an obligation without a cause, or with a false or unlawful cause, can have no effect." In contracts of mutual interest, the cause of the engagement is the thing given or done, or engaged to be given or done, or the risk incurred by one of the parties; and in contracts of beneficence, the liberality which one of the parties wishes to extend to the other is a sufficient consideration. But when an engagement has no cause or consideration, or, what is the same thing, where the cause for which it is contracted is false, the engagement is null and the contract based on it is also null and cannot be enforced by action. *Mouton v. Noble*, 1 La. Ann. 192.

1. Reason of the Rule. — *Smith on Contracts*, p. 168.

In *Blount v. Blount*, 2 Law Repos. (N. Car.) 587, Taylor, C. J., referring to the distinction as regards the necessity of a consideration between simple contracts and specialties, says: "The distinction between a deed and a parol contract is well settled at common law and upon the basis of sense and justice. The inconsiderate manner in which words frequently pass from men would often betray them into acts of imprudence, and not unfrequently expose them to the artifices of fraud, were they not placed under the safeguard of that rule which denies validity to a parol contract unsupported by a consideration. On the other hand, the ceremonies which accompany a deed imply reflection and care, and serve to enable a man to avoid either surprise or imposition."

In *Eastwood v. Kenyon*, 11 Ad. & El. 438, 39 E. C. L. 137, Lord Denman, C. J., referring to the reason of the rule, says: "The eminent counsel who argued for the plaintiff in *Lee v. Muggeridge*, 5 Taunt. 36, spoke of Lord Mansfield as having considered the rule of *nudum pactum* as too narrow, and maintained that all promises deliberately made ought to be held binding. I do not find this language ascribed

(2) *Illustrations of Gratuitous Promises.* — Although this principle has long been too well settled to admit of doubt, its application has nevertheless been a fruitful source of litigation.¹ It would be unnecessary, if not impossible, to

to him by any reporter, and do not know whether we are to receive it as a traditional report or as a deduction from what he does appear to have laid down. If the latter, the note to *Wennall v. Adney*, 3 B. & P. 249, shows the deduction to be erroneous. If the former, Lord Tenterden and his court declared that they could not adopt it in *Littlefield v. Shee*, 2 B. & Ad. 811, 22 E. C. L. 187. Indeed, the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it. The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult."

Gifts for Charitable and Educational Purposes. — A consideration is no less essential in the case of a promise to give to a charity than in any other case. The maxim *ex nudo pacto non oritur actio* applies to both. *Thum's Estate*, 5 Pa. Dist. Rep. 739.

A promissory note made in aid of a fund for the support of a minister of a parish, was held void for want of a consideration. *Boutell v. Cowdin*, 9 Mass. 254.

A promise to pay a certain sum to a university to be used exclusively to liquidate an indebtedness of the university, but if used for any other purpose the sum to be refunded to the donor, was held to be without consideration, though the sum was used to create a fund for said liquidation. *Johnson v. Otterbein University*, 41 Ohio St. 527.

Gift of Donor's Own Bill or Note. — The principle that a consideration is necessary to support a simple contract applies to the case of gifts of negotiable instruments. The donor's own note or bill of exchange is not a good subject of gift either *inter vivos* or *causa mortis*. Such a gift is but a promise to pay a sum certain at a future day and cannot be enforced either at law or in equity. See the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 194; and also the title **GIFTS**.

1. A Voluntary Promise by the Holder of a Note to one of its joint and several makers who has partly paid it, that he will look for payment of the residue to the other maker, is not binding. *Smith v. Bartholomew*, 1 Met. (Mass.) 276, 35 Am. Dec. 365.

Nor is the holder's voluntary promise not to call on one of two obligors for any more than half the amount of the bond. *Lemaster v. Burckhart*, 2 Bibb (Ky.) 27.

Neither is a voluntary promise to release a party from liability on a note. *Maness v. Henry*, 96 Ala. 454.

Nor is a voluntary promise made by the payee of a note to the surety thereon to sue the principal. *Mendel v. Cairnes*, 84 Ind. 141.

An Agreement After Maturity of a Note to pay it at a particular place is not enforceable unless there is a new consideration to support it. *Colter v. Greenhagen*, 3 Minn. 126.

Nor is an agreement by the payee to accept the sum in monthly payments. *Pfeiffer v. Campbell*, 111 N. Y. 631.

An Agreement to Extend the Time of Payment of a Note or the performance of a contract is not binding unless founded on a sufficient consideration, and is no bar to a suit brought before the expiration of the time given. *Gross v. Steinle*, 20 D. C. 339; *Thalman v. Barbour*, 5 Ind. 178; *Stryker v. Vanderbilt*, 27 N. J. L. 68; *Babcock v. Kuntzsch*, (Supreme Ct.) 32 N. Y. Supp. 663, 85 Hun (N. Y.) 615; *Bixler v. Ream*, 3 P. & W. (Pa.) 282; *Gibson v. Irby*, 17 Tex. 173; *Stickler v. Giles*, 9 Wash. 147; *Bankruptcy of Spencer*, 6 Hawaiian 134.

Promise to Pay Note After Release by Laches of Holder. — A promise by an indorser to pay a bill or note from which he has been released by the laches of the holder, is without consideration and void. *May v. Coffin*, 4 Mass. 341; *Freeman v. Boynton*, 7 Mass. 483. Compare *Johnson v. Geoffrion*, 7 L. C. J. 125, 13 L. C. Rep. 161.

Where One Who Is Surety for Another Gives a Promissory Note in discharge of the obligation in its original form, and the obligation has already been discharged by the principal debtor, the surety being ignorant of the fact, the note so given by the latter is without consideration, whether the maker had or had not inquired of the principal debtor to ascertain whether the original debt still subsisted or had been paid. *Pettyjohn v. Liebscher*, 92 Ga. 149.

Addendum to Sealed Note. — To a sealed note the following addendum was made after its execution and delivery: "The above note is to be accounted for with interest at eight per cent. per annum." It was held that the addendum not being under seal, no recovery could be had thereon unless a consideration were shown. *Sanders v. Bagwell*, 37 S. Car. 145.

Giving Note for One-half Difference Between Gold and Legal Tender Notes. — The defendant being indebted to the plaintiff upon a promissory note payable in gold, paid the debt in full legal tender notes and executed to the plaintiff another note for one-half the difference between the value of legal tender notes and gold. It was held that there was no consideration for this last note. *Turner v. Young*, 27 Ind. 373, 89 Am. Dec. 508.

Giving Note Payable in Gold in Renewal of Note Payable in Treasury Notes. — Where the maker of a promissory note, which is payable in United States Treasury notes, not being able to meet the same at maturity, gives another note to his creditor, payable in gold, in order to secure the latter against any loss by reason of the depreciation of treasury notes after the maturity of the original note, and before its

set forth all the cases of gratuitous promises, the enforcement of which has from time to time been sought; but in the note below will be found some of the most striking instances which will serve as illustrations of the principle.

payment, the second note given for such purpose will be without consideration. *Gates v. Hackethal*, 57 Ill. 534, 11 Am. Rep. 45.

Note Given by Indorser to Acceptor of Bill. — A promissory note in the usual form, given by an indorser to an acceptor of a bill, for the amount of the bill, after its payment by the acceptor, is not enforceable unless such indorsement was made for the purpose of saving the acceptor harmless from his acceptance, and the note was given in pursuance of that understanding. *Sowerwein v. Jones*, 7 Gill & J. (Md.) 335.

A Promise to Release a Debt is not the same thing as an actual release, and if there is no sufficient consideration for the promise to release, the promise is *nudum pactum*. *McNutt v. Loney*, 153 Pa. St. 281.

A Promise Not to Levy an Execution on property on which the judgment was a lien, is void for want of consideration. *Merchants' Bank v. Davis*, 3 Ga. 112; *Union Bank v. Govan*, 10 Smed. & M. (Miss.) 333.

A Voluntary Agreement to Take Less than the Amount of a Disputed Debt without payment is not binding. *Bryan v. Brazil*, 52 Iowa 350.

Agreement of Cestui Que Trust to Accept Less than Amount Due Him by His Trustees. — Trustees charged with the support of the testator's imbecile son invested the property in Confederate bonds, which became worthless, and refused to furnish any further support; whereupon the son, who was then twenty-two, agreed to abate one-third of the principal which the trustees were ordered by the will to pay to him at the age of twenty-five. It was held that this agreement could not be enforced, for want of consideration. *Knight v. Watts*, 26 W. Va. 175.

A Promise by a Debtor to Pay His Debt to a Third Person is not enforceable unless the creditor has released the debtor or assigned the debt to such third person. *Phalan v. Stiles*, 11 Vt. 82.

A Judgment Creditor's Agreement voluntarily made, to attend a sale of his debtor's property under the execution and make it bring the amount of the indebtedness, is not binding. *Baer v. Christian*, 83 Ga. 322.

A Promise by an Attorney to His Client during the suit, to indemnify him against the consequences of it, is without consideration and will not support an action. *Mitchell v. Bell*, Conf. Rep. (N. Car.) 17, 2 Am. Dec. 627.

A promise by a solicitor in chancery to pay the costs of a suit instituted by him, without any consideration for such promise, is *nudum pactum*, and cannot be enforced against him. *Files v. McLeod*, 14 Ala. 611.

Where an Attorney Received a Claim for Collection and was directed to retain out of the moneys collected a sum due him; and the owner afterwards assigned the whole claim to another, and the attorney promised to pay it to the latter, it was held that the attorney might, notwithstanding, retain the amount due to him, his promise being *nudum pactum*. *Taylor v. Bates*, 5 Cow. (N. Y.) 376.

An Agreement by the Cashier of a Bank with one not to take notes with the latter's name on them as surety unless they contain the names of other sureties who are solvent, is without consideration. *North Atchison Bank v. Gay*, 114 Mo. 203.

Note Given to Widow for Debt Due Husband's Estate. — A, being deeply in debt, delivered a slave to B, to sell and hold the proceeds. After A's death, his widow applied to B for the money from the sale of the slave, and B gave her his promissory note for the amount. In an action upon the note, it was held that there was no consideration therefor, as the money belonged to A's representatives. *Bryan v. Philpot*, 3 Ired. L. (N. Car.) 467.

Giving Note and Mortgage When No Debt Existed. — A advanced money to his son B, who was to support him and his wife for life for the use of it. B died, and A, of his own motion, went to live with a grandson, C, who took care of him at his own request, and not at that of B's executors or for their benefit. But C procured from them notes and a mortgage which he claimed were given to pay him for keeping the old people. A had no personal claim against the executors, and never proved his claim against the estate or assigned it to C, and it was neither paid nor suspended. It was held that the securities did not represent a debt and should be given up and canceled, and a perpetual injunction was granted against their enforcement. *Teed v. Marvin*, 41 Mich. 216.

Giving Note for Loss for Which Maker Was Not Responsible. — The treasurer of a savings bank gave his note to the bank, secured by an assignment of an insurance policy on his life, to make up to the bank a loss on loans for which he was neither morally nor legally responsible. It was held that the note was without consideration and void. *Dexter Sav. Bank v. Copeland*, 77 Me. 263.

Giving Note for Fine After Serving Alternative Term of Imprisonment. — The defendant was convicted of being a common seller of intoxicating liquor and was sentenced to pay a fine of one hundred dollars and costs, and in default of payment to stand committed according to law. The law thus referred to fixed the term of imprisonment at sixty days. After the defendant had undergone imprisonment for sixty days, he gave his note to the treasurer for the amount of the fine and was released. It was held that the note was void for want of a consideration, as the defendant had offset the fine by undergoing the imprisonment. *Rollins v. Lashus*, 74 Me. 218.

Voluntary Promise Not to Revoke Legacy. — A promise on the part of a testatrix to let a legacy stand and remain for another's benefit at her death cannot be enforced against her estate, without clear proof, by direct and positive testimony, of a sufficient consideration. *King's Estate*, 150 Pa. St. 143.

Promise to Pay Wages After Their Forfeiture. — The defendant hired the plaintiff on the terms that if he should be drunk during service, he

b. SUFFICIENCY OF CONSIDERATION — (1) Consideration Must Be Valuable. — Not only must there be a consideration to support every simple con-

should forfeit all wages then due. The plaintiff was drunk during the continuance of the service, and so forfeited his wages, but the defendant waived the forfeiture and promised to pay him. It was held that the defendant's promise was void for want of consideration. *Monkwan v. Shepherdson*, 11 Ad. & El. 411, 39 E. C. L. 130.

Promise of Maker of Void Mortgage to Pay Rent. — A mortgage of the homestead by husband and wife, the voluntary signature and assent of the wife not being shown and certified as required by law (Code, section 2822), is a mere nullity, and has no operation against the husband, by estoppel or otherwise; and a subsequent promise by him, after default, to pay rent to the mortgagee, no surrender or change of possession being shown, is without consideration, and does not create the relation of landlord and tenant between them. *Strauss v. Harrison*, 79 Ala. 324.

Promise to Pay Taxes on Property Not Assessed. — Taxes cannot be imposed or collected save in the mode prescribed by law, and an express promise to pay taxes on property which has escaped taxation, which taxes have never been placed on the tax duplicate, is void. *State v. Illyes*, 87 Ind. 405.

Promise of Widow to Pay Out of Insurance Policy Premiums Paid by Third Party. — The brother of the plaintiff's testator took out an insurance policy in favor of his wife. The testator paid the premiums upon this policy to the amount of eight hundred and fifty dollars, and held the policy as security for the same. Upon the death of the insured it was agreed between the widow, the testator, and the agent of the insurance company, that the company should pay the amount of the policy to the widow less the amount of the premiums paid by the testator, for which amount check should be remitted to him. The widow afterwards demanded of the company the full amount of the policy which was paid to her. In an action upon the agreement it was held that the promise was without consideration and void. *Sullivan v. Sullivan*, 99 Cal. 187.

Promise to Pay for Deficiency of Land in Deed. — Where land is sold and described in a deed as "supposed to contain" a certain quantity, and a deficiency is afterwards discovered, there is no obligation on the grantor to compensate the grantee for such deficiency, and a promise to pay for the same is without consideration and will not support an action of assumpsit. *Smith v. Ware*, 13 Johns. (N. Y.) 257.

Promise to Person Supposed to Be Acting as Promisor's Agent. — Where the owner of property, believing that another who had been trying to sell such property on speculation for his own benefit alone, was really acting as his agent in the matter, accordingly promises to compensate him for his trouble, such promise is without consideration and is void. *Washburne v. Pintsch*, 17 Fed. Rep. 582.

An Oral Promise, by a Purchaser at a Foreclosure Sale under a power-of-sale mortgage made to the mortgagor before the purchaser has re-

ceived a deed from the mortgagee, that, if the mortgagor wishes, the purchaser will sell the premises back to the mortgagor for what they cost, does not bind the purchaser by way either of contract or of trust. *Rose v. Fall River Five Cents Sav. Bank*, 165 Mass. 273.

Warranty of Quality of Article Sold. — Where a party has sold and delivered an article of a stipulated quality, and at a given price, an agreement to warrant it of better quality, without any further consideration, is a *nudum pactum*. *McDugald v. McFadgin*, 6 Jones L. (N. Car.) 89.

Gratuitous Agreement Regarding Settlement of Title to Property. — The plaintiff, an outgoing postmaster, owned a letter-case, which he had used in the office. The defendant, his successor in office, insisted that it should be turned over to him with the other furniture of the office, claiming that it belonged to the government. It was agreed that the defendant might take it, and the plaintiff should write to the Post Office Department, and, if the department did not claim it, the defendant should re-deliver it to him. It was held that there was no consideration for the agreement, and the plaintiff might at any time demand the case. *Smith v. Force*, 31 Minn. 119.

An Assignment of Choses in Action, without valuable consideration, designed to take effect at the death of the assignor, and where such choses in action are not delivered until after the assignor has become insane, passes no title to the assignees. *Lonsdale's Estate*, 29 Pa. St. 407.

Payment for Lands out of Their Profits. — An agreement to convey lands in consideration of the purchaser's paying for them out of the profits of the lands is void. *Dorsey v. Packwood*, 12 How. (U. S.) 126.

A contract by one to transfer to his son certain plantations as soon as the latter should pay the cost of the same, it being the intention that such payment should be made from the profits of the plantations themselves, was deficient in mutuality and a *nudum pactum*. *Beall v. Clark*, 71 Ga. 818.

Promise by Purchaser at Sheriff's Sale. — A purchaser at a sheriff's sale afterwards promised the wife of the debtor to secure to her the balance, if any, of the price he should obtain for the property, after reimbursing himself. It was held that the promise was *nudum pactum* and void. *Heathman v. Hall*, 3 Ired. Eq. (N. Car.) 414.

Promises Made by a Husband After the Death of His Wife to pay to certain of her relations money to the amount that she brought him at the marriage — such marriage having taken place when the money of the wife became the property of the husband — are without consideration and cannot be enforced against his estate. *Murphy's Estate*, 11 Phila. (Pa.) 2.

Option upon Real Estate. — In an action for specific performance of an option contract to purchase real estate, it appeared that the plaintiff paid the defendant A five dollars for an option on a certain lot at any time before November 1, 1886. Subsequently A made a ver-

tract, but the consideration itself must be valuable.¹ It need not consist of money, though it is usually, but not necessarily, something which is convertible into or is measurable by it; but at all events it must be something the value of which the law considers capable of estimation.

What Constitutes Value in the eye of the law will hereafter be more fully considered,² but in general terms it may be said to consist either in some right, interest, profit, or benefit accruing to the party who makes the promise, or some forbearance, detriment, loss, responsibility, act, labor, or service given, suffered, or undertaken by the other to whom it is made.³

bal extension of the time in the written option to December 1, 1886. On November 9th A sold the lot to the defendant B. Between that date and December 1st the plaintiff tendered A the sum agreed upon in the option and demanded a deed, which was refused. It was held that there was no consideration for the extension of time, it was *nudum pactum* and unenforceable. *Coleman v. Applegarth*, 68 Md. 21, 6 Am. St. Rep. 417.

A written agreement to give A the refusal of a farm, with no agreement on the part of A to take it, and no other consideration, is void. *Burnet v. Bisco*, 4 Johns. (N. Y.) 235.

The purchaser at an execution sale of real estate gave the defendant in the execution a written promise to reconvey upon the payment of a specified sum by a day made, but the defendant did not bind himself to make such payment, and the promise was founded on no consideration. It was held that the promise for a reconveyance was a mere gratuity, giving the defendant option to redeem, but no vested interest. *Mers v. Franklin Ins. Co.*, 68 Mo. 127.

Stipulation in Bills of Lading Exempting Carrier from Liability or Limiting Amount of Recovery. — In order to render operative a stipulation in a bill of lading exempting a common carrier from certain liabilities, or limiting the amount of recovery in case of loss or damage through its negligence, there must be a concession in rates or some other consideration given therefor. See the title CARRIERS OF GOODS, vol. 5, p. 298.

A Release to the Master from Liability for Personal Injuries Received by an Employee must be supported by a consideration; and a stipulation for employment thereafter for such time as may suit the master is not a sufficient consideration. *Gulf, etc., R. Co. v. Winton*, 7 Tex. Civ. App. 57. And see generally the title MASTER AND SERVANT.

Promise to Give Turn at Mill. — Where the owner of a rice mill, who had a turn at his own mill, agreed to let a customer have it, and there was no particular inducement shown, or other explanation given, it was held that the agreement was a *nudum pactum*. *Ashe v. Derosset*, 8 Jones L. (N. Car.) 240.

Granting of Annuity. — The plaintiff's intestate, out of mere regard for the defendant, granted her an annuity of three hundred dollars a year. Afterwards, a mortgage was made from the defendant to the plaintiff's intestate, for the interest upon which the former reserved a certain part of the annuity each year. Upon a bill to foreclose the mortgage, it was held that the plaintiff was entitled to recover the amount of the mortgage and full interest,

that the annuity was a mere gratuity and the application of it to the payment of the interest was in effect a bare forgiveness of so much of the debt, which was void for want of a consideration. *Tulane v. Clifton*, 47 N. J. Eq. 351.

The Defendant Purchased a Quantity of Tin in Boxes for the Plaintiff, at his request, and delivered it to him in the same condition unopened. Afterwards, upon the boxes being opened, it was found that the tin was damaged; and the defendant, being informed of this fact, promised the plaintiff to make him an equitable allowance therefor. It was held that such promise was void for want of consideration. *Hawley v. Farrar*, 1 Vt. 420.

1. See cases to the note *Necessity of Valuable Consideration* — *Simple Contracts*.

2. See *infra*, this title, *Valuable Considerations*.

3. **What Constitutes a Valuable Consideration** — *England*. — *Williamson v. Clements*, 1 Taunt. 523; *Mather v. Maidstone*, 18 C. B. 273, 86 E. C. L. 273; *Currie v. Misa*, L. R. 10 Exch. 162.

Canada. — *Brownell v. Raworth*, 21 New Bruns. 11.

United States. — *Townsley v. Sumrall*, 2 Pet. (U. S.) 170.

Alabama. — *Holt v. Robinson*, 21 Ala. 106, 56 Am. Dec. 240; *Maull v. Vaughn*, 45 Ala. 134.

Arkansas. — *Logan v. Lee*, 10 Ark. 585.

Colorado. — *Dyer v. McPhee*, 6 Colo. 174.

Connecticut. — *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79; *Clark v. Sigourney*, 17 Conn. 511.

Georgia. — *Tompkins v. Philips*, 12 Ga. 52; *Tillinghast v. Banks*, 14 Ga. 649; *Molyneux v. Collier*, 17 Ga. 46.

Illinois. — *Buchanan v. International Bank*, 78 Ill. 500; *Doyle v. Knapp*, 4 Ill. 334.

Indiana. — *Shaffer v. Ryan*, 84 Ind. 140.

Louisiana. — *Benner v. Van Norden*, 27 La. Ann. 473.

Massachusetts. — *Hubbard v. Coolidge*, 1 Met. (Mass.) 84; *Adams v. Wilson*, 12 Met. (Mass.) 138, 45 Am. Dec. 240; *Forster v. Fuller*, 6 Mass. 58, 4 Am. Dec. 87; *Perley v. Balch*, 23 Pick. (Mass.) 283, 34 Am. Dec. 56; *Train v. Gold*, 5 Pick. (Mass.) 380; *Cottage St. M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286; *Crombie v. McGrath*, 139 Mass. 550.

Missouri. — *Carr v. Card*, 34 Mo. 513.

New Hampshire. — *Underhill v. Gibson*, 2 N. H. 352, 9 Am. Dec. 82.

New Jersey. — *Day v. Gardner*, 42 N. J. Eq. 199; *Conover v. Stillwell*, 34 N. J. L. 54.

New York. — *Miller v. Drake*, 1 Cai. (N. Y.) 45.

North Carolina. — *Watkins v. James*, 5 Jones L. (N. Car.) 105; *Findly v. Ray*, 5 Jones

(2) *Good or Meritorious Considerations* — **Affection or Gratitude.** — It follows, as a natural consequence from the foregoing statement, that a good or meritorious consideration will not suffice to support a simple contract. A promise founded upon considerations of affection or gratitude is deemed in law a mere beneficence and cannot be the foundation of a legal action.¹

(3) *Moral Considerations* — (a) **Insufficiency in General.** — For like reasons, a pre-existing moral or conscientious obligation on the part of the promisor to do the thing promised, as, for instance, to make amends for an injury which the promisor is morally bound to repair, is not a sufficient consideration for his promise to do it.² Although this doctrine has been occasionally criticised and was seemingly not strictly recognized in some of the earlier cases,³ it is now settled beyond doubt and seems correct on principle, for to hold otherwise would destroy or render illogical the whole doctrine of consideration. If an antecedent moral obligation were held to be sufficient to support an express promise, there would seem to be no valid reason to deny the sufficiency of a subsequent moral obligation, or that duty to fulfill a promise which arises

L. (N. Car.) 125; *Brown v. Ray*, 10 Ired. L. (N. Car.) 72, 51 Am. Dec. 379; *New Hanover Bank v. Bridgers*, 98 N. Car. 67, 2 Am. St. Rep. 317.

Pennsylvania. — *Harlan v. Harlan*, 20 Pa. St. 393.

Vermont. — *Sampson v. Swift*, 11 Vt. 315; *Holley v. Adams*, 16 Vt. 206, 42 Am. Dec. 508.

A Detriment to the Promisee constitutes as good a consideration as a benefit to the promisor. *Lane v. Mallory*, Hob. 4; *Williamson v. Clements*, 1 Taunt. 523; *Townsley v. Sumrall*, 2 Pet. (U. S.) 170; *Forster v. Fuller*, 6 Mass. 58, 4 Am. Dec. 87; *Underhill v. Gibson*, 2 N. H. 352, 9 Am. Dec. 82; *New Hanover Bank v. Bridgers*, 98 N. Car. 67, 2 Am. St. Rep. 317.

Sufficiency of Consideration a Question of Law. — What constitutes a sufficient consideration for a contract is a question of law. *Applewhite v. Allen*, 8 Humph. (Tenn.) 697.

1. Good or Meritorious Consideration — **Affection or Gratitude** — *England.* — *Holliday v. Atkinson*, 5 B. & C. 501, 11 E. C. L. 286.

Illinois. — *Kirkpatrick v. Taylor*, 43 Ill. 207; *Williams v. Forbes*, 114 Ill. 167.

Maryland. — *Pennington v. Gittings*, 2 Gill & J. (Md.) 208.

New York. — *Hadley v. Reed*, (Supreme Ct.) 12 N. Y. Supp. 163; *Duvoll v. Wilson*, 9 Barb. (N. Y.) 487; *Fink v. Cox*, 18 Johns. (N. Y.) 145, 9 Am. Dec. 191.

Pennsylvania. — *Kennedy v. Ware*, 1 Pa. St. 445, 44 Am. Dec. 145.

Vermont. — *Smith v. Kittridge*, 21 Vt. 238.

2. Moral Obligation Not a Valuable Consideration — *England.* — *Beaumont v. Reeve*, 8 Q. B. 483, 55 E. C. L. 483.

Indiana. — *Eakin v. Fenton*, 15 Ind. 59.

Iowa. — *Nightingale v. Barney*, 4 Greene (Iowa) 106.

New Jersey. — *Udike v. Titus*, 13 N. J. Eq. 151.

New York. — *Geer v. Archer*, 2 Barb. (N. Y.) 420; *Nash v. Russell*, 5 Barb. (N. Y.) 556; *Ehle v. Judson*, 24 Wend. (N. Y.) 97.

Tennessee. — *Bates v. Watson*, 1 Sneed (Tenn.) 376; *Parker v. Cowan*, 1 Heisk. (Tenn.) 518.

In *Beaumont v. Reeve*, 8 Q. B. 483, 55 E. C. L. 483, a woman declared in assumpsit against a man, averring that the defendant had

seduced and debauched the plaintiff, and induced her to cohabit with him, whereby she had been injured in her character and deprived of the means of procuring an honest livelihood; that the two had agreed to discontinue the immoral connection and live apart; and that the defendant, as a compensation for the injury and in consideration of the premises, undertook to pay the plaintiff a yearly sum towards her maintenance, which he had failed to do. It was held a bad declaration, since the moral obligation on the part of the defendant to provide for the woman was not a sufficient consideration.

3. Moral Obligation Held to Be a Sufficient Consideration. — It cannot be denied that many distinguished judges have laid down the principle that moral obligation is alone a sufficient consideration to support a contract. Thus did Lord Mansfield in *Cowper* 288, 544. He was followed by Mr. Justice Buller, by Lord Ellenborough, and other judges, in other cases. But it was an obvious remark, that the cases cited in illustration of those positions were all cases where a prior legal obligation had existed, but by reason of some statute, or stubborn rule of law, it could not be enforced; as a promise to pay a debt barred by bankruptcy, or the statute of limitations, or a promise by an adult to pay a debt contracted during minority. In all these instances, a good consideration existed; for each had received a benefit. All the cases on this subject are carefully, and with just discrimination, revised, in a note in *Wennall v. Adney*, 3 B. & P. 249, and the true distinctions taken. *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79.

In *Wells v. Horton*, 2 C. & P. 383, 12 E. C. L. 184, Best, C. J., lays down the broad proposition that a moral obligation is a sufficient consideration for a promise; but upon reference to the facts of the case, it is to be observed that this was a case in which there was a precedent legal obligation which had been barred by the statute of limitations.

In *Turner v. Vaughan*, 2 Wils. 339, and *Scott v. Carruth*, 9 Yerg. (Tenn.) 418, an antecedent moral obligation was held to be a sufficient consideration; and in *Barlow v. Smith*, 4 Vt. 144, and *Glass v. Beach*, 5 Vt. 172, there are *dicta* to that effect.

from the deliberate making of it.¹

(b) **Sufficiency When Founded upon an Antecedent Legal Obligation** — *aa*. STATEMENT OF THE EXCEPTION. — This rule is, however, subject to exception when the duty is not purely conscientious but arises from an antecedent legal obligation which has been suspended by some positive rule of law,² or is founded upon some legal right which the promisee has allowed to escape through mistake or by his dependence upon the promisee.³

bb. ILLUSTRATIONS — (*aa*) *Debt Barred by Statute of Limitations*. — Thus, a debt barred by the statute of limitations furnishes a sufficient consideration for a new

1. *Mills v. Wyman*, 3 Pick. (Mass.) 207.

2. **Antecedent Legal Obligation** — *England* — *Eastwood v. Kenyon*, 11 Ad. & El. 438, 39 E. C. L. 137.

Connecticut. — *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79.

Indiana. — *Wiggins v. Keizer*, 6 Ind. 252.

Maryland. — *Ellicott v. Turner*, 4 Md. 476.

Massachusetts. — *Mills v. Wyman*, 3 Pick. (Mass.) 207.

New York. — *Watkins v. Halstead*, 2 Sandf. (N. Y.) 311; *Geer v. Archer*, 2 Barb. (N. Y.) 424; *Smith v. Ware*, 13 Johns. (N. Y.) 257.

Rhode Island. — *Shepard v. Rhodes*, 7 R. I. 470.

Vermont. — *Hawley v. Farrar*, 1 Vt. 420.

In *Mills v. Wyman*, 3 Pick. (Mass.) 207, Parker, C. J., delivering the opinion of the court, said: "It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some pre-existing obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such pre-existing equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a *quid pro quo*; and according to the principles of natural justice the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises therefore have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience."

3. **Antecedent Legal Right**. — The plaintiff purchased lands of the defendant, and the latter filed his bill in chancery to enforce the vendor's lien and obtained a decree *pro confesso* and an order of sale. The plaintiff, before the

sale, complained that there was a mistake in the calculation, but was told by the defendant to settle on the basis of the decree, and if it turned out to be wrong he would correct it by returning the excess. Upon this, the plaintiff paid the amount of the decree, which was about five hundred dollars in excess of what was due. The defendant subsequently refused to pay the amount. It was held that the duty to allow the credit was a moral obligation, and that this moral obligation originating from a positive legal duty, to which he could have been held before the decree, was sufficient to support his express promise to refund. *Turlington v. Slaughter*, 54 Ala. 195.

An Agreement by a Judgment Creditor that he would allow upon the judgment the amount which, prior to the judgment, he had received towards the debt, is founded upon a sufficient consideration. *Thayer v. Mowry*, 36 Me. 287.

Where Money Has Been Paid, and a Receipt Taken, and afterwards the party to whom it was paid brings an action for the same money, and recovers through the omission of the defendant to produce the receipt in his defense, a subsequent promise by the plaintiff in that action, that if the defendant had the receipt, he would refund the money, is a valid promise, of which the moral obligation to repay the money is the consideration. *Bentley v. Morse*, 14 Johns. (N. Y.) 468.

When the Plaintiff in a Foreclosure Proceeding Fails to Credit Payments made on the mortgage debt and takes a decree for the entire amount, but afterwards promises the defendant to refund the amount of such payments, the defendant may maintain an action thereon. *Doyle v. Reilly*, 18 Iowa 108, 85 Am. Dec. 582.

The defendant was the county treasurer of Crawford county for the year 1874. He settled his accounts, and the auditors' reports thereon were properly filed in the prothonotary's office on the 3d of February, 1876, and became a judgment, which was not appealed from by any of the parties interested. In January, 1878, it was discovered that there were errors in these accounts to the extent of one thousand seven hundred and seventeen dollars and seventy-six cents, and the defendant, who had no knowledge of these errors prior thereto, admitted them and acknowledged the mistake to that amount to the clerk of the county commissioner and to the county treasurer and promised them to pay the same. The county brought assumpsit upon this promise, and it was held that the case came within the scope of the rule recognizing the sufficiency of moral considerations founded upon antecedent legal obligations. *Stebbins v. Crawford County*, 92 Pa. St. 289, 37 Am. Rep. 687.

promise. The debt is not extinguished by the operation of the statute, but merely from considerations of public policy rendered unenforceable at law. The pleading of the statute is a privilege personal to the debtor, and his subsequent promise to pay the debt is construed to be a waiver of the right.¹

(bb) *Debt Discharged in Bankruptcy.* — For the same reason, the debt of a person discharged under the bankrupt or insolvent laws may be afterwards revived by a new promise, the moral obligations arising from the old debt being a sufficient consideration for it.²

(cc) *Debt Contracted by Infant.* — A debt contracted by an infant for things not necessities is not void, but merely voidable, and may be ratified by him after attaining his majority. The plea of infancy is a bar raised by the law for his protection and may be waived by his subsequent express promise to pay.³

cc. CASES NOT WITHIN THE EXCEPTION—(aa) *Debt Contracted by Feme Covert.* — So much for debts which are merely voidable. Where, however, the original contract is absolutely void, as, for instance, a debt contracted by a married woman, there is no such legal foundation for the moral obligation as will support her promise to pay the debt after her discovery.⁴

1. Debt Barred by Statute of Limitations. — 2 Black. Com. 445; *Lonsdale v. Brown*, 4 Wash. (U. S.) 86; *Comer v. Allen*, 72 Ga. 1; *Pittman v. Elder*, 76 Ga. 371; *Jamison v. Ludlow*, 3 La. Ann. 492; *French v. Motley*, 63 Me. 326; *McKelvey v. Tate*, 3 Rich. L. (S. Car.) 339; *Womack v. Womack*, 8 Tex. 397, 58 Am. Dec. 119; *Walker v. Henry*, 36 W. Va. 100. And see generally the title LIMITATION OF ACTIONS.

A promissory note given by a married woman as a security for advances made to her husband, and which in equity binds her separate estate, is a good consideration for another promissory note given by her after her husband's death for a balance then due, although the former note is barred by the statute of limitations. *La Touche v. La Touche*, 3 H. & C. 576.

If all the Creditors of an Insolvent Consent to Accept a Composition for their respective demands upon an assignment of his effects by a deed of trust, to which they are all parties, and one of them, before he executes, obtains from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note be made, the note is void in law, as a fraud on the rest of the creditors; and a subsequent promise to pay it is a promise without consideration, which will not maintain an action. *Cockshott v. Bennett*, 2 T. R. 763.

2. Debt Discharged in Bankruptcy — *England.* — *Besford v. Saunders*, 2 H. Bl. 116.
Canada. — *Austin v. Gordon*, 32 U. C. Q. B. 621.

California. — *Feeny v. Daly*, 8 Cal. 84; *Chaffee v. Browne*, 109 Cal. 211; *Lambert v. Schmalz*, (Cal. 1897) 50 Pac. Rep. 13.

Georgia. — *Ross v. Jordan*, 62 Ga. 298; *Anderson v. Clark*, 70 Ga. 362.

Indiana. — *Carey v. Hess*, 112 Ind. 398.

Maryland. — *Wilson v. Russell*, 13 Md. 494; *Katz v. Moore*, 13 Md. 566.

Massachusetts. — *Maxim v. Morse*, 8 Mass. 127; *Way v. Sperry*, 6 Cush. (Mass.) 238, 52 Am. Dec. 779.

Missouri. — *Wislizenus v. O'Fallon*, 91 Mo. 184.

New Hampshire. — *Trumball v. Tilton*, 21 N. H. 128.

New York. — *Scouten v. Eislord*, 7 Johns. (N. Y.) 36; *Shippey v. Henderson*, 14 Johns. (N. Y.) 178, 7 Am. Dec. 458; *Erwin v. Saunders*, 1 Cow. (N. Y.) 249, 13 Am. Dec. 520; *Nash v. Russell*, 5 Barb. (N. Y.) 556.

Ohio. — *Turner v. Chrisman*, 20 Ohio 332.

Vermont. — *Farmers', etc., Bank v. Flint*, 17 Vt. 508.

And see generally the title INSOLVENCY AND BANKRUPTCY.

Promise by Third Person. — The debt of a person discharged under the bankrupt or insolvent law is not thereby so absolutely extinguished as to be of no value whatever to the creditor. It is still subject to be revived by a new promise of the debtor after his discharge, and the debt is a sufficient consideration for the new promise. And as the debt forms a basis for a promise to pay by the debtor, it equally forms a consideration for a promise to pay by a third party, whereby the debt is to be extinguished and finally discharged. *Webster v. Le Compte*, 74 Md. 250.

But a debt from which a person has been discharged in bankruptcy does not impose such a moral obligation upon his sons as will support a note given therefor after the death of the father. *McElven v. Sloan*, 56 Ga. 208.

3. Hawkes v. Saunders, 1 Cowp. 289; *Eastwood v. Kenyon*, 11 Ad. & El. 438, 39 E. C. L. 137. See generally the title INFANTS.

4. Debt Contracted by Feme Covert. — *Loyd v. Lee*, 1 Stra. 94; *Meyer v. Haworth*, 8 Ad. & El. 467, 35 E. C. L. 442; *Dixie v. Worthy*, 11 U. C. Q. B. 328, *Watson v. Dunlap*, 2 Cranch (C. C.) 14; *Kent v. Rand*, 64 N. H. 45; *Wilcox v. Arnold*, 116 N. Car. 708. And see generally the title HUSBAND AND WIFE.

The plaintiff furnished goods to the defendant while she was a *feme covert*, living apart from her husband, and after his death she promised to pay for them. It was held that as the price of the goods originally constituted a debt from the husband and not from the defendant, there was not a sufficient precedent legal obligation to constitute the defendant's moral obligation a sufficient consideration. *Littlefield v. Shee*, 2 B. & Ad. 811, 22 E. C. L. 187.

Promise After Obtaining Divorce. — A promise made by a married woman to pay for goods

(bb) *Debt Voluntarily Released by Creditor.* — And the same principle applies to a promise to pay a debt which has been voluntarily released by the creditor,¹ or to a promise to pay a balance claimed by him after the debt has been compromised.²

2. Specialties — *a. AT LAW* — (1) *General Principle* — **Consideration Not Necessary.** — It was the established rule of the common law that an instrument under seal needed no consideration to support it.

Seal Imports Consideration. — The reason of this rule has been held to be that a seal conclusively imports a consideration and that the courts will not hear evidence to the contrary.³

Seal Implies Reflection and Care. — But that this is the true principle has been denied and seemingly with reason; for, if the object of the rule which requires a consideration to give validity to simple promises be to provide a safeguard against the artifices of fraud and to protect men from being betrayed into acts of imprudence,⁴ the reason which denies the application of the rule to deeds would logically appear to be that the ceremonies which accompany the execution of the deed imply that reflection and care which serve to enable a man to avoid either surprise or imposition, and thus render the protection of the rule unnecessary.⁵

purchased by her during coverture, is void; and the law will not raise an implied promise by her from such consideration. Neither will such precedent consideration support an express promise by her to pay the debt, made after her divorce from her husband. *Watkins v. Halstead*, 2 Sandf. (N. Y.) 311.

Promise After Becoming a Free Dealer. — Where a married woman executes a promissory note, her subsequent promise to pay it after she has been constituted a free dealer by statute will not bind her. *Waters v. Bean*, 15 Ga. 358.

Where Goods Are Furnished to a Married Woman, on the Faith of Her Separate Estate, or she executes a note as the surety of her husband, there is such a moral obligation to pay the debt as will support an action at law on a promise to pay, after the coverture has ceased. *Vance v. Wells*, 8 Ala. 399; *Sherwin v. Sanders*, 59 Vt. 499, 59 Am. Rep. 750. See the title **SEPARATE PROPERTY (OF MARRIED WOMEN.)**

Debts Contracted Before Marriage. — A husband and wife executed a joint note for a debt of the wife contracted before marriage. After the husband's death the wife promised to pay the note. It was held that the precedent legal obligation both supported the promise and rendered it binding. *Parker v. Cowan*, 1 Heisk. (Tenn.) 518.

1. Debt Voluntarily Released by Creditor. — *Samuel v. Fairgrieve*, 21 Ont. App. 418; *Montgomery v. Lampton*, 3 Met. (Ky.) 519; *Warren v. Whitney*, 24 Me. 561, 41 Am. Dec. 406; *Ingersoll v. Martin*, 58 Md. 67, 42 Am. Rep. 322; *Valentine v. Foster*, 1 Met. (Mass.) 520, 35 Am. Dec. 377; *Hale v. Rice*, 124 Mass. 292; *Grant v. Porter*, 63 N. H. 229.

2. Compromised Debts. — Where a debt has been discharged by accord and satisfaction for less than its amount, there remains no such moral obligation to pay the balance as will support a subsequent promise to that effect. *Stafford v. Bacon*, 1 Hill (N. Y.) 532, 37 Am. Dec. 755.

When a debt is discharged by consent of the creditor for less than its amount, a subsequent

promise to pay the remainder will not be binding. Thus where the defendant, in accordance with the terms of a compromise agreed upon between the parties, paid to the plaintiff the amount claimed of him except fifty dollars, and afterwards the defendant voluntarily gave the plaintiff his note for fifty dollars, it was held that there was no consideration for the note. *Phelps v. Dennett*, 57 Me. 491.

Pennsylvania. — In *Willing v. Peters*, 12 S. & R. (Pa.) 177, the distinction made in cases where the precedent legal obligation has been released by act of the law and where it is discharged by the voluntary act of the creditor was disapproved, and it was held that a promise by a debtor, after the execution of a voluntary release under seal by the creditor at the debtor's request, to pay the balance of the debt, is founded on a sufficient consideration and is binding. Compare *Snevily v. Read*, 9 Watts (Pa.) 396.

3. See *infra*, this title, *Presumption of Consideration* — *Specialties*.

4. See *supra*, this title, *Necessity and Sufficiency of Consideration* — *Simple Contracts*.

5. Seal Implies Reflection and Care. — *Blount v. Blount*, 2 Law Repos. (N. Car.) 587.

In *Walker v. Walker*, 13 Ired. L. (N. Car.) 335, *Pearson, J.*, said: "We are not aware of any rule of law by which a consideration is inferred from the fact of the execution of a sealed instrument. No consideration is necessary in order to give validity to a deed. It derives its efficacy from the solemnity of its execution — the acts of sealing and delivery; not upon the idea that the seal imports a consideration, but because it is his solemn act and deed, and is therefore obligatory. No consideration being necessary to give validity to a deed, it follows that the law does not, from the fact of execution, make any inference one way or the other in reference to a consideration. A misapprehension of this subject may have arisen from the fact that in deeds of conveyance, operating under the statute of uses, either a valuable or a good consideration is necessary in order to raise the

(2) *Common-law Conveyances*. — All common-law conveyances which operate by transmutation of possession, such as feoffments and the like, and all modern statutory conveyances, where the statute does not expressly provide otherwise, require no consideration to pass the legal title to the land.¹

Doctrine of Resulting Uses. — But under the doctrine of resulting uses, where a feoffment was made without any consideration, equity, which never raises a use without a consideration, presumed that the grantor meant it to the use of himself, unless he expressly declared it to be to the use of the grantee or another, and then nothing could be presumed contrary to his own expressions.²

(3) *Conveyances Operating by Virtue of Statute of Uses*. — As distinguished from common-law conveyances, conveyances which operate under the statute of uses, such as deeds of bargain and sale, covenant to stand seized, and lease and release, require a consideration to support them. The statute only converts into a legal estate the use which was before an equitable interest, and equity would enforce no use where there was not a good or a valuable consideration to support it.³

Deeds of Bargain and Sale and of Lease and Release require a valuable consideration to support them. It was formerly held that this consideration must be pecuniary, but modern authority has somewhat relaxed the rule in this respect.⁴

A Covenant to Stand Seized to Uses must be supported by the considerations of blood or marriage.⁵

b. IN EQUITY — (1) *Executory Deeds* — (a) **In General**. — It is a fundamental principle of equity to refuse aid to the enforcement of executory deeds unless founded upon either a good or a valuable consideration.⁶

Seal of No Effect in Equity. — The presence of a seal does not, in equity, import a consideration, but proof of it must be given.⁷

use. But the general rule is, a deed is valid without a consideration. A voluntary bond for money, executed to a stranger, and professing, on its face, to be without consideration and for mere friendship, is binding."

1. Common-law Conveyances — Voluntary Deeds Valid Between Parties and Privies — England. — *Cooch v. Goodman*, 2 Q. B. 580, 42 E. C. L. 817.

Connecticut. — *Rogers v. Hillhouse*, 3 Conn. 393.

Indiana. — *McNeely v. Rucker*, 6 Blackf. (Ind.) 391; *Doe v. Hurd*, 7 Blackf. (Ind.) 510; *Thompson v. Thompson*, 9 Ind. 324; *Randall v. Ghent*, 19 Ind. 271; *Fouty v. Fouty*, 34 Ind. 433.

Maine. — *Green v. Thomas*, 11 Me. 318; *Laberee v. Carleton*, 53 Me. 211; *Hatch v. Bates*, 54 Me. 136.

New York. — *Bucklin v. Bucklin*, 1 Abb. App. Dec. (N. Y.) 242; *Ring v. Steele*, 4 Abb. App. Dec. (N. Y.) 68; *Meriam v. Harsen*, 2 Barb. Ch. (N. Y.) 232; *Richards v. Moore* (Suprem. Ct.) 14 N. Y. Supp. 851.

Pennsylvania. — *Brown v. Chambersburg Bank*, 3 Pa. St. 187.

South Carolina. — *Brown v. Brown*, 44 S. Car. 378.

Tennessee. — *Jackson v. Dillon*, 2 Overt. (Tenn.) 261.

Texas. — *Baker v. Westcott*, 73 Tex. 129.

A voluntary deed purporting to be for the beneficial use of the grantee, and made deliberately and without mistake or contrivance, is binding upon the grantee and his heirs, and can be avoided only by creditors and others having superior equities to the grantee. *Jackson v. Cleaveland*, 15 Mich. 94, 90 Am. Dec. 266.

A child has no natural right to the estate of his father, and a father, if not indebted to creditors, may make any disposition of his property that he chooses. If he be of sound and disposing mind and not unduly influenced by one standing in a confidential fiduciary relation, a gift by him will be valid against the attack of his heirs. *Uhlich v. Muhlke*, 61 Ill. 499.

A Deed Made in Pursuance of a Sale under a Decree is good, although no other consideration is expressed. *Porter v. Robinson*, 3 A. K. Marsh. (Ky.) 253, 13 Am. Dec. 153.

2. 2 Black. Com. 330. And see generally the title **DEEDS**.

Resulting Uses. — The common-law rule that feoffment without consideration, and which declared no uses, created a resulting use to the grantor, was merely technical, and not applicable where a consideration, though nominal, was recited, or beneficial uses in favor of the grantee were expressed. *Jackson v. Cleaveland*, 15 Mich. 94, 90 Am. Dec. 266.

3. Conveyances Operating by Virtue of Statute of Uses. — 4 Kent's Com. 465; *Chiles v. Coleman*, 2 A. K. Marsh. (Ky.) 296, 12 Am. Dec. 396; *Gault v. Hall*, 26 Me. 561; *Jackson v. Delancey*, 4 Cow. (N. Y.) 427; *Jackson v. Florence*, 16 Johns. (N. Y.) 46; *Jackson v. Sebring*, 16 Johns. (N. Y.) 515, 8 Am. Dec. 357; *Springs v. Hanks*, 5 Ired. L. (N. Car.) 30; *Boardman v. Dean*, 34 Pa. St. 252; *Wood v. Beach*, 7 Vt. 522.

4. See the title DEEDS

5. See the title DEEDS.

6. See the title EQUITY

7. In Equity — Seal Has No Effect. — *Adams's Equity* 78; *Fry on Specific Performance*, § 96 (3d Am. ed.); *Pomeroy on Specific Perform-*

(b) **Necessity for Valuable Consideration — Specific Performance.** — In order to induce a court of equity to enforce specific performance of a contract against an unwilling promisor, or against one in whose favor he has changed his intention, a valuable consideration must be shown.¹

(c) **Sufficiency of Good or Meritorious Consideration.** — However, after the death of the promisor without his having altered his intention, a court of equity will sometimes decree the enforcement of a promise or covenant founded upon a good or meritorious consideration when the promisee or covenantee has an equity superior to those against whom the promise or covenant is sought to be enforced; but it will never do so where the equities are merely equal.²

(2) **Executed Deeds** — (a) **Voluntary Deeds Valid Between the Parties.** — Although a court of equity will not decree specific performance of a voluntary executory deed, yet, if the deed be in fact executed and contain no power of revocation, the court will not set it aside at the instance of the grantor or his heirs merely because it is voluntary;³ but will, on the other hand, enforce all the rights growing out of it.⁴

(b) **Voluntary Deeds as a Fraud upon Creditors and Subsequent Purchasers** — *aa.* **EXISTING CREDITORS.** — But it is a principle of natural justice as well as of the common law, of which the statute 13 Eliz., c. 5, was merely declaratory, that "every man must be just before he is generous;" and therefore all voluntary conveyances, the object, tendency, or effect of which is to defraud another, are void as to existing creditors of the grantor.⁵

bb. **SUBSEQUENT CREDITORS.** — Subsequent as well as existing creditors are held to be within the provisions of the statute, and may claim its benefits by showing that the deed was made in contemplation of future indebtedness.⁶

cc. **SUBSEQUENT PURCHASERS.** — By Statute 27 Eliz., c. 4, it is enacted that conveyances, grants, etc., of or out of any lands or hereditaments had or made of purpose to defraud and deceive such persons as shall purchase the same lands or hereditaments, or any rent, profit, or commodity out of the same, shall be deemed and taken, only as against such persons and their representatives as shall so purchase the same for money or other good consideration, to be utterly void.

In the United States, however, it is held that a voluntary deed is valid against any subsequent purchaser who buys with notice, whether the notice be actual or such as the law implies from the recording of the prior deed.⁷

3. Contracts of Record. — Contracts or obligations of record, as judgments and recognizances, need no consideration to render them binding, but derive their force from the fact that they have been promulgated by or are founded upon the authority, and receive the sanction, of a court of record.⁸

4. Statutory Obligations. — A statutory obligation requires no consideration to support it, but is effective by virtue of the statute under which it is taken.⁹

III. FROM, TO WHOM, AND AT WHOSE INSTANCE CONSIDERATION MUST MOVE —

1. From Whom the Consideration Must Move. — It was the established doctrine of the common law of *England* that the consideration for a promise must move from the party who sought its enforcement, and consequently, that a promise

ance, § 57; *Lamprey v. Lamprey*, 29 Minn. 151.

In *Buford v. McKee*, 1 Dana (Ky.) 107, Nicholas, J., says: "The idea, which seems to have had some countenance from a few old cases, that an agreement in writing would be specially enforced merely because it was solemnized by the signature and seal of the party, has been long exploded."

1. See the title SPECIFIC PERFORMANCE.

2. See the titles EQUITY; LEGACIES AND DEVICES; SPECIFIC PERFORMANCE.

3. See the title GIFTS.

4. *Wyche v. Greene*, 16 Ga. 49. See generally the title EQUITY.

5. See the title FRAUDULENT SALES AND CONVEYANCES.

6. See the title FRAUDULENT SALES AND CONVEYANCES.

7. See the title FRAUDULENT SALES AND CONVEYANCES.

8. *Chitty on Contracts*, p. 3.

9. *Bildersee v. Aden*, 62 Barb. (N. Y.) 175, 12 Abb. Pr. N. S. (N. Y.) 324; *Thompson v. Blanchard*, 3 N. Y. 335.

made by one person to another for the benefit of a third person who was a stranger to the consideration would not support an action by the latter.¹ This is also the rule in *Massachusetts* and perhaps in other states,² but it has not been generally followed in the *United States*, and the prevailing doctrine here would seem to be that an action will lie on a promise made by the defendant to a third person for the benefit of the plaintiff, although the plaintiff was not privy to the consideration.³

1. Consideration Must Move from the Plaintiff — English Doctrines. — *Thomas v. Thomas*, 2 Q. B. 851, 42 E. C. L. 945.

In *Tweddle v. Atkinson*, 1 B. & S. 393, 101 E. C. L. 393, the declaration stated that in consideration of an intended marriage between the plaintiff and the daughter of G., T., the father of the plaintiff, and G. verbally promised to give their children marriage portions; and that after the marriage G. and T., as a mode of giving effect to their verbal promises, entered into a written agreement by which it was mutually agreed that they should pay the sums of £200 and £100, respectively, to the plaintiff, and that the plaintiff should have full power to sue for the same in any court of law or equity. The declaration further charged a breach of this agreement by non-payment of the £200 by G., or by the defendant, his executor. It was held on demurrer that the action was not maintainable, the plaintiff being a stranger to the agreement. In this case, Crompton, J., said: "It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued."

2. Massachusetts. — *Millard v. Baldwin*, 3 Gray (Mass.) 484; *Dow v. Clark*, 7 Gray (Mass.) 198; *Sanders v. Filley*, 12 Pick. (Mass.) 554.

A and B gave a bond to C, conditioned to pay C's debts. The holder of a promissory note made by C before the date of the bond brought an action of assumpsit, on the money counts, against A and B, to recover the amount of the note. It was held that the action could not be maintained. *Johnson v. Foster*, 12 Met. (Mass.) 167.

A merchant consigned twelve bales of cotton to a factor, and on the same day drew a bill of exchange upon him, expressed on its face to be drawn against the cotton, procured its discount by a bank, and advised the factor of the consignment and the draft. Upon presentation of the draft the factor refused to accept it, and advised the merchant by letter that he did so because he had not received the bill of lading for the cotton, and that he would accept the draft when the bill was received. Two days later he received the bill; and a few days afterwards the bank, to which his letter had meanwhile been shown, again presented the draft to him together with his letter and a duplicate bill of lading, and requested his acceptance, which he again refused. Upon the subsequent receipt of the cotton, the factor sold it and credited its proceeds to the merchant, who was his debtor to a larger amount. In an action by the bank against the factor it was held that the plaintiff could not maintain

an action against the defendant upon his promise to accept the draft, or for the proceeds of the cotton. Gray, J., delivering the opinion of the court, said: "The plaintiffs did not take the draft, or make advances, upon the faith of any promise of the defendants, or of any actual receipt by them of the cotton or the bill of lading, but solely upon the faith of the drawer's signature and implied promise that the defendants should have funds to meet the draft. The whole consideration for the defendant's promise moved from the drawer and not from the plaintiffs. And the defendants made no promise to the plaintiffs. Their only promise to accept the draft was made to Hill, the drawer, after the draft had been negotiated to the plaintiffs; and there is no proof that the defendants authorized that promise to be shown to the plaintiffs, or that Hill, to whom that promise was made, was an agent of the plaintiffs. His relation to them was that of drawer and payee, not of agent and principal. To infer, as suggested in behalf of the plaintiffs, that he was their agent in receiving the defendant's promise, so that they might sue thereon in their own name, would be unsupported by any facts in the case, and would be an evasion of the rules of law, which will not allow any person who took the draft before that promise was made to maintain an action upon that promise, either as an acceptance or a promise to accept." *Exchange Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1.

A promise to three upon a consideration proceeding from them and a fourth person will support an action brought by the three. *Cabot v. Haskins*, 3 Pick. (Mass.) 83.

North Carolina. — A parol agreement between an executor and a purchaser of the property of the estate, that the latter shall pay all of a particular class of debts due by the testator, does not entitle one of that class of creditors to sustain a suit against such purchaser. *Styron v. Bell*, 8 Jones L. (N. Car.) 222.

The plaintiff was the trustee in a deed of trust made by A to secure a debt he owed to B. The defendant was also a creditor of A. Under these circumstances, a promise by the plaintiff to forbear proceeding under the deed of trust would not amount to a good consideration at law to uphold a promise of the defendant to pay to the plaintiff the debt due by A to B so as to enable the plaintiff to declare upon it in his own name. *Jordan v. Wilson*, 6 Ired. L. (N. Car.) 430.

3. Plaintiff May Sue upon Promise Made to Third Person for His Benefit — United States. — *Hendrick v. Lindsay*, 93 U. S. 143.

Alabama. — *Mason v. Hall*, 30 Ala. 599; *Shotwell v. Gilkey*, 31 Ala. 724.

Arkansas. — *Hecht v. Caughron*, 46 Ark. 132.

2. To Whom the Consideration Must Move. — Furthermore, it is not necessary to the validity of the contract that the consideration, when it moves from the promisee, should pass directly to the promisor. It is sufficient if it move from the former to a third person at the promisor's request.¹ This follows from the very nature of a valuable consideration, for if the consideration passes from the promisee, it is equally a relinquishment of a right whether the right accrues to the promisor or to a third party.²

Goods Furnished or Services Rendered to Third Person. — Thus goods furnished³ or services rendered⁴ to a third person at the promisor's request, form a sufficient

California. — Sacramento Lumber Co. v. Wagner, 67 Cal. 293.

Colorado. — Green v. Morrison, 5 Colo. 18.

Connecticut. — Meech v. Ensign, 49 Conn. 191, 44 Am. Rep. 225.

Illinois. — Steele v. Clark, 77 Ill. 471; Thompson v. Dearborn, 107 Ill. 87.

Indiana. — Carnahan v. Tousey, 93 Ind. 569; Moore v. Hubbard, 15 Ind. App. 84.

Kansas. — Anthony v. Herman, 14 Kan. 497; Alliance Mut. L. Assur. Soc. v. Welch, 26 Kan. 642; Brenner v. Luth, 28 Kan. 581; Strong v. Marcy, 33 Kan. 109.

Kentucky. — Farrow v. Turner, 2 A. K. Marsh. (Ky.) 495.

Missouri. — Rogers v. Gosnell, 58 Mo. 589.

Nebraska. — Shamp v. Meyer, 20 Neb. 223.

New Hampshire. — Horn v. Fuller, 6 N. H. 511.

New York. — Lawrence v. Fox, 20 N. Y. 269; Slauson v. Watkins, 95 N. Y. 372; Litchfield v. Flint, 104 N. Y. 550; Cailleux v. Hall, 1 E. D. Smith (N. Y.) 5.

Ohio. — Brewer v. Maurer, 38 Ohio St. 550, 43 Am. Rep. 436; Trimble v. Strother, 25 Ohio St. 378.

Rhode Island. — Urquhart v. Brayton, 12 R. I. 171; Wood v. Moriarty, 15 R. I. 518.

Tennessee. — M'Carty v. Blevins, 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262.

Wisconsin. — Gray v. McDonald, 19 Wis. 217; Johannes v. Phenix Ins. Co., 66 Wis. 57, 57 Am. Rep. 249.

Where a father executed a deed of all his property to his son in consideration of a contract by the son to pay a certain sum in yearly instalments to the grantor's daughter, it was held that there was sufficient privity of contract between the parties to enable the daughter to maintain an action against the son upon his contract. Knowles v. Erwin, 43 Hun (N. Y.) 150.

Where one person procured a conveyance of a tract of land to be made to another person, in consideration whereof the latter agreed to maintain the former and his wife during their lives, and after their death to pay to a third person a certain sum of money, it was held that said third person might maintain an action for said sum of money, although the agreement was not in writing. Lamb v. Donovan, 19 Ind. 40.

1. To Whom the Consideration Must Move. — 7 Vin. Abr. 331.

England. — Lee v. Edwards, 1 Lev. 280; Keyme v. Goulston, 1 Lev. 140; Rolte v. Sharp, Cro. Car. 77; Benson v. Trench, 1 Lev. 98.

United States. — Lipsmeier v. Vehslage, 29 Fed. Rep. 175.

Alabama. — Frazier v. Parks, 56 Ala. 363; Darby v. Berney Nat. Bank, 97 Ala. 643.

Arkansas. — Williams v. Perkins, 21 Ark. 18.

Colorado. — Reed v. Pueblo First Nat. Bank, 23 Colo. 380; Bennett v. Morse, 6 Colo. App. 122.

Connecticut. — Andrews v. Ives, 3 Conn. 368.

Illinois. — Dillman v. Nadelhoffer, 160 Ill. 121; Post v. Springfield First Nat. Bank, 38 Ill. App. 259; Featherstone v. Hendrick, 59 Ill. App. 497.

Indiana. — Crawford v. Shaw, 18 Ind. 495.

Iowa. — Miller v. Root, 77 Iowa 545.

Kansas. — Winans v. Gibbs, etc., Mfg. Co., 48 Kan. 777; Bowling v. Floyd, (Kan. App. 1897) 48 Pac. Rep. 875.

Kentucky. — Isaack v. Porter, 2 A. K. Marsh. (Ky.) 452; Allen v. Pryor, 3 A. K. Marsh. (Ky.) 305.

Maryland. — Heyman v. Dooley, 77 Md. 162.

Massachusetts. — Hunt v. Adams, 5 Mass. 358, 4 Am. Dec. 68.

Minnesota. — Osborne v. Gullikson, 64 Minn. 218.

Mississippi. — Doe v. Curtis, 3 How. (Miss.) 230.

Nebraska. — Lewis v. Owen, 26 Neb. 156; Lindsey v. Heaton, 27 Neb. 662.

New York. — Kinsman v. Birdsall, 2 E. D. Smith (N. Y.) 395; Leonard v. Vredenburg, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317; Herendeen v. De Witt, 49 Hun (N. Y.) 53; Hurd v. Newbrook, 2 N. Y. Misc. Rep. (Buffalo Super. Ct.) 38; Pennsylvania Coal Co. v. Blake, 85 N. Y. 226; Beakes v. Da Cunha, 126 N. Y. 293.

Oregon. — Hoxie v. Hodges, 1 Oregon 251.

Pennsylvania. — Johnston v. Elizabeth Bldg., etc., Assoc. 104 Pa. St. 394.

2. See infra, Valuable Considerations — Definition.

3. Goods Furnished to Third Person. — Lipsmeier v. Vehslage, 29 Fed. Rep. 175; Williams v. Perkins, 21 Ark. 18; Heyman v. Dooley, 77 Md. 162; Hurd v. Newbrook, 2 N. Y. Misc. Rep. (Buffalo Super. Ct.) 38; Leonard v. Vredenburg, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317; Beakes v. Da Cunha, 126 N. Y. 293; Lindsey v. Heaton, 27 Neb. 662; Freed v. Richey, 115 Pa. St. 361.

It was mutually agreed between the plaintiff, the defendant, and one H., that H. should do certain work for the defendant for which the plaintiff should pay him in goods, and that the defendant should pay the amount to the plaintiff in lumber. The work having been done, it was held in a suit by the plaintiff on the defendant's promise that it was made upon a good consideration and was binding. Mather v. Perry, 2 Den. (N. Y.) 162.

4. Services Rendered Third Person. — Andrews v. Ives, 3 Conn. 368; Lewis v. Owen, 26 Neb. 156.

The defendant made application to the superintendent of the poor to confine his father

consideration for his promise.

Instruments Executed for Accommodation. — And a note,¹ a mortgage,² or a deed³ will be valid, although the consideration pass to a third person, if the instrument be executed for his accommodation.

Joint and Several Note. — For stronger reasons, if the note be given by joint makers it is not necessary that the consideration should move to both of them. It is sufficient if it move to either.⁴

Sureties, Guarantors, and Irregular Indorsers. — And likewise a surety, a guarantor, or an irregular indorser who signs a note before its delivery to give the maker credit with the payee,⁵ or who signs it afterwards in compliance with a previous agreement to that effect,⁶ will be bound, though the consideration pass only to the maker.

in an insane asylum. He said he would not be able to support him in full, but that he would reimburse the county to the amount of fifty dollars a year, and thereupon the superintendent agreed to and did take the requisite steps to transfer the father to the asylum, where he was taken and remained several years at the expense of the county. It was held that there was a sufficient consideration to support the promise. *Herendeen v. De Witt*, 49 Hun (N. Y.) 53.

1. Accommodation Note. — Stockholders of a corporation who, to raise money for its use, execute their individual note, cannot plead that such note was void for want of consideration. *Reed v. Pueblo First Nat. Bank*, 23 Colo. 380.

2. Mortgage Given as Security for Loan to Third Party. — *Rockafellow v. Peay*, 40 Ark. 69; *Pennsylvania Coal Co. v. Blake*, 85 N. Y. 226.

A member of a building association who has given to it a mortgage to secure a loan made to a fellow member is liable to the same extent as he would be if the loan had been made to himself. *Johnston v. Elizabeth Bldg., etc., Assoc.*, 104 Pa. St. 394.

Mortgage by Married Woman as Surety for Husband — Illinois. — Under the law of Illinois a married woman can mortgage her property for the purpose of securing her husband's debts, and a consideration passing from the mortgagee to the husband is a sufficient consideration for such mortgage. *Post v. Springfield First Nat. Bank*, 38 Ill. App. 259.

3. Deeds. — It is no objection to a deed that it states the consideration to have been paid to a third person. *Doe v. Curtis*, 3 How. (Miss.) 230.

4. Note Executed by Joint Makers. — *Westphal v. Nevills*, 92 Cal. 545; *Bowling v. Floyd*, (Kan. App. 1897) 48 Pac. Rep. 875; *Isaack v. Porter*, 2 A. K. Marsh. (Ky.) 452; *Kinsman v. Bird-sall*, 2 E. D. Smith (N. Y.) 395; *Hoxie v. Hodges*, 1 Oregon 251.

Where two persons execute a note as principals, but one of them is surety in fact for the other, the surety cannot plead that there was no consideration for his promise, because it is unnecessary that any consideration should move to him. *Crawford v. Shaw*, 18 Ind. 495.

5. Sureties, Guarantors, and Irregular Indorsers. — *Darby v. Berney Nat. Bank*, 97 Ala. 643; *Dillman v. Nadelhoffer*, 160 Ill. 121; *Featherstone v. Hendrick*, 59 Ill. App. 497; *Winans v. Gibbs*, etc., Mfg. Co., 48 Kan. 777; *Allen v.*

Pryor, 3 A. K. Marsh. (Ky.) 305; *Hunt v. Adams*, 5 Mass. 358, 4 Am. Dec. 68; *Osborne v. Gullikson*, 64 Minn. 218.

6. Signing After Delivery in Accordance with Previous Agreement — *Arkansas*. — *Williams v. Perkins*, 21 Ark. 18.

California. — *Winders v. Sperry*, 96 Cal. 194.

Maine. — *Leonard v. Wildes*, 36 Me. 265; *Childs v. Wyman*, 44 Me. 433, 69 Am. Dec. 111.

Massachusetts. — *Moies v. Bird*, 11 Mass. 436, 6 Am. Dec. 179; *Hawkes v. Phillips*, 7 Gray (Mass.) 284.

Michigan. — *Steers v. Holmes*, 79 Mich. 430.

Minnesota. — *Bowen v. Thwing*, 56 Minn. 177.

Mississippi. — *Standley v. Miles*, 36 Miss. 434.

New York. — *Oppenheim v. Waterbury*, 86 Hun (N. Y.) 122; *Smith v. Molleson*, 148 N. Y. 241.

Vermont. — *Knapp v. Parker*, 6 Vt. 642.

The plaintiff, a manufacturing company, entered into a contract with the defendant to sell its goods within a certain territory for cash or notes, provided that all notes taken should be guaranteed by the defendant. A general agent, sent by the plaintiff into the defendant's territory, made some sales for which notes were taken. The sales were credited to the defendant, who thereupon guaranteed the notes. It was held that the guaranty was supported by a sufficient consideration. *Long, etc., Co. v. Hill*, 48 Ill. App. 517.

In an action upon a guaranty upon a promissory note, it appeared that the defendant was the agent of the plaintiff, the scope of the agency being the sale of machinery manufactured by the plaintiff to persons living within certain territory. This agency was evidenced by a written agreement which, among other things, authorized the sale of machinery on credit to responsible parties under certain conditions, among which was the provision that when any note taken by the defendant for property so sold was not accompanied by a "property statement" or by a chattel mortgage, or should upon examination prove doubtful, it should be indorsed by him. The note in question was taken in this way, and some months after its date the defendant had a settlement with the general agent of the plaintiff, and this note being considered doubtful, the defendant indorsed it according to the contract. It was contended that there was no consideration to support this guaranty, but it

3. At Whose Instance the Consideration Must Move. — The rule is sometimes laid down that a detriment suffered by the promisee in reliance upon the promise is a sufficient consideration for it;¹ but this statement is neither correct in principle nor reconcilable with the decisions, for if a simple promise be originally gratuitous, no amount of detriment which the promisee may suffer in reliance upon it will ever render it enforceable.² For example, if a creditor, influenced by the voluntary promise of a third person to guarantee the debt, forbear to press the debtor, the forbearance will not constitute a consideration for the promise.³ To suffice as such it must be given at the instance of the promisor, and so in every case the act which constitutes the consideration must be brought about by him.⁴ However, if the promisee do

was held that the liability was a continuing one and required the defendant's action whenever the contingency arose. The mere fact of the presentation of the note to him for that purpose and his immediate act of indorsing would clearly indicate that both parties considered the case within the contingency. It was not necessary that there should be a new consideration to support the guaranty. *Windels v. Milwaukee Harvester Co.*, 39 Ill. App. 521.

1. *Dorwin v. Smith*, 35 Vt. 69.

2. *Ridgway v. Grace*, 2 Misc. Rep. (N. Y. C. Pl.) 293.

Detriment from Reliance upon Promise Not a Consideration. — The plaintiff and defendant were joint owners of a vessel which was about to begin a voyage, and the defendant voluntarily undertook to get the vessel insured, but neglected to do so, and the vessel was lost. In an action for the nonperformance of the promise it was held that though the plaintiff sustained a damage by the nonfeasance of the defendant, there being no consideration for the latter's promise an action would not lie. *Thorne v. Deas*, 4 Johns. (N. Y.) 84.

In an action brought to recover damages for a breach of contract to deliver certain bales of cotton, it appeared that the defendants had in their possession upwards of three hundred bales of cotton consigned to them by C. G. S. & Co., upon which they had a lien for advances made to the consignors; that the consignors drew a draft upon the plaintiffs against two hundred bales of cotton, and, in a letter advising them of the draft, inclosed a bill of lading for fifty bales and an order upon the defendants for one hundred and fifty bales. The plaintiffs presented the order by messenger to the defendants, who acknowledged its receipt and promised to deliver the cotton the following week. In reliance upon this promise, the plaintiffs paid the draft. Before the delivery of the cotton the consignors failed, whereupon the defendants refused to deliver the same unless the plaintiffs prepaid the advances which they had made upon it. It was held that as the defendants had no knowledge of the draft drawn against the plaintiffs, and did not know that the same was paid in reliance upon their promise, therefore the promise was without consideration and unenforceable. *Hollins v. Hubbard*, 91 Hun (N. Y.) 375.

Detriment Must Accrue from Entering upon Contract. — The detriment to the promisee which suffices as a consideration for a contract must be a prejudice on entering into the con-

tract, and not from a breach of it. *Ridgway v. Grace*, 2 Misc. Rep. (N. Y. C. Pl.) 293.

The promoters of a certain corporation in their prospectus guaranteed to purchasers of its stock annual dividends of not less than a certain per cent. In an action by one of the purchasers upon this guaranty, the court, by Lord Campbell, C. J., said: "There likewise seems to us, as between these parties, to be an entire want of consideration for the promise. It is not stated, nor does it appear, that, from the plaintiff's buying and becoming bearer of these shares, any benefit accrued to the defendant, or that, at the time when the contract is supposed to have been entered into, any prejudice accrued to the plaintiff. A prejudice to the promisee, incurred at the request of the promisor, may be a consideration, as well as a benefit to the promisor proceeding from the promisee; but this must be a prejudice on entering into the contract, not a prejudice from the breach of it." *Gerhard v. Bates*, 2 El. & Bl. 476, 75 E. C. L. 476.

3. See *infra*, this title, *Valuable Considerations — Forbearance — There Must Be an Agreement to Forbear*.

4. An Act, to Constitute a Consideration, Must Be Brought About by the Promisor. — An undertaking to pay money upon the occurrence of an event which is not to be brought about by the promisor is a naked promise upon which no action will lie. *Stewart v. Hamilton College*, 2 Den. (N. Y.) 403.

Where a creditor charged his traveling and other expenses incurred on a journey made for the purpose of collecting a debt, which expenses were included in a new note given by the debtor, it was held that the note was to this extent without consideration. *Bean v. Jones*, 8 N. H. 149.

A promissory note executed by a father to one of his sons, the only consideration of which was a verbal promise, made three or four years previously, to give him land worth the sum specified, in excess of the distributive interest of the other children, if the son would not go away and leave him, another son having gone to Texas, is without legal consideration, when it is not shown that the payee abandoned a contemplated removal on the faith of the promise. *Head v. Baldwin*, 83 Ala. 132.

But in *Humphrey v. Haskell*, 7 Allen (Mass.) 497, it was held that if a broker who will be entitled to commissions upon the sale of property promises to divide them with a purchaser, in order to induce the latter to buy the

any act to his prejudice, however slight, at the request of the promisor, either express or implied, the detriment so sustained operates as a consideration.¹

IV. TIME OF RENDERING OR PERFORMING THE CONSIDERATION — 1. In General. — The power of a consideration to sustain a contract may depend not only upon its value but upon the time it is rendered or performed. A consideration in this regard may be either concurrent, executory, executed, or continuing.

2. Concurrent Consideration. — In respect to the first, it hardly needs citation of authority to the proposition that a concurrent consideration, or that which passes simultaneously with the making of the promise, is sufficient to support it.

3. Executory Consideration. — But it is not necessary that the consideration should exist at the time the promise is made. Where one party promises another to pay him a sum of money if he will do a particular act, and the latter does the act before the revocation of the promise, or before it has otherwise ceased to exist, the promise thereupon becomes binding although the promisee does not at the time engage to do the act. In the meanwhile the obligation of the contract or promise is suspended, for until the performance of the condition of the promise there is no consideration and the promise is *nudum pactum*; but on the performance of the condition by the promisee, it is clothed with a valid consideration which relates back to the promise and renders it obligatory.²

property, he is liable upon the promise upon the completion of the sale, although the purchaser had determined in his own mind to make the purchase, if necessary, without such promise.

1. Consideration Must Move at Instance of Promisor. — *Shadwell v. Shadwell*, 9 C. B. N. S. 159, 99 E. C. L. 159; *Violet v. Patton*, 5 Cranch (U. S.) 142; *Johnson v. Wabash College*, 2 Ind. 555; *Owings's Case*, 1 Bland (Md.) 370, 17 Am. Dec. 311; *Wilson v. Baptist Education Soc.*, 10 Barb. (N. Y.) 308.

It is an ample consideration for the defendant's promise of indemnity, if the plaintiff takes upon himself an onerous obligation at the defendant's request. *Chapin v. Lapham*, 20 Pick. (Mass.) 467.

In order to facilitate the making of an agreement, for which there was sufficient consideration, between the plaintiff and a third person, the defendant, who received no benefit to himself by the agreement, became party thereto. It was held that as the agreement was such as the plaintiff would not have made unless the defendant had acceded, there was a sufficient consideration for the defendant's promise. *Baily v. Croft*, 4 Taunt. 611.

2. Executory Considerations. — *Hilton v. Southwick*, 17 Me. 303, 35 Am. Dec. 253; *Train v. Gold*, 5 Pick. (Mass.) 380; *Cottage St. M. E. Church v. Kendall*, 121 Mass. 529, 23 Am. Rep. 286; *Exum v. Canty*, 34 Miss. 533; *Barnes v. Perine*, 9 Barb. (N. Y.) 202; *L'Amoureux v. Gould*, 7 N. Y. 349, 57 Am. Dec. 524; *Willets v. Sun Mut. Ins. Co.*, 45 N. Y. 45, 6 Am. Rep. 31; *Sands v. Crooke*, 46 N. Y. 564; *White v. Baxter*, 71 N. Y. 254; *Marie v. Garrison*, 83 N. Y. 14; *Miller v. McKenzie*, 95 N. Y. 575, 47 Am. Rep. 85; *Morgenstern v. Davis*, (Supreme Ct.) 14 N. Y. Supp. 31.

In *Poughkeepsie*, etc., *Plank Road Co. v. Griffin*, 21 Barb. (N. Y.) 454, which was an action upon an agreement to take certain shares in a plank road, *Strong, J.*, delivering the

opinion of the court, said: "It is said that there is a want of the requisite consideration to render the agreement valid. If by that it is meant that there is not a certain instantaneous advantage to the subscriber, it is so far true; but if that should be a fatal objection, no contract based upon a future consideration could be enforced, as there can be no certainty as to anything depending upon human agency. It is enough, however, to support an executory contract, that upon the contingency of its performance the requisite consideration must necessarily arise."

The assignment of a bond for the conveyance of land which, at the time of the execution of the instrument, was the property of a third person is a sufficient consideration for a promissory note, if the obligors within the time mentioned in the bond acquire title to the land. *Trask v. Vinson*, 20 Pick. (Mass.) 105.

A Contingent Liability Which Subsequently Becomes Absolute is a sufficient consideration. Thus a note given to indemnify the promisee against any loss which he might suffer by reason of his subsequent indorsing for the accommodation of the promisor, which indorsements were afterwards made, is founded on a valid consideration. *Gardner v. Webber*, 17 Pick. (Mass.) 407.

An Option for the Purchase of Lands which has been extended for an additional period of time without consideration, while void as an option, is good as a continuing offer to sell, and if accepted and a tender of the purchase price is made before the offer is retracted, a contract is completed which may be specifically enforced. *Ide v. Leiser*, 10 Mont. 5.

A contract under seal to convey land to another upon the payment by him of a stipulated price, provided such payment be made within six months of the date of the contract, is obligatory if supported by a consideration of five dollars actually paid by the obligee to the obligor. After the former has made his elec-

Reward for Apprehension of Criminal. — Thus a public offer to pay a certain sum for the apprehension of a criminal, or for information sufficient to secure his conviction, becomes a binding contract in favor of the person who, upon the strength of the offer, performs the service.¹

Future Advances — Mortgage. — A mortgage given to secure future advances at a time when no indebtedness existed is valid, and becomes operative when the advances are made.²

4. Executed Consideration — a. GENERAL PRINCIPLE. — The rule was well expressed when it was said that an executed or past consideration is no consideration for any other promise than that which the law will imply.³

tion to pay the stipulated price, and has actually tendered the same within the time specified in the contract and demanded a conveyance, there is no want of mutuality, but both parties are bound absolutely, and specific performance may be enforced at the instance of the obligee suing in behalf of a third person to whom he has sold all his interest in the premises, or in the contract sought to be enforced, such assignee being a co-party plaintiff as use. *Simms v. Lide*, 94 Ga. 553.

In a contract relating to the sale of real estate, the obligors bound themselves to pay to the obligee a certain sum, by a day named, for said real estate, if the said obligee should elect to sell the same. It was held that after an election by the obligee in accordance with the terms of the agreement, the contract could not be avoided for want of mutuality. *Goodpaster v. Porter*, 11 Iowa 161.

1. Reward for Apprehension of Criminal. — *England v. Davidson*, 11 Ad. & El. 856, 39 E. C. L. 254; *Ryer v. Stockwell*, 14 Cal. 134, 73 Am. Dec. 634; *Freeman v. Boston*, 5 Met. (Mass.) 56; *Furman v. Parke*, 21 N. J. L. 310. See the title REWARDS.

2. Future Advances — Mortgage. — *Schuelenburg v. Martin*, 1 McCrary (U. S.) 348; *Newkirk v. Newkirk*, 56 Mich. 525; *Klein v. Glass*, 53 Tex. 37. See the title MORTGAGES.

A mortgage may be given to secure future advances, or as a general security for balances which may become due; and the security may be taken in a sum large enough to cover the floating debt to be secured thereby. *Foster v. Reynolds*, 38 Mo. 553.

A mortgagee is a purchaser for value, and whether the consideration is adequate or not will not affect the legal title. Therefore, where the plaintiffs took a mortgage from A to secure future advancements, there being a prior mortgage to B, the defendant's grantor, defectively registered, it was held that if after the execution of the plaintiffs' mortgage, and before they had made any part of or all the advancements stipulated, they had been fixed with notice of the defendant's equity, any advancements subsequently made by them would have been made at their peril; but if they were unaffected with notice before they paid out their money, their legal title must prevail as a security for repayment. *Todd v. Outlaw*, 79 N. Car. 235.

"It may now be regarded as settled law in this country, by virtue of a long line of decisions, beginning with the leading case of *Shirras v. Caig*, 7 Cranch (U. S.) 34, that a mortgage to secure future advances is a valid contract. The only proper question in such a

case is the *bona fides* of the transaction. It was said by Judge Story, in the case of *Leeds v. Cameron*, 3 Sumn. (U. S.) 492: 'Nothing can be more clear, both upon principle and authority, than that, at the common law, a mortgage *bona fide* made may be for future advances and liabilities for the mortgagor by the mortgagee, as well as for present debts and liabilities;' and in *Conard v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 448, the Supreme Court of the United States, speaking through the same distinguished judge, said: 'Mortgages may as well be given to secure future advances and contingent debts as those which already exist, and are certain and due. The only question that properly arises in such cases is the *bona fides* of the transaction.' In *Lyle v. Ducomb*, 5 Binn. (Pa.) 585, the court, speaking through Tilghman, C. J., said: 'There cannot be a more fair, *bona fide*, and valuable consideration than the drawing or indorsing of notes at a future period for the benefit and at the request of the mortgagor, and nothing is more reasonable than the providing a sufficient indemnity beforehand.' " *Louisville Banking Co. v. Leonard*, 90 Ky. 106.

Mortgages to Secure Future Advances Void as to Existing Creditors. — A deed absolute on its face, but intended as a mortgage to secure a small existing indebtedness to the vendee and mortgagee, and also to stand by verbal agreement, not stated in the deed, as security for future advances to be made and indebtedness to be incurred by the vendee in behalf of the vendor or mortgagor, is a valid security to the extent of the existing indebtedness, but fraudulent and void as to judgment creditors, or creditors seeking by bill to enforce payment of debts due from maker and vendor, as to the debts not in existence at the time of the execution of the deed. *Turbeville v. Gibson*, 5 Heisk. (Tenn.) 565. See, generally, the title MORTGAGES.

3. Executed Consideration — Statement of the Rule. — *Per Maule, B.*, in *Hopkins v. Logan*, 5 M. & W. 241. For similar statements of the rule see *Lattimore v. Garrard*, 1 Exch. 809; *Hopkins v. Logan*, 5 M. & W. 241; *Granger v. Collins*, 6 M. & W. 458; *Jackson v. Cobbin*, 8 M. & W. 790; *Kaye v. Dutton*, 7 M. & G. 807, 49 E. C. L. 807; *Bailey v. Bussing*, 29 Conn. 1.

In *Roscorla v. Thomas*, 3 Q. B. 234, 43 E. C. L. 713, it was held that an executed consideration will not support an express promise beyond the limits of the promise which in its absence would have been implied by law, and consequently that an action could not be maintained which, on the ground of an express undertaking to that effect, upheld by a past

b. WHEN NO LIABILITY IS CREATED — (1) In General. — The meaning of this is that when the act or thing which is set up as the consideration does not impose a liability upon the promisor, it cannot be a foundation for an express promise.¹

The Principle upon Which the Rule Rests has already been discussed, namely, that the act or thing which constitutes the consideration must in every case move at the instance of the promisor.²

(2) *Consideration Previously Moving to Third Person.* — It is therefore obvious that where the consideration has moved to a third person before the promise was made, this requisite is lacking.

Promise to Pay Existing Debt of Third Person. — And so a promise to pay the existing debt of a third person is void unless there be some consideration other than that which has already moved.³

consideration, sought to impose a liability which would not have arisen out of the consideration itself.

1. Executed Consideration. — *Victors v. Davies*, 12 M. & W. 758; *Cunningham v. Richardson*, 7 U. C. Q. B. 163; *Rees v. Howcutt*, 4 U. C. C. P. 284; *Marlatt v. Gooderham*, 14 U. C. Q. B. 221; *Williams v. Perkins*, 21 Ark. 18; *Allen v. Woodward*, 22 N. H. 544; *Comstock v. Smith*, 7 Johns. (N. Y.) 87.

"It is held that a consideration executed and past, as in the present case, the service performed by the plaintiff for the testator in his lifetime for several years then past, is not sufficient to maintain an assumpsit unless it was moved by a precedent request, and so laid. For it is not reasonable that one man should do another a kindness, and then charge him with a recompense; this would be obliging him whether he would or not, and bringing him under an obligation without his concurrence. Therefore, where A.'s servant was arrested in London for a trespass, and J. S., who knew A., bailed him, and afterwards A., for his friendship, promised to save him harmless, and J. S. comes to be charged, yet it is held that this is no consideration to ground an assumpsit, because the bailing, which was the consideration, was past and executed before. But it had been otherwise if the master had previously requested him to become bail for his servant, * * * because the promise is not a naked one, but couples itself with the precedent request, and with the merits of the party which were procured by that request, and is therefore founded upon a good consideration. * * *

But where a party derives benefit from the consideration it is sufficient, because equivalent to a previous request; as where a man pays a sum of money, or buys any goods for me without my knowledge or request, and afterwards I agree to the payment, or receive the goods, this is equivalent to a previous request to do so; but it is still necessary to aver in the declaration that it was money paid and laid out for me at my special instance and request, and my subsequent conduct will be evidence of it. So where assumpsit was for work and labor done by the plaintiff for the defendant, in consideration whereof he promised to pay, after judgment by default and error brought, it was objected that this was a past consideration, and not being laid to be done at the defendant's request, it could be no consideration to raise an assumpsit. The

court said they took the rule of law to be that a past consideration is not sufficient to support a subsequent promise, unless there was a request of the party, either express or implied, at the time of performing the consideration; but where there was an express request at the time it would in all cases be sufficient to support a subsequent promise; and however the declaration might be sufficient after a verdict, yet it was not so after a judgment by default, and the judgment was reversed." Note to *Osborne v. Rogers*, 1 Saund. 264.

This note is here set forth for the reason that it has been extensively cited as an authority.

A Promise to Give Security for a Note made after the making of the note is founded upon a past consideration and is void. *Roberts v. Waters*, 9 Iowa 434.

A Promise to Indemnify One for Having Indorsed Certain Notes is upon a past consideration and is not enforceable. *Bulkley v. Landon*, 2 Conn. 404.

Promise to Indemnify Co-Surety. — A promise upon no new consideration to execute a bond to indemnify a co-surety against loss is void if made after the liability of all the parties to the instrument has been incurred. *Jones v. Shorter*, 1 Ga. 294, 44 Am. Dec. 649.

Warranty After Completion of Sale. — The declaration stated that in consideration that the plaintiff had bought of the defendant a horse at a certain price, the defendant promised that the horse was free from vice; nevertheless, the defendant did not perform or regard his said promise, but thereby deceived and defrauded the plaintiff in this, to wit: that the said horse, at the time of making the said promise, was not free from vice, but on the contrary was vicious, restive, etc. It was held on a motion in arrest of judgment that the sale of the horse was an executed consideration, and not sufficient to sustain the defendant's promise. *Roscorla v. Thomas*, 3 Q. B. 234, 43 E. C. L. 713.

2. See *supra*, this title, *At Whose Instance the Consideration Must Move*.

3. Promise to Pay Existing Debt of Third Person — *Alabama*. — *Beall v. Ridgeway*, 18 Ala. 117; *Ware v. Morgan*, 67 Ala. 461.

California. — *Comstock v. Breed*, 12 Cal. 286.

Maine. — *Cutler v. Everett*, 33 Me. 201.
Maryland. — *Elliott v. Giese*, 7 Har. & J. (Md.) 457.

Becoming Surety After Execution of Contract. — The principle of law just stated applies to the promise of a person who becomes surety for the performance of a contract after its execution,¹ and to a surety or guarantor who signs

Massachusetts. — *Tenney v. Prince*, 4 Pick. (Mass.) 387, 16 Am. Dec. 347.

Minnesota. — *Turle v. Sargent*, 63 Minn. 211.

Mississippi. — *Barkley v. Hanlan*, 55 Miss. 606.

Missouri. — *Pfeiffer v. Kingsland*, 25 Mo. 66.

New York. — *Bailey v. Freeman*, 4 Johns. (N. Y.) 280; *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317; *Marston v. French*, (C. Pl.) 17 N. Y. Supp. 509; *Farnsworth v. Clark*, 44 Barb. (N. Y.) 602.

Pennsylvania. — *Hess's Estate*, 150 Pa. St. 346; *Reading R. Co. v. Johnson*, 7 W. & S. (Pa.) 317; *Cobb v. Page*, 17 Pa. St. 469.

Tennessee. — *Gilman v. Kibler*, 5 Humph. (Tenn.) 19; *Clark v. Small*, 6 Yerg. (Tenn.) 418.

Vermont. — *Russell v. Buck*, 11 Vt. 166; *Goddard's Estate*, 66 Vt. 415.

Where one makes a promise to pay the pre-existing debt of another for the purpose of its security, there is no element either of detriment to the promisee or of benefit to the promisor, and upon principle it is clear that there is no consideration. It is the case of a promise made for a consideration wholly past and not founded upon the request of the promisor, and cannot be distinguished in principle from the case where a third person subscribes to an existing note, or guarantees the payment of a subsisting debt, or where an administrator executes his note for a debt of the intestate; in all of which cases it is held that there is no consideration. *Rutledge v. Townsend*, 38 Ala. 706.

Promise to Pay Award Against Third Person. — The plaintiff and another submitted a matter in controversy between them to arbitrators, and the defendants, who were not interested in the controversy, promised in writing that in consideration of the said submission they would pay whatever sum should be awarded in favor of the plaintiff. It was held that the promise was without consideration and was not binding on the promisors. *Barlow v. Smith*, 4 Vt. 139.

Promise to Pay Debt of Adult Son. — Where a son who was of full age and had ceased to be a member of his father's family was suddenly taken sick among strangers, and being poor and in distress was relieved by the plaintiff, and afterwards the father wrote to the plaintiff promising to pay him the expenses incurred, it was held that the promise was not founded upon a legal consideration, and was not enforceable. *Mills v. Wyman*, 3 Pick. (Mass.) 207.

The son of the defendant's testatrix, about a year before his death, obtained a policy of insurance on his life payable to his mother, to whom he was indebted. Upon his death she collected two thousand dollars on the policy. The son at his death had no property and was deeply in debt, owing the plaintiff, among others, one thousand two hundred and fifty dollars, which she could not collect. She made a claim upon the testatrix for the money due her, and the latter, in consideration of the circumstances, gave her a note for five hundred

and fifty dollars, payable six months after her (the testatrix's) death. In an action upon this note it was held that it was without consideration and void. *Dunckel v. Failing* (Supreme Ct.) 5 N. Y. Supp. 504.

Promise to Pay Debt of Father. — A promise in writing, not under seal, by a son to pay a debt for his father must be considered *nudum pactum*, unless some consideration moving from the creditor to the son, or some agreement binding the creditor to forbearance, or the like, in the event of the assumption by the son, be proved. *Parker v. Carter*, 4 Munf. (Va.) 273, 6 Am. Dec. 513.

The plaintiff furnished necessities to a person who was indigent and in need of relief, and the defendant, his son, who was of sufficient ability, signed and delivered to the plaintiff a writing in these words: "This may certify that the debt now due from my father, B, to C, I acknowledge to be for necessities of life, and of such a nature that I consider myself hereby obligated to pay said C sixty dollars towards said debt now due, provided my father does not settle with said C in his lifetime." It was held that this promise was void, being a promise to pay the existing debt of another. *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79.

A Note Given by a Widow to a Creditor of Her Deceased Husband's Estate for a balance due, after he had received the dividend to which he was entitled as a general creditor, is without consideration and is void. *Paxson v. Nields*, 137 Pa. St. 385, 21 Am. St. Rep. 888.

A promissory note given by a widow to a creditor of her deceased husband who did not take it in payment of the debt, and neither lost or suspended any remedy for its collection or receipted the account, is without consideration. *Watson v. Reynolds*, 54 Ala. 191; *Maul v. Vaughn*, 45 Ala. 134.

The widow of a hairdresser who died in October, 1836, continued to reside in his house and keep open the shop (through which was the entrance to the house), but there was no proof of any articles being sold. In December she received notice of a bond debt of £100 due from him, and had his goods valued. In January, 1837, on the application of a creditor to whom he owed £24 for goods, she gave a promissory note for that amount, payable to the creditor twelve months after date. In March she took out administration. It was held, in an action against her on the promissory note, that this was not evidence to charge her as executrix *de son tort*. *Serle v. Waterworth*, 4 M. & W. 9.

Joining as Surety in Note Given for Existing Debt. — Where a third person joins with a debtor in the execution of a promissory note, payable to the creditor and to be delivered as collateral security for the original indebtedness, the note is without consideration as to him. *Rutledge v. Townsend*, 38 Ala. 706.

1. Becoming Surety After Execution of Contract. — An agreement whereby one binds himself as surety for the performance by a contractor of a contract for the erection of a building is

a note after its delivery.¹

(3) *Services Voluntarily Rendered to Promisor.* — A person cannot make another his debtor by the rendering of voluntary services,² and as such services impose no liability upon the person for whose benefit they are rendered, they cannot be a consideration for his subsequent promise to pay for them.³

c. *WHEN LIABILITY IS CREATED.* — But, on the other hand, from the statement of the rule it follows that when the thing given or done imposes a liability upon the promisor, it is a sufficient consideration for his subsequent promise to discharge it.

Thing Done at Express Request. — Thus where services are rendered at his express request, his subsequent promise to pay for them is valid.⁴

invalid, if it is made after such contract has been entered into between such contractor and the party contracting with him, and without any new consideration. *La Fayette Mut. Bldg. Assoc. v. Kleinhoffer*, 40 Mo. App. 389.

And so also is a guaranty of payment of rent made several days after the execution of a lease. *Macfarland v. Heim*, 127 Mo. 327, 48 Am. St. Rep. 629.

1. *Becoming Surety or Guarantor After Delivery of Note* — *United States*. — *Toppan v. Cleveland, etc.*, R. Co., 1 Flipp. (U. S.) 74.

Alabama. — *Rudolph v. Brewer*, 96 Ala. 189; *Savage v. Rome First Nat. Bank*, 112 Ala. 508.

California. — *Leverone v. Hildreth*, 80 Cal. 139.

Illinois. — *Davis v. Smith*, 29 Ill. App. 313; *Edwards v. School Trustees*, 30 Ill. App. 528; *Grier v. Cable*, 45 Ill. App. 405; *Featherstone v. Hendrick*, 59 Ill. App. 497.

Indiana. — *Owens v. Tague*, 3 Ind. App. 245; *Brant v. Barnett*, 10 Ind. App. 653; *Davidson v. King*, 51 Ind. 224.

Iowa. — *Briggs v. Downing*, 48 Iowa 550.

Maryland. — *Aldridge v. Turner*, 1 Gill & J. (Md.) 427.

Massachusetts. — *Tenney v. Prince*, 4 Pick. (Mass.) 385, 16 Am. Dec. 347, 7 Pick. (Mass.) 243; *Courtney v. Doyle*, 10 Allen (Mass.) 122.

Missouri. — *Williams v. Williams*, 67 Mo. 661.

Nebraska. — *Barnes v. Van Keuren*, 31 Neb. 165.

Texas. — *Simmang v. Farnsworth*, (Tex. Civ. App. 1893) 24 S. W. Rep. 541.

2. *Hayes v. Warren*, 2 Stra. 933.

Labor or Service Voluntarily Done or performed by the plaintiff for the defendant without his privity or request, however meritorious or beneficial it may be to the defendant, as in saving his property from destruction by fire, affords no ground of action. *Bartholomew v. Jackson*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237.

3. *Promise to Pay for Services Voluntarily Rendered.* — *Sanderson v. Brown*, 57 Me. 308; *Chamberlin v. Whitford*, 102 Mass. 448; *Morse v. Mason*, 103 Mass. 560; *Chaffee v. Thomas*, 7 Cow. (N. Y.) 358; *Myers v. Dean*, 11 Misc. Rep. (N. Y. C. Pl.) 368.

When one person renders services for another gratuitously, and with no expectation of being paid therefor, no obligation is incurred by the recipient which will support a subsequent promise to pay for the same. *Allen v. Bryson*, 67 Iowa 591, 56 Am. Rep. 358.

A note given by a candidate for an elective office in payment of services in promoting his

election, but which were not rendered at his request, is void as being founded upon a past consideration. *Dearborn v. Bowman*, 3 Met. (Mass.) 155.

Where the defendant's minor children were taken from his house without his consent and without any neglect on his part to provide for them, and were boarded by his wife's father during the pendency of a libel filed by her for a divorce, and the defendant, after the board had been furnished, promised to pay therefor, it was held that the promise was not binding for want of a sufficient consideration. *Dodge v. Adams*, 19 Pick. (Mass.) 429.

Improvements Voluntarily Made upon Promisor's Lands. — The plaintiff entered on land belonging to the defendant and, without his knowledge or authority, cleared it, made improvements, erected buildings, etc. The defendant afterwards agreed by parol with the plaintiff to sell him the land or pay him for the improvements he had made. It was held that the promise to pay for the improvements was without consideration and void. *Frear v. Hardenbergh*, 5 Johns. (N. Y.) 272, 4 Am. Dec. 356.

A Promise to Pay for Improvements Made upon the Public Lands will not bind the promisor if made after the purchase of the same. *Carson v. Clark*, 2 Ill. 113, 25 Am. Dec. 79.

Past Forbearance is not a legal consideration. *Carter v. Moses*, 39 Ill. 539.

A contract signed on a note by the maker in these terms: "In consequence of the attached note * * * not being paid at maturity, I hereby promise and agree to pay two per cent interest per month until said note is paid," is *nudum pactum*. The past default of the debtor, or past forbearance of the creditor, could not be a consideration for a contract to increase the rate of interest which the note bore when executed. *Shealy v. Toole*, 56 Ga. 210.

4. *Executed Consideration at Precedent Express Request.* — *Pool v. Horner*, 64 Md. 131; *Stuht v. Sweesy*, 48 Neb. 767.

Express Request Must Create a Liability. — It is sometimes said that a past consideration is sufficient to support an express promise when moved by a precedent request, but this is not true unless the request creates a liability. Thus in a case where a father requested a physician to attend a child of full age and for whom he was not bound to provide, though sick at the father's house, and the father afterwards promised to pay for the medical services rendered, it was held that as the request did

Thing Done at Implied Request. — And the law will sometimes imply a request from the acceptance of the consideration. Thus where a person pays a sum of money for the benefit of the promisor, or buys goods or performs services for him, and the promisor has the option of accepting or rejecting the benefits so conferred, the law will imply a request from their acceptance and will hold valid a promise to pay for them.¹

5. Continuing Consideration. — A consideration which is executed in part only is called a continuing consideration and is valid, the executory portion of it being sufficient to support the entire promise. Thus a promise to pay for continuous services is enforceable if made any time before their termination, the portion yet to be rendered being a consideration for the whole.²

V. ADEQUACY OF CONSIDERATION — 1. In General — Consideration Need Not Be Adequate — *a. AT LAW.* — Although the consideration of simple contracts and of certain forms of real conveyances must be valuable, it is not essential that the consideration should be adequate in point of value. The law does not weigh the *quantum* of consideration, deeming it unwise to interfere with the facility of contracting and the free exercise of the judgment and will of the parties, but allows them to be the sole judges of the benefits to be derived from their bargains, provided there be no incompetency to contract and the agreement violates no rule of law.³

not raise an implied promise on the part of the father to pay for such medical services, it was not sufficient to support the subsequent promise. *Rankin v. Beale*, 68 Mo. App. 325.

1. Implied Request. — *Kaye v. Dutton*, 7 M. & G. 807, 49 E. C. L. 807; *Comstock v. Smith*, 7 Johns. (N. Y.) 87; *Hicks v. Burhans*, 10 Johns. (N. Y.) 243; *Doty v. Wilson*, 14 Johns. (N. Y.) 378; *Root v. Strang*, 77 Hun (N. Y.) 14; *Wilson v. Edmonds*, 24 N. H. 517; *Boothe v. Fitzpatrick*, 36 Vt. 682.

A promise to pay for past services under circumstances from which a previous request may be implied is supported by a sufficient consideration. *Silverthorn v. Wylie*, (Wis. 1897) 71 N. W. Rep. 107.

2. Continuing Consideration. — *Hargroves v. Cooke*, 15 Ga. 321; *Loomis v. Newhall*, 15 Pick. (Mass.) 159.

An executed consideration will not support a promise, nor will voluntary services rendered as a mere favor or gratuity constitute a valuable consideration for a promise; but where there is a request, and continuous services of value are rendered to the person making the request, the consideration is a valid one and will support a promise to pay for such services, although some of them were rendered prior to the request. *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16.

Promise to Pay for Continuous Services. — A promise by the father of a bastard child to pay the stepfather for the child's support, past and future, if he will continue to support it, is binding. *Wiggins v. Keizer*, 6 Ind. 252.

The defendant married a woman who was an inmate of the plaintiff's family, and at the defendant's request, she continued to reside with the plaintiff for a year after the marriage. About the middle of the year the defendant promised to pay the plaintiff his wife's board for a year at the end of that term. It was held that as the promise was made before the expiration of the year, it was founded upon a sufficient consideration. *Cotton v. Wescott*, 3 Bulst. 187.

The plaintiff, a physician, was called to attend the defendant's married daughter and continued to attend her professionally for some time. After several visits had been made the defendant agreed to be responsible for the plaintiff's bill. It was held that the promise was founded upon a valid consideration. *Bagley v. Moulton*, 42 Vt. 184.

Continuous Liability upon Bonds. — Eight days after the execution of an administration bond by A as security for B, the administrator, C wrote to A that at the request of B he promised and agreed to indemnify A against all loss or injury he might sustain in consequence of having become security for B in that business. It was held that the consideration was a continuing one, and sufficient to sustain an action of assumpsit by A against C for indemnity against a loss that afterwards happened to him by reason of the default of B, the administrator. *Carroll v. Nixon*, 4 W. & S. (Pa.) 517.

The plaintiff went bail for the son of the defendant's intestate, who had been arrested on a criminal charge, the intestate having agreed to indemnify the plaintiff against any charge which might be imposed upon him. In an action upon this indemnity, for costs with which the plaintiff had been charged by reason of the default of the son, it was held that although no new bond was executed after the promise was made, yet, the plaintiff having at any time afterwards the right to surrender the son, his not having done so was a consideration which was executory and continuous in its nature and sufficient to support the promise. *Bestor v. Roberts*, 58 Ala. 331.

3. Adequacy of Consideration. — 2 Black. Com. 445.

United States. — *Lawrence v. McCalmont*, 2 How. (U. S.) 426.

Alabama. — *Hoot v. Sorrell*, 11 Ala. 386.

Arkansas. — *Woodruff v. McDonald*, 33 Ark. 97.

Connecticut. — *Clark v. Sigourney*, 17 Conn. 511.

Indiana. — *Brown v. Budd*, 2 Ind. 442.

Inadequacy No Defense to Action upon Promissory Note. — Thus in an action upon a promissory note given as the price of real or personal property, it is no defense

Maryland. — *Haines v. Haines*, 6 Md. 435; *Drury v. Briscoe*, 42 Md. 154; *Stewart v. State*, 2 Har. & G. (Md.) 114.

Massachusetts. — *Hubbard v. Coolidge*, 1 Met. (Mass.) 84.

New Hampshire. — *Bedel v. Loomis*, 11 N. H. 9; *Sanborn v. French*, 22 N. H. 246.

New York. — *Seward v. Jackson*, 8 Cow. (N. Y.) 406.

Ohio. — *Judy v. Louderman*, 48 Ohio St. 562.

Pennsylvania. — *Hind v. Holdship*, 2 Watts. (Pa.) 104, 26 Am. Dec. 107; *Duffy v. Mechanics*, etc., Ins. Co., 8 W. & S. (Pa.) 413.

South Carolina. — *Goree v. Wilson*, 1 Bailey L. (S. Car.) 597; *Sarter v. Gordon*, 2 Hill Eq. (S. Car.) 121; *Taylor v. Heriot*, 4 Desaus. (S. Car.) 227.

Tennessee. — *Randle v. Harris*, 6 Yerg. (Tenn.) 508.

Vermont. — *Whittle v. Skinner*, 23 Vt. 531.

To support a note or other contract, it is not necessary that the consideration therefor shall be equal in pecuniary value to the amount of the obligation incurred by the note or contract. It is enough generally that no part of the consideration upon which it is founded was wanting at the time the obligation was incurred, and that no part of it has subsequently failed. If one voluntarily and fairly purchases either real or personal property of another at a fixed price, and executes his note for the payment of the purchase money, he will not be allowed when sued thereon to prove, for the purpose of defeating or reducing the amount of the recovery on the note, that the property in fact was not worth one-half, one-fourth, or even one-tenth of the amount at which he purchased it. *Worth v. Case*, 42 N. Y. 362.

In *Whitefield v. M'Leod*, 2 Bay (S. Car.) 380, 1 Am. Dec. 650, the court said: "Inadequacy of consideration is not alone any ground for setting aside a contract solemnly entered into. The adequacy or inadequacy of consideration, in every contract, depends so much upon the different ideas of men, in relation to the objects of their contracts, and the views and purposes with which they are entered into, that there is no fixing any general standard or rule by which it can be settled; for what one man might think a full and adequate consideration, another might think very inadequate, so that really it is so indefinite and uncertain in itself that such a doctrine never could be reduced to practical use, as every contract might be impeached where any advantage is gained on one side or the other which had not equally been acquired by the opposite party."

The plaintiff and the defendant swapped horses, and afterwards the defendant, finding himself worsted in the trade, brought back and turned into the plaintiff's pasture the horse he had received, and took away, without the plaintiff's knowledge, the horse he had given. The plaintiff demanded that the defendant return his horse and take back his own, which the defendant refused to do, and the plaintiff, after keeping the defendant's horse for two weeks, sold it at public auction

and brought an action of trover for the difference in value between the amount so received and the value of his horse. It was held that the trade could not be set aside for inadequacy of consideration received by the defendant, and the plaintiff recovered. *Kidder v. Chamberlin*, 41 Vt. 62.

Celebrated Cases. — In *Thornborow v. Whitacre*, 2 Ld. Raym. 1164, in an action of assumpsit, the plaintiff declared that the defendant had, in consideration of 2s. 6d. paid down, and £4. 17s. 6d. to be paid on the performance of the agreement, promised to give the plaintiff two grains of rye corn on Monday the 29th of March, four on the next Monday, eight on the next, sixteen on the next, thirty-two on the next, sixty-four on the next, one hundred and twenty-eight on the next, and so on for a year, doubling on every successive Monday the quantity delivered on the last Monday. The defendant demurred to the declaration, and upon calculation it was found that, supposing the contract to have been performed, the whole quantity of rye to have been delivered would be 524,288,000 quarters, so that, as the counsel for the unfortunate defendant remarked, all the rye grown in the world would not come to so much. But the court said that though the contract was a foolish one it would hold at law, and that the defendant ought to pay something for his folly. The case was ultimately compromised. Mr. Smith, in his work on Contracts (p. 179), referring to this celebrated case, says: "I presume, however, that if instead of demurring, the defendant had pleaded that he had been induced to enter into the contract by fraud, he would have been able to sustain his plea; since it seems obvious on the face of the thing that the plaintiff was a good arithmetician, who, by a sort of catch, took in a man unable to reckon so well. Probably the plaintiff had taken his hint from the old story regarding the invention of the game of chess. But, by demurring, the defendant admitted that there was no fraud, and consequently the only question was on the validity of the contract in the absence of fraud; so that the case presents a strong example of the reluctance of the courts to enter into a question as to the adequacy of consideration."

There is another old case equally celebrated in which a horse was sold for one barleycorn for the first nail in the horse's shoe, two for the second, four for the third, and so on, doubling on each nail. The amount found to be due was five hundred quarters of barley. We are not told upon what principle this case was decided, but Lord Chief Justice Hyde, who sat in the case, directed the jury to find for the plaintiff in the sum of eight pounds, which was the value of the horse. *James v. Morgan*, 1 Lev. 111.

Inadequacy of Consideration Does Not Render a Conveyance Voluntary. — To bring a conveyance within the category of voluntary conveyances, there must be a total want of any substantial consideration for the same; mere inadequacy of consideration would not be

that the value of the property conveyed was inadequate to the amount of the note.¹

b. IN EQUITY. — Nor is the fact that a bargain is hard and unreasonable enough to induce even a court of equity to interfere. Every man is presumed to be capable of managing his own affairs, and whether his bargains are wise or unwise is not ordinarily a legitimate subject of inquiry in a court of either legal or equitable jurisdiction. No principle is better settled than that mere inadequacy does not form a distinct ground of equitable relief.² Thus

enough. In the one case, if the grantor is indebted at the time of making it his creditors may avoid it; whereas if it is only an inadequate consideration, the deed will not be void as to creditors unless made with a fraudulent intent. A deed made upon a good consideration only is a voluntary conveyance, but if it be made upon a consideration deemed valuable in law, it is of a different character. Washburn on Real Property, book 3, vol. 3, p. 391.

Payment of Sum of Money Not Adequate to Sustain Promise to Pay Larger Sum. — A's wife died testate, and by her will bequeathed to B, C, and D, each, the sum of two hundred dollars, but left no property out of which the legacies, or any part of them, could be satisfied. After her decease A entered into an agreement in writing with the legatees by which he agreed to pay to them the several sums bequeathed to them by his wife in consideration (1) of one cent; (2) of the love and affection he bore his deceased wife, and the fact that she had done her part in the acquisition of his property; and (3) that she had expressed her desire, by her will, that they should have said sums of money. In a suit upon the agreement it was held that the doctrine that inadequacy of consideration will not vitiate an agreement does not apply to a mere exchange of sums of money the values of which are exactly fixed, but to the exchange of something of indefinite value for money, or for some other thing of indefinite value; and that a consideration of one cent will not support a promise to pay six hundred dollars, but such a contract is so unconscionable as to be void on its face. *Schnell v. Nell*, 17 Ind. 29, 79 Am. Dec. 453.

One dollar is a sufficient consideration for a promise to pay one thousand dollars at some future day, or upon the happening of some uncertain event, but it is only a sufficient consideration for a general and unqualified promise to pay one dollar. The reason of this distinction seems to be that the law has never in theory abandoned the principle that a consideration must be commensurate with the obligation which is given in exchange for it; that although the smallest consideration will in most cases support the largest promise, this is only because the law shuts its eyes to the inequality between them; and hence any inequality to which the law cannot shut its eyes is fatal to the validity of the promise. The value of most considerations, as well as of most promises, is a thing which the law cannot measure; it is not merely a matter of fact, but a matter of opinion. If, therefore, the promisor thinks the consideration is equal to the promise in value (*i. e.*, if he is willing to give the promise for the sake of getting the

consideration), the consideration will be equal to the promise in value for all the purposes of the contract. From this it is but an easy step to the conclusion that whatever a promisor chooses to accept as the consideration of his promise, the law will regard as equal to the promise in value, provided the law can see that it has any value. Langdell's Summary of the Law of Contracts, § 55.

Payment of Present Sum Sufficient to Support Promise to Pay Larger Sum in Future. — A agreed, in consideration of £2,500 paper money to be paid him by B in the years 1780 and 1781, to pay the latter £2,500 specie in 1790. The contract was held obligatory. *Brachan v. Griffin*, 3 Call. (Va.) 433.

Deeds of Assignment. — In deeds of assignment an express consideration of one dollar is sufficient to vest the legal title to the property in the assignee. *Cunningham v. Freeborn*, 11 Wend. (N. Y.) 241.

Bargain and Sale of Land. — Any valuable consideration, however small, is sufficient to support a deed of bargain and sale, and the acknowledgment in the deed of the payment is conclusive of the fact so far as to give effect to the conveyance. *Ocheltree v. McClung*, 7 W. Va. 232.

California Conveyancing Act. — The term "valuable consideration," as used in the twenty-sixth section of the Conveyancing Act, means a pecuniary consideration, or its equivalent, as distinguished from a good consideration, and has no reference to the adequacy of the price to the value of the property conveyed. *Clark v. Troy*, 20 Cal. 220.

1. Inadequacy Not a Defense to Action upon a Promissory Note. — *Boggs v. Wann*, 58 Fed. Rep. 681; *Magers v. Dunlap*, 39 Ill. App. 618; *Nash v. Lull*, 102 Mass. 60; *Johnson v. Titus*, 2 Hill (N. Y.) 606; *Worth v. Case*, 42 N. Y. 362; *Earl v. Peck*, 64 N. Y. 596; *Matthews v. Crockett*, 82 Va. 394; *Jones v. Degge*, 84 Va. 685.

In *Solomon v. Turner*, 1 Stark. 51, 2 E. C. L. 30, in an action upon a promissory note given as the price of certain pictures sold by the plaintiff to the defendant, where evidence that the amount of the note infinitely exceeded the true value of the pictures was offered, Lord Ellenborough, C. J., who sat in the case, said: "I will not admit the evidence for the purpose of reducing the damages by showing that the pictures were of an inferior value, but if you can, by the inadequacy of the value and other circumstances, prove fraud on the part of the plaintiff, so as to show that there was no contract at all, the evidence will be admissible; if it fall short of that, it will be unavailable." The defendant failing to give such proof, the plaintiff had a verdict.

2. Dunn v. Chambers, 4 Barb. (N. Y.) 376.

specific performance of a contract will not be denied,¹ nor will a con-

1. **Specific Performance** — *England*. — *White v. Damon*, 7 Ves. Jr. 30; *Coles v. Trecothick*, 9 Ves. Jr. 234; *Peacock v. Evans*, 16 Ves. Jr. 512; *Western v. Russell*, 3 Ves. & B. 188; *Callaghan v. Callaghan*, 8 Cl. & F. 374.

United States. — *Erwin v. Parham*, 12 How. (U. S.) 197; *Wann v. Coe*, 31 Fed. Rep. 369.

Maryland. — *Hannan v. Towers*, 3 Har. & J. (Md.) 147, 5 Am. Dec. 427; *Young v. Frost*, 5 Gill (Md.) 288; *Shepherd v. Bevin*, 9 Gill (Md.) 32.

Massachusetts. — *Western R. Corp. v. Babcock*, 6 Met. (Mass.) 346; *Leach v. Fobes*, 11 Gray (Mass.) 506; *Park v. Johnson*, 4 Allen (Mass.) 259; *Powers v. Mayo*, 97 Mass. 180; *Lee v. Kirby*, 104 Mass. 420.

Michigan. — *Burtch v. Hogge*, Harr. (Mich.) 31.

Missouri. — *Bean v. Valle*, 2 Mo. 126; *Harrison v. Town*, 17 Mo. 237.

New Jersey. — *Rodman v. Zilley*, 1 N. J. Eq. 320; *Ready v. Noakes*, 29 N. J. Eq. 497; *Shadle v. Disborough*, 30 N. J. Eq. 370.

New York. — *Westervelt v. Matheson*, 1 Hoffm. Ch. (N. Y.) 37; *Viele v. Troy*, etc., R. Co., 21 Barb. (N. Y.) 381.

North Carolina. — *White v. Thompson*, 1 Dev. & B. Eq. (N. Car.) 493.

Ohio. — *Galloway v. Barr*, 12 Ohio 355.

South Carolina. — *Fripp v. Fripp*, Rice Eq. (S. Car.) 84; *Gasque v. Small*, 2 Strobb. Eq. (S. Car.) 72.

Texas. — *Curlin v. Hendricks*, 35 Tex. 225.

Virginia. — *Hale v. Wilkinson*, 21 Gratt. (Va.) 75.

West Virginia. — *Conaway v. Sweeney*, 24 W. Va. 643.

Although it is essential that there should be a valuable consideration to induce a court of equity to decree specific performance of a contract, it is not essential that the consideration should be adequate. The parties themselves are the best judges of that, and therefore mere inadequacy, if not so gross as to prove fraud or imposition, will not warrant the refusal of relief. *Adams's Equity*, p. 78.

The party claiming performance must present a case fair, just, and reasonable; the contract to be performed must have been entered into upon adequate consideration, and must be free from fraud, misrepresentation, or surprise; and it must not be hard, unconscionable, or unequal. Where the inadequacy of price, in a contract to sell or convey, is so inadequate as to be conclusive evidence of fraud, as where it would shock the moral sense of an indifferent man, a court of chancery should not carry it into effect. But inadequacy of price merely, without being such as to prove fraud conclusively, the contract being entered into deliberately and being fair in all its parts, is not an objection to its being executed. *Seymour v. Delancy*, 3 Cow. (N. Y.) 445, 15 Am. Dec. 270.

Where a bill to enforce specific performance is filed by one party to an agreement, and the other party defends on the ground that the contract is not just and equitable in all its parts, it would be hazardous for the court, where the contract furnishes no standard or measure, to attempt a solution of these

relative advantages which might, and probably would, vary with changing time. It is a general rule that the parties themselves are the sole judges of the value of the benefits to be derived from their bargains. *South*, etc., *Alabama R. Co. v. Highland Ave.*, etc., R. Co., 98 Ala. 400, 39 Am. St. Rep. 74.

A father executed a written contract under seal by which he agreed, for the consideration of five dollars received, to convey to his daughter and her husband a tract of one hundred and seventy acres of land of which he had put them in possession. It was held that this paper alone was sufficient to defeat the application of the other heirs of the father for a partition of this portion of his estate after his decease, and equity would decree its specific performance on application by the daughter and her husband. Any supposed inadequacy of price, in the absence of fraud, would have but little influence in the interpretation of such a contract between parent and child. *Haines v. Haines*, 6 Md. 435.

California Statute. — Section 3391 of the Civ. Code of Cal. provides that "specific performance cannot be enforced against a party to a contract in any of the following cases: 1. If he has not received an adequate consideration for the contract. 2. If it is not, as to him, just and reasonable."

In *Morrill v. Everson*, 77 Cal. 114, in a suit for specific performance of a contract in relation to a lot in the city of San Diego, it appeared that the plaintiffs were real estate brokers and the defendant was a somewhat weak-minded and excitable woman of not much business knowledge. The property at the time of the contract was of the value of one thousand six hundred dollars, and of the rental value of twelve dollars per month. The contract was that the plaintiffs rented the property for the term of nine months at a rental of ten dollars per month, to be paid in advance, and had the right of purchasing at any time during the term for the sum of one thousand three hundred dollars. During the latter part of the term the value of the property increased to four thousand dollars, and the plaintiffs then sought to buy. The court below declined to enforce the contract, and upon appeal the court, by Hayne, C., sustaining the judgment, said: "We do not doubt that the point of time to which the question of adequacy must relate is the time of the formation of the contract, and it is safe to say that it is not necessary that there be the highest possible price, but only a consideration which is adequate under all the circumstances. But we think that there was no such consideration for the contract which is sought to be enforced. The lease was a comparatively unimportant part of the contract. The rent for the entire term amounted to only ninety dollars. The real thing which the plaintiffs wanted was the right to purchase, which, under the circumstances of the market, was extremely valuable. They got this right, without any corresponding obligation to purchase, for the insignificant rent paid for the use of the premises, which rent was less even than the rental value of the property. This being the case,

tract¹ or deed² be set aside, nor a sale be vacated,³ merely because the consideration is inadequate.

we think that, while there was a consideration which was sufficient to render the contract binding in law, yet that so far as the right of purchase was concerned there was no 'adequate' consideration within the meaning of the provision of the Civil Code above referred to."

1. **Setting Aside Contract** — *England*. — Griffith *v.* Spratley, 1 Cox 383.

United States. — Eyre *v.* Potter, 15 How. (U. S.) 42; Waterman *v.* Waterman, 27 Fed. Rep. 827.

Alabama. — Judge *v.* Wilkins, 19 Ala. 765.

Arkansas. — Hardy *v.* Heard, 15 Ark. 184.

Illinois. — Weld *v.* Rees, 48 Ill. 428.

New York. — Udall *v.* Kenney, 3 Cow. (N. Y.) 590.

Ohio. — Knobb *v.* Lindsay, 5 Ohio 469.

Pennsylvania. — Graham *v.* Pancoast, 30 Pa. St. 89.

Tennessee. — White *v.* Flora, 2 Overt. (Tenn.) 426; Coffee *v.* Ruffin, 4 Coldw. (Tenn.) 487; Hardean *v.* Burge, 10 Yerg. (Tenn.) 202.

Before a sale will be set aside for inadequacy of price alone, it must appear that the price was so grossly inadequate as to shock the moral sense and create at once, upon its being mentioned, a suspicion of fraud. Clark *v.* Krause, 2 Mackey (D. C.) 559.

The court of chancery will not relieve from an improvident contract for the purchase of stock which has a speculative value in the market where the sale is without fraud or warranty, although the stock is sold at a price far beyond its real value. Moffat *v.* Winslow, 7 Paige (N. Y.) 124.

2. **Setting Aside Deed** — *England*. — Harrison *v.* Guest, 8 H. L. Cas. 481.

United States. — Warner *v.* Daniels, 1 Woodb. & M. (U. S.) 90; Jenkins *v.* Einstein, 3 Biss. (U. S.) 128; Follett *v.* Rose, 3 McLean (U. S.) 332.

Alabama. — Wood *v.* Craft, 85 Ala. 260.

Iowa. — Herron *v.* Herron, 71 Iowa 428; Brockway *v.* Harrington, 82 Iowa 23.

Kentucky. — Talbott *v.* Hooser, 12 Bush (Ky.) 408.

Michigan. — Keagle *v.* Pessell, 91 Mich. 618.

Missouri. — Morriso *v.* Philliber, 30 Mo. 145.

New York. — Diefendorf *v.* Diefendorf, (Supreme Ct.) 8 N. Y. Supp. 617.

North Carolina. — Green *v.* Thompson, 2 Ired. Eq. (N. Car.) 365.

Ohio. — Steele *v.* Worthington, 2 Ohio 182.

Oregon. — Scovill *v.* Barney, 4 Oregon 288.

Pennsylvania. — Harris *v.* Tyson, 24 Pa. St. 347; Cummings's Appeal, 67 Pa. St. 404.

Virginia. — Tebbis *v.* Lee, 76 Va. 744.

Inadequacy of price *per se* is no ground to set aside a conveyance unless it be so gross as to be evidence of fraud. In judging of the adequacy or inadequacy of price, the condition and circumstances of the estate at the time of the sale must be regarded. Franklin *v.* Osgood, 14 Johns. (N. Y.) 527.

In the absence of any other evidence tending to show fraud in the transfer of real estate, the mere inadequacy of the consideration paid is not sufficient to do so. Emonds *v.* Termehr, 60 Iowa 92.

Where a deed which purported to have been made in pursuance and consideration of a certain decree pronounced by a court of chancery directed the grantors, who were executors, to convey, and for the further consideration of five shillings, it was held that the latter consideration was sufficient to support the deed, and consequently that the existence of the decree need not be proven. Toncra *v.* Henderson, 3 Litt. (Ky.) 234.

3. **Vacating Sale** — *Florida*. — Sammis *v.* Matthews, 19 Fla. 811.

Illinois. — McMullen *v.* Gable, 47 Ill. 67; Comstock *v.* Purple, 49 Ill. 158; Hoyt *v.* Pawtucket Sav. Inst., 110 Ill. 390.

Maryland. — Johnson *v.* Dorsey, 7 Gill (Md.) 269.

Mississippi. — Delafield *v.* Anderson, 7 Smed. & M. (Miss.) 630.

New York. — Parmelee *v.* Cameron, 41 N. Y. 392; Osgood *v.* Franklin, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513.

North Carolina. — Barnett *v.* Spratt, 4 Ired. Eq. (N. Car.) 171.

Tennessee. — Merriman *v.* Lacefield, 4 Heisk. (Tenn.) 209; Birdsong *v.* Birdsong, 2 Head (Tenn.) 289.

Virginia. — Cribbins *v.* Markwood, 13 Gratt. (Va.) 495; Mayo *v.* Carrington, 19 Gratt. (Va.) 74.

West Virginia. — Bradford *v.* McConihay, 15 W. Va. 732.

See also Moore *v.* Lowery, 27 Tex. 541; Harrington *v.* Wells, 12 Vt. 505.

When a stranger is the purchaser at a sale under a decree in equity, it will not be set aside for mere inadequacy of price, no matter how gross, unless there be some unfair practice at the sale, or unless those interested are surprised without fault or negligence on their part, and this rule applies as well upon objections to the confirmation of the sale as in the case of an original bill to set aside the sale, in the absence of special reasons to the contrary. Parker *v.* Bluffton Car Wheel Co., 108 Ala. 140.

The defendant was administrator of the estate of his deceased brother, of whom the plaintiffs were children and heirs-at-law. After the defendant's discharge as administrator he continued to care for and look after the real estate of the plaintiffs during their minority and afterwards. Subsequently one of the plaintiffs came to the defendant and stated that they wished to sell one of the pieces of realty, and asked the defendant to buy it. The defendant strongly advised against the sale, and said he did not want the land, but that if the heirs insisted on selling, he would give as much for it as any one else would offer. Thereupon the plaintiff saw other friends and made some inquiries as to the value and expediency of selling, and finally offered the land to the defendant for two thousand five hundred dollars. The defendant told the plaintiff that the property was assessed for taxation at two thousand seven hundred dollars, and again advised him to hold on to it, but the plaintiff declared that he could do better with the money in a business investment, and after some delay the defend-

2. Inadequacy Evidence of Fraud. — But though inadequacy of consideration is not itself a distinct ground of defense at law nor of relief in equity, yet it is evidence of fraud¹ which is both; and while, as evidence, it is ordinarily entitled to very little weight when standing alone, yet when it is coupled with other circumstances showing over-reaching or oppression, or when the parties stand in such relation that this will be presumed, inadequacy becomes a material element of constructive fraud.

Inadequacy Coupled with Other Evidences of Fraud. — Thus when, in addition to the inadequacy, it appears that undue influence was exerted over the grantor or promisor,² or that through age, ignorance, sickness, or mental incapacity, he did not fully comprehend his act,³ or when, by the suppression of material

ant consented to purchase, if the other heirs desired to sell. Thereupon the plaintiff wrote to them, and they consented to the sale, and a deed was accordingly made. There was some dispute as to the real value of the land at the time, but the evidence showed that the real estate market was very dull, and that it was almost impossible to sell property for cash at any price. The land afterwards greatly increased in value by an extraordinary growth of the town in which it was situated, and the plaintiffs brought an action to recover the land, charging that it was obtained from them by fraud. It was held that the evidence showed that the defendant acted perfectly fairly and honestly in the matter, and judgment was entered for him accordingly. *Kirschner v. Kirschner*, 113 Mo. 290.

Inadequacy When Rights of Infants Are Concerned. — On a suit in partition, some of the parties to which were infants, sale was ordered of a tract of land worth one thousand six hundred dollars, and an agent of one of the parties was engaged to be present and prevent a sacrifice of the property. By some accident the agent was prevented from attending, and the land was sold for fifty dollars. It was held that although no fraud in the purchase appeared, yet the inadequacy of price was so great as to shock the conscience; and, as infants were concerned, it was the duty of the court to set aside the sale. *Mitchell v. Jones*, 50 Mo. 438.

1. Inadequacy of Consideration an Evidence of Fraud. — *Clarkson v. Hanway*, 2 P. Wms. 203; *Morse v. Royal*, 12 Ves. Jr. 355; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264; *Baldwin v. National Hedge, etc., Co.*, 39 U. S. App. 162; *St. Louis, etc., R. Co. v. Phillips*, 27 U. S. App. 643; *Wormack v. Rogers*, 9 Ga. 60; *Goff v. Rogers*, 71 Ind. 459; *Boyd v. Ellis*, 11 Iowa 97; *Chouteau v. Nuckolls*, 20 Mo. 442; *Shotwell v. Shotwell*, 24 N. J. Eq. 378; *Hamet v. Dundass*, 4 Pa. St. 178; *Davidson v. Little*, 22 Pa. St. 245, 60 Am. Dec. 81; *Birdsong v. Birdsong*, 2 Head (Tenn.) 289; *Kuelkamp v. Hidding*, 31 Wis. 503; *Fisher v. Shelver*, 53 Wis. 498.

More inadequacy of consideration, unless extremely gross, does not *per se* prove fraud. *Kempner v. Churchill*, 8 Wall. (U. S.) 362.

Where the incumbrances upon realty, with the consideration paid for its conveyance, very nearly equal its reasonable value, the fact that the consideration is small does not constitute a badge of fraud. *Day v. Cole*, 44 Iowa 452.

Inadequacy Not Amounting to Evidence of Fraud. — A plantation located on the Missis-

sippi river in the parish of Carroll, Louisiana, was appraised in 1860 at one hundred and nineteen thousand three hundred and ninety-three dollars; in 1866, at ninety-five thousand six hundred and forty-five dollars, or fifty-five dollars per acre. The land was sold in 1868 at an administrator's sale for two thousand five hundred and thirty-three dollars, being at the rate of one dollar and fifty cents per acre. It was held that, considering the overflow of the river, and other physical and moral causes tending to affect the values of real estate similarly situated, together with the bankrupt condition of the South at this period of her history, and in comparison with prices received at other sales, the consideration of the sale was not inadequate. *Boyd v. Wyly*, 124 U. S. 98.

The defendant, being the owner of a silver mine in Arizona, prospected the same to the extent of driving a tunnel for a short distance, and sinking a shaft to about twenty feet, resulting in a find of a small vein of silver ore. He thereupon organized a stock company in Iowa to operate the mine, with a capital stock of five hundred thousand dollars. In consideration of seventy thousand dollars' worth of such stock the plaintiff agreed to pay the defendant seventeen hundred and fifty dollars, or convey to him certain real estate. It was held that the contract was not without consideration, nor was the consideration so inadequate as to constitute a badge of fraud. *Coles v. Kennedy*, 81 Iowa 360.

2. Undue Influence. — *Gartside v. Isherwood*, 1 Bro. C. C. 558; *Fox v. Mackreth*, 2 Cox Ch. 322; *Case v. Case*, 26 Mich. 484; *Bunch v. Shannon*, 46 Miss. 526; *Simonton v. Bacon*, 49 Miss. 582; *Whelan v. Whelan*, 3 Cow. (N. Y.) 537.

An assignment of a large amount of property by a person of advanced years, procured by one having influence over her, without adequate consideration, will be closely examined by a court of equity. *Leddel v. Starr*, 20 N. J. Eq. 274.

3. Age, Ignorance, and Mental Incapacity. — *Summers v. Griffiths*, 35 Beav. 27; *Kelly v. McGuire*, 15 Ark. 555; *White v. White*, 89 Ill. 460; *McCormick v. Malin*, 5 Blackf. (Ind.) 509; *Tally v. Smith*, 1 Coldw. (Tenn.) 290.

A contract will be set aside in equity for gross inadequacy of consideration where the relation of the parties is such as to warrant the presumption that the defendant took advantage of the plaintiff's illiteracy and ignorance. *George v. Richardson*, Gilmer (Va.) 230.

Where a husband and wife, seventy-nine

facts, he is unacquainted with the value of the thing conveyed,¹ or through surprise² or stress of financial embarrassment³ is led into an improvident bargain, relief will be granted.

and seventy years old, respectively, are induced to make a land deal involving about twelve thousand dollars, in which they pay about five thousand dollars too much, the transfer should be set aside, as between the parties, whether induced by fraud or misunderstanding. *Galbraith v. McLaughlin*, 91 Iowa 399.

Where a deed sought to be set aside is shown to have been executed by the grantor without any adequate consideration, and when his mind from age, disease, and excessive use of whiskey had become so impaired as to render him incapable of understanding the value of the property and of disposing of it, relief will be granted. *Howard v. Howard*, 87 Ky. 616.

Where a person who owned real estate of the value of three thousand five hundred dollars, but had no knowledge of its value, and was illiterate, being able neither to read nor write, was induced by a person, in whom she had confidence and who acted in a double capacity as agent for both parties, to dispose of said real estate to another for seventy-five dollars, it was held that the transaction was stamped with fraud, and the facts would warrant a decree setting aside the conveyance on the ground of fraud. *Morriso v. Philliber*, 30 Mo. 145.

An ignorant woman, unacquainted with the value of land, was induced to pay six hundred dollars for land worth not over two hundred dollars, by one who had been the friend and physician of her deceased husband, and for whom she entertained feelings of gratitude for past kindnesses. It was held that under the circumstances the inadequacy of price constituted a fraud, and a rescission of the contract was decreed. *Hunter v. Owen*, (Ky. 1888) 9 S. W. Rep. 717.

Although No Confidential Relations Subsist Between the Parties a deed will be set aside as having been procured by undue influence, where it appears that the deed was executed for an inadequate consideration, while the grantor was seriously ill and under the influence of opiates, without any previous bargain or negotiation in respect to the sale of the property, and without the grantor receiving advice, legal or otherwise. *Nielson v. Lafflin*, (Supreme Ct.) 21 N. Y. Supp. 731.

1. Suppression of Material Facts—Grantor Unacquainted with Value of Thing Conveyed.—*Juzan v. Toulmin*, 9 Ala. 662; *Witherwax v. Riddle*, 121 Ill. 140; *Havlin v. Reed*, (Ky. 1887) 5 S. W. Rep. 554; *Bean v. Valle*, 2 Mo. 126.

Where the managing partner in a mine not only conceals from his copartner, who is absent, the fact that valuable ore has been found, but misleads him by letter as to its true condition, and by such misrepresentation and concealment obtains a sale of the partner's interest in the property to himself at a grossly inadequate price, the sale will be set aside as fraudulent. *Bowman v. Patrick*, 36 Fed. Rep. 138. See also *Maloy v. Berkin*, 11 Mont. 138; *Kapaakea v. Morrison*, 2 Hawaiian 272.

S. and M. being about to marry, entered into an ante-nuptial marriage contract, whereby S. gave M. a life estate in a house and lot worth about six thousand dollars, and M., in consideration thereof, relinquished all interest in S.'s estate. The contract was prepared by S.'s attorney, who undertook to explain it to M., who had no other adviser. S. had then and at his death an estate above one hundred thousand dollars. M. had about three thousand seven hundred dollars personal estate, which passed to S. by virtue of the marriage. There was no actual fraud on the part of S. or his attorney, but M. was not informed that the three thousand seven hundred dollars became the property of S. by virtue of the marriage, and was induced to believe by S.'s despondent views of his affairs that he had but a small estate. It was held that M. was not bound by the contract, the inadequacy of consideration and other circumstances raising the presumption that she did not understand her act. *Spurlock v. Brown*, 91 Tenn. 241.

2. Surprise.—The plaintiff, who was a poor and improvident man, and ignorant that he had any interest in a certain property, was approached by the defendant who informed him of the fact and stated that he had purchased the property, and offered the plaintiff a certain sum for a relinquishment of his interest; and the plaintiff, without taking time to consider the offer or seek advice, accepted the money and executed the release. The price paid was inadequate to the value of the interest conveyed. Upon a bill in equity to set aside the conveyance, it was held that although there was no evidence of actual fraud, the plaintiff had been surprised into making an improvident bargain, and for this reason a decree was accordingly made rescinding the transaction. *Evans v. Llewellyn*, 1 Cox 333. See also *Mortlock v. Buller*, 10 Ves. Jr. 292.

3. When Advantage Is Taken of a Person's Financial Distress.—*Cockell v. Taylor*, 15 Beav. 103; *Butler v. Duncan*, 47 Mich. 94; *Brown v. Hall*, 14 R. I. 249.

Inadequacy of price, whether it be so gross as to be *per se* proof of fraud or not, if attended by circumstances evincing unconscientious advantage taken by the vendee of the improvidence and distress of the vendor, will avoid the contract in equity, though it be a contract executed. *M'Kinney v. Pinckard*, 2 Leigh (Va.) 149, 21 Am. Dec. 601.

In *Hough v. Hunt*, 2 Ohio 495, 15 Am. Dec. 569, a person deeply in debt, in order to obtain a loan of money, agreed to purchase a tract of land at more than double its value and gave a mortgage upon other property to secure the loan and part of the purchase money. The vendor was apprised of the purchaser's necessities. The contract was rescinded in equity. In passing the decree the court said: "The rule in chancery is well established. When a person is encumbered with debts, and that fact is known to a person with whom he contracts, who avails himself of it to exact an unconscionable bargain, equity will relieve upon account of the advantage and hardship. Where

Confidential Relations. — Again, where the parties stand in a confidential relation, inadequacy of price will raise a presumption of fraud,¹ and the burden is upon the grantee to show that he acted with perfect fairness.

3. Gross Inadequacy Proof of Fraud. — When the inadequacy of consideration is very gross, fraud will be presumed, for though in such a case there may be no positive evidence of it, yet, when the inequality is so great as to shock the conscience, the mind cannot resist the inference that the bargain must in some way have been improperly obtained.²

What Constitutes Gross Inadequacy. — As to what degree of inequality constitutes gross inadequacy, no rule can be laid down. Between the parties, it has been said, "to set aside a conveyance, there must be an inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it."³ When the rights

the inadequacy of price is so great that the mind revolts at it, the court will lay hold on the slightest circumstances of oppression or advantage to rescind the contract. So, when a person borrowing money to relieve his necessities is induced to purchase property at an exorbitant price, and to an amount greatly beyond the loan obtained, and secure the payment by mortgage on his other lands, the necessity of the purchaser, connected with the exorbitancy of price, are sufficient evidence of unfair advantages to justify the interference of the court."

1. Confidential Relations — Guardian and Ward. — Conveyances between persons standing in the relation of guardian and ward are justly the objects of suspicion in courts of equity. Any substantial inadequacy of price in such a case amounts to undue advantage. *Williams v. Powell*, 1 Ired. Eq. (N. Car.) 460.

Attorney and Client. — A grantor will be entitled to a reconveyance of the property if she is led by her attorney, in whom she has perfect confidence, to make a conveyance of the land to him at a grossly inadequate price. *Leggat v. Leggat*, 13 Mont. 190. See also *Gibson v. Jeyes*, 6 Ves. Jr. 266; *Robinson v. Schly*, 6 Ga. 515.

Principal and Agent. — Upon a bill in equity to set aside and cancel a deed, where the evidence showed that the grantee was at the time acting as the grantor's agent in charge of the property; that the grantor was an old negro woman, about eighty years of age, feeble in mind and body, almost blind, and suffering from a surgical operation for the relief of her eyes; that the deed was prepared by an attorney at the instance of the grantee, without consultation with the grantor, and was read over to her, but not explained by the notary who took her acknowledgment of signature by mark; and that she had previously executed a will which was never revoked and by which she devised and bequeathed all her property to a woman who lived with her and whom she had raised from childhood, it was held that relief should be granted. *Burke v. Taylor*, 94 Ala. 530.

2. Gross Inadequacy Proof of Fraud — England. — *Stilwell v. Wilkins*, 1 Jac. 280.

United States. — *Byers v. Surget*, 19 How. (U. S.) 303; *Hume v. U. S.*, 21 Ct. of Cl. 328.

Illinois. — *County Ct. v. People*, 58 Ill. 191; *County Ct. v. People*, 58 Ill. 456.

Missouri. — *Mitchell v. Jones*, 50 Mo. 438.

New Jersey. — *Wintermute v. Snyder*, 3 N. J. Eq. 489; *Phillips v. Pullen*, 45 N. J. Eq. 5.

New York. — *Dunn v. Chambers*, 4 Barb. (N. Y.) 376.

Tennessee. — *Deaderick v. Watkins*, 8 Humph. (Tenn.) 520.

Texas. — *Bryant v. Kelton*, 1 Tex. 415; *Burch v. Smith*, 15 Tex. 219.

Wherever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong and in general a conclusive presumption, though there be no direct proof of fraud, that an undue advantage has been taken of the ignorance, the weakness, or the distress and necessity of the vendor; and this imposes on the purchaser a necessity to remove this violent presumption by the clearest evidence of the fairness of his conduct; and the relief is given by the court, either by refusing to enforce the contract, or by setting it aside altogether, according to the circumstances of the case. The relief is extended not only to young heirs selling their expectancies; but to all who are weak or necessitous, or not perfectly cognizant of their rights, whether selling expectancies or absolute estates; more especially where the purchaser is very intelligent and acute, and avails himself of his superiority in an unreasonable manner. *Butler v. Haskell*, 4 Desaus. (S. Car.) 651.

3. Per Lord Thurlow, Chancellor, in Gwynne v. Heaton, 1 Bro. C. C. 1. *Howard v. Edgell*, 17 Vt. 9.

Instances of Gross Inadequacy. — In *Heathcote v. Paignon*, 2 Bro. C. C. 167, where the plaintiff, being indebted to the defendant's testator, sold him a life annuity of fifty pounds for the sum of two hundred pounds, the inequality in price was held to be evidence of the defendant's having taken advantage of the plaintiff's distress, and the sale was set aside.

Where the consideration paid is only one-fifth or one-sixth of the value of the property, the inadequacy is so gross as to warrant the presumption of fraud. *Friedman v. Hirsch*, (Supreme Ct.) 18 N. Y. Supp. 85.

But in *Feigley v. Feigley*, 7 Md. 537, 61 Am. Dec. 375, it was held that in the sale of property for two hundred dollars, worth eight hundred dollars, there is not such a glaring inadequacy of consideration as would, of itself,

of creditors are prejudiced, a less degree of inequality would seem to suffice.¹

VI. GOOD CONSIDERATION — 1. Definition. — A good consideration is defined to be that of blood or natural affection between near relations.²

2. Between Whom It Will Operate. — Its sufficiency to support a deed having already been considered,³ the only remaining inquiry is the degrees of consanguinity or affinity within which it will operate.

Husband and Wife. — The relationship existing between husband and wife is sufficient to constitute love and affection between them a good consideration.⁴

Parent and Child. — And so it is between parent and child.⁵

Father and Illegitimate Child. — But not, it would seem, between a father and his illegitimate child, since in law the latter is deemed *nullius filius*.⁶

Mother and Illegitimate Child. — But the same reason does not obtain in *North*

stamp the transaction with fraud, and render the deed void as to the wife of the deceased grantor.

1. What Constitutes Gross Inadequacy in Respect to Creditors. — Cases in which the question of inadequacy of consideration arises between the grantor and grantee of a deed, where suit is instituted for the purpose of setting aside the grant on the ground of imposition, are not applicable in determining a question of the fairness of a consideration between a vendee and creditor under the statute concerning fraudulent conveyances. What inadequacy of consideration would induce a court to set aside a conveyance at the instance of the grantor, on the ground of imposition, is an entirely different question from that degree of inadequacy which would avoid an assignment on the ground of fraud in a suit by a creditor or purchaser against the assignee. *Kuykendall v. McDonald*, 15 Mo. 416, 57 Am. Dec. 212. See also *Barrow v. Bailey*, 5 Fla. 9; *Bay v. Cook*, 31 Ill. 336.

To justify the inference of fraud, the disparity must be so glaring as to satisfy the court that the conveyance was not made in good faith. *Fuller v. Brewster*, 53 Md. 358.

Illustrations. — Where the facts clearly show that the vendor was insolvent, and that all his property was conveyed to a creditor in payment of a debt which was less than one-fourth of the true value of it and about one-fourth of the price which a purchaser offered and stood ready to give for it, the presumption of fraud is so violent that if not rebutted it will be sufficient to avoid the conveyance. *Shelton v. Church*, 38 Conn. 416.

Where a debtor deprives himself of all power to pay the debt by conveying his property, worth five thousand dollars, to his wife for the consideration of one thousand dollars and the payment of a mortgage of one thousand dollars on the premises, a fraudulent intent will be inferred. *Sandman v. Seaman*, 84 Hun (N. Y.) 337.

An embarrassed or insolvent debtor may sell his entire stock of goods in absolute payment of a *bona fide* existing debt when there is no material difference between the value of the property and the amount of the debt, and no use or benefit is reserved to himself; but, when such sale is attacked by other creditors, the purchaser must satisfactorily prove the existence, amount, and *bona fides* of his debt, and the adequacy of the consideration; and if he proves only a part of his debt, it must be re-

garded as simulated at least to the extent of the residue, and renders the sale fraudulent in fact as against other creditors. *Moore v. Penn*, 95 Ala. 200.

A Sale of Selected Goods at a Discount of Thirty-five Per Cent. by a business firm, for the purpose of raising money to meet pressing demands, when neither the vendor nor purchaser supposed the concern to be insolvent, is not such a badge of fraud as will support a creditor's bill. *Barnes v. Foxen*, 53 Mich. 475.

Inadequacy of Price at Commissioners' Sale. — The sale of a debtor's residence worth four thousand dollars or more will not be set aside at the instance of creditors for inadequacy of price because purchased by the debtor's wife for two thousand seven hundred dollars at the commissioner's sale, when the creditors had knowledge of, and their attorneys were present at, the sale and were not from any cause prevented from bidding. *Alms v. Gates*, (Ky. 1895) 32 S. W. Rep. 1088.

Gross Inadequacy Question of Fact. — When a conveyance executed in payment of an antecedent debt is attacked for fraud by existing creditors, the onus of proving the sufficiency of the consideration being on the grantee, the law "will not weigh considerations in diamond scales," nor balance the property against the price so closely as to leave no room for ordinary differences of opinion; yet, where the evidence shows that the price was only about two-thirds of the value of the property — as one thousand three hundred to two thousand dollars, or one thousand six hundred to two thousand five hundred dollars — the question should be submitted to the jury whether the disparity does not amount to gross inadequacy. *Mobile Sav. Bank v. McDonnell*, 89 Ala. 434, 18 Am. St. Rep. 137.

2. 2 Black. Com., p. 296.

3. See *supra*, this title, *Necessity and Sufficiency of Consideration — Specialties*.

4. Husband and Wife. — *Stafford v. Stafford*, 41 Tex. 111.

5. Parent and Child. — *Nichols v. Emery*, 109 Cal. 323; *Oliphant v. Liversidge*, 142 Ill. 160; *Pierson v. Armstrong*, 1 Iowa 282, 63 Am. Dec. 440; *Knowles v. Erwin*, 43 Hun (N. Y.) 150; *Ferguson's Appeal*, 117 Pa. St. 426.

Parent and Step-child are within the requisite degree of relationship. *Schneitter v. Carman*, (Iowa 1896) 67 N. W. Rep. 249.

6. Father and Illegitimate Child. — *Blount v. Blount*, 2 Law Repos. (N. Car.) 587.

Carolina in the case of a mother and her illegitimate child, since under the code of that state the child may inherit from her. This relationship has consequently been held the basis of a good consideration.¹

Uncle and Nephew. — The collateral relationship between uncle and nephew is not sufficient to sustain a good consideration.²

Grandparent and Grandchild. — The relationship of grandparent and grandchild is the subject of conflict, some of the decisions holding it sufficient to constitute love and affection between them a good consideration,³ while there are others denying it.⁴

Father-in-law and Son-in-law. — The affinity between father-in-law and son-in-law is sufficient for a good consideration to operate between them.⁵

Brother-in-law and Sister-in-law. — But not the affinity between brother-in-law and sister-in-law.⁶

VII. VALUABLE CONSIDERATIONS — 1. Definition. — A valuable consideration has already been defined to consist either in some right, interest, profit, or benefit accruing to the party who makes the promise, or some forbearance, detriment, loss, responsibility, act, labor, or service, given, suffered, or undertaken by the party to whom it is made.⁷

1. Mother and Illegitimate Child. — *Ivey v. Granberry*, 66 N. Car. 223.

2. Uncle and Nephew. — *Edwards v. Jones*, 1 Myl. & C. 226; *Buford v. McKee*, 1 Dana (Ky.) 107; *Hayes v. Kershow*, 1 Sandf. Ch. (N. Y.) 258. But see *Rosher v. Williams*, L. R. 20 Eq. 210.

Text-book writers have sometimes stated this relationship to constitute the basis of a good consideration. Thus Mr. Washtburn, in his treatise on Real Property, vol. 2, p. 420, says: "A good consideration is one raised by the relationship of marriage or of blood within the degrees of nephew or cousin." He, however, cites no authorities to support the text and the decisions seem to be contrary.

3. Grandparent and Grandchild. — *Stovall v. Barnett*, 4 Litt. (Ky.) 207; *Hanson v. Buckner*, 4 Dana (Ky.) 251, 29 Am. Dec. 401; *Kuuku v. Kawaiui*, 4 Hawaiian 515.

4. Kinnebrew v. Kinnebrew, 35 Ala. 628; *Borum v. King*, 37 Ala. 606.

5. Father-in-law and Son-in-law. — *Bell v. Scammon*, 15 N. H. 381, 41 Am. Dec. 706.

Mother-in-law and Daughter-in-law. — The defendant and her husband had acquired certain land. The husband died without issue, and the land descended in equal shares to the plaintiff, who was his mother, and the defendant. The plaintiff was advised and urged by a daughter to convey her share to the defendant, on the ground that she ought to enjoy the whole of the property left by her husband. The plaintiff did convey her share to the defendant, and it was held that the relations of the parties constituted a good consideration for the conveyance. *Beith v. Beith*, 76 Iowa 601.

6. Brother-in-law and Sister-in-law. — In *Cotton v. Graham*, 84 Ky. 672, "love and affection" for a deceased brother's widow was held not to be a sufficient consideration to support a bond and a mortgage securing it. In delivering the opinion of the court, Pryor, C. J., said: "It is assumed in argument that the statements of the petition show only the consideration of love and affection on the part of the appellees for the execution of the obligation for the benefit of their sister-in-law, Mrs.

Parker; and that such a consideration, where the relationship is so remote, or where none in fact existed except such as sprung from the marital relation that existed between their deceased brother and his wife, will not support the agreement to pay. If the facts alleged authorized the conclusion reached by counsel and the court below, there would be less difficulty in determining the question involved. This court has heretofore held, in several cases, that a voluntary agreement to provide for a collateral relation will not be specifically enforced. The obligation to provide for a wife or child constitutes such a meritorious consideration as will authorize a court of equity to enforce it, but, as said in *Buford v. McKee*, 1 Dana (Ky.) 107: 'The whole foundation of the principle which turns mere gratuitous engagements and voluntary promises of bounty and munificence into contracts of obligatory efficacy is of such doubtful equity that we feel no disposition to carry it further than it has already gone.'

7. See *supra*, this title, *Necessity and Sufficiency of Consideration — Consideration Must Be Valuable*.

Civilian Division of Valuable Considerations. — "These valuable considerations are divided by the civilians into four species. 1. *Do ut des*; as when I give money or goods on a contract that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond or promise of repayment; and all sales of goods in which there is either an express contract to pay so much for them or else the law implies a contract to pay so much as they are worth. 2. The second species is *facio ut facias*; as when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together, or to do any other positive acts on both sides. Or it may be to forbear on one side on consideration of something done on the other; as that in consideration A, the tenant, will repair his house, B, the landlord, will not sue him for waste. Or it may be for mutual forbearance on both sides; as that in consideration that A will not trade to Lisbon, B will

2. General Principle. — Although this is the definition that is usually given, it is rather the statement of a principle as embodied in the circumstances to which it commonly finds application than of the principle itself. In the abstract a valuable consideration may be defined to be the relinquishment by the promisee of some right which he may lawfully exercise or enforce. As applied to sales, it is the relinquishment of the right of property; in respect to bailments, it is the relinquishment of the right of possession; in considerations founded upon some act or forbearance, it is the relinquishment of a personal right, singly or in conjunction with others.

Benefit or Detriment Not Essential. — Considered, therefore, as a mere relinquishment of a right, it becomes immaterial whether it be of benefit to the promisor or of detriment to the promisee. No better illustration can be given of this than the abstinence from a vicious habit by the promisee at the instance of the promisor. This can confer no benefit upon the promisor and is certainly not a detriment to the promisee, and yet the relinquishment of the right to continue the habit, provided, of course, it be not some act which constitutes a public offense, has been held to be a valuable consideration.¹

3. Money — *a. PAYMENT OF MONEY* — (1) *In General.* — Thus premised, concrete illustrations of the principle may follow. First, naturally, is the payment of money. It is too obvious to require citation of authority that this is a valuable consideration. This is true whether the payment be direct or indirect.²

(2) *Interest — Agreement to Pay Additional Interest.* — An agreement to pay a higher rate of interest than the contract then draws is a valuable consideration for an agreement to extend the time of payment.³

Prepayment of Interest. — And so also is the prepayment of interest before it is due.⁴

Interest upon Interest. — A note given for interest upon interest which had previously become due upon another note is valid.⁵

(3) *Commissions.* — The payment to an agent of commissions upon sales made by him is a valuable consideration for his guaranty of notes taken in payment of the goods sold.⁶

b. MONEY EXPENDED AT PROMISOR'S INSTANCE. — If money be expended

not trade to Marseilles, so as to avoid interfering with each other. 3. The third species of consideration is *facio ut des*; when a man agrees to perform anything for a price, either specifically mentioned or left to the determination of the law to set a value to it. As when a servant hires himself to his master for certain wages or an agreed sum of money; here the servant contracts to do his master's service in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform this service for what it shall be reasonably worth. 4. The fourth species is *do ut facias*, which is the direct counterpart of the preceding. As when I agree with a servant to give him such wages upon his performing such work; which, we see, is nothing else but the last species inverted; for *servus facit, ut herus det, and herus dat, ut servus faciat.*" 2 Black. Com., p. 444.

1. See *infra*, this section, *Forbearance — Abstinence.*

2. **The Payment of a Greater Price for a Tract of Land Than the Purchaser Would Otherwise Have Paid** is a valuable consideration for the sale of an equity of redemption in an adjoining tract. *Whipple v. Sheldon*, 63 Vt. 197.

Purchase of Promisor's Bonds. — An agree-

ment between a corporation owning ore lands and a furnace, to give all its traffic to a railroad company in consideration of the latter subscribing to the bonds of the corporation, is based upon a sufficient consideration. *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.*, 171 Pa. St. 284.

Annuity. — An agreement to pay the grantor five hundred dollars annually for life and to pay four thousand five hundred dollars to the legatees under his will is a valuable consideration for a conveyance of two parcels of land worth twelve thousand dollars. *Keagle v. Pessell*, 91 Mich. 618.

3. **Additional Interest.** — *Schoonhoven v. Pratt*, 25 Ill. 457; *Harbert v. Dumont*, 3 Ind. 346; *Clarkson v. Creely*, 35 Mo. 95.

4. **Prepayment of Interest.** — *Warner v. Campbell*, 26 Ill. 282; *Dickerson v. Ripley County*, 6 Ind. 128; *Williams v. Scott*, 83 Ind. 403; *Wright v. Bartlett*, 43 N. H. 548; *Ready v. Sommer*, 37 Wis. 265.

5. **Interest upon Interest.** — *Wilcox v. Howland*, 23 Pick. (Mass.) 167; *Hathaway v. Meads*, 11 Oregon 66.

6. *Windels v. Milwaukee Harvester Co.*, 39 Ill. App. 521; *Haile v. Morgan*, 25 S. Car. 601; *Hoover v. McCormick*, 84 Wis. 215. And see generally the title *DEL CREDERE COMMISSION.*

by the promisee at the instance of the promisor, or in furtherance of an undertaking in which they are jointly interested, it furnishes a valuable consideration for a promise of repayment or a conveyance of property.¹

1. Money Expended in Conducting Litigation. — A son may lawfully assist his father, in conducting a litigation, with his money, time, and services, and a debt so incurred by the father will constitute a valid consideration as against his creditors for the transfer of a promissory note to the son. *Proctor v. Cole*, 104 Ind. 373.

Where a father employed counsel to defend a suit for his widowed daughter growing out of her deceased husband's estate, and paid the expenses so incurred, this furnished an ample consideration for a note given by the daughter to him for the amount so expended. *Glanton v. Whitaker*, 75 Ga. 523.

In a suit upon a promissory note it appeared that the plaintiff and defendant had been jointly engaged in the illegal business of selling lottery tickets; that they had abandoned the further prosecution of their business and had a settlement resulting in a credit balance of six hundred dollars, of which each party was entitled to one-half; that thereafter criminal prosecutions were instituted against certain persons theretofore employed by the plaintiff and the defendant as ticket sellers, and the plaintiff and the defendant, considering themselves morally bound to defend their former employees, agreed that the sum of six hundred dollars above mentioned should be used for that purpose, and it was turned over to the plaintiff to be so used. The testimony further tended to show that the defendant authorized the plaintiff to expend on their joint account all sums necessary for the defense of these persons, and that the plaintiff did, in fact, expend for that purpose a sum greatly in excess of the six hundred dollars, for the defendant's half of which sum the note in suit was given. It was held that the note was founded upon a valuable consideration and was not illegal. *Hutchinson v. Dornin*, 23 Mo. App. 575.

Money Expended in Improvements upon Land. — Shortly after the marriage of the plaintiff with the daughter of one K. the latter proposed to grant to the plaintiff a house and lot, then much out of repair and untenable, provided he would repair the same so as to make it a comfortable residence, saying he (K.) intended the property for his daughter. This proposition was accepted by the plaintiff, who repaired the property, expending a large sum of money on the same, and he, with his wife, resided on it for four years. Before his removal from it a correspondence on the subject of the conveyance of the property to the plaintiff, or to the plaintiff and his wife, took place, which ended in propositions to convey the property on certain terms beneficial to the plaintiff and his wife, in pursuance of and intended to be in execution of the original offer made after the marriage. No conveyance, however, was made. The plaintiff and wife moved from the property, but rents were paid to them for it after their removal. K. died insolvent, and the property in question was sold by a trustee under a decree in chancery obtained by creditors of the estate. The plaintiff and wife filed a bill against the heirs of K.

and the trustee of the creditors, claiming a conveyance of the property and for general relief. It was held that the money expended in improvements upon the property constituted an equitable mortgage upon the same, and it was therefore decreed that the property should be sold, the proceeds of the sale first to be applied to the payment of money expended by the plaintiff in making improvements on the property, and the balance, if any, to be paid over for the benefit of the creditors of the estate. *King v. Thompson*, 9 Pet. (U. S.) 204.

To the same effect see *Haines v. Haines*, 6 Md. 435.

The defendant conveyed to the plaintiff a piece of land to which he had a doubtful title, and verbally promised to indemnify him for any improvements he might make upon the land if it should ever be recovered from him by the rightful owner. Relying upon this promise the plaintiff made improvements, and the land was afterwards recovered from him, whereupon he brought this action. It was held that the plaintiff's making improvements under the circumstances was a sufficient consideration for the defendant's promise. *Richardson v. Gosser*, 26 Pa. St. 335.

Purchasing Property. — The plaintiff and defendant were the owners respectively of two pieces of property, each adjoining another lot, and, fearing that the latter would be so used as to injure their property, they entered into an agreement by which the plaintiff was to buy the lot for twenty-five hundred dollars and the defendant was to pay him one hundred dollars for so doing. The plaintiff purchased the lot and brought his action to recover the one hundred dollars. It was held that there was a good consideration to support the contract and that it could be enforced. *Reynolds v. Guilbert*, 13 Hun (N. Y.) 301.

Where a verbal promise was made by a father that if his son would purchase a certain woolen factory then advertised for sale, he (the father) would contribute five thousand dollars towards the payment of the purchase money, the purchase of the property by the son upon the faith of this promise, and the liability thereby incurred, constitute a sufficient consideration to support the contract. *Steele v. Steele*, 75 Md. 477.

Expenses Incurred in Collection of Note. — In an action brought on a sealed obligation in which the defendant, after setting forth the contents of a note given some time before, covenanted that the money should be paid to the plaintiff at his residence in Missouri, when due, or that the plaintiff's expenses in coming to Indiana for the money should be paid, it was held that the expense incurred by the plaintiff in making the trip in accordance with this agreement was a sufficient consideration for it. *Shirly v. Harris*, 3 McLean (U. S.) 330.

Money Expended in Constructing and Patenting Machine. — Money expended by the plaintiff in constructing a machine and securing a patent upon it is a sufficient consideration for the promise of the defendant, the inventor, in

Money Expended in Payment of Debts. — So where a debtor makes a note or conveyance upon the payee's or grantee's promise to pay certain debts of the maker or grantor, the expenditure of money in the performance of the trust constitutes a valuable consideration.¹

whose name the letters patent were issued, to transfer a half interest therein to the plaintiff. *Golden State, etc., Iron Works v. Angell*, 89 Cal. 643.

Advancement of Money in Aid of Common Enterprise. — An advancement of money by the plaintiff is a sufficient consideration for a promise by the defendant to divide the profits of the transaction in the making of which the money was used. *Bruce v. Hastings*, 41 Vt. 380, 98 Am. Dec. 592.

Money Expended by a Sheriff for the Wages and Sustenance of Special Deputies is a valuable consideration for the promise of persons whose property is threatened by a mob to reimburse him. The contract is furthermore not void on grounds of public policy. A doubtful matter of public policy is not sufficient to invalidate a contract. An agreement will not be declared void on this ground unless it expressly and unquestionably contravenes public policy and is manifestly injurious to the interests of the state. *McCandless v. Allegheny Bessemer Steel Co.*, 152 Pa. St. 139.

Money Expended in Securing Location of Public Building. — An agreement by the defendant to pay a certain sum to the plaintiff in the event that a government building shall be erected in a particular locality is a binding obligation if the plaintiff shows that he has been at expense, trouble, etc., in effecting such location. *Bryan v. Dyer*, 28 Ill. 188.

Satisfaction of Judgment. — Payment by a third person, at the instance and request of a surety, of a judgment against the principal and surety, is a sufficient consideration to support a note and mortgage given by the surety for the repayment of the money. *Frazier v. Parks*, 56 Ala. 363.

Contribution to Railway Relief Fund. — The railroad companies operated and controlled by the defendant and their employees formed a railway relief association. The object of the association was the relief of its members injured in the companies' service. The companies agreed on their part to supply appropriations necessary to make up the deficits in the benefit fund; to pay all the operating expenses; to make themselves liable for the safe keeping of the funds; and to guarantee the fulfilment of the obligations of the association. The members on their part agreed that the acceptance of benefits from the said relief fund for injury or death should operate as a release of all claims for damages against the companies arising from injury or death. There was, however, no stipulation that the members should not bring suit for damages in case of injury through the company's negligence, and there was nothing in the contract preventing them from doing so. When a member was injured he had the right to elect, under the terms of the contract, whether he should pursue his remedy for damages in an action against the company, or accept the benefits of the relief fund in discharge of its liability to him. The plaintiff, a member of the associa-

tion, was injured, and made his claim against the association for the amount due him, which was paid. He afterwards brought suit against the company. It was held that the acceptance of the relief fund was a valid compromise, and that the contribution made by the defendant to the relief fund was a sufficient consideration of it. *Lease v. Pennsylvania Co.*, 10 Ind. App. 47.

Where a Commission Merchant Is Employed to Buy and Sell Grain on the board of trade for another, not to enter into gambling contracts or speculate in differences in the price of grain, and does in good faith actually buy and sell grain for his principal, and on his orders, at the market prices, and in so doing pays out money and incurs liability, under his contracts, for the principal, such advances and liabilities incurred by the agent will form a good and sufficient consideration for promissory notes of the principal given to settle the same, and such notes will be binding obligations. *Powell v. McCord*, 121 Ill. 330.

1. Payment of Promisor's or Grantor's Debts. — Where one person receives the property of another upon an agreement to pay the latter's debts, the conveyance constitutes a valuable consideration for the grantee's promise to a creditor to pay him the amount of his claim. *Smith v. Rogers*, 35 Vt. 140; *McWhorter v. Wright*, 5 Ga. 555.

As the Consideration of a Bill of Sale. — The consideration of a bill of sale being that the vendee shall pay certain debts due by the vendor to a third person, the discharge of the debts by the vendee is a valuable consideration for the sale. *Bell v. Greenwood*, 21 Ark. 249. See also *Jolly v. Kyle*, 27 Oregon 95.

A promise to pay the debt of a retail dealer to a wholesale merchant as a part of the consideration of a sale of the stock of such retail dealer to the promisor, is founded on a legal consideration. *Scudder v. Carter*, 43 Ill. App. 252.

As the Consideration of a Bill or Note. — The defendant being indebted to the plaintiff and to several other parties, it was agreed by all concerned that the defendant should give the plaintiff a bill for the joint amount of the several debts, and that upon receipt of the money when due the plaintiff should pay himself and the other creditors out of the proceeds. It was held that the plaintiff was a trustee for the payment of the defendant's debts and this was a sufficient consideration for the note. *Cole v. Cresswell*, 11 Ad. & El. 661, 39 E. C. L. 191.

A promissory note, given in consideration of the payee's verbal promise to convey to the maker an interest in land, and to release certain claims against the maker and a third person, is not wholly void, and the payee may enforce a mortgage of personal property given to secure payment of the note, if it does not appear that the property exceeds in value the latter part of the consideration. *Jenkins v. Williams*, 16 Gray (Mass.) 158.

c. LOANS — Promise of Principal. — The loan of money is a valuable consideration not only for the promise of repayment of the principal sum with interest, but also for a collateral contract,¹ provided the same does not offend against the usury laws.

Promise by Third Party. — It is also a valuable consideration for a contract simultaneously entered into by a third party to secure its repayment.²

d. REDUCTION IN FREIGHT RATES. — A reduction in the rate of freight charged upon a shipment is a valuable consideration for a stipulation in the bill of lading limiting the amount or character of the carrier's liability.³

4. Pre-existing Legal and Equitable Obligations — a. LIQUIDATED LEGAL OBLIGATIONS — (1) Debts. — A pre-existing debt which would be sufficient to raise an implied promise to pay is a valuable consideration for an express promise to do so.⁴ It also forms a valid basis for a grant of an annuity,⁵ an

1. Loans of Money — Collateral Contracts. — In consideration of an advance by the plaintiffs, who were cotton factors, the defendant agreed to repay the amount advanced with ten per cent. interest, and also to ship to the plaintiffs two hundred bales of cotton, to be sold on commissions, and failing so to do, to pay commissions for every bale deficient. It was held that this contract was supported by a sufficient consideration, and that the agreement to pay commissions on bales not shipped did not render the contract usurious. *Norwood v. Faulkner*, 22 S. Car. 367, 53 Am. Rep. 717.

2. Agreement to Purchase Stock Pledged as Collateral. — Simultaneous with the granting of a loan to a third party, the defendants executed an agreement by which they bound themselves in the event that the loan was not repaid at maturity to purchase at an agreed price certain shares of stock pledged as collateral therefor. It was held that the granting of the loan was a valuable consideration for this agreement. *Bennett v. Morse*, 6 Colo. App. 122. See also the titles GUARANTY; SURETYSHIP.

3. Reduction in Freight Rates — Limitation in Amount of Liability. — *Western R. Co. v. Harwell*, 97 Ala. 341; *Hance v. Wabash Western R. Co.*, 56 Mo. App. 476; *Duvenick v. Missouri Pac. R. Co.*, 57 Mo. App. 550; *Paddock v. Missouri Pac. R. Co.*, 1 Mo. App. Rep. 87; *Johnstone v. Richmond, etc., R. Co.*, 39 S. Car. 55. And see generally the title CARRIERS OF GOODS, vol. 5, p. 154.

Where a reduced rate is given as a consideration, merely that the cattle should be shipped "at the owner's risk," it will not also be a consideration for a special contract releasing the carrier from damages due to delay. *San Antonio, etc., R. Co. v. Barnett*, (Tex. Civ. App. 1896) 34 S. W. Rep. 139.

Release from Liability Beyond Receiving Carrier's Line. — Reduced rates given for the transportation of freight are sufficient consideration to support the shipper's promise to release connecting lines from liability as common carriers for points beyond the receiving carrier's line. *Western R. Co. v. Harwell*, 97 Ala. 341.

Limitation in Time Within Which Demand for Damages Must Be Made. — A reduction from the regular freight rate charged for the carriage of live stock is a sufficient consideration to support a stipulation in the special contract requiring suit for damages to the stock to be brought within forty days after delivery.

Texas, etc., R. Co. v. Klepper, (Tex. Civ. App. 1893) 24 S. W. Rep. 567. See the title CARRIERS OF LIVE STOCK, vol. 5, p. 427.

4. Pre-existing Debt — Promise of Repayment. — The existence of a debt is sufficient to support an express promise to pay it. *Bailey v. Bussing*, 29 Conn. 1.

Where a party in a suit becomes entitled to costs from the opposite party, the promise of the latter to pay the tax bill is supported by a valuable consideration. *Warner v. Booge*, 15 Johns. (N. Y.) 233.

If one person advance to another a sum of money towards the purchase of a house by the latter, this is a valuable consideration for a subsequent promise by him to pay the amount, although the deed was taken in the name of the former as security for the advance. *Hennessey v. Connor*, 139 Mass. 120.

5. Pre-existing Debt — Annuity. — A loan of money from time to time is a valuable consideration for the grant of an annuity. *Kelfe v. Ambrose*, 7 T. R. 547.

Giving Note for Pre-existing Debt. — A wife inherited one thousand one hundred dollars, which she gave to her husband to use in the purchase of a farm. He afterwards sold the farm and with the proceeds bought another. He subsequently wished to sell the second farm, but the wife refused to join in the conveyance unless some provision was made for her money, whereupon he gave her a note for three thousand dollars, which represented the original amount with about eighteen years' interest. The husband was insolvent at the time the note was given, but this fact does not appear to have been known to the wife. It was held that the note was founded upon a sufficient consideration and could not be attacked by creditors of the husband. *Graves v. Davenport*, 50 Fed. Rep. 881.

Debt Represented by Undelivered Note. — A judgment is not fraudulent as to creditors because founded upon a note which was never delivered, where it appears that the note is evidence of a debt. *Columbus Watch Co. v. Hodenpyl*, 61 Hun (N. Y.) 557.

A Note Which Is Given for an Amount Due the Payee from the Maker on a Certain Contract is supported by a sufficient consideration, although the payee may owe the maker at the time more than the amount of the note on other contracts. *Knox v. Clifford*, 38 Wis. 651, 20 Am. Rep. 28.

assignment of choses in action,¹ or a mortgage,² or absolute conveyance of real³ or personal property;⁴ and the conveyance is equally valid, whether it be taken in absolute discharge of the debt or merely as collateral security for

1. Pre-existing Debt — Assignment of Chose in Action. — An agreement by the creditor to credit the proceeds upon the debt is a valuable consideration for an assignment by the debtor of a chose in action. *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 83.

Bills and Notes — Pre-existing Debt as a Consideration for a Transfer Thereof. — How far a pre-existing debt is a valuable consideration for the transfer of a bill or note, so as to constitute the holder a *bona fide* purchaser, is a vexed question, for a discussion of which see the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 285.

Insurance Policy. — A pre-existing debt forms a valid consideration for an assignment of an insurance policy after a loss covered thereby has occurred. *Glover v. Lee*, 140 Ill. 102.

2. Mortgages — Pre-existing Debt as a Consideration for — United States. — *Franklin Sav. Bank v. Taylor*, 53 Fed. Rep. 854.

Alabama. — *Bray v. Comer*, 82 Ala. 183.

Indiana. — *McLaughlin v. Ward*, 77 Ind. 383; *Evans v. Pence*, 78 Ind. 439; *Louthain v. Miller*, 85 Ind. 161.

Michigan. — *Wright v. Towle*, 67 Mich. 255.

Minnesota. — *Close v. Hodges*, 44 Minn. 204; *Berlin Mach. Works v. Security Trust Co.*, 60 Minn. 161.

Missouri. — *Splint v. Sullivan*, 58 Mo. App. 582.

Montana. — *Laubenheimer v. McDermott*, 5 Mont. 512.

Nebraska. — *Chaffee v. Atlas Lumber Co.*, 43 Neb. 224, 47 Am. St. Rep. 753; *Griffin v. Chase*, 36 Neb. 328.

New York. — *Korneman v. Fred Hower Brewing Co.*, 4 Misc. Rep. (Brooklyn City Ct.) 299.

Oregon. — *Moore v. Fuller*, 6 Oregon 272, 25 Am. Rep. 524.

Washington. — *Warren v. His Creditors*, 3 Wash. 48.

Liability for Conversion of Wife's Separate Estate. — If the husband converts the wife's statutory separate estate, he becomes indebted to her to the amount used, and although insolvent and largely indebted, may secure such debt by a mortgage of property to a trustee for her; and the conveyance, if made *bona fide*, is valid against the husband's creditors. *Northington v. Faber*, 52 Ala. 45. See also *Drury v. Briscoe*, 42 Md. 154; *Gicker v. Martin*, 50 Pa. St. 138; *Peiffer v. Lytle*, 58 Pa. St. 386; *William and Mary College v. Powell*, 12 Gratt. (Va.) 372; *Wochoska v. Wochoska*, 45 Wis. 423.

3. Pre-existing Debt — Deed of Conveyance of Realty. — *Saunderson v. Broadwell*, 82 Cal. 132; *McMahan v. Morrison*, 16 Ind. 172; *Steinriede v. Tegge*, (Ky. 1890) 14 S. W. Rep. 357; *Bussey v. Reese*, 38 Md. 264; *Warren v. Wilder*, 114 N. Y. 209; *Whaley v. Duncan*, 47 S. Car. 139.

A debtor in failing circumstances has a right to give a preference to one creditor over another, and for this purpose may transfer real

property to him, provided the transfer be an absolute and not a colorable one, and be for a valuable consideration. A pre-existing indebtedness constitutes a valuable consideration for such a transfer. *Saunderson v. Broadwell*, 82 Cal. 132.

Where a deed is made in consideration of the absolute discharge of a promissory debt, the grantee is a purchaser for value so as to protect him against a previous unrecorded deed of the same grantor. *State Bank v. Frame*, 112 Mo. 502. Compare *Schumpert v. Dillard*, 55 Miss. 348.

A deed from husband and wife conveying his property to trustees for her benefit is made on a valuable consideration, and is not void for fraud as to creditors, where it is given for money and property of the wife used in the husband's business and to pay his debts. *Hitz v. National Metropolitan Bank*, 111 U. S. 722. See also *Tarsney v. Turner*, 48 Fed. Rep. 818; *Hill v. West*, 8 Ohio 222, 31 Am. Dec. 442.

As a Christmas present, a father gave to his minor son and daughter a promissory note which he held, and handed it to their mother to keep for them until they should become of age. He afterwards collected the note, however, during the son's minority, and in lieu of the son's interest therein, which was one thousand dollars, he caused to be issued in the son's name shares of stock of the face value of that amount in a manufacturing corporation in which he was largely interested. After the son had become of age, the stock was found to have greatly depreciated in value, and to make up the deficiency the father conveyed to the son a tract of land. At the time of the gift of the note and also when the stock was substituted therefor, the father was wealthy, but at the time of the conveyance of the land he was insolvent. In an action by a subsequent creditor, no fraudulent intent being proven, the conveyance was held to be founded upon a sufficient consideration. *Beloit Second Nat. Bank v. Merrill*, 81 Wis. 142, 29 Am. St. Rep. 877.

On the question whether an antecedent deed is a valuable consideration so as to enable the grantee of a deed to claim the benefit of being a *bona fide* purchaser, see the titles **FRAUDULENT SALES AND CONVEYANCES**; **NOTICE**; **RECORDING ACTS**.

4. Pre-existing Debts — Sale of Personal Property. — A written agreement by a debtor, that in consideration of his indebtedness he will let his creditor have certain specified articles at a time and place specified, at the market price, is a valid contract, evidencing a legal consideration, and imposing on the debtor the duty to set out the articles for the creditor at the time and place agreed. *Bates v. Churchill*, 32 Me. 31.

Debt to Joint Creditors. — A prior indebtedness from the defendant to the plaintiff and to others jointly is not a sufficient consideration to support a promise by the defendant to pay the plaintiff one-third of the debt. *Vadakin v. Soper*, 1 Aik. (Vt.) 287.

its future payment. In the one case the extinguishment of the debt furnishes the consideration; in the other, the creditor's implied forbearance¹ supplies it.

(2) *Liabilities* — (a) *Upon Contract* — *aa. IN GENERAL.* — So the liability of a person upon a contract is a valuable consideration for his promise to discharge it.²

Liability upon Bills and Notes. — Thus the liability to the holder of a party upon a bill or note, whether as maker,³ surety,⁴ or indorser,⁵ is a sufficient consideration to support a note given by him to the holder in renewal or discharge of the original instrument. And, for the same reason, the liability of an indorser upon the original note is a sufficient consideration for his indorsement of the renewal note.⁶

Liability of Principal to Surety or Guarantor. — Again, the liability of a principal to his surety or guarantor is a valuable consideration for the execution of a mortgage as an indemnity against loss,⁷ or for a transfer of real⁸ or personal property,⁹ or the execution of a promissory note,¹⁰ upon a promise, either express or implied, by the surety or guarantor to apply the amount so received to the

1. See *infra*, this title and section, *Forbearance*.

2. *Liability upon Contract.* — Merrick *v.* Bank of Metropolis, 8 Gill (Md.) 59; Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74.

The existence of outstanding claims for labor bestowed upon the defendant's property which may become liens thereon, constitutes a valuable consideration for a promise to pay them. Kiely *v.* Bertrand, 67 Mich. 332.

The payment of a note executed by a married woman with her husband, without any consideration inuring to her separate estate cannot be enforced against her. But if, after the termination of the disability of coverture, she executes renewal notes, whereby an extension of time is obtained, a sufficient consideration is created to render her liable. New Hanover Bank *v.* Bridgers, 98 N. Car. 67, 2 Am. St. Rep. 317.

After Usurious Securities Given for a Loan Have Been Destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest is founded on a sufficient consideration, and is binding. Barnes *v.* Hedley, 2 Taunt. 184.

The parties to a loan of money which is usurious may cancel the old contract, purge the consideration of usury, and make it the basis of a new obligation which will be binding upon the borrower. Garvin *v.* Linton, 62 Ark. 370.

3. *Note Given in Renewal of Note.* — Merchants' Bank *v.* McClelland, 9 Colo. 608; Judd *v.* Martin, 97 Ind. 173; Gates *v.* Hamilton, 12 Iowa 50; North Atchison Bank *v.* Gay, 114 Mo. 203; National Bank *v.* Place, 86 N. Y. 444; Weaver *v.* Farrington, 6 Misc. Rep. (N. Y. City Ct.) 54; Williamson *v.* Cline, 40 W. Va. 194.

4. Pauly *v.* Murray, 110 Cal. 13; Galesburg First Nat. Bank *v.* Davis, 108 Ill. 633.

5. Bacon *v.* Heywood, 11 Misc. Rep. (N. Y. Super. Ct.) 7; Hayes *v.* Mestaniz, 2 N. Y. App. Div. 135.

6. Sanders *v.* Smith, (Miss. 1888) 5 So. Rep. 514; Dykman *v.* Northridge, 1 N. Y. App. Div. 26; Bromley *v.* Hawley, 60 Vt. 46.

7. *Liability of Principal to Surety or Guarantor -- Execution of Mortgage.* — Williams *v.* Silliman, 74 Tex. 626; Willis *v.* Heath, (Tex. 1891)

18 S. W. Rep. 801; Warren *v.* His Creditors, 3 Wash. 48.

8. *Conveyance of Real Property.* — Ellis *v.* Herrin, (N. J. 1892) 24 Atl. Rep. 129; Buffum *v.* Green, 5 N. H. 71, 20 Am. Dec. 562.

9. *Conveyance of Personal Property.* — The plaintiff was surety upon the bond of a village treasurer, and the latter, being short in his accounts, agreed, in order to protect the plaintiff, to sell him his stock of goods, a number of book accounts, and several horses and wagons, in consideration that the plaintiff should pay the shortage. The plaintiff took possession of the property, but it was afterwards seized by the defendant under an attachment obtained by him as an existing creditor of the vendor. The plaintiff paid the shortage, which amounted to a sum exceeding the value of the goods. In an action to recover their value it was held that the sale was founded upon a valid consideration, and judgment was entered for the plaintiff. Flannery *v.* Van Tassel, (Supreme Ct.) 16 N. Y. Supp. 741. See also Kinnear *v.* White, 2 Kerr (New Bruns.) 235.

The agreement of a member of a firm with his partner, to be responsible for the price of goods furnished by the firm to A, is a sufficient consideration for an assignment to him by A of a debt due to A, less in amount than the price of the goods so furnished, as against one who afterwards attaches such debt on trustee process in a suit against A. Carroll *v.* Sullivan, 103 Mass. 31.

10. *Execution of Promissory Note.* — Haseltine *v.* Guild, 11 N. H. 390.

The mere liability of one as a surety for another on a note not yet due will not of itself give a cause of action against the principal in favor of the surety. It may, however, furnish a good consideration for a promissory note, upon a promise, either express or implied by law, on the part of the surety, that he will pay and discharge the debt of his principal. Swift *v.* Crocker, 21 Pick. (Mass.) 241.

An Outstanding Liability as Surety or Indorser for another, together with an express promise by such surety or indorser, to the principal, that he will make the debt his own and pay it, is a sufficient consideration for an express promise to pay an equal amount on demand. Gladwin *v.* Gladwin, 13 Cal. 330.

satisfaction of the debt of his principal.

bb. NOVATION. — Where novation of a contract is had, the extinguishment of the original obligation constitutes the consideration for the new one.¹ If, however, the original contract is void for want or failure of consideration, its extinguishment furnishes no consideration for the new contract.²

(b) *For Torts.* — The liability of a person for a tort committed by him is a valuable consideration for his promise to pay damages.³

b. EQUITABLE DUTIES. — So the existence of a claim founded upon an equitable duty, such as would be enforced by a court of chancery, is a sufficient consideration for a promise to pay it, and such promise may be enforced in a court of law.⁴

1. See the title *NOVATION*.

2. *Novation of Void Contract.* — Nutter *v.* Stover, 48 Me. 163; Commonwealth Ins. Co. *v.* Whitney, 1 Met. (Mass.) 21.

Where a note is executed and delivered as a gift, and afterwards taken up by the maker and a new note for a larger amount given in lieu of it, the latter being likewise intended as a gift, the giving up of the first furnishes no consideration, upon which the latter can be sustained, for any part of the amount. Copp *v.* Sawyer, 6 N. H. 386.

The parties to a note having agreed that a question raised as to the validity of the note was to await the decision in a pending suit upon a similar note, and the holder of the note, by false representations as to the result of said suit, having subsequently procured a renewal of the note, in any action upon the new note the plaintiff is to be treated as if he were suing upon the original note, which, under the statute, was void. Rash *v.* Farley, 91 Ky. 344, 34 Am. St. Rep. 233.

3. *Liability of Guardian upon Account.* — Where a ward, within three years from the final settlement of his guardian, employed counsel to institute suit to set aside certain allowances and to recover certain sums from the guardian, wrongfully withheld by him; and the guardian promised that if the ward would not bring suit against him, he would hold all of such sums for him and manage them for him until he (the ward) should marry and settle down, and would then pay him all of such sums with their accretions, and would make him his (the guardian's) heir; the contract to make the ward the guardian's heir and to pay the sums of money are distinct and separate matters, and the promise to pay the sum of money may be separated from the promise to make the ward an heir, and may be enforced against the guardian or his estate, without working any injustice, the forbearance to sue being sufficient consideration for such promise. Doan *v.* Dow, 8 Ind. App. 324.

Liability for False Representations. — The plaintiff was induced by false representations as to the standing of a company, made by the defendant, who was interested therein, to purchase its stock, resign a position, and enter the service of the company. After learning the true condition of affairs he threatened to sue, but was deterred from doing so by the defendant's contract, by which it was agreed that the company should employ the plaintiff at a certain salary, and in case of change depriving him of salary and employment the defendant agreed to take back the stock at the price paid

by the plaintiff for it. It was held that there was a sufficient consideration for the defendant's promise. Lamson *v.* Lamson, 52 Vt. 595.

Liability for Trespass — Taking Personal Property. — A trespass committed by the taking and retaining the possession of the property of another constitutes a sufficient consideration to support a promise or covenant made by the trespasser for the return of the property to the owner. Spaulding *v.* Crawford, 27 Tex. 155.

The plaintiff, being the owner of a canal-boat, left her in the harbor of New York in charge of one D., with directions to him to have her tied up for the winter. D., instead of following the instructions, ran her to Albany and took on board a cargo of oats, consigned to the defendants at New York. After reaching the city he collected what freight he could and abandoned the boat. The plaintiff, having discovered his boat, took her in charge, called at the office of the defendants, notified them of the facts, and that he would look to the defendants for freight and storage. The defendants, after the boat had been recovered by the plaintiff, procured the cargo to be unloaded at an elevator at the expense of the owner, which expense, being a lien upon the boat, the plaintiff was obliged to pay in order to release her. The defendants afterwards agreed to pay the plaintiff for the use of the boat if he could show that he was the owner. In an action upon this promise it was held that the defendants were trespassers in interfering with the boat after the plaintiff had taken her in charge, and that if the defendants, by the use of the boat, brought a legal charge upon it which the plaintiff was obliged to pay in order to repossess himself of his property, they would be liable to repay it, and that the subsequent promise of the defendants to reimburse the plaintiff was founded upon a sufficient consideration, it being the common case of a promise by a wrongdoer to pay the damage sustained by the owner of property, and implying a waiver of the tort. Beadle *v.* Whitlock, 64 Barb. (N. Y.) 287.

Liability for Damages for Negligence. — The liability of a common carrier for damage caused by his negligence to goods while in transit is a valuable consideration for the carrier's promise to replace the goods or pay their value. New York, etc., Steamship Co. *v.* Island City Boating, etc., Assoc., 2 Tex. Civ. App. 490.

4. *Equitable Duties.* — State *v.* Reigart, 1 Gill (Md.) 1, 39 Am. Dec. 628; Hudson *v.* Critcher, 8 Jones L. (N. Car.) 485.

5. Compromise of Doubtful and Unliquidated Claims — *a.* DOUBTFUL CLAIMS—

(1) *In General.* — Closely allied with the preceding, and based upon the same general principle, is the compromise of doubtful and unliquidated claims. As it is the policy of the law to discourage litigation and to enforce voluntary settlements effected without the interposition of the law, it has uniformly been held that the compromise of doubtful claims is valid, the mutual release of their respective rights by the parties to the controversy, and the avoidance of the expense and annoyance of a suit at law, being a sufficient consideration for the composition.¹

The promise of a husband who has borrowed money from his wife, to pay it to her children, is an equitable consideration which will support the assignment of a promissory note from the husband to one of such children. *Goff v. Rogers*, 71 Ind. 459; *Proctor v. Cole*, 104 Ind. 373.

Wife's Equity of Settlement. — Where the wife is entitled to an equitable provision for the support of herself and her children out of a legacy given to her by a deceased relative, which legacy the husband has not reduced to possession, that equity is a sufficient consideration for a post-nuptial agreement of the husband that a part of the legacy shall be secured for the use and support of the wife and her children. *Partridge v. Havens*, 10 Paige (N. Y.) 618.

A contract which can be enforced in equity may be entered into between husband and wife for the transfer of property from the former to the latter for a *bona fide* and valuable consideration, and the interest which the wife has in a mortgage executed to her before marriage, whether as respects her right of survivorship or her equitable claim to a separate provision, is sufficient to form the consideration of such a contract with her husband. *Stocket v. Holliday*, 9 Md. 480.

For other cases of contracts or conveyances founded upon a wife's equity of settlement, see *Montefiore v. Behrens*, L. R. 1 Eq. 171; *Bradford v. Goldsborough*, 15 Ala. 311; *McCauley v. Rodes*, 7 B. Mon. (Ky.) 462; *McClanahan v. Beasley*, 17 B. Mon. (Ky.) 111; *Oswald v. Hoover*, 43 Md. 360; *Walden v. Walden*, 33 Gratt. (Va.) 88; *Poindexter v. Jeffries*, 15 Gratt. (Va.) 363; *Hannan v. Oxley*, 23 Wis. 519.

An Agreement to Allow an Offset which is compellable only in chancery is a good consideration for a promise. *Punderson v. Fanning*, 1 Root (Conn.) 193.

Duty to Rectify Mistakes. — A sum of money which, at the time, was actually due to the defendant, was paid to him by the plaintiff, but the bookkeeper failed to make any entry thereof in the plaintiff's books, and the item was lost sight of in a subsequent settlement of cross-accounts between the parties. The plaintiff afterwards exhibited to the defendant a detailed account, showing the fact of the omission, whereupon the defendant conceded the mistake and promised to rectify it. It was held that the facts constituted a sufficient consideration for a binding promise. *Elsworth Coal Co. v. Quade*, 28 Mo. App. 421.

1. Compromise of Doubtful Claims — England. — *Wilkinson v. Byers*, 1 Ad. & El. 106, 28 E. C. L. 48; *Longridge v. Dorville*, 5 B. & Ald.

117, 7 E. C. L. 43; *Llewellyn v. Llewellyn*, 3 D. & L. 318, 9 Jur. 991, 15 L. J. Q. B. 4; *Cook v. Wright*, 1 B. & S. 559, 101 E. C. L. 559; *Crowther v. Farrer*, 15 Q. B. 677, 69 E. C. L. 677, 15 Jur. 535, 20 L. J. Q. B. 298.

United States. — *Northern Liberty Market Co. v. Kelly*, 113 U. S. 199; *Central Trust Co. v. Wabash, etc., R. Co.*, 29 Fed. Rep. 554; *Gaines v. Molen*, 30 Fed. Rep. 27; *Robson v. Mississippi River Logging Co.*, 43 Fed. Rep. 364; *Battle v. McArthur*, 49 Fed. Rep. 715; *The Cayuga*, 59 Fed. Rep. 483, 16 U. S. App. 577.

Alabama. — *Bogan v. Camp*, 30 Ala. 279; *Allen v. Prater*, 30 Ala. 458; *Wyatt v. Evins*, 52 Ala. 285.

Arkansas. — *Richardson v. Comstock*, 21 Ark. 69; *Snow v. Grace*, 29 Ark. 131; *Burton v. Baird*, 44 Ark. 556.

California. — *McClure v. McClure*, 100 Cal. 339.

Colorado. — *Swem v. Green*, 9 Colo. 358; *Russell v. Daniels*, 5 Colo. App. 224.

Connecticut. — *Ford v. Hubinger*, 64 Conn. 129.

District of Columbia. — *Northern Liberty Market Co. v. Steubner*, 4 Mackey (D. C.) 301.

Florida. — *McLane v. Piaggio*, 24 Fla. 71.

Georgia. — *Crusselle v. Pugh*, 71 Ga. 744.

Illinois. — *Lawrence v. Codington*, 52 Ill. App. 133; *Stoelke v. Hahn*, 55 Ill. App. 497; *Pool v. Docker*, 92 Ill. 501.

Indiana. — *Proctor v. Heaton*, 114 Ind. 250; *Piper v. Foshier*, 121 Ind. 407; *Bement v. May*, 135 Ind. 664; *Jones v. Rittenhouse*, 87 Ind. 348.

Iowa. — *Keefe v. Vogle*, 36 Iowa 87; *Goode-nov v. Parkinson*, 67 Iowa 95; *Schaben v. Brunning*, 74 Iowa 102; *Shaw v. Chicago, etc., R. Co.*, 82 Iowa 199; *French v. French*, 84 Iowa 655; *Larned v. Dubuque*, 86 Iowa 166; *Heffelfinger v. Hummel*, 90 Iowa 311; *Stoutenberg v. Huisman*, 93 Iowa 213; *Commercial Exch. Bank v. McLeod*, 67 Iowa 718.

Kansas. — *Finley v. Funk*, 35 Kan. 668.

Kentucky. — *Frazier v. Steel, Sneed* (Ky.) 334; *Taylor v. Patrick*, 1 Bibb (Ky.) 168; *Fisher v. May*, 2 Bibb (Ky.) 448, 5 Am. Dec. 626; *Kennedy v. Davis*, 2 Bibb (Ky.) 343; *Mills v. Lee*, 6 T. B. Mon. (Ky.) 91, 17 Am. Dec. 118; *Rains v. Lee*, (Ky 1896) 36 S. W. Rep. 176; *Fain v. Turner*, 96 Ky. 634.

Louisiana. — *Antoine v. Smith*, 40 La. Ann. 560.

Maine. — *Miller v. Whittier*, 36 Me. 577.

Maryland. — *Hartle v. Stahl*, 27 Md. 157; *McClellan v. Kennedy*, 8 Md. 230.

Massachusetts. — *Barlow v. Ocean Ins. Co.*, 4 Met. (Mass.) 270; *Leach v. Fobes*, 11 Gray (Mass.) 506, 71 Am. Dec. 732; *Easton v. Easton*, 112 Mass. 438; *Gloucester Isinglass, etc., Co.*

Family Settlements. — Upon this principle the settlement of adverse claims to the distribution of a decedent's property is upheld.¹

v. Russia Cement Co., 154 Mass. 92, 26 Am. St. Rep. 214.

Michigan. — *Weed v. Terry*, Walk. (Mich.) 501.

Minnesota. — *Hanley v. Noyes*, 35 Minn. 174.

Mississippi. — *Field v. Weir*, 28 Miss. 56; *Boone v. Boone*, 58 Miss. 820.

Missouri. — *Valle v. Picton*, 16 Mo. App. 178.

Nebraska. — *Treat v. Price*, 47 Neb. 875; *Slade v. Swedeburg Elevator Co.*, 39 Neb. 600.

New Hampshire. — *Pitkin v. Noyes*, 48 N. H. 294, 97 Am. Dec. 615; *Burnham v. Dunn*, 35 N. H. 556; *Eddy v. Phoenix Mut. L. Ins. Co.*, 65 N. H. 27, 23 Am. St. Rep. 17.

New Jersey. — *Clark v. Turnbull*, 47 N. J. L. 265, 54 Am. Rep. 157; *Phillips v. Pullen*, 50 N. J. L. 439; *Grandin v. Grandin*, 49 N. J. L. 508, 60 Am. Rep. 642.

New York. — *Scott v. Warner*, 2 Lans. (N. Y.) 49; *Russell v. Cook*, 3 Hill (N. Y.) 504; *Palmerton v. Huxford*, 4 Den. (N. Y.) 166; *Stewart v. Ahrenfeldt*, 4 Den. (N. Y.) 189; *Seaman v. Seaman*, 12 Wend. (N. Y.) 381; *Hall v. Brown*, 15 Johns. (N. Y.) 194; *Palmer v. North*, 35 Barb. (N. Y.) 283; *Farmers' Bank v. Blair*, 44 Barb. (N. Y.) 641; *Higginson v. New York Second Nat. Bank*, 59 Hun (N. Y.) 183; *U. S. National Bank v. Homestead Bank*, (C. Pl.) 18 N. Y. Supp. 758; *Struthers v. Smith*, 85 Hun (N. Y.) 261; *Housatonic Nat. Bank v. Foster*, 85 Hun (N. Y.) 376; *Crans v. Hunter*, 28 N. Y. 389; *Downer v. Church*, 44 N. Y. 647; *Wales v. Stout*, 115 N. Y. 638; *Wahl v. Barnum*, 116 N. Y. 87; *Zoebisich v. Von Minden*, 120 N. Y. 406; *Lawrence v. Church*, 128 N. Y. 324; *Baird v. Baird*, 145 N. Y. 659.

North Carolina. — *Mayo v. Gardner*, 4 Jones L. (N. Car.) 359; *Truett v. Chaplin*, 4 Hawks (N. Car.) 178.

Ohio. — *Moore v. Powell*, 1 Disney (Ohio) 144.

Oregon. — *Williams v. Poppleton*, 3 Oregon 139; *Oregonian R. Co. v. Wright*, 10 Oregon 162.

Pennsylvania. — *Paxson v. Hewson*, 14 Phila. (Pa.) 174; *Cavode v. McKelvey*, Add. (Pa.) 56; *Rice v. Bixler*, 1 W. & S. (Pa.) 445; *Fleming v. Ramsey*, 46 Pa. St. 252.

Rhode Island. — *Smith v. Angell*, 14 R. I. 192; *Anthony v. Boyd*, 15 R. I. 495.

South Carolina. — *Sams v. Rhett*, 2 McMull L. (S. Car.) 171.

Tennessee. — *Williams v. Harvey*, Cooke (Tenn.) 466.

Texas. — *Dunbar v. Tirey*, (Tex. App. 1891) 17 S. W. Rep. 1116; *Hilliard v. White*, (Tex. Civ. App. 1895) 31 S. W. Rep. 553.

Vermont. — *Blake v. Peck*, 11 Vt. 483; *Paris v. Dexter*, 15 Vt. 379; *Green v. Seymour*, 59 Vt. 459.

Virginia. — *Zane v. Zane*, 6 Munf. (Va.) 406; *Moore v. Fitzwater*, 2 Rand. (Va.) 442.

Washington. — *Brodek v. Farnum*, 11 Wash. 565.

West Virginia. — *Davisson v. Ford*, 23 W. Va. 617.

Wisconsin. — *Continental Nat. Bank v. McGeoch*, 92 Wis. 286; *Mygatt v. Tarbell*, 78 Wis. 351.

Wyoming. — *Bolln v. Metcalf*, (Wyoming 1895) 42 Pac. Rep. 12.

Suits Against Decedent's Estate. — If, on the death of a judgment debtor, it is doubtful whether the judgment lien continues, this constitutes a sufficient consideration for a mortgage and note given by the widow of the deceased judgment debtor, to satisfy the judgment. *Mullanphy v. Riley*, 10 Mo. 489.

The compromise of a *bona fide* claim against an estate with the heirs entitled to distribution therein, whereby such claim is withdrawn, constitutes a good and sufficient consideration to support an agreement by the heirs to pay the claimant a certain sum of money less than the claim. *Husband v. Epling*, 81 Ill. 172, 25 Am. Rep. 273.

An Agreement by a Wife to Discontinue Proceedings for a Divorce, and the condonation of the act upon which the proceedings were founded, are a sufficient consideration for a note executed to a third person in trust for her. *Adams v. Adams*, 91 N. Y. 381, 43 Am. Rep. 675.

The defendant, in consideration of the plaintiff's abandoning a suit for divorce against him, conveyed to her certain property for her separate use to keep up an establishment for herself and children. It was held that the deed was upon a sufficient consideration. *Jodrell v. Jodrell*, 9 Beav. 45.

Promise to Pay Sum Actually Claimed. — In the settlement of a disputed claim, the fact that the sum paid in compromise is only the amount that the debtor concedes to be due does not invalidate the settlement. *Treat v. Price*, 47 Neb. 875.

Abandonment of Defense of Infancy. — Payment of a smaller sum, with an agreement to abandon the defense of infancy and pay costs, may be pleaded in satisfaction of a larger demand, whether liquidated or unliquidated. *Cooper v. Parker*, 15 C. B. 822, 80 E. C. L. 822.

Arbitration Note. — Where the parties to a controversy which they have decided to submit to arbitration deliver each his note to the arbitrators to be filled out for the amount of the award, the note so delivered in pursuance of the award is founded upon a sufficient consideration. *Woodrow v. O'Conner*, 28 Vt. 776.

Parties entered into an agreement, under seal, to submit certain matters in dispute to three of their neighbors. The arbitrators so chosen by the agreement of the parties were not sworn, but the parties took an oath to abide by their decision. They found for the plaintiff sixty dollars, and the defendant thereupon promised to pay it. In an action of assumpsit to recover the amount, the agreement under seal is competent to show that there was a good consideration for the promise. *Morrow v. Smith*, 10 Mo. 308.

1. Family Settlements — *England*. — *Stapilton v. Stapilton*, 1 Atk. 2; *Westby v. Westby*, 2 Dr. & War. 502; *Miller v. Harrison*, 5 Ir. Eq. R. 324;

Boundary Disputes. — And a like principle gives validity to the compromise of disputes in respect to the location of the boundary lines of tracts of land.¹

(2) *Claim Need Only Be Considered Doubtful.* — Moreover, in order to render valid the compromise of a claim, it is not essential that the matter should be really in doubt. It is sufficient if the parties consider it so far doubtful as to make it the subject of a compromise.²

Smith v. Mogford, 21 W. R. 472; *Ockford v. Barelli*, 20 W. R. 116, 25 L. T. N. S. 504.

Georgia. — *Austell v. Rice*, 5 Ga. 472; *Watkins v. Watkins*, 24 Ga. 402; *Smith v. Smith*, 36 Ga. 184, 91 Am. Dec. 761.

Illinois. — *Hindert v. Schneider*, 4 Ill. App. 203.

Iowa. — *Adams v. Adams*, 70 Iowa 253.

Kentucky. — *Fain v. Turner*, 96 Ky. 634; *Waller v. Marks*, (Ky. 1897) 38 S. W. Rep. 894, 45 Cent. L. J. 289.

Maryland. — *Hartle v. Stahl*, 27 Md. 157.

New Jersey. — *Rue v. Meirs*, 43 N. J. Eq. 377.

New York. — *Seaman v. Seaman*, 12 Wend. (N. Y.) 381; *Steele v. White*, 2 Paige (N. Y.) 478; *Cruger v. Douglas*, 4 Edw. Ch. (N. Y.) 433; *St. Mark's Church v. Teed*, 120 N. Y. 583.

North Carolina. — *Bailey v. Wilson*, 1 Dev. & B. Eq. (N. Car.) 182.

Pennsylvania. — *Ralston's Estate*, 172 Pa. St. 104.

Rhode Island. — *Supreme Assembly, etc., v. Campbell*, 17 R. I. 402.

Vermont. — *Bellows v. Sowles*, 55 Vt. 391, 45 Am. Rep. 621.

Virginia. — *Zane v. Zane*, 6 Munf. (Va.) 406. See generally the title FAMILY ARRANGEMENTS.

1. Compromise of Boundary Disputes. — An agreement to divide land covered by two conflicting patents is a good consideration, and the court will not investigate the comparative merits of the two patents. *M'Intire v. Johnson*, 4 Bibb (Ky.) 48.

An executed compromise (allowing a rebate of the purchase money), fairly entered into between vendor and vendee, in reference to a disputed boundary line of a tract of land alleged to have been misrepresented by the vendor, and the location of which both had equal opportunity of ascertaining, cannot be disturbed by the vendor because it afterwards turns out that the boundary line was in fact located as represented by him, and the vendee in fact obtained all the tract, including the portion for which rebate was allowed. *Carlisle v. Barker*, 57 Ala. 267.

The question as to the actual place of the division line on the face of the earth was referred. The demandant, after one of the referees had partially surveyed a line, proposed to agree upon the line as claimed by the tenants, and to pay for what he had cut on the land, if the tenants would pay the costs of the referees; the terms were acceded to and complied with, and the agreement as to the line reduced to writing and signed by the demandant. It was held that the settlement of the line and the agreement signed by the plaintiff in reference thereto were on a good and valid consideration, and binding as any other contract for such consideration. *Hunter v. Heath*, 67 Me. 507.

See generally the title BOUNDARIES.

2. Claim Need Only Be Considered Doubtful —

England. — *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449; *Matter of Midland Union, etc., R. Co.*, 4 De G. M. & G. 356; *Kingsford v. Oxenden*, 55 J. P. 789.

United States. — *Union Bank v. Geary*, 5 Pet. (U. S.) 99.

Illinois. — *McKinley v. Watkins*, 13 Ill. 140.

Indiana. — *Sweitzer v. Heasley*, 13 Ind. App. 567.

Iowa. — *Keefe v. Vogle*, 36 Iowa 87.

Mississippi. — *Byrne v. Cummings*, 41 Miss. 192; *Swanson v. Griffin*, 68 Miss. 319.

Nebraska. — *Carter White Lead Co. v. Kinlin*, 47 Neb. 409.

New Hampshire. — *Flannagan v. Kilcome*, 58 N. H. 443.

New Jersey. — *Clark v. Turnbull*, 47 N. J. L. 265, 54 Am. Rep. 157.

New York. — *Steele v. White*, 2 Paige (N. Y.) 478; *Dovale v. Ackerman*, 11 Misc. Rep. (N. Y. C. Pl.) 245, 2 N. Y. App. Div. 404.

Pennsylvania. — *O'Keson v. Barclay*, 2 P. & W. (Pa.) 531.

Tennessee. — *Warren v. Williamson*, 8 Baxt. (Tenn.) 427.

If a party threatens to sue, honestly supposing he has a good cause of action, it will uphold a contract fairly entered into in order to avoid a suit. Otherwise, if the claim is a mere pretense to extort money. The compromise of a doubtful right is a sufficient consideration for a promise. *McKinley v. Watkins*, 13 Ill. 140.

The compromise of a doubtful right, though it afterwards turns out the right is on the other side, when there is neither actual nor constructive fraud, and the parties act in good faith, with full knowledge of the facts, is a sufficient consideration to support a promise. The real consideration which each party receives under a compromise being, not the sacrifice of the right, but the settlement of the dispute and the abandonment of the claim, it is no objection to the validity of the transaction that the right was really in one of the parties only, and that the other had no right whatever. The fact that the one may have had no claim is immaterial, if he was honestly mistaken in that regard. *Honeyman v. Jarvis*, 79 Ill. 318.

The attorney of the plaintiffs, in an action on a promissory note, agreed with the defendant, whose intestate was an indorser of the note, that if she would confess judgment and not dispute her liability, he, the attorney, would immediately proceed by execution to make the amount out of the drawer of the note, the principal debtor, who, he assured her, had sufficient property to satisfy the same. Upon the faith of this promise she did confess the judgment. It was held that the defendant's relinquishment of her defense and the confession of judgment were a sufficient consideration to bind the plaintiffs. As to the merits of the defense, *Thompson, J.*, deliver-

After Compromise Merits of Claim Cannot Be Investigated. — And after a compromise has been entered into in good faith, in an action to enforce the satisfaction, the merits of the original controversy cannot be called into question.¹

(3) *Groundless Claims.* — But, to render the compromise valid, both parties must concur in supposing the right to be doubtful, for if the claimant, knowing his demand to be groundless, forces the other party to a settlement by threats of suit, the compromise will be void.²

ing the opinion of the court, said: "It is unnecessary to examine whether this defense would have been available or not. The validity of the contract did not depend upon that question. It is enough that the bank considered it a doubtful question, and that they supposed they were gaining some benefit by foreclosing all inquiry on the subject, and the complainant, by precluding herself from setting up the defense, waived what she supposed might have been of material benefit to her." *Union Bank v. Geary*, 5 Pet. (U. S.) 99.

The plaintiff brought an action of slander against the defendant, and his counsel filed a declaration in which the words alleged to have been spoken were not actionable at all. When the suit had been pending for a time, the parties met and compromised it by the defendant giving his note to the plaintiff for one hundred dollars, and it was upon this note that suit was brought. The ground of defense in the court below was that although the compromise of a doubtful claim affecting the rights of parties is always a good consideration, without regard to the question of who might have the right side of the controversy, yet in this case, by the plaintiff's own showing, he could not have recovered, and therefore the note given in compromise of the suit was without consideration, and the court so instructed the jury, who found a verdict accordingly. Upon appeal the judgment of the court below was reversed and a *venire de novo* awarded. *O'Keson v. Barclay*, 2 P. & W. (Pa.) 531.

1. *After Compromise Merits of Claim Cannot Be Investigated* — *United States*. — *Lipsmeier v. Vehslage*, 29 Fed. Rep. 175.

Alabama. — *Curry v. Davis*, 44 Ala. 281.

Connecticut. — *Ford v. Habinger*, 64 Conn. 129.

Indiana. — *Proctor v. Heaton*, 114 Ind. 250.

Iowa. — *French v. French*, 84 Iowa 655.

Maine. — *Miller v. Whittier*, 36 Me. 577.

Massachusetts. — *Cobb v. Arnold*, 8 Met. (Mass.) 403.

Michigan. — *Hall Mfg. Co. v. American R. Supply Co.*, 48 Mich. 331.

Missouri. — *Clough v. Holden*, (Mo. 1892) 20 S. W. Rep. 695.

Nebraska. — *Slade v. Swedeburg Elevator Co.*, 39 Neb. 600.

New Jersey. — *Grant v. Chambers*, 30 N. J. L. 323.

New York. — *Steele v. White*, 2 Paige (N. Y.) 478; *White v. Hoyt*, 73 N. Y. 514; *Stewart v. Ahrenfeldt*, 4 Den. (N. Y.) 190; *Barnes v. Ryan*, 66 Hun (N. Y.) 170.

Pennsylvania. — *Paxson v. Hewson*, 14 Phila. (Pa.) 174.

Texas. — *Hunter v. Lanius*, 82 Tex. 677.

A compromise of a disputed claim is a good consideration for an agreement, and in an action on the new agreement matters which

might have been set up as a defense to the original claim cannot be set up as a defense to the new agreement. *Paxson v. Hewson*, 14 Phila. (Pa.) 174.

Where a contract for the exclusive right to sell a patented article on payment of a royalty is made by a person who owns a conflicting patent, and the agreement is made for the express purpose of avoiding any conflict and for dividing the royalty, he cannot, in an action against him on the contract, question the validity of the plaintiff's patent. *Hall Mfg. Co. v. American R. Supply Co.*, 48 Mich. 331.

A suit was brought by the plaintiffs against the defendants on a note purporting to be for one thousand five hundred dollars. The defense set up was forgery; the parties compromised the suit by the defendants giving the plaintiffs a new note for one thousand dollars, and upon suit brought on the last note it was held that the compromise was a good consideration for the new note, and that the defendants could not set up as a defense that the first note was a forgery. *Grant v. Chambers*, 30 N. J. L. 323.

Where all the facts of compromise between a ward and his insolvent guardian, entered into after the ward has become of age, in reference to the guardian's liability to the ward, were capable of being equally well known to both parties, a receipt in writing given by the ward to the guardian, which was in these words: "Received of T. J. M. the sum of eight hundred dollars, as a compromise and payment in full for all claims against him as guardian," will not be set aside and declared void in chancery, so as to enable the ward to reach the sureties on the guardian's bond by a settlement in the Probate Court, because the ward failed to know or to inform himself that such sureties were not dead or worthless when the receipt was executed and delivered to the guardian, when the ward has had from seven to eight years to inform himself of all his rights, since he attained his majority. *Motley v. Motley*, 45 Ala. 555.

2. *Groundless Claims* — *Alabama*. — *Bullock v. Ogburn*, 13 Ala. 346; *Ware v. Morgan*, 67 Ala. 461; *Prater v. Miller*, 25 Ala. 320, 60 Am. Dec. 521.

Illinois. — *Knotts v. Preble*, 50 Ill. 226, 99 Am. Dec. 514.

Indiana. — *Jarvis v. Sutton*, 3 Ind. 289; *Spahr v. Hollingshead*, 8 Blackf. (Ind.) 415; *Schnell v. Nell*, 17 Ind. 29, 79 Am. Dec. 453.

Iowa. — *Sullivan v. Collins*, 18 Iowa 228; *Tucker v. Ronk*, 43 Iowa 80.

Kentucky. — *Creutz v. Heil*, 89 Ky. 429.

Mississippi. — *Foster v. Metts*, 55 Miss. 77, 30 Am. Rep. 504.

Nebraska. — *Fitzgerald v. Fitzgerald, etc.*, Constr. Co., 44 Neb. 463.

b. UNLIQUIDATED CLAIMS — (1) *Ex Contractu*. — Where the legality of a demand growing out of a contract is undisputed, the amount of the damages is a proper subject for a compromise between the parties.

(2) *Ex Delicto* — (a) *In General*. — In like manner damages growing out of the commission of a tort may be compromised.¹

North Dakota. — McGlynn v. Scott, 4 N. Dak. 18.

Pennsylvania. — Logan v. Mathews, 6 Pa. St. 417.

Wisconsin. — Fuller v. Green, 64 Wis. 159, 54 Am. Rep. 600.

A promissory note given by a mail contractor for money stolen from the mail by his agent and employee carrying the same does not create any liability against the maker thereof. And, in such case, the agreement of the loser to forbear suit for a certain time, and his acceptance of a promissory note payable accordingly, do not constitute any legal consideration for the giving of the note. Foster v. Metts, 55 Miss. 77, 30 Am. Rep. 504.

A promise made to settle a doubtful right, or to get rid of a probable liability, is binding and made upon a good and valuable consideration, and it is no defense for the promisor to say he was mistaken in regard to his liability. But where a person's building takes fire by accident, and the fire extends to the building of another, which is destroyed, there is no legal or moral obligation on the part of the former to make good the loss of the latter; and a note given by the owner on whose premises the fire originated, to the other party, on the false representation of the latter that he could prove the maker to have been the cause of the fire, and thereby inducing him to believe he was in some way liable, is without consideration, and a suit thereon by the payee may be defeated on that ground. Knotts v. Preble, 50 Ill. 226, 99 Am. Dec. 514.

The mere existence of a controversy, which has not assumed the form of a pending suit, is not necessarily a sufficient consideration for a contract of compromise; the controversy must have been *bona fide* and based on reasonable grounds; the promise to pay a mere unfounded claim which one is induced to make by threats of litigation is without consideration, and as incapable of enforcement as the original claim, and the jury must pass on the good faith of the plaintiff in the assertion of such a claim, and whether there was reasonable ground for it. Ware v. Morgan, 67 Ala. 461.

Compromise of Illegal Claims. — No compromise by the parties of differences in respect to clearly illegal contracts and transactions can purge them and produce a valid claim. Everingham v. Meighan, 55 Wis. 354.

1. **Suit for Personal Injury.** — A promissory note given in settlement of a threatened suit for a personal injury, in a case where the payee supposed or believed that he had a cause of action, which note is in good faith given and accepted as a compromise of that supposed cause of action, is supported by a sufficient consideration and its payment may be enforced. Parker v. Enslow, 102 Ill. 272, 40 Am. Rep. 588.

Damage Suits. — The giving up a suit in-

stituted to try a question respecting which the law is doubtful is a good consideration for a promise to pay a stipulated sum; and therefore where a ship, having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted by the owners of the latter to compel the owners of the former to make good the damage, and the former vessel was detained until bail was given, and pending such proceedings the agents of the owners of the vessel detained agreed, on the owners of the damaged vessel renouncing all claims on the other vessel and on their proving the amount of the damage done, to indemnify them and to pay a stipulated sum by way of damages, it was held that, there being contradictory decisions as to the point whether shipowners were liable for an injury done while their ship was under the control of the pilot required by law, there was a sufficient consideration to sustain the promise made by the agents of the owners of the detained vessel to pay the stipulated damages. Longridge v. Dorville, 5 B. & Ald. 117, 7 E. C. L. 43.

Where a Blaster Lost His Eyes while in the service of the owner of a rock quarry, or of his contractor or lessee, and the owner of the quarry gave him a house and lot for life as compensation for the injury received and to prevent any suit against himself or his lessee, it was held that there was a good and valid consideration to support the conveyance. Crusselle v. Pugh, 71 Ga. 744.

Damage to Warehouse from Unskilful Excavation. — A complaint in substance alleged that the defendant commenced to excavate upon a lot adjoining premises occupied by the plaintiff's assignors as a warehouse, and that by reason of the negligent, unskilful, and careless manner in which the excavation was made, the floor of the warehouse was caused to fall through, together with the goods stored therein; that thereupon a settlement of the damages was demanded, and a compromise agreed upon between the parties whereby the defendant was to take certain tin plate at a stipulated price, and was to take away certain rivets, sort them over and return the undamaged ones, and to pay all damages for the rivets not returned; that the tin plate and rivets had been delivered to the defendant previous to the agreement, but that some of the rivets which were so sorted and returned were so unskilfully sorted that the plaintiff refused to receive them, and that the residue had never been sorted or returned; and that the plaintiff was damaged thereby in a certain sum, and that the defendant had failed to pay any part of the damages. It was held that the plaintiff's liability was a sufficient consideration for the agreement, and that the complaint stated a cause of action. Dunton v. Niles, 95 Cal. 494.

Wrongful Sale. — The defendant's intestate had a title in his own name to a piece of land

(b) **When Tort Is a Public Offense.** — And, although the tort involves a public offense for which the tortfeasor is liable to a criminal prosecution, the civil liability to the injured party may, nevertheless, be the subject of a compromise.¹ But when there has been no criminal prosecution of the offense the law scrutinizes such transactions closely; and therefore great care must be observed that the compromise of the civil damages does not include a compounding of the public offense as well, for if there be any express or implied agreement to shield the offender the whole transaction is void.²

which really belonged to himself and the plaintiff together. The plaintiff had personal property on the farm, and the deceased sold the farm without notice to him, and thereby occasioned loss on the sale of the plaintiff's personal property by reason of its forced sale out of season. The deceased and the plaintiff went over the items of loss together and agreed upon the amount due, and the note in suit was given for the amount. It was held that there was a sufficient consideration for it. *Hawxhurst v. Ritch*, (Supreme Ct.) 6 N. Y. Supp. 134.

1. Civil Liability Arising from the Commission of a Crime May Be Compromised. — *Breathwit v. Rogers*, 32 Ark. 758; *Walbridge v. Arnold*, 21 Conn. 424; *Dodson v. McCauley*, 62 Ga. 130; *Taylor v. Cottrell*, 16 Ill. 93; *Schommer v. Farwell*, 56 Ill. 542; *Souhegan Nat. Bank v. Wallace*, 61 N. H. 24.

See also the title COMPOUNDING OFFENSES.

Liability for Assault and Battery. — A note given to satisfy the plaintiff's private claim for damages for an assault and battery committed by the defendant is valid. *Walbridge v. Arnold*, 21 Conn. 424; *Noble v. Peebles*, 13 S. & R. (Pa.) 319; *Mathison v. Hanks*, 2 Hill L. (S. Car.) 625.

A promissory note given in satisfaction of a personal injury inflicted on the payee, though it exceeds the probable amount of the injury inflicted, has a sufficient consideration to support it in law, and will not be set aside unless a compromise of the public offense was included as a part of the consideration. *Whitenack v. Ten Eyck*, 3 N. J. Eq. 249.

Liability for Funds Embezzled. — An embezzler is under a legal and moral obligation to repay the person whose money he has wrongfully appropriated to his own use, and it is therefore not against public policy nor unlawful for him to give security for its return at a future day, provided no compromise of the criminal offense be contemplated by the parties.

Alabama. — *Bibb v. Hitchcock*, 49 Ala. 468, 20 Am. Rep. 288; *Moog v. Strang*, 69 Ala. 98.

Connecticut. — *Von Windisch v. Klaus*, 46 Conn. 433.

Dakota. — *School Dist. No. 61 v. Collins*, (Dakota 1889) 41 N. W. Rep. 466.

Florida. — *Johnston v. Allen*, 22 Fla. 224, 1 Am. St. Rep. 180.

Georgia. — *Southern Express Co. v. Duffey*, 48 Ga. 358; *Godwin v. Crowell*, 56 Ga. 566; *Wheaton v. Ansley*, 71 Ga. 35.

Illinois. — *Ford v. Cratty*, 52 Ill. 313.

Maryland. — *Washington Brewery Co. v. Carry*, (Md. 1892) 24 Atl. Rep. 151.

Massachusetts. — *Popple v. Day*, 123 Mass. 520.

Michigan. — *Wolf v. Troxell*, 94 Mich. 573; *Miller v. Minor Lumber Co.*, 98 Mich. 163, 39 Am. St. Rep. 524.

Missouri. — *Cheltenham Fire-Brick Co. v. Cook*, 44 Mo. 29.

New York. — *Girty v. Standard Oil Co.*, 1 N. Y. App. Div. 224; *Cohoes v. Cropsey*, 55 N. Y. 685.

Pennsylvania. — *Saalfeld v. Manrow*, 165 Pa. St. 114; *Pearce v. Wilson*, 111 Pa. St. 14, 56 Am. Rep. 243; *Portner v. Kirschner*, 169 Pa. St. 472, 47 Am. St. Rep. 925.

Rhode Island. — *Wilcox v. Daniels*, 15 R. I. 261.

Tennessee. — *Armstrong v. Southern Express Co.*, 4 Baxt. (Tenn.) 376; *Provident, etc., Assur. Soc. v. Edmonds*, 95 Tenn. 53.

It is a valuable consideration for a promissory note, given by the promisor, who was an assignee of a bankrupt, toward the payment of moneys received and misused by him, that the promisee, who was his co-assignee, refrained from pressing against him proceedings instituted to protect the interests of the creditors. *Abbott v. Fisher*, 124 Mass. 414.

Assignment of Right of Action for Recovery of Embezzled Fund Lost in Speculation. — Under sections 2440, 2441 of the Code of *Tennessee*, it is provided that any person who has paid money or delivered anything of value lost on any game or wager may recover the same by action if brought within ninety days, and that such action may be brought for the use of the wife or children of the loser after the expiration of ninety days and within twelve months. Where an officer of a bank embezzled its funds and lost the same in illegal speculation, it was held that an assignment to the bank by the embezzler and his wife of their right to recover the money so lost was valid. *Allen v. Dunham*, 92 Tenn. 257.

Liability for False Representations. — While an agreement made in consideration of stifling a prosecution for a felony is void, yet certain misdemeanors which chiefly affect the individuals aggrieved, and not the public interests, do not come within that rule, and may be settled by private agreement. The obtaining of money by one individual from another by false and fraudulent representations is such a misdemeanor, which may lawfully be settled by the parties after the institution of a criminal proceeding. Hence a promissory note given to the prosecutor to settle such an offense, and in consideration of the abandonment of a criminal prosecution begun thereon, is founded upon a valid consideration. *Geier v. Shade*, 109 Pa. St. 180; *Rothermal v. Hughes*, 134 Pa. St. 510. See also *Nickelson v. Wilson*, 60 N. Y. 362.

2. See the title COMPOUNDING OFFENSES.

Volume VI.

(c) **Bastardy Suits.** — Although a bastardy suit is in its nature a *quasi*-criminal action, its true purpose is to compel the father to maintain the child that it may not become a public charge, and it is therefore within the reason of the law that a compromise between the father and mother for the support of the child should be permitted and enforced.¹

Putative Father After Compromise Cannot Dispute His Paternity. — As the mother by making the compromise, and the public by permitting it, are forever barred from proceeding against any other person, the putative father, after a compromise has been made in good faith, cannot show that he was not and could not have been the father of the child, for the purpose of defeating the satisfaction.²

Death of Child. — The death of the child subsequent to the compromise will not relieve the father from the payment of the satisfaction.³

1. Compromise of Bastardy Suits — *England.*

— *Linnegar v. Hodd*, 5 C. B. 437, 57 E. C. L. 437; *Hicks v. Gregory*, 8 C. B. 378, 65 E. C. L. 378; *Smith v. Roche*, 6 C. B. N. S. 223, 95 E. C. L. 223; *Jennings v. Brown*, 9 M. & W. 496; *Knye v. Moore*, 1 Sim. & S. 61.

Alabama. — *Ashburne v. Gibson*, 9 Port. (Ala.) 549; *Robinson v. Crenshaw*, 2 Stew. & P. (Ala.) 276; *Merritt v. Fleming*, 42 Ala. 234.

Georgia. — *Hays v. McFarlan*, 32 Ga. 699, 79 Am. Dec. 317; *Jackson v. Finney*, 33 Ga. 512.

Illinois. — *Coleman v. Frum*, 4 Ill. 377; *Heaps v. Dunham*, 95 Ill. 583.

Indiana. — *Marshall v. Bell*, 1 Ind. App. 506; *Harter v. Johnson*, 16 Ind. 271; *Allen v. Davison*, 16 Ind. 416; *Abshire v. Mather*, 27 Ind. 381; *Thompson v. Nelson*, 28 Ind. 431; *Moon v. Martin*, 122 Ind. 211.

Kentucky. — *Burgen v. Straughan*, 7 J. J. Marsh. (Ky.) 583.

Massachusetts. — *Cutter v. Collins*, 12 Cush. (Mass.) 233.

Michigan. — *Taylor v. Dansby*, 42 Mich. 82.

Mississippi. — *Swanson v. Griffin*, 68 Miss. 319.

New Hampshire. — *Parker v. Way*, 15 N. H. 45.

New York. — *Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 329; *People v. Hayes*, 70 Hun (N. Y.) 111; *Hook v. Pratt*, 78 N. Y. 371, 34 Am. Rep. 539; *Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20.

Pennsylvania. — *Maurer v. Mitchell*, 9 W. & S. (Pa.) 69; *Shenk v. Mingle*, 13 S. & R. (Pa.) 29.

Vermont. — *Haven v. Hobbs*, 1 Vt. 238, 18 Am. Dec. 678; *Holcomb v. Stimpson*, 8 Vt. 141.

West Virginia. — *Billingsley v. Clelland*, 41 W. Va. 234.

For additional citations of authority, see the title **BASTARDY**, vol. 3, p. 890.

"Fair and honorable compromises between parties, perhaps equally guilty, who are about to become the parents of illegitimate offspring, are not only dictated by sentiments of honor and duty, but are in entire harmony with the policy of our statutes. And had there never been any prosecution in this case, and, without the pressure of a prosecution, the defendant had voluntarily come forward and executed these notes, they would have been, as they now are, good in law, because based on the consideration of not only a moral but also a legal obligation to provide, to some extent, for the expenses and support of both mother

and child. The amount which the father should pay and the mother should receive was a proper subject-matter for negotiation and agreement; and no circumstance of fraud appearing in the case, and no coercion other than such as the law sanctions, we see no reason why he should be absolved from the obligations which, by contract, he has assumed." *Per* Brinkerhoff, J., in *Maxwell v. Campbell*, 8 Ohio St. 265.

Compromise of Bastardy Suits Not Illegal. — An agreement by the mother of a bastard child with the father, that if he will contribute to the maintenance of their child she will not proceed against him under the bastardy act, is not unlawful, immoral, or inconsistent with the policy of the law. *Burgen v. Straughan*, 7 J. J. Marsh. (Ky.) 583.

After Compromise Prosecuting Witness Found Not to Be Pregnant. — In a suit to recover money paid to compromise a prosecution for bastardy, on the ground that the prosecuting witness was not pregnant and that the prosecution was fraudulent, it appeared from the evidence that the prosecution was instituted in good faith, and that at the time there was reason to believe that the prosecuting witness was pregnant, though it proved not to be so. It was held that the settlement of the prosecution was a good consideration for the payment of the money, and that it could not be recovered back. *Thompson v. Nelson*, 28 Ind. 431.

2. After Compromise — Putative Father Cannot Dispute His Paternity. — *Shaw v. Whiteman*, 1 Peake N. P. (ed. 1795) 29, 4 Petersd. 185; *Holcomb v. Stimpson*, 8 Vt. 141.

3. Death of Child After Compromise. — Where the father of a bastard child gives to the mother a promissory note for the purpose of maintaining the child and securing the dismissal of the bastardy proceeding, the death of the child shortly after its birth will not defeat the collection of the note on the ground of a failure of consideration. *Marshall v. Bell*, 1 Ind. App. 506; *Harter v. Johnson*, 16 Ind. 271; *Potter v. Earnest*, 45 Ind. 416; *Maurer v. Mitchell*, 9 W. & S. (Pa.) 69; *Smith v. Roche*, 5 Jur. N. S. 918.

In *Maxwell v. Campbell*, 8 Ohio St. 265, where, after the making of the agreement, the child died, the court, by Brinkerhoff, J., said: "Doubtless there might have been a contract so framed between the parties that payments to be made by the father should cease at the death of the child; but no such contract is disclosed in the case before us. For aught that

6. Incurring Liabilities — As Principal — Purchasing Property. — If a party, at the instance of the promisor and moved by his promise of assistance, incurs liabilities, as for example in the purchase of property, which he would not otherwise have incurred, the assumption of the liability furnishes a valuable consideration for the promise.¹

As Surety. — So the incurring of liability as surety upon a contract is a sufficient consideration for a promise of indemnity, or a transfer of real or personal property as such.²

appears in the case, the contract was unconditional and absolute; she taking upon herself the risk that the support of the child might cost more than she was to receive, and he taking upon himself the risk of its costing less than he was to pay."

The Fact That a Bastard Child is Still-born does not affect the validity of a note given to the mother. *Merritt v. Flemming*, 42 Ala. 234.

Compromise by Married Woman Without Joining Husband. — A feme covert delivered of or pregnant with a bastard child cannot maintain a suit against the putative father without joining her husband. A receipt and discharge from liability given by the wife to the party accused is therefore a void act, and constitutes no valid consideration for a promissory note. *Wilbur v. Crane*, 13 Pick. (Mass.) 284.

When a Woman Has Been Deserted by Her Husband, she may sue on a note given to her to compromise a bastard suit. Exception can only be taken by plea in abatement. *Parker v. Way*, 15 N. H. 45.

Failure to Enter Compromise on Record Will Not Invalidate. — It is no defense to an action by the mother of a bastard child, on a promissory note given in settlement of the bastardy proceeding, that she was at the time of the settlement a minor, and that the justice before whom the proceeding was pending failed to find and enter of record the fact that suitable provision had been made for the maintenance of the child, as required by section 994, Ind. Rev. Stat. 1881. *Allyn v. Allyn*, 108 Ind. 327.

Subsequent Giving of Bond to Overseer Does Not Invalidate. — A note given by the father to the mother of a bastard child, on a settlement of a prosecution in her behalf, is not affected by the fact that the father has since been compelled by the overseers to give a bond of indemnity for its support, the mother having supported the child from its birth. *Knight v. Priest*, 2 Vt. 507.

1. Assuming Liabilities — Purchasing Property. — A father-in-law having promised his son-in-law that if the latter would purchase a certain tract of land he would assist in paying for it by letting him have the amount of a particular bond when collected, and the son-in-law having thereupon made the purchase, this promise was determined to be upon sufficient consideration, and obligatory in law. *Scott v. Osborne*, 2 Munf. (Va.) 413.

B. induced G., who had married a niece of B.'s whom he had raised and to whom he was much attached, to abandon his determination to remove to Mississippi, and to incur a heavy expense in the purchase of a farm in Kentucky, by agreeing verbally to pay five thousand dollars of the purchase money in three annual instalments. It was held that there was a valuable consideration for this agree-

ment, and that the same was enforceable against his estate. *Berry v. Graddy*, 1 Metc. (Ky.) 553. Compare *Reed v. Vannorsdale*, 2 Leigh (Va.) 569.

The defendant, the administrator of an estate, had a sale of his intestate's effects, among which were a negro man and his wife. The plaintiff purchased the man, and when the woman was offered for sale and was on the point of being bid off by a stranger, the defendant urged the plaintiff to buy her also. He replied that he was not able, upon which the defendant promised that if he would buy the negro woman that he, the defendant, would give him one hundred dollars. The plaintiff accordingly bid off the negress, and gave his note for her according to the terms of the sale. He afterwards paid the note, and then brought this action to recover the hundred dollars. It was held that there was a sufficient consideration for the promise. *Meacham v. McKie*, 1 Hill L. (S. Car.) 374. And see, *supra*, this section, *Money Expended at Promisor's Instance — Improvement upon Land*.

Renting Dock. — The defendant owned a dock upon the Hudson river which formerly had been used for freighting purposes, but was then not in use, which disuse detracted from its value. He entered into a parol agreement with the plaintiffs by which he undertook that in case they would carry on the freighting business from said dock, paying him a certain sum for the use thereof, and run a boat therefrom to the city of New York to the close of the season of navigation, he would guarantee them against all losses or damages incurred. The plaintiffs, in pursuance of this agreement, chartered a steamboat and conducted the business as required to the close of the season, and in so doing sustained a loss. It was held that the risks and liabilities incurred by the plaintiffs were a sufficient consideration for the promise of the defendant, as was also the benefit accruing to the defendant from the renting of his dock. *Sands v. Crooke*, 46 N. Y. 564.

A Covenant to Erect a Brick House of certain dimensions named therein, upon a piece of land, is a valuable consideration for a conveyance of it. *Brewer v. Bessinger*, 25 Miss. 86.

2. Becoming Surety as a Consideration for Indemnity. — *Mills v. Brown*, 11 Iowa 314; *Lucas v. Chamberlain*, 8 B. Mon. (Ky.) 276; *Kemp-ton v. Coffin*, 12 Pick. (Mass.) 129; *Marshall v. Cobleigh*, 18 N. H. 485; *Branch v. Howard*, 4 Tex. Civ. App. 271.

See the title SURETYSHIP.

Where A appeals from a judgment against him, and B becomes his surety on the appeal bond, and A, to secure B for his liability on the appeal bond, assigns to B a judgment held by A against third parties, the liability

Liability Must Be Actual. — But there must be an actual liability to incur in order to constitute it a valuable consideration. The incurring of a mere ideal danger which has no foundation in fact or in law is not a valid consideration for a promise.¹

7. Services — a. IN GENERAL. — The performance of services by the promisee for the benefit of the promisor, or for another at the promisor's instance, is a valuable consideration.²

of B on the appeal bond is a sufficient consideration to support the assignment made to him by A. *Hobbs v. Duff*, 23 Cal. 596.

That one becomes the surety of another, to his bond as executor, is a sufficient consideration to support a mortgage or deed of trust. *Perkins v. Mayfield*, 5 Port. (Ala.) 182; *Grigsby v. Shwarz*, 82 Cal. 278; *Uhlér v. Semple*, 20 N. J. Eq. 288.

Where an agent is authorized to sell personally at a certain price, with an agreement that he may have all he can make over such price for making the sale, and a sale is made by him for a larger price than that stipulated, and the agent joins with the purchaser in an indemnity bond and gives a chattel mortgage on his own property to secure the payment of certain liabilities of the vendor assumed by the vendee as a part of the purchase money, and the agent takes a promissory note in his own name for the excess over the stipulated price, the property sold and the risk run by the agent in giving said bond and executing said chattel mortgage will, it seems, constitute a sufficient consideration to uphold such note. *Eastman v. Brown*, 32 Ill. 53.

The Assuming a Contingent Liability and promising to pay a definite sum in an event which the parties contemplate might happen is sufficient to support a concurrent promise to pay an amount certain made by the party for whose benefit the assumption of the contingent liability was to inure. *Aldrich v. Lyman*, 6 R. I. 98. See also *Myers v. Morse*, 15 Johns. (N. Y.) 425.

Insuring Life or Property. — Action was brought by the transferees of certain promissory notes given to an insurance company for premiums since earned, to recover the amount of such notes. It was held, on the plea of the defendant, that the premium of insurance for which they were given constituted a good consideration. *Wood v. Shaw*, 3 L. C. J. 169.

1. *Maull v. Vaughn*, 45 Ala. 134; *Cabot v. Haskins*, 3 Pick. (Mass.) 83.

2. **Services.** — *Barley v. Buell*, 70 Cal. 335; *Borden v. Curtis*, 46 N. J. Eq. 468; *Freeland v. Bacon*, (City Ct.) 7 N. Y. Supp. 674; *Cowee v. Cornell*, 75 N. Y. 91, 31 Am. Rep. 428.

Household Services. — Delay by a man to fulfill a promise to marry, and services rendered to him by the woman during the continuance of the engagement, in procuring and taking care of his clothing, are a sufficient consideration for a promissory note given by him to her; and the fact that other motives entered into his mind and induced him to give it is immaterial. *Prescott v. Ward*, 10 Allen (Mass.) 203.

The defendant's testator, having taken by mistake a fatal dose of aconite, and being aware of his approaching death, executed and delivered to the plaintiff — who had been his

housekeeper for seven or eight years, and to whom he was indebted for services — a promissory note for the sum of ten thousand dollars, the consideration being expressed "for services rendered." In an action upon the note it was held that it was valid, although the amount was greater than the value of the services. *Earl v. Peck*, 64 N. Y. 596. To the same effect see *Stone v. Pennoek*, 31 Mo. App. 544.

Services of Emancipated Minor Child. — A father may emancipate his minor child by parol, and thereafter make contracts with the child to compensate him for services; and services rendered under such a contract will be a valid and adequate consideration for a promissory note, *Phelps v. Hopkinson*, 61 Ill. App. 400; or for a conveyance of real estate as against the father's creditors. *Kain v. Larkin*, 131 N. Y. 300.

Services Rendered by a Labor Union in supplying an employer with servants to take the places of others who had refused to work and left his employ are a valuable consideration for a promissory note. *Graboski v. Gewertz*, (C. Pl.) 17 N. Y. Supp. 528.

Maintenance and Support. — A father, being old and infirm, and having a large dependent family but no property except a small farm and some live stock, made a verbal contract with his son, a young man living in his family, that the latter should cultivate the farm for a year, and out of the crop support the entire family and feed the live stock, and take the residue for his compensation. The father and a younger son gave some assistance in the cultivation of the crop, which yielded about one hundred bushels of corn. There was no intentional fraud on the part of the father. In an action by the father's creditors in which they sought to subject the crop to the payment of their debts, it was held that the crop belonged to the son, charged with the support of the father's family, and that the father's creditors could not assert any claim to it. *Glasgow v. Turner*, 91 Tenn. 163.

Support of Child. — A decree of divorce was rendered and the custody of a minor son was given to the mother, and the father was required to pay to the mother three hundred dollars. Of that amount two hundred dollars was afterwards paid, and later the father and mother entered into an agreement that if the father would take the care and custody of the minor son, the mother would relieve him from the payment of the other hundred dollars still remaining due and unpaid; and the father, in pursuance of such agreement, did take such son under his charge, and continued to support and maintain him. It was held that the agreement was valid, and that these transactions had the effect to pay, satisfy, and discharge the judgment for the remaining

Note for Services Payable at Maker's Death. — Thus a promissory note, payable at the maker's death, given in consideration of services rendered to him, will not be deemed a donation in disguise, but will constitute a binding claim against his estate,¹ and this notwithstanding the payee may have received something for his services during the maker's lifetime.²

hundred dollars. *Miller v. Morrison*, 43 Kan. 416.

The defendants adopted the infant daughter of the plaintiff, who had lost his wife and could not well care for the child. Not long afterwards the plaintiff desired to have the child again, and it was agreed that he might adopt her. This was not done, however, at the time, as the plaintiff's plans for the re-establishment of his home miscarried, and he asked the defendants to keep the child for him until his home was in a condition to receive her, and he agreed in the meanwhile to compensate them for so doing. The plaintiff delayed the matter about seven years, the agreement in the meanwhile that he should eventually be allowed to adopt the child being kept good. When he did adopt her it was not convenient for him to pay for the keeping of the child as agreed, and the plaintiff gave his note and mortgage for the amount of the indebtedness. In an action to cancel the note and mortgage on the alleged ground that the same was given without consideration, the plaintiff insisted that the note was without consideration because it was given to the defendants for boarding their own child, but the court, by Adams, C. J., said: "While it is true that Mrs. Whitaker's [one of the defendants] legal relation as mother to the child continued until the articles of adoption retransferring the child were drawn and signed, which was after the board in question was furnished, it is also true that in some respects, and in material respects, the relation had become changed. After the agreement was made, neither the Whitakers nor the child could look upon the union as permanent. The child was liable to be returned to its natural father at any time. There was no basis in such a relation for the cultivation and growth of a parental or filial attachment. So far as the Whitakers' affectional relations were concerned, the child was a boarder, and only that. It was with the Whitakers during its unserviceable years, and essentially as a boarder. It seems to us that the plaintiff, in trying to repudiate his note, is trying to avail himself of a technicality to enable him to perpetrate a moral wrong. We think that under the circumstances shown the note was not without consideration." *Clayton v. Whitaker*, 68 Iowa 412.

Alternative Contracts for Services. — In *Hoskins v. Fogg*, 60 N. H. 402, a contract to pay an agent a certain sum for selling a farm, and half the sum if the owner sold it outside the agent's influence, was held to be founded upon a valid consideration, and that the agent, if prevented from making the sale by the owner's selling it outside his influence, might recover upon the contract half the sum agreed to be paid.

But in *Hamlin v. Wheelock*, 42 Hun (N. Y.) 530, where the defendant agreed to pay to the plaintiff two dollars and fifty cents on each and

every five thousand bushels of grain purchased and sold, or sold and purchased, in the course of the defendant's business, to any customer or customers who should be introduced to him by the plaintiff or by any of the persons so introduced, it was held that so far as the contract provided for the payment of the amount specified for the act of the plaintiff in introducing customers to the defendant it was valid, but that in so far as it provided for the payment of the amount specified in the case of persons introduced to the defendant by dealers introduced to him by the plaintiff, it imposed no legal obligation upon the defendant, since any benefit he derived therefrom was in no way dependent upon the act of the plaintiff.

Attendance as a Witness in an action pending in another state is a sufficient consideration for a promise to pay the witness more than the legal fee, since such attendance could not have been enforced by subpoena. *Armstrong v. Prentice*, 86 Wis. 210.

Conducting Newspaper in Interest of Political Party. — Conducting a newspaper in the interest of a certain political party, and in advocacy of its principles, is a valuable consideration for a contract to furnish a certain number of subscribers or pay a certain sum of money in lieu thereof. *Moss v. Witness Printing Co.*, 64 Ind. 125.

Prosecuting Suit. — The plaintiff and defendant had, or supposed they had, a similar interest dependent upon the settlement of a controversy, and the defendant promised the plaintiff that if he would commence and carry through a suit in his own name to settle the matter, he (defendant) would pay him one half of the expenses incurred in such suit. In consequence of and in reliance upon such promise, the plaintiff brought and prosecuted the suit to a final termination. It was held that the promise was founded upon a sufficient consideration. *Dorwin v. Smith*, 35 Vt. 69.

The Performance of Labor, Though Unsuccessful, is a good consideration. *Lampleigh v. Braithwait*, Hob. 105; 1 Smith's L. Cas. 151.

Conjuring a Sick Man to Cure Him is not a valid consideration for a promissory note. *Cooper v. Livingston*, 19 Fla. 684.

1. Note for Services Payable at Maker's Death Valid. — *Velie v. Titus*, 60 Hun (N. Y.) 405; *Root v. Strang*, 77 Hun (N. Y.) 14.

2. Payment for Services During Maker's Lifetime Does Not Invalidate. — *Barthe v. Lacroix*, 29 La. Ann. 326, 29 Am. Rep. 330.

Upon an appeal from the action of commissioners in disallowing a claim against an estate, it appeared that the deceased was an unmarried man and in very poor health, and had made his home at intervals with the appellant, who was a relative and poor, paying an agreed price per week for his board when there. The appellant and his wife rendered him various small services, particularly in the care of him when ill, and he stated to them

b. AGREEMENTS TO PERFORM. — An agreement or covenant to perform future services is a valuable consideration between the parties for a present promise or conveyance.¹

Future Maintenance and Support. — Thus an agreement or covenant to maintain and support the promisor² or grantor,³ or another person at the promisor's or grantor's request,⁴ is a valuable consideration for a promissory note or real conveyance.

Such Conveyance Void as to Existing Creditors. — But such a conveyance, though valid between the parties, is void as to existing creditors of the grantor.⁵

8. Information. — If a person possesses information which he is not legally bound to disclose he may make it the subject of a valid sale, and the imparting of it will be a valuable consideration for a promise.⁶

that he would compensate them for it, and they expected him to do so. About two months before his death he requested the appellant to draw a note for seven hundred dollars payable to himself, which he did, and the deceased examined and signed it and delivered it to the appellant, stating that he desired the appellant to have it for what he and his wife had done for him; that if he (the deceased) got well he should want it back, but that if he died they were to have it. The note remained in the appellant's hands until the death of the maker. There was no claim that there had been any fraud in procuring it. It was held that the note was founded upon a valid consideration. *Clark's Appeal*, 57 Conn. 565.

1. A Covenant to Perform Personal Services for the Grantor is a valuable consideration, and sufficient to support a deed of bargain and sale. *Young v. Ringo*, 1 T. B. Mon. (Ky.) 30.

To Constitute the Rendering of Future Services a Good Consideration for the giving of a note, there must be some contract for future services which may be enforced by the maker of the note if the recipient omits to perform them. *Hulse v. Hulse*, 17 C. B. 711, 84 E. C. L. 711. But see *supra*, this title, *Time of Rendering or Performing the Consideration—Executory Consideration*.

2. Future Maintenance and Support. — In *Phile's Estate*, 14 Phila. (Pa.) 330, a note which was given upon condition that the payee should give the maker a home as long as she lived was held valid, and the idea of a consideration was not negatived by the fact that the maker also paid a weekly sum for her board. The court, by Ashman, J., said: "It is one thing to board a person from week to week, with the privilege of terminating the agreement at pleasure, and another to assume the obligation of continuing the service for a lifetime. The benefit to the decedent was not simply the present care which she received, but the certainty of an assured home. It was accompanied with a corresponding duty on the part of the claimant, for the breach of which she would be clearly liable in damages, to provide that home, regardless of any possible inconvenience which might be developed by the future. In the light of this reciprocal duty and benefit, it is impossible to say that no valid consideration existed."

3. Support as Consideration for a Deed. — *Pellizzarro v. Reppert*, 83 Iowa 497; *Hutchinson v. Hutchinson*, 46 Me. 154; *Taylor v. Crockett*, 123 Mo. 300; *Shontz v. Brown*, 27 Pa. St. 123; *Keener v. Keener*, 34 W. Va. 421.

Where the owners of a farm conveyed the same in fee on condition that the grantee should support and maintain them during their respective lives, it was held that this was equivalent to receiving a life annuity as the purchase price, which was a valuable consideration. *Spalding v. Hallenbeck*, 30 Barb. (N. Y.) 292.

The defendants' testator, about a year before his death, executed an instrument by which he agreed to give "all moneys and personal property I may be possessed of in the United States" to the plaintiffs after his death, and the plaintiffs agreed, in writing, to board, nurse, clothe, and furnish him with medical attendance while he lived, and also to bury him. In an action for specific performance of the testator's agreement, it was held that there was an adequate, valuable consideration therefor, and that it was not void for uncertainty. *Brady v. Smith*, 8 Misc. Rep. (N. Y. Super. Ct.) 465.

4. Andrews v. Ives, 3 Conn. 368; *Howe v. Hyde*, 88 Mich. 91.

5. Gordon v. Reynolds, 114 Ill. 118; *Kain v. Larkin*, 62 Hun (N. Y.) 621, 17 N. Y. Supp. 223; *Lehman v. Bentley*, 60 N. Y. Super. Ct. 473.

6. Information as to Facts Affecting the Value of Stocks. — Reliable information as to facts upon which the future price of stocks will depend is a sufficient consideration to uphold an agreement or contract in relation to such stock. *White v. Drew*, 56 How. Pr. (N. Y. Supreme Ct.) 53; *Parsons v. Robinson*, 59 N. Y. Super. Ct. 546, *affirmed* in 133 N. Y. 537.

Information Affecting the Value of Real Estate. — A written agreement that one party shall purchase a tract of land, and that another party shall share in the profits of the land and allow the purchaser ten per cent. upon his advances, which agreement is based upon the consideration of information to be given as to the location of a railroad depot making the investment profitable, creates a trust in the land in favor of the party furnishing the information, is founded upon a sufficient consideration, and is not void as against public policy, if it does not appear that any rights of the railroad company were affected by the giving of such information, or that it was obtained through a relation to them of trust or confidence, or given in violation of such trust or confidence. *Green v. Brooks*, 81 Cal. 328.

Information of an Outside Title to Land in the adverse possession of another constitutes a valuable consideration for a note, and the sale

9. Trouble, Risk, and Inconvenience. — If the promisee, at the instance of the promisor and moved by his promise, do any act which occasions him even the slightest trouble or inconvenience,¹ or in doing which he incurs a

of such information is not barratrous. *Lucas v. Pico*, 55 Cal. 126.

Information as to Mineral Properties in Land. — A party who has discovered the locality of an oil spring, a mine, or other valuable properties, may sell the knowledge thus acquired, and such information is a sufficient consideration for a purchaser's promise to pay. *Reed v. Golden*, 28 Kan. 632, 42 Am. Rep. 180.

Information About Price of Property. — The plaintiff, a real estate broker, having learned from the owner of a house and lot the price and terms of sale, and having received a promise of one per cent. commission for selling, appraised the defendant, who pursued the same business, of the information he had received and promised to allow him one-half per cent. of such commission if the defendant effected a sale; and the defendant, having applications for investment, agreed that in case a sale should be effected by him he would divide the brokerage with the plaintiff. It was held that the agreement was supported by a sufficient consideration, and that the defendant, having himself applied to the owner, consummated a sale, and received a commission, was liable to the plaintiff for one half of the amount. *McLaughlin v. Barnard*, 2 E. D. Smith (N. Y.) 372.

Information as to Names of Important Witnesses. — Information given in good faith to a party litigant, and disclosing the names of important witnesses in his suit, may be a good consideration for a note. *Chandler v. Mason*, 2 Vt. 194; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370.

Scientific Instruction. — A promissory note was given as the price of admission into a private society organized for the purpose of instructing in a new system of medicine. There was no fraud nor imposition practiced upon the maker. Upon a plea of want of consideration, it was held that the note was valid. As a general rule, when a man, from curiosity, or for the sake of information, buys the right of gratifying the one or procuring the other, he must be held to his contract, although he may be disappointed as to the value of his purchase. It is not the business of courts to protect parties from the consequences of bad contracts. *Goree v. Wilson*; 1 Bailey L. (S. Car.) 597.

Surrender of Letter Containing Information. — The defendant promised to pay the plaintiff \$1000 if the latter would surrender to him a certain letter which contained information valuable to the defendant. It was held that the delivery of the letter was a sufficient consideration for the promise. *Wilkinson v. Oliveira*, 1 Bing. N. Cas. 490, 27 E. C. L. 468.

1. Recovering Judgment Against Third Party. — The defendants guaranteed, in writing, the return in six months of certain bonds loaned by the plaintiffs to the R. I. M. Co. The bonds not having been returned, the defendants, having been informed that the plaintiffs intended to sue them upon the guaranty, verbally agreed that if the plaintiffs would re-

cover a judgment against the company they would take an assignment thereof, return to them the bonds, and pay the costs. The plaintiffs, in pursuance of the agreement, immediately brought suit against the company, recovered and perfected judgment, tendered a written assignment thereof to the defendants, and demanded performance of the agreement, which was refused. In an action upon the agreement it was held that the performance by the plaintiffs of the acts upon which the defendants' promise was conditioned constituted a valuable consideration. *Beckwith v. Brackett*, 97 N. Y. 52.

Attending Promisor's Funeral. — A parol contract to pay a person a sum of money conditioned upon his attending the promisor's funeral, and in consideration of his promise to do so, is a valid contract, and is enforceable upon the performance of the condition. *Earle v. Angell*, 157 Mass. 294.

"Guessing" Contest. — The defendant company, as a means of advertising their soap, offered a piano as a prize for the person guessing the correct weight of a large cake or block of soap exhibited at an exhibition. The guessing was free, and all persons who desired to guess were provided with coupon tickets upon which to mark their guesses. The tickets were deposited, or were supposed to be deposited, in a box, and the corresponding coupons retained by the respective guessers. The plaintiff guessed within a shade of the correct weight, and after the soap had been weighed presented her coupon with her guess marked thereon, but the judges could not find her ticket in the box and awarded the prize to another person, whose guess was not so near the correct weight as the plaintiff's. The plaintiff afterwards brought an action for breach of contract. It was held, on demurrer to the plaintiff's declaration, that the competition was not a lottery within the meaning of the Criminal Code, and that the exercise of judgment required in the guessing was a sufficient consideration to support the contract. *Dunham v. St. Croix Soap Co.*, 33 Can. L. J. 444.

A Clause in a Note Providing for the Payment of Attorney's Fees if the note is placed in the hands of an attorney for collection is not void for want of a consideration. Such clause only becomes operative upon the maker's default, and the inconvenience and trouble occasioned thereby is a sufficient consideration for the contingent promise. *Barton v. Farmers', etc., Nat. Bank*, 122 Ill. 352; *Weigley v. Matson*, 24 Ill. App. 178, affirmed in 125 Ill. 64, 8 Am. St. Rep. 335.

Procuring Subscriptions. — The defendant's testatrix gave her note as a contribution to pay off a church debt upon condition that the testator would make an effort to gain subscriptions enough to raise the whole debt. The testator thereafter succeeded in procuring subscriptions and pledges for the remainder of the debt. It was held that his acceptance of her offer and his efforts in reliance upon it

risk,¹ the act so performed constitutes a valuable consideration for the promise.

10. Construction of Railroads, Buildings, and the Like — **Construction of Railroad and Location of Stations.** — Where parties, in consideration of the benefits which would naturally accrue to them from the construction of a railroad or the location of a railroad station upon or near lands in which they are interested, bind themselves to convey lands, to subscribe to stock, to pay money, or the like, the construction of the railroad² or the location of the

were a sufficient consideration for the note. *Roberts v. Cobb*, 31 Hun (N. Y.) 150. See the title **SUBSCRIPTIONS**.

Apportionment of Taxes. — If taxes upon real estate have been assessed to the occupant thereof, and, by the request of one of the parties interested therein, the collector gets the assessors to apportion the same, so that he may know how much thereof belongs to his portion of the real estate, this will furnish a good consideration for an express promise by him to pay his proportion of the taxes to the collector. *Burr v. Wilcox*, 13 Allen (Mass.) 269.

Executing Bond of Indemnity. — The defendant was indebted to the plaintiff upon a bill of exchange drawn by the defendant, payable to his own order, and indorsed to the plaintiff. The plaintiff lost the bill and was unable to present it at maturity, whereupon the defendant promised to pay it if the plaintiff would execute a bond of indemnity to secure him against loss, which was accordingly done. It was held that the execution of the bond was a sufficient consideration for the promise. *Williamson v. Clements*, 1 Taunt. 523.

Procuring Security for Part of Debt. — The inconvenience to a debtor of procuring security for a part of the debt is a sufficient consideration to support a promise by the creditor to relinquish the residue. *Little v. Hobbs*, 34 Me. 357.

Time. — A and B being about to complete a contract for the sale of land, A agreed to pay B one dollar for every hour he should detain him in closing the contract beyond a given time. It was held that B's time was a valuable consideration and sufficient to support the promise. *Paige v. Ripley*, 12 Vt. 289.

Trouble and Exertion by Surety. — A surety agreed with his cosurety that if the latter would procure the principal, who was insolvent, to pay a stipulated sum on the debt, he would release him from any obligation to contribute to the payment of the balance. The promisee performed his part of the undertaking by procuring the principal to make the payment. It was held that the promisee's trouble and exertion was a sufficient consideration to support the promise to release, and that he was not liable to contribution. *Warren v. Whitesides*, 34 Miss. 171.

Making Oath as to Amount of Debt. — A promise by the defendant to pay a sum of money to the plaintiff if the latter will take an oath that the amount is due him is founded upon a sufficient consideration. *Bretton v. Pretti-man*, T. Raym. 153.

Where the plaintiff claimed a sum of money of the defendant, who denied it, but promised that if the plaintiff would swear to the correctness of the claim he would pay it, and the plaintiff made affidavit accordingly, it was

held that the making of the affidavit was a sufficient consideration for the defendant's promise and bound him to perform it, and it was not competent for him to prove that the plaintiff had sworn falsely or that he was mistaken in his affidavit. *Brooks v. Ball*, 18 Johns. (N. Y.) 337.

Proving Validity and Correctness of Debt. — Where an administrator promised the plaintiff to pay a debt due by the intestate if he would submit the account to A to ascertain the true amount, the promise was held to be enforceable, his submitting accounts being a sufficient consideration. *March v. Culpepper*, Cro. Car. 70.

A promise made by A to pay a debt due from B to C, in consideration that C bring two witnesses to prove it, on oath before a justice of the peace, to be a just debt, is held to be a sufficient consideration. *Amie v. Andrews*, 1 Mod. 166.

Procuring Affidavits to Establish Unsoundness of Slave. — An undertaking on the part of the plaintiff to procure affidavits to establish the unsoundness of a slave was a sufficient trouble to sustain a promise by the defendant to return a portion of the price paid for the slave. *Overstreet v. Philips*, 1 Litt. (Ky.) 121.

Executing Void Conveyance. — A married woman executed a separate deed for her land to the defendant, and the defendant, in consideration thereof, gave his promissory note payable to her. In an action by the plaintiff as administrator it was held that though the deed was void, the trouble and inconvenience of executing it and the difficulty which she might have had in asserting her title against her own void conveyance were a sufficient consideration for the note. *Sanborn v. French*, 22 N. H. 246.

1. Incurring Additional Risks. — A vessel, in consequence of a desertion of some of the seamen, was left short of hands in harbor before the voyage was completed. The master, to induce the remaining seamen to perform the rest of the voyage, promised to pay them a sum of money in addition to their wages. They accordingly performed the rest of the voyage with the diminished number of hands. In an action by one of the seamen against the master for the sum promised it was held that as the seamen were not bound by their original contract of service to proceed with the diminished number of hands, which increased the risk of the voyage, their undertaking to do so was therefore a good consideration for the master's promise. *Hartley v. Ponsonby*, 7 El. & Bl. 872, 90 E. C. L. 872.

2. Construction of Railroad. — The defendant subscribed to the capital stock of a railroad company and thereby promised to pay the company the amount of his subscription when the track of the road should be "laid

station ¹ is a valuable consideration for the promise.

Erection of Public Buildings. — The same principle applies and gives validity to promises made in consideration of the location and erection of a public building.²

Erection of Private Buildings. — So where the erection of a private building would prove of benefit to the whole community, as, for instance, the establishment of a large manufacturing plant, promises made in consideration thereof are enforceable.³ Even where the erection of the building is merely of benefit to a single or limited number of individuals, as where a land company interested in the improvement of a tract of land conveys a lot in consideration of the vendee's promise to erect a building thereon, the conveyance is for a valuable consideration.⁴

11. Marriage and Promises of Marriage — *a.* **CONTRACTS AND CONVEYANCES BETWEEN THE PARTIES.** — Marriage, in contemplation of law, is not only a valuable consideration for a contract or conveyance between the parties to it, but is a consideration of the highest value, and from motives of the soundest public policy is upheld with a strong resolution. The husband and wife,

ready for the running of cars" between specified points. The subscription was made for the purpose of aiding in the construction of the company's road and in consideration of the advantages that might accrue to the defendant therefrom, and especially from the construction of that part of the road between the points specified in the subscription. The railroad company completed the road between the specified points ready for the running of cars. It was held that the subscription was supported by a sufficient consideration. *Lesh v. Karshner*, 47 Ohio St. 302. See also to the same effect, *Chicago, etc., R. Co. v. Derkes*, 103 Ind. 520; *Cedar Rapids First Nat. Bank v. Hendrie*, 49 Iowa 402; *Charleston, etc., R. Co. v. Leech*, 33 S. Car. 175, 26 Am. St. Rep. 667.

But in *Holladay v. Patterson*, 5 Oregon 177, a contract for the payment of money in consideration that a railroad company would cause the line of its road to be located upon a certain route, instead of adopting another route then surveyed which was shorter and over which the road could be constructed at less expense, was held void as contrary to public policy.

1. Location of Railroad Station. — An agreement by a railroad company to locate a station at a certain point is a valuable consideration. *Mills County v. Burlington, etc., R. Co.*, 47 Iowa 66.

Where the defendant, with others, subscribed a writing by which, in consideration that a railroad company would construct a depot, etc., for the accommodation of travelers at B, he agreed to pay the company fifty dollars for the purpose of aiding in making the depot and establishing and improving public roads to and from the same, it was held that the instrument imported a request to the company to construct the buildings and establish and improve the roads, and that a compliance with the request by the company so far as to construct the depot was a sufficient consideration for the defendant's undertaking. *Kennedy v. Cotton*, 28 Barb. (N. Y.) 59.

2. Building Court-house Upon Certain Site. — In an action upon a promissory note it appeared that the court-house in a certain county

had become old and dilapidated and that the board of police had determined to build a new one. Certain citizens of the county seat petitioned the board to build the new court-house on a different lot in a different part of the town, and proposed to make a donation to the county of a lot for that purpose. The lot proposed to be donated was very eligible for a court-house, more so than that upon which the old one was situated, and the board was inclined to accept the proposition and to change the location. The defendant's testator and certain other persons owning property near the old court-house, which property would have been greatly diminished in value by the removal of the court-house to another part of the town, proposed to pay the county two thousand dollars toward the erection of the new one if the board of police would build it on the site of the old court-house. This proposition the board accepted, and did build it on the same lot. It was held that the benefit to the defendants in preventing a diminution in the value of their property was a sufficient consideration for the note. *Odineal v. Barry*, 24 Miss. 9.

Renting Building for Post-office. — A contract by which the defendant, in consideration of the plaintiffs leasing to the government a building for a post-office, at a nominal rent, agreed to pay to the plaintiff a certain sum for each month of the term is valid, the benefits derived by the defendants from the location of the post-office in proximity to their places of business being a sufficient consideration. *Fearnley v. De Mainville*, 5 Colo. App. 441.

Establishment of Military Headquarters. — A conveyance of land by a city to the United States, in consideration of the establishment of military headquarters thereon, to the benefit of the city, is for a valuable consideration. *Stanley v. Schwalby*, 162 U. S. 255.

3. Establishing Private Manufacturing Business. — The erection of a large manufacturing plant in a town is a valuable consideration for an agreement by some of its inhabitants to contribute towards its cost. The benefits derived by the community from such an establishment make it, in a certain sense, a public enterprise. *Pitt v. Gentle*, 49 Mo. 74.

4. Kinzie v. Penrose, 3 Ill. 515.

parties to such a conveyance, are therefore deemed, in the highest sense, purchasers for a valuable consideration.¹

Antenuptial Settlements. — It is upon this principle that antenuptial settlements are upheld.²

Conveyance by Insolvent Grantor. — And though the grantor be insolvent, the settlement will not be set aside at the instance of creditors unless it is made to appear that the grantee was a party to the fraud.³

Reciprocal Promises of Marriage are valuable considerations each for the other, and damages may be recovered for their breach.⁴ A promise of marriage is like-

1. Marriage — Contracts and Conveyances Between the Parties. — *Magniac v. Thompson*, 7 Pet. (U. S.) 348; *Tolman v. Ward*, 86 Me. 306, 41 Am. St. Rep. 556; *Ellinger v. Crowl*, 17 Md. 361.

An oral agreement on the part of a single woman to marry and to pay the existing debts of her intended husband, in consideration that he convey to her a piece of real estate, if fully performed by the wife, after marriage, is binding in equity upon the husband; and a conveyance made to her in pursuance thereof is upon a good and sufficient consideration. *Dyger v. Remerschnider*, 32 N. Y. 629.

Promissory Note Given to Induce Marriage. — A promissory note given by a man to a woman in consideration of her promise to marry him is made upon and for a sufficient and valuable consideration, and the subsequent marriage of the parties will not affect or destroy such a note. It is a contract to pay, made in contemplation of marriage, and by force of the statute (Laws of 1849, c. 379) remains in full force after the marriage. *Wright v. Wright*, 59 Barb. (N. Y.) 505, affirmed in 54 N. Y. 437, reversing as to the latter part of this proposition *Curtis v. Brooks*, 37 Barb. (N. Y.) 476; *Banfield v. Rumsey*, 2 Hun (N. Y.) 112.

2. Antenuptial Settlements — England. — *Ex p. Marsh*, 1 Atk. 159; *Brown v. Jones*, 1 Atk. 188; *Stileman v. Ashdown*, 2 Atk. 477; *Shaw v. Jakeman*, 4 East 201; *Battersbee v. Farrington*, 1 Swanst. 106; *Ford v. Stuart*, 15 Beav. 505.

Canada. — *Barbour v. Fairchild*, 6 L. C. Rep. 114.

United States. — *Prewit v. Wilson*, 103 U. S. 22.

Alabama. — *Lockwood v. Nelson*, 16 Ala. 294.

Arkansas. — *Galbreath v. Cook*, 30 Ark. 417.

California. — *Hussey v. Castle*, 41 Cal. 239.

Delaware. — *Cochran v. McBeath*, 1 Del. Ch. 187.

Georgia. — *Merritt v. Scott*, 6 Ga. 563, 50 Am. Dec. 365; *Marshall v. Morris*, 16 Ga. 368.

Illinois. — *Parsons v. Ely*, 45 Ill. 232; *Edwards v. Martin*, 39 Ill. App. 145.

Indiana. — *Bunell v. Witherow*, 29 Ind. 123.

Kentucky. — *Jones v. Henry*, 3 Litt. (Ky.) 427; *Kinnard v. Daniel*, 13 B. Mon. (Ky.) 496.

Maine. — *Vance v. Vance*, 21 Me. 364.

Maryland. — *Betts v. Union Bank*, 1 Har. & G. (Md.) 175, 18 Am. Dec. 283; *Buchanan v. Deshon*, 1 Har. & G. (Md.) 280; *Albert v. Wina*, 5 Md. 66; *Naill v. Maurer*, 25 Md. 532; *Michael v. Morey*, 26 Md. 239, 90 Am. Dec. 106.

Massachusetts. — *Miller v. Goodwin*, 8 Gray (Mass.) 542.

Mississippi. — *Armfield v. Armfield*, Freem. (Miss.) 311; *Gorin v. Gordon*, 38 Miss. 205.

New Jersey. — *Satterthwaite v. Emley*, 4 N. J. Eq. 489, 43 Am. Dec. 618.

New York. — *Wood v. Jackson*, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; *Roberts v. Roberts*, 22 Wend. (N. Y.) 140; *De Barante v. Gott*, 6 Barb. (N. Y.) 492.

North Carolina. — *Credle v. Carrawan*, 64 N. Car. 422.

Ohio. — *Finch v. Finch*, 10 Ohio St. 501.

Pennsylvania. — *Frank's Appeal*, 59 Pa. St. 190.

Rhode Island. — *Eaton v. Tillinghast*, 4 R. I. 276.

South Carolina. — *Davidson v. Graves*, Riley Eq. (S. Car.) 232; *Rivers v. Thayer*, 7 Rich. Eq. (S. Car.) 136.

Virginia. — *Welles v. Cole*, 6 Gratt. (Va.) 645; *Triplett v. Romine*, 33 Gratt. (Va.) 655.

And see the title MARRIAGE SETTLEMENTS.

A woman's fortune falling short of the husband's expectations is no reason for setting aside a marriage agreement. *Ex p. Marsh*, 1 Atk. 159.

An antenuptial settlement made in contemplation of marriage is based upon a sufficient consideration, and where the marriage has been consummated, and the relation of husband and wife has been maintained for several years, the ante-nuptial settlement cannot be set aside upon the ground that the wife personally, and by her friends and agents, falsely represented that she was a virtuous, worthy, chaste, and moral woman, whereas she was in fact a woman of unchaste and immoral character. *Barnes v. Barnes*, 110 Cal. 418.

3. Conveyance by Insolvent Grantor — Betrothed Must Have Knowledge of the Fraud. — *Prewit v. Wilson*, 103 U. S. 22; *Andrews v. Jones*, 10 Ala. 400; *Marshall v. Morris*, 16 Ga. 368; *Smith v. Allen*, 5 Allen (Mass.) 454, 81 Am. Dec. 758; *Bonser v. Miller*, 5 Oregon 110; *Jones's Appeal*, 62 Pa. St. 324; *Herring v. Wickham*, 29 Gratt. (Va.) 628, 26 Am. Rep. 405.

Presumption of Validity. — The law sanctions a conveyance founded upon the consideration of marriage, and the legal presumption is that such a conveyance is valid and is not a fraud upon the rights of any one. The mere fact that a purchaser knows the conveyance to be founded upon this consideration is not sufficient to make it his duty, at his peril, to inquire whether the title of his grantor was not fraudulent. *Frazer v. Western*, 1 Barb. Ch. (N. Y.) 220.

4. Reciprocal Promises of Marriage. — *Harrison v. Cage*, 5 Mod. 411; *Rutter v. Hebden*, 1 Lev. 147; *Benning v. Grange*, 13 L. C. J. 290; *Mathieu v. Laflamme*, 4 Rev. Leg. 371; *Burks v. Shain*, 2 Bibb (Ky.) 341, 5 Am. Dec. 616;

wise a valuable consideration for a conveyance, and the grantee will be entitled to hold the land against the claim of creditors, although the marriage be prevented by the grantor's death,¹ or though the grantee discover before the marriage that the grantor is insolvent.²

b. CONTRACTS AND CONVEYANCES BY THIRD PARTIES. — If a person be induced to marry by the promise or conveyance of a third party, the marriage constitutes a valuable consideration for it, and this whether the promise or conveyance be made upon condition that the promisee or grantee shall marry any particular woman,³ or merely that he shall marry, without restriction upon his choice.⁴

Wightman v. Coates, 15 Mass. 1, 8 Am. Dec. 77; *Holder v. Dickeson*, 1 Freem. 95. And see the title BREACH OF PROMISE OF MARRIAGE, vol. 4, p. 882.

Promise of Marriage by Infant. — The contracts of infants are not void, but voidable at their election merely; consequently, a promise by an infant to marry is a good consideration for a corresponding promise. *Willard v. Stone*, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496.

1. *Smith v. Allen*, 5 Allen (Mass.) 454, 81 Am. Dec. 758.

2. **Discovery of Insolvency After Execution of Deed but Before Marriage.** — In *Prignon v. Daussat*, 4 Wash. 199, 31 Am. St. Rep. 914, it was held that though a woman to whom a conveyance is made in consideration of her marriage with the grantor discovers, after the execution of the conveyance, but before the marriage, that the deed is made in fraud of the grantor's creditors, it will not affect her title. *Hoyt, J.*, delivering the opinion of the court, said: "It would not do to hold that the grantee should, without fault on her part, be deprived of the benefits of her contract. For some months, and in principle it may as well have been for some years, the grantee had been bound by her agreement to marry, entered into in perfect good faith and for a valuable and proper consideration. To hold that because she afterwards learned of some fact that showed a fraudulent intent on the part of the grantor she should be deprived of the benefits of a contract which, during its existence, if she at all observed the proprieties of the relation thereby established, practically prevented her from taking any steps looking to the formation of a marriage relation as between herself and any other party, would, to our minds, be unjust in the highest degree. Naturally, during the continuance of this contract, the associations between the parties were very intimate, and the affections may have become so involved that to break off the relation would destroy the happiness, and perhaps the health, of the parties thereto. If the argument of appellant were to prevail, the innocent party must refuse to carry out a contract upon which her heart has become fixed, or enter into the same without any such safeguard as her prudence had thought it necessary to provide for. It is impossible to place the parties in the condition they were in before the execution of the deed, and as the innocent party cannot be put *in statu quo*, she cannot be compelled to surrender the fruits of her bargain. But it is not necessary to enlarge upon the question. As we view the law, it is the contract to marry, and not the marriage itself, which is the con-

sideration which supports the deed; and this being so, if at the time the deed is made the contract to marry for which it is given is a binding one between the parties, and executed with the solemnities required by the statute for that purpose, an indefeasible title vests in the grantee."

3. **Marriage — Promise or Conveyance by Third Party** — *England*. — *Chichester v. Cobb*, 14 L. T. N. S. 433; Anonymous, 1 Vent. 268.

Illinois. — *May v. May*, 55 Ill. App. 488.

Ohio. — *Thompson v. Thompson*, 17 Ohio St. 649.

Pennsylvania. — *Barr v. Hill*, Add. (Pa.) 276.

South Carolina. — *Johnston v. Dilliard*, 1 Bay (S. Car.) 232.

Tennessee. — *Cains v. Jones*, 5 Verg. (Tenn.) 249.

Virginia. — *Eppes v. Randolph*, 2 Call (Va.) 125; *Argenbright v. Campbell*, 3 Hen. & M. (Va.) 144; *Chichester v. Vass*, 1 Munf. (Va.) 98, 4 Am. Dec. 531.

An agreement by parol made, before the Act of 1819, by a father, in consideration of the marriage of his illegitimate daughter, to settle all his estate upon her husband, herself, and the issue of her marriage, is binding; and although it does not attach specifically upon any portion of the father's property, so as to defeat a purchaser with notice, yet it will be enforced against volunteers claiming under him. *Wall v. Scales*, 1 Dev. Eq. (N. Car.) 476.

In *Ex p. Cottrell*, 2 Cowp. 742, a person gave to another a bond to pay him certain sums by instalments in consideration that he would marry a woman by whom the obligor had several bastard children, and after the marriage had, the obligor became bankrupt, and the question was whether the obligee could prove this debt under the commission. The case was sent out of chancery to the Court of King's Bench for the opinion of the court of law. The court interrupted the counsel for the creditor by inquiring what could be objected to the bond; and when the counsel on the other side contended that the debt could not be proved because it was not founded on a good consideration, Lord Mansfield replied that the consideration was good between the parties, as it was a stipulation between them in consideration of marriage; the one having performed his part and married the woman, the other was bound to perform his.

4. **No Particular Marriage Need Be Contemplated.** — To constitute a marriage a valuable consideration it is not necessary that the grantee's marriage with any particular person be contemplated. If the grantee in a voluntary deed gains credit by the conveyance and

12. Mutual Promises — Consideration Each for the Other. — The rule is well established that in bilateral contracts the promise of each of the parties is a sufficient consideration for the promise of the other.¹

a person is induced to marry her on account of provisions made for her in the deed, such conveyance, on the marriage, ceases to be voluntary and becomes good against a subsequent *bona fide* purchaser for a valuable consideration. *Sterry v. Arden*, 1 Johns. Ch. (N. Y.) 261.

In *Gurvin v. Cromartie*, 11 Ired. L. (N. Car.) 174, 53 Am. Dec. 406, a promise made to a man in consideration of his marrying and having a child was held valid, although no particular woman was designated by the promisor. The court, by Ruffin, C. J., after reviewing the decisions, said: "Those cases and precedents fully establish that a promise to pay a man for marrying a particular woman will maintain an action after the marriage had. It follows that a promise to pay him for marrying any woman, without designating one in particular, is likewise valid; for there is no perceptible distinction on which the law can give an action in the one case and not in the other. It was argued, indeed, that it might be a prejudice to one to marry a particular woman, and by possibility, in such a case, the man would not have married her had it not been for the promise; whereas marriage generally is to be taken to be to the party's gratification and benefit, and when he is left at large to his own free choice his marriage cannot be intended to be to his disadvantage; and that therefore that in this last case the marriage is not a sufficient consideration. But the distinction seems to be entirely untenable, for experience proves, even when the parties are of their own exclusive selection, marriage may or may not be judicious or happy. And it is just as much an act of prudence for a man to refrain from marrying any woman without having a competent livelihood for himself, his wife, and a family, as it is for him, under those circumstances, not to marry a particular woman. In either case he may be induced to marry or not to marry by his having or not having a reasonable consideration. But the law does not inquire whether the party has or has not made a fortunate match, because it is not the adequacy of the consideration which determines the validity of the promise, but it is the doing of some thing by the party to whom the promise is made, and it is a familiar elementary principle that such act, however trifling, constitutes a sufficient consideration. The act of marriage with any one woman must, in this point of view, be the same as that with any other; and therefore, as far as the objection to the want of a consideration affects the case, the instructions to the jury were right."

1. Mutual Promises — United States. — *McKinnon v. McKinnon*, 12 U. S. App. 433.

Illinois. — *Cooke v. Murphy*, 70 Ill. 96.

Indiana. — *Downey v. Hinchman*, 25 Ind. 453.

Kentucky. — *Cowan v. Hite*, 2 A. K. Marsh. (Ky.) 238.

Maine. — *Babcock v. Wilson*, 17 Me. 372, 35 Am. Dec. 263; *Preble v. Hunt*, 85 Me. 267.

Massachusetts. — *Quarles v. George*, 23 Pick. (Mass.) 400.

Missouri. — *Byrd v. Fox*, 8 Mo. 574.

New Jersey. — *Buckingham v. Ludlam*, 40 N. J. Eq. 422.

New York. — *Briggs v. Tillotson*, 8 Johns. (N. Y.) 304; *Norris v. Tiffany*, 6 Misc. Rep. (N. Y. C. Pl.) 380; *Bracco v. Tighe*, 75 Hun (N. Y.) 140; *Livingston v. New York L. Ins., etc., Co.*, (Supreme Ct.) 13 N. Y. Supp. 105, 59 Hun (N. Y.) 622.

North Carolina. — *Whitehead v. Potter*, 4 Ired. L. (N. Car.) 257; *Forney v. Shipp*, 4 Jones L. (N. Car.) 527; *Abrams v. Suttles*, Busb. L. (N. Car.) 99; *Puffer v. Lucas*, 101 N. Car. 281.

Ohio. — *Nott v. Johnson*, 7 Ohio St. 270; *Ware v. Langmade*, 9 Ohio Cir. Ct. Rep. 85, 2 Ohio Dec. 116.

Pennsylvania. — *Berger's Appeal*, 96 Pa. St. 443.

Vermont. — *Missisquoi Bank v. Sabin*, 48 Vt. 239.

Illustrations. — A contract that if the defendants would hire from the plaintiff two negroes as boat hands the plaintiff would deliver to them his cotton crop to be carried to market is not *nudum pactum*; it is promise for promise. *Rice v. Sims*, 8 Rich. L. (S. Car.) 416.

An agreement by A to discharge the balance of a judgment due to B upon B's delivering to him a wagon at a time specified is a sufficient consideration to support a promise by B so to deliver it. *Givan v. Swadley*, 3 Ind. 484.

Where two execution creditors have the same debtor and agree that one shall bid off certain of the property, and the other certain other of the property, at the sheriff's sale, and then sell it out at private sale, for the benefit of the purchaser, the residue of the proceeds to go to the other creditor, the mutual promises are a sufficient consideration to support the contract. *Young v. Snyder*, 3 Grant's Cas. (Pa.) 151.

A written agreement was made between a building contractor and the claimants of liens upon the building by which it was mutually agreed that if the owner of the building would pay the amount due upon the same, the laborers should first be paid in full and the remainder be distributed *pro rata* among the other lien claimants, whereupon they would assign their liens to the owner of the building. In an action to foreclose the lien of one of the parties to the agreement it was held that the mutual agreement of the lien-holders who signed such agreement to forego their right to foreclose their liens in consideration of being paid at a given time, and also the acceptance of the agreement by the owner of the building and payment by him under it, constituted a sufficient consideration for the agreement. *Wilson v. Samuels*, 100 Cal. 514.

The plaintiff was the registered owner of ten shares of stock in a corporation chartered to construct a railroad. Nothing had been paid upon the shares, but he was liable upon call to be assessed the amount of their face value. Being desirous of getting rid of the shares and of his liability upon them, he entered into an agreement with the defendant, who promised to accept and execute a transfer of the shares, and

Exchange of Promissory Notes. — Thus where parties exchange their promissory notes, the note of each finds a consideration in the note of the other.¹

to do all acts necessary to relieve the plaintiff from all liability. Upon a bill in equity to enforce the specific performance of this contract it was held that the mutual promises, viz., of the plaintiff to transfer the shares and such benefits as might subsequently accrue from them, and the defendant's promise to accept and assume their incident liabilities, were sufficient considerations, each for the other. *Cheale v. Kenward*, 3 DeG. & J. 27.

Agreement to Share Gains and Losses. — Where the plaintiff's promise to account to the defendant for one half of the profits is supported by the obligation incurred by the defendant to share one half of the losses, it is a case of mutual promises, reciprocally binding. *Coleman v. Eyre*, 45 N. Y. 38.

The plaintiff sold the defendant a half interest in his share in a speculation, agreeing to divide any profits that might be made, and the defendant agreeing to share any losses if they should occur. The speculation resulted in a loss, and in an action brought to compel the defendant to pay his moiety it was held that the plaintiff's promise was a sufficient consideration for the defendant's. *Coleman v. Eyre*, 45 N. Y. 38.

An agreement between two accommodation indorsers on a note that they will divide any loss that may occur between them is founded upon a sufficient consideration. *Phillips v. Preston*, 5 How. (U. S.) 278.

Percentage of Contingent Profits for a Guaranty Against Loss. — A stipulation that the defendant shall have five per cent. of the profits, if any should be realized from an investment, is a sufficient consideration to support the defendant's promise to guarantee the plaintiff against loss. *Shelton v. Reynolds*, 111 N. Car. 525.

Mutual Promises to Pay for Excess or Deficiency. — A promise to refund in case of a deficiency is a good consideration for a promise to pay for an excess over what is called for in a deed. *Seward v. Mitchell*, 1 Coldw. (Tenn.) 87.

A conveyed to B a tract of land containing two hundred and twenty-one acres, more or less. Some years afterwards it was mutually agreed to have the land surveyed, and if it were found to contain more than two hundred and twenty-one acres, the defendant should pay the plaintiff ten dollars per acre for the excess; if it fell short, the plaintiff to refund to the defendant at the same rate. Here are mutual promises, and one is a good consideration to support the other. *Howe v. O'Mally*, 1 Murph. (N. Car.) 287.

Mutual Promises to Pay for Anticipation or Delay in Performance of Contract. — In a contract for the erection of a building the plaintiff's agreement to pay five hundred dollars for every day the work is delayed after a certain date is a sufficient consideration for the defendant's agreement to pay five hundred dollars per day if the work should be finished before that date. *Mansfield v. New York Cent., etc., R. Co.*, 114 N. Y. 331.

Agreement of Competitors to Divide Prize. — Where several architects submit plans and

specifications for the erection of a building, their agreement to retire from further competition and let the plans alone compete, and to share equally in the remuneration which shall fall to the successful competitor, is founded upon a valuable consideration. *Flanders v. Wood*, 83 Tex. 277.

Mutual Agreement Among Heirs to Equalize Legacies. — Where some of the children of a testator agree to contribute each a certain sum so as to make the share of another child equal to theirs, the promise of each is a consideration for the promise of the others. *Graves v. Graves*, 7 B. Mon. (Ky.) 213.

Mutual Agreement of Stockholders to Pay Corporate Indebtedness. — Where the stockholders of an embarrassed corporation mutually agree to contribute to a fund for defraying the corporate debts in proportion to their respective holdings of the stock, the promise of each is a sufficient consideration for the promise of the others. *Lillard v. Decatur Cotton Seed Oil Co.*, (Tex. Civ. App. 1896) 36 S. W. Rep. 792. See also *Conrad v. La Rue*, 52 Mich. 83; *Sterling Wrench Co. v. Amstutz*, 50 Ohio St. 484. See generally the title STOCKHOLDERS.

A Verbal Agreement Between Joint Payees of a Note, that upon the death of either without living issue it shall belong to the survivor, is enforceable. *Taylor v. Smith*, 116 N. Car. 531.

Deed and Agreement to Reconvey. — Where, as one transaction, A executes a deed conveying real estate to B and the latter executes an agreement to reconvey, the execution of each is a sufficient consideration to support the other. *Wilson v. Fairchild*, 45 Minn. 203.

Mutual Waiver of Jury Trial. — Under section 8 of article 4 of the *Maryland Constitution*, which provides that "the parties to any cause may submit the same to the court for determination without the aid of a jury," a jury may be dispensed with in civil cases by agreement of the parties, and the promise of each party to relinquish his constitutional right to a jury trial is a sufficient consideration for an agreement to submit the cause to the court. *Lanahan v. Heaven*, 77 Md. 605.

1. Exchange of Promissory Notes — Maine. — *Dockray v. Dunn*, 37 Me. 442.

Maryland. — *Williams v. Banks*, 11 Md. 198. *Massachusetts.* — *Eaton v. Carey*, 10 Pick. (Mass.) 211; *Higginson v. Gray*, 6 Met. (Mass.) 212; *Whittier v. Eager*, 1 Allen (Mass.) 499; *Backus v. Spaulding*, 116 Mass. 418.

New Jersey. — *Savage v. Ball*, 17 N. J. Eq. 142.

New York. — *Dowe v. Schutt*, 2 Den. (N. Y.) 621; *Odell v. Greenly*, 4 Duer (N. Y.) 358; *Baldwin v. Van Deusen*, 37 N. Y. 487; *Cohu v. Husson*, 57 N. Y. Super. Ct. 238; *Newman v. Frost*, 52 N. Y. 422.

Ohio. — *Rankin v. Knight*, 1 Cinc. Super. Ct. Rep. 515.

An Exchange of Checks constitutes a good consideration in each case. *Foster v. Paulk*, 41 Me. 425.

An Indorsement of C's Note by A to B is a good consideration for a note from B to A, and it is

Agreement to Deliver and Accept Goods. — So in contracts of sale, the agreement to sell and deliver the property is supported by the promise of the other party to receive and pay for it.¹

no defense to B's note that he failed to recover against C on the note indorsed to him by A. *Luke v. Fisher*, 10 Cush. (Mass.) 271.

Covenant for Covenant. — In a suit for the breach of a bond conditioned that the defendant would not sell intoxicating liquors of any kind within a certain town or a certain township for the term of one year, the consideration of which bond was that the obligee had given a like bond to the defendant, it was held that the execution of each instrument was an implied and valid consideration for the execution of the other. *McAlister v. Howell*, 42 Ind. 15.

The Covenants in a Deed are of themselves a sufficient consideration for a promise. *Gridley v. Tucker, Freem.* (Miss.) 209.

A covenant by a husband to secure his wife an annuity during her life, in case she should survive him, is a sufficient consideration for a grant of an annuity from her father. *Ex p. Draycott*, 2 Glyn. & J. 283.

A Bond to Convey Land on payment of notes given for the price is a good consideration for the note. *Crawford v. Robie*, 42 N. H. 162; *Bacon v. Pettibone*, 2 Root (Conn.) 284; *Kerney v. Gardner*, 27 Ill. 162.

A bond for title and possession of the land, title or no title, is a sufficient consideration for a promise to pay money where the defendant does not offer to surrender the bond and possession of the land. *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735.

Mutual Covenants of Warranty, contained in a deed of partition of land, form a sufficient consideration for each other. *Nunnally v. White*, 3 Metc. (Ky.) 584.

1. Mutual Promises to Deliver and Pay for Goods — *England.* — *Bettisworth v. Campion*, Yelv. 133.

United States. — *Mississippi River Logging Co. v. Robson*, 69 Fed. Rep. 773, 32 U. S. App. 520.

Alabama. — *Morris v. Lagerfelt*, 103 Ala. 608.

Illinois. — *Funk v. Hough*, 29 Ill. 145; *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85.

Iowa. — *Boies v. Vincent*, 24 Iowa 387.

Maine. — *Appleton v. Chase*, 19 Me. 74; *Jones v. Binford*, 74 Me. 439.

New York. — *White v. Demilt*, 2 Hall (N. Y.) 405.

Tennessee. — *Cherry v. Smith*, 3 Humph. (Tenn.) 19, 39 Am. Dec. 150.

Agreements to Transfer and Accept Shares of Stock. — The plaintiff agreed to accept and the defendant to transfer certain shares of stock. In an action upon the agreement it was held that the mutual promises constituted a consideration. *Flannery v. Dechert*, 13 Pa. St. 505.

Agreements to Furnish and to Load Cars. — The defendant's agreement to furnish a certain number of cars for the use of the plaintiff on a certain date is supported by the plaintiff's promise to load and deliver them to the defendant on that date. *Baker v. Kansas City, etc., R. Co.*, 91 Mo. 152.

Agreements in Respect to Trial of Cause. — An

agreement by a plaintiff with one of several defendants, that the cause shall be tried without delay, and if the defendants prevail the defendant entering into the agreement shall pay the plaintiff a certain sum and receive an assignment of the claims and securities on which the action is brought, is valid. The plaintiff's stipulation to transfer the securities is a sufficient consideration for the defendant's promise to pay in the contingency contemplated. *Gray v. Bowen*, 10 Bosw. (N. Y.) 67.

Agreements by Artisans for Exchange of Work. — The plaintiff, who was a blacksmith, and the defendant, who was a wagonmaker, mutually agreed that they would exchange work, the defendant to take the work of the plaintiff, and the plaintiff the work of the defendant. There was no limitation in the agreement respecting its duration or amount, and the parties continued their dealings under it for several years, during which time mutual accounts for a considerable amount accrued in favor of each, when the plaintiff notified the defendant that he would take no more of his work. There was at this time a balance in favor of the plaintiff, to recover which this action was brought. The defendant continued his business as wagonmaker up to the time of the commencement of the suit, and was ever ready to work for the plaintiff and to pay the balance due him in the manner agreed upon. It was held that the mutual promises of the plaintiff and the defendant were a sufficient consideration to render the contract obligatory, and that no action could be maintained by the plaintiff to recover the balance until after a demand had been made and the defendant had refused or unreasonably neglected to perform the services according to the stipulations of his contract. *Davis v. Petit*, 27 Vt. 216.

Agreement to Make and Receive Assignment of Contract. — An agreement to transfer a bid for transporting United States mails over a particular mail route, which has been accepted by the post-office department, is a sufficient consideration for the agreement of the other party to receive such transfer. *Carleton v. Jackson*, 21 Vt. 481.

The Defendant's Agreement to Furnish a Sleeping-car Berth is supported by the plaintiff's promise to accept and pay for it. *Pullman Palace-Car Co. v. Booth*, (Tex. Civ. App. 1894) 28 S. W. Rep. 719.

Mutual Agreement to Rescind or Modify Contract. — The parties to a contract may at any time rescind it, either in whole or in part, by mutual consent, and the surrender of their mutual rights is a sufficient consideration.

Alabama. — *Langford v. Cummings*, 4 Ala. 46; *Lightfoot v. Strahan*, 7 Ala. 444; *Borum v. Garland*, 9 Ala. 452; *Hussey v. Roquemore*, 27 Ala. 281; *Murphy v. Barefield*, 27 Ala. 634; *Thomason v. Dill*, 30 Ala. 444.

Colorado. — *Doherty v. Doe*, 18 Colo. 456.

Connecticut. — *Connelly v. Devoe*, 37 Conn. 570.

Illinois. — *Roberts v. Carter*, 31 Ill. App. 142.

Promises Must Be Concurrent. — But in order that a promise may be a sufficient consideration for a promise, it is essential that they shall be made at the same time, otherwise the one antecedently made will be without consideration and void, and consequently insufficient to support the subsequent one.¹

Both Promises Must Be Enforceable. — Again, it is essential that there should be an absolute mutuality of engagement, so that each party may have an action upon the promise of the other, for if one of the promises be void or unenforceable the other is void also.²

13. Release from Arrest or Imprisonment. — If a person be arrested upon lawful process, his release constitutes a valuable consideration for a note, bond, or promise of indemnity.³

Merits of Action Immaterial. — Where the arrest is upon civil process, and an action has been instituted in good faith, the merits of the case are not material to the validity of the promise or security.⁴ The same principle governs as in the compromise of doubtful claims.

Indiana. — *Ohio Thresher, etc., Co. v. Hensel*, 9 Ind. App. 328.

Iowa. — *Leach v. Keach*, 7 Iowa 235.

Massachusetts. — *Rollins v. Marsh*, 128 Mass. 116.

New York. — *Gibson v. Donnelly*, (C. Pl.) 13 N. Y. Supp. 808.

North Carolina. — *Brown v. Catawba Lumber Co.*, 117 N. Car. 287.

Ohio. — *Smith v. McKinney*, 22 Ohio St. 200.

Pennsylvania. — *Flegal v. Hoover*, 156 Pa. St. 276.

See generally the title **NOVATION**.

Modification of Contract. — The defendant agreed to pay the plaintiff forty dollars per week in consideration of certain services to be performed and a share of the profits of the enterprise. Afterwards they mutually agreed to reduce the weekly payments to the sum of thirty-four dollars, and upon this basis the plaintiff continued in the service of the defendant for several months. Thereafter he brought an action to recover the balance of six dollars per week, claiming that the agreement to accept the lesser sum was void for want of consideration. Bookstaver, J., delivering the opinion of the court, said: "While the agreement remained executory, assuming the interpretation of the original agreement contended for by plaintiff to be correct, he had a right to demand the full amount of the weekly payments. He, however, had a right to waive consideration and carry out the modified agreement, and if he did this, executing it, he cannot revoke it and sue for the larger sum." *Romaine v. Beacon Lithographic Co.*, 13 Misc. Rep. (N. Y. C. Pl.) 122.

1. Promises Must Be Concurrent. — *Stiles v. McClellan*, 6 Colo. 89; *Livingston v. Rogers*, 1 Cal. (N. Y.) 583; *Tucker v. Woods*, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305; *Keep v. Goodrich*, 12 Johns. (N. Y.) 397; *James v. Fulcro*, 5 Tex. 512, 55 Am. Dec. 743.

2. Both Promises Must Be Enforceable. — *Copper Miners v. Fox*, 3 Eng. L. & Eq. 420.

Promise by Married Woman. — An agreement by a creditor to release a debtor in consideration of the promise of a married woman to assume the debt is void for want of capacity in the woman so to contract, and this notwithstanding that she paid part of the debt, which payment was duly indorsed with the assent of

the creditor. *Shaver v. Bear River, etc., Co.*, 10 Cal. 396.

Husband and wife were negotiating with a purchaser for the exchange of the wife's property for consideration partly money and partly in lands. The parties verbally agreed upon the trade, and the purchaser gave to the wife a writing promising to comply with the terms. It was held that as the wife's promise was void his written obligation was without consideration, and could not be enforced against him by suit of the wife. *Williams v. Graves*, 7 Tex. Civ. App. 356.

3. A Release from Arrest upon Lawful Process is a good consideration for a note. *Bestar v. Roberts*, 58 Ala. 331; *Waterman v. Barratt*, 4 Harr. (Del.) 311.

Prison Liberties. — Where a written instrument in the form of a bond, and signed, but not under seal, was taken by a sheriff as security for the liberties of the prison, it was held valid, and the indulgence of the prisoner with his personal liberty was held to be a sufficient consideration to support such an instrument. *Seymour v. Harvey*, 8 Conn. 63. *Compare Cantev v. Duren*, Harp. L. (S. Car.) 434.

Note in Payment of Penalties. — A warrant was directed to an officer of excise, by the commissioners, commanding him to apprehend a person convicted in several penalties, to take him to prison, and to keep him there until the amount of the penalties was paid. The officer, having arrested the party, discharged him upon a note for the amount of the penalties, payable at a future day, and the commissioners afterwards approved of his conduct. It was held that the discharge was a good consideration for the note, and that an action might be maintained thereon. *Pilkington v. Green*, 2 B. & P. 151.

4. Merits of Action Immaterial. — A declaration stated that an action was depending at the plaintiff's suit against D.; that D. was arrested and in the sheriff's custody by virtue of a capias indorsed for bail for a debt; that costs had been incurred by the plaintiff in the prosecution of the action; and that thereupon, in consideration that the plaintiff would discharge D. out of custody, the defendant promised to pay the plaintiff the debt, interest, and costs in the action against D.; and that the plaintiff discharged D. Breach, nonpayment.

Illegal Arrest. — If, however, the arrest is clearly illegal, the promise or security is void.¹

14. Real Property — *a. IN GENERAL.* — Any interest in real property, whether legal or equitable, which may be the subject of a sale, is a valuable consideration.²

Expectant Interest. — Even where the interest is not vested, or in fact has no legal existence, as for instance, the expectation of the heir to the estate of the ancestor, it seems that the release of such expectancy, made with the consent of the ancestor, is a valuable consideration.³

b. CLAIM OF TITLE. — A quitclaim deed for land without reference to the character of the title is, in the absence of fraud, a valuable consideration for a promise.⁴

Plea, that there was not any claim, or demand, or cause of action against D. in respect of which the plaintiff could, or was entitled to, recover in the action; that he, by discharging D., did not give up or part with any available remedy, as he well knew; that the arrest and proceedings were colorable only, and were not commenced for the purpose of trying any doubtful or contested question of fact. It was held that the declaration disclosed a sufficient consideration, and that the plea was no answer, as it did not show that the arrest was fraudulent or illegal. *Smith v. Monteith*, 2 D. & L. 358, 13 M. & W. 427, 9 Jur. 310, 14 L. J. Exch. 22.

1. Release from Illegal Arrest. — If A be illegally arrested by B for a debt, a promise by C to pay the debt claimed by B in consideration of B's releasing A out of custody is without consideration and is void. *Atkinson v. Settree*, Willes. 482.

2. The Sale of an Equitable Title is at law a sufficient consideration. *Whitbeck v. Whitbeck*, 9 Cow. (N. Y.) 266, 18 Am. Dec. 503.

Making "Give-or-Take" Offer. — Where there is a controversy over land and one of the parties agrees, in consideration of the other making a give-or-take offer, to give a quitclaim deed to part of the land, both the agreement and the deed are founded upon a valuable consideration. *Buckingham v. Ludlum*, 41 N. J. Eq. 348.

Conveyance Without Wife's Signature. — A sold to B a tract of land for one thousand two hundred dollars, of which one half was paid in cash, and three notes were given for the residue. A indorsed one of the notes to a third person, who sued upon it, but was defeated because the deed tendered by A was not executed by his wife. An agreement was then made between A and B by which the latter agreed to accept the deed without the wife's signature, and to pay to A the amount of the note which had been sued upon, and for which A was liable on his indorsement, and also one other of the three notes, the third being at the time surrendered to him by A. It was held that the conveyance by A, without the wife's signature, was a sufficient consideration to support the agreement. *Frierwood v. Pierce*, 17 Ind. 461.

Tenancy in Common. — Where tenants in common consent to a partition of land, a written agreement by one of them which guarantees a certain value to a particular division, whenever the assignee of that portion wishes to sell, upon

his releasing all claims to the residue of the estate, is a contract based upon a valid consideration, binding upon the party making it, and is susceptible of specific execution. *Stephens v. Stephens*, 1 Baxt. (Tenn.) 52.

Sale of Mining Claim. — The payees of a promissory note claimed to be the owners of certain mining claims which were to constitute the capital stock of a company they proposed to organize for mining purposes, and the note was given for shares in such stock taken by the maker. In an action on the note there was evidence tending to show that the claims were conveyed to a company formed but not legally organized. It was held that the equitable right acquired by the defendant in such interest as the payees had in the mining claims constituted a valuable consideration for the execution of the note, and the right to recover some amount thereon was not defeated by the failure to incorporate the mining company. *Smith v. Gillen*, 52 Ark. 442.

3. Release of Expectant Interest in Ancestor's Estate. — The execution and delivery by a child to his father of a paper, not under seal, relinquishing all claim to the father's estate, on receiving a note against a third person indorsed by the father, is a good consideration for such indorsement. *Weston v. Hight*, 18 Me. 281.

A Release by an Heir Apparent of His Estate in Expectancy, with a covenant that neither he nor those claiming under him will ever claim any right in the same, is, if made fairly and with the consent of the ancestor, a bar to the releasor's claim thereto, by descent or devise, after his ancestor's death. Such covenant runs with the land, and protects the heirs and assigns of the covenantee. *Trull v. Eastman*, 3 Met. (Mass.) 121, 37 Am. Dec. 126.

4. Claims of Title. — *Bonney v. Smith*, 17 Ill. 531; *Sheldon v. Harding*, 44 Ill. 68; *Mullen v. Hawkins*, 141 Ind. 363.

Where a party in possession of real estate, claiming in good faith some interest therein, surrenders the same to the owner in consideration of receiving from such owner his promissory note, the surrender of possession is a sufficient consideration for the note. *Harms v. Aufeld*, 79 Ill. 257.

The possession of land, or a claim of title to real estate, may be the subject of sale and transfer, and a good consideration to support a promise for the price. The transfer of the possession or of the claim of title is to the prejudice of the seller, and a benefit to

c. EASEMENTS. — The release of an easement is a valuable consideration.¹

d. HOMESTEAD AND DOWER. — The release by a wife of her homestead and dower interest in lands is a valuable consideration for a note or conveyance made to her.²

e. LEASES. — The assignment³ or surrender⁴ of a lease of real property is a valuable consideration.

the purchaser, and therefore a good consideration. *Doyle v. Knapp*, 4 Ill. 334.

Where a Claim to a Future Contingent Interest in Land was made in good faith, based upon the terms of a will, a release thereof was a sufficient consideration for a promissory note given therefor by one who, denying such claim, chose to compromise it; and in the absence of fraud or undue advantage it is immaterial whether such claim was well founded or not. *Brooks v. Wage*, 85 Wis. 12.

Where a Residuary Legatee Who in Good Faith Claims the Title to or an Interest in Land directed by the will of his father to be sold to make a provision for the payment to the testator's widow of the yearly sum of one thousand dollars from the interest on the proceeds gives up his claim, and agrees to quitclaim to the purchaser all his interest in the premises, this will form a sufficient consideration for an agreement by the widow to relinquish, in his favor, her right to the interest upon a stipulated portion of the fund. *Woodburn v. Woodburn*, 123 Ill. 608.

1. **Easement.** — The grant by one party to another of the exclusive right to use a driveway situated between their lands, and which had hitherto been used in common, is a valuable consideration. *Fish v. Dunn*, 59 Minn. 99. See the title EASEMENTS.

2. **Release of Dower** — *United States*. — *Sykes v. Chadwick*, 18 Wall. (U. S.) 141.

Alabama. — *Hoot v. Sorrell*, 11 Ala. 386.

Arkansas. — *Baucum v. Cole*, 56 Ark. 259.

Florida. — *Nalle v. Lively*, 15 Fla. 130.

Indiana. — *Hollowell v. Simonson*, 21 Ind. 398; *Brown v. Rawlings*, 72 Ind. 505; *Sedgwick v. Tucker*, 90 Ind. 271; *Worley v. Sipe*, 111 Ind. 238.

Kentucky. — *Ward v. Crotty*, 4 Metc. (Ky.) 59.

Maryland. — *Unger v. Price*, 9 Md. 552; *Betts v. Union Bank*, 1 Har. & G. (Md.) 175, 18 Am. Dec. 283.

Massachusetts. — *Bullard v. Briggs*, 7 Pick. (Mass.) 533, 19 Am. Dec. 292; *Nichols v. Nichols*, 136 Mass. 256.

Michigan. — *Farwell v. Johnston*, 34 Mich. 342; *Randall v. Randall*, 37 Mich. 563.

New York. — *Garlick v. Strong*, 3 Paige (N. Y.) 440; *Kelley v. Case*, 18 Hun (N. Y.) 472.

Virginia. — *Payne v. Hutcheson*, 32 Gratt. (Va.) 812.

See also the titles DOWER; HOMESTEAD.

Illustrations. — A relinquishment of dower by a wife for the benefit of her husband is a sufficient consideration for a subsequent settlement upon her by him; and such settlement is not fraudulent as to creditors of the husband if the relinquishment was obtained upon an express agreement with her that the settlement should be made, and the property settled upon her is a fair equivalent for the dower released. *Nalle v. Lively*, 15 Fla. 130.

Where executors have the power to sell and

the title to the lands of the testator, they can make an agreement to assign a part thereof to the widow for dower in consideration of her releasing the residue, which, in the absence of collusion between them and the widow, will bind the heirs as well as creditors. *Harrow v. Johnson*, 3 Metc. (Ky.) 578.

A husband mortgages his land, and in consideration of his wife's releasing her right of dower to the mortgagee, conveys the equity of redemption to a stranger in fee for the benefit of the wife, but by a deed containing no declaration of the trust and purporting to be for the consideration of a sum of money paid by the grantee. It was held, as against creditors of the husband, that the relinquishment of the right of dower was a valid consideration for the conveyance of the equity of redemption; that parol evidence was admissible to show that it was the true consideration; that if the transaction was honest, and the right of dower equivalent in value to the equity of redemption, the conveyance was valid; and that whether the trust could be enforced or not by the wife was immaterial. *Bullard v. Briggs*, 7 Pick. (Mass.) 533, 19 Am. Dec. 292.

The plaintiff was a married woman, and being in possession of premises belonging to her husband, who had absconded, and while preparing to leave the same, made a contract for a certain sum with the defendant, who held a mortgage on the premises which was due, to remain for a time, and at the end thereof, deliver possession to him. In an action by the plaintiff, after performance by her, to recover the sum which the defendant agreed to pay, it was held that the promise to pay was supported by a sufficient consideration. The plaintiff's performance was advantageous to the defendant and an inconvenience to herself; being in possession, as wife of the owner of the fee, her agreement to surrender it was a sufficient consideration to support the defendant's agreement; and her possession as owner of a contingent right of dower was a subsisting right of which she might make disposal by sale. *Hart v. Young*, 1 Lans. (N. Y.) 417.

In *Razor v. Razor*, 39 Ill. App. 527, where a husband agreed with his wife, in consideration of her joining with him in a conveyance of their home place, to invest the proceeds of the sale in another place and have the same deeded to her, it was held that the agreement was supported by a valuable consideration.

3. **An Assignment of a Lease**, though made against the terms of the instrument, passes a subsisting title, though subject to be defeated, and is a sufficient consideration for a note. *Spear v. Fuller*, 8 N. H. 174, 28 Am. Dec. 391.

4. **Surrender of Lease.** — An agreement by a landlord to pay his tenant's moving expenses if the latter would deliver immediate posses-

f. MORTGAGES. — The release of a mortgage upon real property is a valuable consideration.¹

g. EQUITY OF REDEMPTION. — The sale or surrender of an equity of redemption is a valuable consideration.²

h. LIENS. — The release of a lien upon real or personal property is a valuable consideration.³

i. IMPROVEMENTS UPON LAND. — Improvements Made upon Leased Land, which the tenant is by the terms of the lease entitled to remove, may be the subject of a sale and constitute a valuable consideration for a note.⁴

Improvements Made upon Public and Reclaimed Lands likewise constitute a valuable consideration for a promise.⁵

sion of the premises, so as to save the landlord from paying an increase of premium for insurance on the building imposed on account of the character of the tenant's business, is founded upon a valuable consideration. *Creighton v. Finlayson*, 46 Neb. 457.

1. Release of Mortgage. — M. held a mortgage on certain city lots, on which the owner desired to negotiate a large loan for the purpose of building thereon a hotel, contracts for furnishing the material for which were held by H. & C., who promised M. in writing that if he would release his mortgage they would pay him the amount thereof out of the payments made to them for material from time to time, as the building progressed. M. released. Payments for material were made to H. & C., but they paid nothing to M. In a suit by H. & C. to foreclose mechanics' liens on the lots and hotel, it was held that the release by M. of his mortgage was a sufficient consideration for the promises of H. & C.; that they were estopped from claiming liens on the property prior to M.; and that their liens should be charged with the amount due M. on his mortgage. *Henry, etc., Co. v. Fisherdict*, 37 Neb. 207.

2. The Surrender of a Mortgagor's Right to Redeem is a valuable consideration. *Shade v. Crestvion*, 93 Ind. 591.

If a note be given to prevent the sale of an equity of redemption, so that a clear title to the same land under a deed should be obtained by a relative of the maker; or if the payee parted with a right which he had under an attachment of land, by omitting to levy thereon, in consequence of the note, such note is not void for want of consideration. *Bradbury v. Blake*, 25 Me. 397.

3. The Release of a Vendor's Lien is a valuable consideration for the execution to the vendor of a mortgage upon the property, and such mortgagee stands in the position of a *bona fide* purchaser for value and not as one who takes a mortgage to secure a pre-existing debt. *Lane v. Logue*, 12 Lea (Tenn.) 681.

A Waiver by a Landlord of His Lien for Rent on crops of his tenant is a sufficient consideration to support a promise by a vendee of the crops to pay to him the rent. *Sharp v. Carmody*, (Ky. 1895) 32 S. W. Rep. 749.

The Payment of Taxes Which Are a Lien on mortgaged premises, by a mortgagor, may be a good consideration for a promise by a mortgagee, holding a mortgage standing subsequent to the taxes, to relinquish part of his mortgage debt. *Day v. Gardner*, 42 N. J. Eq. 199.

4. Sale of Improvements upon Land. — A, at his own expense, built a plaster mill on the land of B, in pursuance of a verbal agreement that A might own and use said mill as his own. Subsequently B conveyed said land to the defendant, who, by a parol agreement, bought the mill of A, gave his promissory note for the price, and enjoyed it thereafter for some years. It was held that there was a valid consideration for the note. *Washband v. Washband*, 24 Conn. 500.

A promise to a tenant, by the owner of land, to pay for a house which the former has built thereon, under a verbal contract with the latter for a longer credit than a year, is not *nudum pactum*. The original contract, though incapable of supporting an action, was good as a parol license to the tenant to build; and the owner of the soil having permitted the erection of the building, it could have been removed by the tenant during the term. This supports the subsequent promise to pay for the house, which justifies a recovery for its value at the time of said promise. *Duff v. Snider*, 54 Miss. 245.

5. Improvements upon Public and Reclaimed Lands — *Alabama*. — *Duncan v. Hall*, 9 Ala. 128.

Arkansas. — *Sherrer v. Bullock*, 23 Ark. 729.

California. — *Ward v. Packard*, 18 Cal. 392.

Florida. — *Taylor v. Baker*, 1 Fla. 282.

Iowa. — *Freeman v. Holliday*, 1 Morr. (Iowa) 80; *Hill v. Smith*, 1 Morr. (Iowa) 70; *Ellis v. Mosier*, 2 Greene (Iowa) 246; *Brooks v. Ellis*, 3 Greene (Iowa) 527.

Kansas. — *Moore v. McIntosh*, 6 Kan. 39; *Bell v. Parks*, 18 Kan. 152.

Michigan. — *McCabe v. Caner*, 68 Mich. 182.

Nebraska. — *Brooks v. Hiatt*, 13 Neb. 503; *Paxton Cattle Co. v. Arapahoe First Nat. Bank*, 21 Neb. 621, 59 Am. Rep. 852.

Texas. — *Savoy v. Brewton*, 3 Tex. Civ. App. 336.

Virginia. — *Williams v. Lewis*, 5 Leigh (Va.) 686.

The sale of an improvement on public lands is a valuable consideration for a promissory note, independent of statute. The transfer of an absolute property is not necessary to constitute a valuable consideration. The acquisition of a probable, customary advantage is sufficient for this purpose. *Freeman v. Holliday*, 1 Morr. (Iowa) 80.

An Assignment of a Certificate of Purchase, issued under the act providing for the sale and reclamation of swamp and overflowed lands, vests in the assignee whatever interest was conveyed by the certificate; and this in-

j. **OPTIONS FOR PURCHASE.** — An option for the purchase of land may be made the subject of a valid sale; but it has been held that to constitute it such, the bargain must be capable of legal enforcement.¹ This, however, has been denied, and it has accordingly been held that after the assignee has received the fruits of the option by the consummation of the purchase, he cannot claim as a defense to his promise that the option was valueless because not legally enforceable.²

15. Personal Property — *a.* **IN GENERAL.** — The sale, assignment, or transfer of personal property is a valuable consideration.³

b. **STOCKS, BONDS, ETC.** — Stock in a corporation or joint stock company,⁴

terest, whether a legal or an equitable estate, is a sufficient consideration for a note given for the assignment. *Ward v. Packard*, 18 Cal. 392.

The plaintiff, who was the owner of an improvement on public lands, sold his claim to the defendant, took a note for the purchase money and gave a relinquishment enabling the vendee to locate the land in his own name. In an action upon the note, it was held that whether the rights and interests conveyed were adequate to the price, the plaintiff had at least transferred a right without which the defendant could not have entered the land, and this was a sufficient consideration for the note. *Sherrer v. Bullock*, 23 Ark. 729.

Assignment of Invalid Claim to Public Lands. — The plaintiff sold a claim to a piece of the public lands, and in consideration thereof received the defendant's promissory note. The lands belonged to the tract known as the "Osage ceded lands," which were ceded to the United States by a treaty with the Osage Indians, which provided that the government was to sell the land "on the most advantageous terms for cash," and to apply the proceeds of the sale as provided in the treaty. The treaty also contained a provision that "no pre-emption claim or homestead settlement shall be recognized." It was held that the plaintiff's claim to the land was void and was not a valuable consideration for the note. *Jarvis v. Campbell*, 23 Kan. 370.

1. Option upon Property — Agreement Must Be Enforceable. — The transferring to another a bargain for the purchase of land is not a good consideration of a note for the payment of money, where there is no valid agreement on the part of the owner of the land to convey. *Ehle v. Judson*, 24 Wend. (N. Y.) 97.

2. Option Need Not Be Enforceable. — The plaintiff orally agreed with E., the owner of certain property, for its purchase for £600, and afterwards sold his bargain to the defendant for £40, and by agreement of all the parties and under the direction of the defendant, E. conveyed the land to a person designated by the defendant. In an action for the recovery of the £40, it was contended that as the bargain which the plaintiff sold was merely an oral agreement and not enforceable at law, there was no consideration for the defendant's promise; but Best, C. J., delivering the opinion of the court, said: "Beyond all question, the defendant has had the opportunity of becoming the purchaser, the premises having been conveyed to his nominee, and though there was no legal obligation in E. to convey, yet the defendant has in fact all the advantages of this agreement, and that forms a moral

obligation sufficient to support the promise." *Seaman v. Price*, 2 Bing. 437, 9 E. C. L. 469, 4 B. & C. 525, 10 E. C. L. 400.

3. A Sale and Delivery of Personal Property is a good consideration for a note given therefor, although the seller had no title; and the purchaser cannot, while he retains the possession of the property, defeat a recovery upon the note upon a plea of want of consideration. *Linton v. Porter*, 31 Ill. 107.

Speculative Value of Lottery Ticket. — Where the defense to an action on a promissory note was that it was given without consideration; and the facts were, that rumors being afloat in the neighborhood of the parties that a certain lottery ticket had drawn a prize of two thousand dollars, a fourth part of which was owned by the plaintiff, the defendant purchased of the plaintiff such fourth part, and gave for it his note for two hundred dollars, being the note in suit; and that previous to such sale, the ticket had, in truth, drawn a blank; it was held that this was a bargain of hazard, and the ticket at the time of the sale was a thing of value; consequently there was a sufficient consideration for the note. *Barnum v. Barnum*, 8 Conn. 469, 21 Am. Dec. 689.

Payment in Oats. — It is competent for parties to contract to make a present sale, with possession, of a growing crop of wheat, payment therefor to be made at a future day in oats instead of money; and such a contract when made is binding and passes the title to the wheat precisely as if the future payment was to be made in money. *Crapo v. Seybold*, 36 Mich. 444.

Non-transferable Liquor License. — A license to sell spirituous liquor is not transferable, and a promissory note for which such transfer forms a part consideration is to that extent without valid consideration. *Strahn v. Hamilton*, 38 Ind. 57.

A Policy of Insurance issued by a fire insurance company, not being invalidated by the company's want of authority to do business in the state (Gen. Laws, c. 174, § 3), a note given by the insured as the consideration of the policy is valid. *Connecticut River Mut. F. Ins. Co. v. Whipple*, 61 N. H. 61.

A Valid Patent, or any interest or license under it, without regard to its peculiar value or the degree of its utility, is a good consideration for a promissory note or other contract. *Nash v. Lull*, 102 Mass. 60, 3 Am. Rep. 435.

4. Stock Certificates. — *Knarr v. Sand Creek Turnpike Co.*, 45 Ind. 278; *Wyatt v. Jackson*, 55 Minn. 87; *Farmers', etc., Bank v. Jenks*, 7 Met. (Mass.) 592.

A Promissory Note, Given in Payment of a Sub-

negotiable bonds,¹ certificates of deposit,² and like securities form a valuable consideration for a promissory note.

c. PARTNERSHIP ASSETS. — An interest in partnership assets may be a valuable consideration.³

d. GOOD WILL OF BUSINESS. — The good will of an established business may be the subject of a valid sale, and its transfer is a valuable consideration for a promissory note.⁴

e. CHOSES IN ACTION. — An assignment of a chose in action vests in the assignee an equitable interest, and such equitable interest constitutes a sufficient consideration to sustain an express promise.⁵

scription to the Capital Stock of a Banking Association, and discounted by the bank, for the maker, is upon a good consideration, and may be enforced by the receiver of the bank after its failure; notwithstanding that by an arrangement among the directors, of whom the maker was one, the instrument in question, and others of a similar tenor given by the others, were not to be considered as valid promissory notes, in the hands of any person, or for any purpose whatever, unless the directors should elect to pay their notes and take certificates of the stock. *Cowles v. Gridley*, 24 Barb. (N. Y.) 301.

Where real estate is conveyed to trustees to be held, by written agreement under seal, for the benefit of stockholders, and the company is divided into shares, to be transferred by certificates in a mode pointed out, the transfer of shares is a sufficient consideration for a written promise to pay a sum of money therefor, although it results that the project fails and the shares purchased prove of no value. *Gore v. Mason*, 18 Me. 84.

Stock in Company Operating under Infringement of Patent. — A promissory note, the sole consideration of which was an interest in a telephone exchange company, whose business and property were valueless except as operated to infringe on the patent rights of the American Bell Telephone Co., is without consideration and void. *Clemshire v. Boone County Bank*, 53 Ark. 512.

1. Bonds. — The defendant, as administrator of the estate of the plaintiff's husband, received a large amount of money, one-third of which belonged to the plaintiff, which sum he was permitted to keep and control as her agent. He invested a portion of the money in county bonds which bore interest at the rate of ten per cent. per annum. At the time of the purchase, these bonds were regarded as worth their face value, but afterwards, the county ceasing to pay interest on them, they fell in price to about fifty cents on the dollar. The plaintiff becoming dissatisfied with the conduct of the defendant in investing in these bonds, he executed to her a promissory note for the amount of their face value, drawing eight per cent. interest. In an action upon this note, it was held that the advantage to him in the transaction, which consisted in obtaining title to the bonds which bore two per cent. interest annually more than the note given in exchange for them, was a sufficient consideration for the note. *Denny v. Campbell*, (Ky. 1887) 4 S. W. Rep. 301.

2. A Certificate of Deposit is a good consideration for a note discounted in bank. *Missis-*

issippi R. Co. v. Scott, 7 How. (Miss.) 79. See also *Tuttle v. Campbell*, 74 Mich. 652, 16 Am. St. Rep. 652.

3. Interest in Partnership Assets. — A release of interest in partnership property is a sufficient consideration for the release of such party from a note given for such property. *Hunt v. Dederick*, 105 Ind. 555.

4. Good Will of Business. — The interest of a retiring partner in the good will of the partnership business is a sufficient consideration to support a promissory note executed by the remaining partners; and the liability of the latter upon such note is not affected by the fact that such business is not thereafter successful. *Smock v. Pierson*, 68 Ind. 405, 34 Am. Rep. 269.

The business of an insurance agency worth two thousand dollars is a good consideration for the conveyance of real estate. *Davis v. Garrison*, 85 Iowa 447.

Where the plaintiff, a carman, had for many years enjoyed the patronage of a particular firm, and had actually the exclusive control and direction of all their cartage and the profits thereof, and, by the consent of such firm, permitted the defendant to join him, do half the work, and take half the emolument, it was held that although the plaintiff had no legal right to the continuance of the patronage of such firm, yet that the probability of its continuance under the circumstances stated — followed, as the arrangement was, by an actual participation by the defendant in the business from that time onward — formed a sufficient consideration for promissory notes given by the defendant to the plaintiff for permitting him to share the business and the profits thereof. *Searing v. Tye*, 4 E. D. Smith (N. Y.) 197.

5. Assignment of a Chose in Action. — *Edson v. Fuller*, 22 N. H. 183; *Currier v. Hodgdon*, 3 N. H. 82; *Moar v. Wright*, 1 Vt. 57. And see generally the title **ASSIGNMENTS**, vol. 2, p. 1007.

Assignment of Unliquidated Debt. — In the absence of proof of fraud, the assignment of a negotiable right of action is a sufficient consideration to support a promise; so a promise in consideration of the assignment of an uncertain debt is valid, and may be enforced. *Harrison v. Knight*, 7 Tex. 48.

An assignment by A to B of a sum of money due from C to A, an assent on the part of C, and an express promise by him to B to pay accordingly, are sufficient to maintain assumpsit by B against C. Although the sum due from C to A be an unliquidated balance of account, if the promise be to pay what shall appear to be due, so, if the assignment be of a

f. **LIENS, ATTACHMENTS, AND MORTGAGES.** — The release of a lien,¹ attachment,² or mortgage³ upon personal property is a valuable consideration.

g. **BAILMENTS.** — The bailment of personal property needs no consideration other than the transaction itself to support it. The relinquishment by the bailor of his right of possession of the thing bailed, and the trust and confidence reposed in the bailee, is itself a sufficient consideration to hold the latter to the fulfilment of the trust.⁴

sum to become due to A at a future day, C is liable when the money falls due. *Crocker v. Whitney*, 10 Mass. 316.

The Assignment of a Sheriff's Certificate of the Sale of Land under a decree of foreclosure is a sufficient consideration for a promise by the assignee to pay a junior judgment lien on the land. *Searce v. Gall*, 82 Ind. 255.

The Assignment of a Bond is a valid consideration. *Gwynn v. Hodge*, 4 Jones L. (N. Car.) 168.

The assignment of a bond is a good consideration for an express promise by the obligor, to the assignee, to perform or to pay. *Warren v. Wheeler*, 21 Me. 484.

An assignment of a bond is a valid consideration for a promise of the payment to the assignee; and, where promise of payment is made to him, a suit may be maintained for the amount of the claim in the assignee's own name; and it is immaterial whether the promise be before or subsequent to the assignment. *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 372.

The Assignment of a Judgment is a valuable consideration. *Dickerson v. Derrickson*, 39 Ill. 574; *State Nat. Bank v. Walser*, 46 Mo. 348; *Winberry v. Koonce*, 83 N. Car. 351.

A note given by a judgment debtor to the assignee of the judgment, in part payment thereof, is on a sufficient consideration. *McClees v. Burt*, 5 Met. (Mass.) 198.

The assignment of a judgment and execution by the creditor is a sufficient consideration for a note of hand given therefor to him, who has the equitable interest in the judgment. *Trafton v. Rogers*, 13 Me. 315.

If a Non-negotiable Promissory Note Be Assigned, and the maker promise to pay the amount of the note to the assignee, the assignment of the note is a sufficient consideration for the promise, and the promisor is precluded from pleading a counterclaim which might have been available against the assignor. *Mowry v. Todd*, 12 Mass. 281.

The Transfer of a Promissory Note by indorsement is a sufficient consideration for a promise by the indorsee to pay the indorser an equivalent sum. *Litchfield v. Falconer*, 2 Ala. 280.

Assignment of Invalid Chose in Action. — An act of the legislature having been pronounced unconstitutional and void, any contracts executed under that act having been also declared void, the sale and transfer of such a contract does not constitute a good consideration for a promise to pay money. The sale of an absolutely void chose in action will not form any consideration for a promise. If void, no legal obligation is created by it; and it is, in the view of the law, as if it did not exist. The principle is the same, notwithstanding the

chose in action is salable in market for even the full value that would attach to it if valid; nor does the mere circumstance that the purchasers stipulated to take the risk as to the validity of the act of the legislature vary the law of the case. *Sherman v. Barnard*, 19 Barb. (N. Y.) 291.

1. Lease of Lien. — *McMahon v. Plummer*, 6 Dakota 42; *Rollins v. Hare*, 15 Ind. App. 677.

Where wrecked goods were placed under the care of the wreck master by the captain of the vessel, to be disposed of according to law, and the owner, afterwards and before a sale, promised the wreck master that if he would deliver up the goods to him he would pay him his commissions, it was held that there was a sufficient consideration for the promise. *Etheridge v. Thompson*, 7 Ired. L. (N. Car.) 127.

2. Relinquishment of Attachment. — *Smith v. Taylor*, 39 Me. 242.

3. The Release of a Chattel Mortgage on a stock of goods given to secure a portion of the purchase price is a valuable consideration for the agreement of the mortgagor to sell the goods on account of the mortgagee and to account to him for the proceeds, such agreement also authorizing the mortgagee to take possession of the goods whenever he shall have reasonable cause to deem himself insecure. *Norris v. Vosburgh*, 98 Mich. 426.

Giving Chattel Mortgage. — An insolvent firm gave a chattel mortgage of all its property to two of its creditors, upon their agreement to pay the other creditors of the firm, one of whom was the plaintiff, to whom a promise was also expressly made. The property was exhausted in paying the other debts, and in an action by the plaintiff upon the promise made to him it was held that the receipt of the property was a sufficient consideration for it. *Keyes v. Allen*, 65 Vt. 667.

4. Bailments. — *Hart v. Miles*, 4 C. B. N. S. 371, 93 E. C. L. 371; *Clark v. Gaylord*, 24 Conn. 484; *Miller v. Upton*, 6 Ind. 53; *Newhall v. Paige*, 10 Gray (Mass.) 366; *Rickey v. Morrison*, 69 Mich. 139; *McKay v. Buffalo Bill's Wild West Co.*, 17 Misc. Rep. (N. Y. Supreme Ct.) 396; *Robinson v. Threadgill*, 13 Ired. L. (N. Car.) 39.

And see the title **BAILMENTS**, vol. 3, p. 735.

The mate of a vessel that was lying in Mobile found two bales of cotton floating in the river there, took them from the water, put them on board the vessel, and brought them to Boston, where the owners of the vessel agreed with him to take the cotton into their possession and to be accountable to him for it if they could not discover the owner. They sold the cotton soon afterwards, and, no owner appearing, the mate, after four years, demanded a

16. Release of Personal Rights — a. IN GENERAL. — If a person at the instance of the promisor waive or release his personal right to do any lawful thing, the waiver or release constitutes a valuable consideration for the promise.¹

b. SURRENDER OF CUSTODY OF CHILD. — Parents are the natural guardians of their children and entitled to their custody and control; and the surrender of this right by one to the other, or by both to a third person, is a valuable consideration for a promise.²

c. NAMING CHILD. — An incident of this right of custody and control is the right to give the child a name, and the naming of a child after a particular person is sufficient to support his promise made in consideration thereof.³

settlement, which was refused. It was held that the plaintiff, as finder of the cotton, had a special property therein, and that surrender of possession was a sufficient consideration for the defendant's promise. *Ellery v. Cunningham*, 1 Met. (Mass.) 112.

The defendants, who were innkeepers, held certain baggage belonging to one I. as security for the payment of a hotel bill due them. I. applied to the plaintiff for board, and promised to give him a lien on said baggage subject to the defendants' lien. Together they called upon the defendants, who agreed to hold the baggage until their own and the debt due the plaintiff for board should be paid. It was charged that in violation of such agreement the defendants surrendered said baggage to I., in consequence of which the plaintiff lost the amount due him. It was held that the defendants were bailees of the baggage, and that the confidence reposed in them was a sufficient consideration for their promise. *Hartzell v. Saunders*, 49 Mo. 433, 8 Am. Rep. 136.

Bailment of Property Levied upon under Execution. — A sheriff took goods in execution upon a *fiery facias*, and the defendant promised him to pay him the debt in consideration that he would restore the goods. The promise was held to be upon a sufficient consideration. *Love's Case*, 1 Salk. 28.

The delivery to another of property levied upon by a sheriff, or leaving it under his control, is a sufficient consideration for a promise to redeliver it to the sheriff. *Lockwood v. Bull*, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539.

An agreement by an officer not to move property seized by him on execution, and intrusting it to the custody of another, is a sufficient consideration for an agreement by the latter to keep the property safely, and have it forthcoming at the sale on execution. *Ames v. Taylor*, 49 Me. 381.

Upon the Dissolution of a Partnership, an agreement by one of the partners to wind up the business of the firm, and to pay to the other his share of the fees collected, is not without consideration or void. *Osment v. McElrath*, 68 Cal. 466, 58 Am. Rep. 17.

A Deposit of Money by the plaintiff with a third party for a limited time, during which the defendants would ascertain certain facts, was held a sufficient consideration to support a promise by the defendants to delay entering a judgment and issuing execution. *Reed v. Carrall*, 7 U. C. C. P. 283.

1. Release of Right to Administer upon Estate. — Where one entitled as joint executor to

letters testamentary renounces this right in favor of his co-executor in pursuance of an agreement that he, the renouncing executor, shall be paid one-half of the commissions, such renunciation is a sufficient consideration to support the agreement, and the agreement may be enforced in an action at law. *Ohlendorf v. Kanne*, 66 Md. 495.

Waiver of Right to Secure Divorce. — A man who innocently marries a woman found to be pregnant at the time of marriage by another man is not bound to live with her (Code, section 2224), nor to support the child; and an agreement to do these things is a good and valid consideration for a note given him on account thereof. *Brannum v. O'Connor*, 77 Iowa 632.

The Waiver of a Right to Proceed Against One for Disregarding the Terms of a Decree of Divorce is a valuable consideration. *Lancaster v. Elliott*, 42 Mo. App. 503.

If the Plaintiff Part with Anything that Is of Value to Himself, though it may be of no legal value in the defendant's hands, to obtain the defendant's promise, that forms a valid consideration for the promise. *Bradford v. O'Brien*, 6 U. C. Q. B. 417.

The Delivery of an Unaccepted Bill to the Drawee is a sufficient consideration for his promise to pay the holder a lesser sum. *Forward v. Harris*, 30 Barb. (N. Y.) 338.

2. Surrender of Child. — The surrender by the parents of a child, of all control over her and her services and companionship, constitutes a valuable consideration for a promise of adoption. *Healey v. Simpson*, 113 Mo. 340.

In *In re Plaskett*, 30 L. J. Ch. 606, 9 W. R. 628, 4 L. T. N. S. 544, where a person bound himself to pay an annuity to an unmarried woman by whom he had had several children, on condition that she would not require their custody or management, it was held that there was a sufficient consideration to support the bond as a specialty debt.

3. Naming Child. — *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16; *Diffenderfer v. Scott*, 5 Ind. App. 243; *Eaton v. Libbey*, 165 Mass. 218; *Babcock v. Chase*, 92 Hun (N. Y.) 264.

In *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16, *Elliott, J.*, delivering the opinion of the court, said: "The surrender, at the intestate's request, of the right or privilege of naming the appellant's child, was the yielding of a consideration. The right to give his child a name was one which the father possessed, and one which he could not be deprived of against

d. CHANGE OF RESIDENCE. — If a person changes his residence at the instance of another, a promise made in consideration thereof is valid.¹

17. Contracts and Contractual Rights — *a.* LETTING CONTRACTS. — Where one of the conditions upon which a contract is given to a person is that he shall furnish a bond with sureties for its faithful performance, the letting of the contract furnishes a sufficient consideration for the bond.²

b. ASSIGNMENT OF CONTRACTS. — The assignment by one party of his interest in a contract, made with the consent of the other party, is a valuable consideration for a note given by the assignee.³

c. MODIFICATION OF CONTRACTS. — An agreement by one party to a contract, at the instance of the other party, to modify its terms, is a valuable consideration.⁴

d. RELEASE AND DISCHARGE OF CONTRACTS — (1) *In General.* — The surrender and cancellation of a contract and the release and discharge of rights which have accrued under it, is a valuable consideration for a promise.⁵

his consent. If the intestate chose to bargain for the exercise of this right, he should be bound, for by his bargain he limited and restrained the father's right to bestow his own or some other name upon the child. We can perceive no solid reason for declaring that the right with which the father parted at the intestate's request was of no value. It is difficult, if not impossible, to invent even a plausible reason for affirming that such a right or privilege is absolutely worthless. The father is the natural guardian of his child, and entitled to its services during infancy, and within this natural right must fall the privilege of bestowing a name upon it. In yielding to the intestate's request, and in consideration of the promise accompanying it, the appellant certainly suffered some deprivation and surrendered some right."

1. Change of Residence. — In *Adams v. Honness*, 62 Barb. (N. Y.) 326, the defendant's intestate agreed with the plaintiff, a married woman, that if she would change her place of residence and remove, and reside with her husband near the intestate for the remainder of his life, she should receive a certain sum upon his death. The agreement was fully performed on the part of the plaintiff, and it was held that the estate of the intestate was bound by it. See also *Haines v. Haines*, 6 Md. 435; *King v. Thompson*, 9 Pet. (U. S.) 204.

The plaintiff's testator, desiring to provide for the defendant after his death, by his will left her an annuity, and afterwards, fearing that the legacy might not be sufficient for her needs, proposed to purchase a house for her during his lifetime. He accordingly purchased a house, taking a deed in the name of the defendant. By the terms of the sale the testator paid a certain sum in cash, and for the balance gave notes, the same being made in the name of the defendant. It was verbally agreed between the defendant and the testator that he would furnish her with money to meet the notes as they fell due. The testator died before the maturity of the two last notes. It was held that if the defendant purchased the house and changed her residence at the instance of the testator, and in reliance upon his promise, her act was a sufficient consideration to bind his executor. *Crosbie v. M'Doual*, 13 Ves. Jr. 148.

2. Letting Contract. — *Smith v. Molleson*, 74 Hun (N. Y.) 606.

Making Lease. — Where a party, by a written instrument, recited that he had taken a lease of a lot of ground of another in a certain street, and agreed on the opening of another street into the street in which the lot was situated, that he would pay his landlord one hundred dollars as soon as such new street should be opened; and it was proved that such writing was executed contemporaneously with the lease recited in it, it was held that the execution of the lease was a sufficient consideration for the agreement, and that in an action on the agreement the landlord was entitled to recover. *Andrews v. Pontue*, 24 Wend. (N. Y.) 285.

3. Assignment of Contract. — *Early v. Reed*, 60 Mo. 528.

Assignment of Apprentice. — The defendant gave to the plaintiff a promissory note as the price of consideration for the assignment of an apprentice to E. at his request. It was held that in an action on the note the defendant could not set up as a defense that the assignment was not valid. *Nickerson v. Howard*, 19 Johns. (N. Y.) 113.

4. Modification of Contract. — It is a good consideration for an agreement to pay a teacher such increased compensation that he consents to hold his place at the will of the trustees, instead of holding it as before, from year to year, upon the ground that such change in the tenure of his situation is a detriment to himself, and, under the circumstances, a benefit to the objects of the trust. *Hildreth v. Pinkerton Academy*, 29 N. H. 227.

The Receipt of Additional Security is a good consideration for an agreement by the holder of a promissory note to relinquish all claim upon it against an indorser. *Eccleston v. Ogden*, 34 Barb. (N. Y.) 444.

5. Surrender and Cancellation of Contract. — *Weld v. Nichols*, 17 Pick. (Mass.) 538; *Blagborne v. Hunger*, 101 Mich. 375; *Oregon Pac. R. Co. v. Forrest*, 128 N. Y. 83; *Kvello v. Taylor*, 5 N. Dak. 76; *Perry v. Buckman*, 33 Vt. 7; *Buechel v. Buechel*, 65 Wis. 532. And see *supra*, *Pre-existing Legal or Equitable Obligation*.

Liability upon Contract.
Surrender of Contract for Construction of House. — A verbal promise by the defendant to the

(2) *Resignation from Office.* — If a person hold an office under a contract of employment, his resignation from the office and surrender of the contract is a valuable consideration.¹

contractor, before the completion of the house, to pay the outstanding claims of the plaintiffs and others, if the contractor would surrender the contract, is supported by a sufficient consideration; but if the contractor had already abandoned the contract, and there was nothing due him, the promise would be without consideration, and would not support an action by the plaintiffs. *Clark v. Jones*, 85 Ala. 127.

Surrender of Articles of Separation. — A decree of divorce obtained by a husband against his wife does not, of its own force, release him from his obligation to pay the wife a sum of money monthly for her support during their separation, as stipulated in articles of separation previously entered into between them, at least when no provision for alimony is made in the decree. A new agreement, made after the divorce, whereby the husband is released from the former by obligating himself to pay the wife a certain sum monthly as long as she remains unmarried, imports a valuable consideration which is sufficient to sustain it. *Jones v. Jones*, 1 Colo. App. 28.

An Agreement by a Purchaser to Give Up His Bill of Sale and cancel the contract of sale in pursuance of which such bill of sale was given, is a valuable consideration for a note given by the seller to the purchaser. *Montgomery v. Morris*, 32 Ga. 173.

Surrender of Note. — The plaintiff was possessed of a promissory note of the defendant's, and the defendant, in consideration of the plaintiff's delivering him the note, promised to pay him the amount of it, whereupon the note was delivered. It was held that the surrender of the note was a disadvantage to the plaintiff and a sufficient consideration for the defendant's promise. *Tuke's Case*, 7 Mod. 13.

A Release of a Tenant from the Terms of a Lease on his surrender of the property and agreement to pay the costs of reletting is based on a sufficient consideration. *Tallman v. Earle*, (C. Pl.) 13 N. Y. Supp. 805.

A Release from a Contract to Marry is a good consideration for a promise by the party accepting such release to pay money therefor. *Snell v. Bray*, 56 Wis. 156.

Release of Principal by Surety. — If a surety contract to assume a part of the principal's obligation and release him therefrom, he may do so; and, in such case, the surrendering of a part of a judgment held by the principal, whereby the surety and others were enabled to raise money on their lands to discharge liens, was sufficient consideration to support the contract. *Farr v. Bach*, 13 Ind. App. 125.

Release by One Party to Contract of Other Joint Contractors. — Where several parties are interested in a purchase and liable for the purchase-money, an agreement on the part of one to pay the money yet due is a sufficient consideration to support a contract, on the part of the others, to abandon and give up all their interest in the property purchased. *Morrill v. Colehour*, 82 Ill. 618.

Release of Sureties upon Note. — A owed B one hundred dollars, and gave his note with

two sureties for the amount. Afterwards, in consideration of the forbearance of that debt and of the release of the sureties, A gave his note to B for the original debt and fifty dollars more, payable at a future time. It was held that the consideration for the whole of the latter note was valid. *Taylor v. Meek*, 4 Blackf. (Ind.) 388.

The Release of an Indorser on a promissory note by the payee is a valuable consideration for a chattel mortgage made to him by the maker of the note. *Henry v. Vliet*, 33 Neb. 130, 29 Am. St. Rep. 478.

Release of Covenant. — An agreement between the administrator of the covenantee and the covenantor, not to enforce performance of the covenants in the deed provided the latter would pay certain rent, may be a good consideration for a parol promise to pay such rent. *Nash v. Armstrong*, 10 C. B. N. S. 259, 100 E. C. L. 259.

Release of Security. — The surrender by the holder of bills of lading held as collateral security for a loan is a good consideration for the substitution, as security, of new bills of lading antedating the loan. *Midland Nat. Bank v. Missouri Pac. R. Co.*, 132 Mo. 492.

Release of Void Agreement. — An agreement between the maker and the holder of a note, which, by its terms, is payable on demand, with interest, that the maker will pay interest semi-annually, and shall not be required to pay the principal until he wishes to do so, is without consideration and void; and a subsequent agreement between the same parties that, in consideration of the maker's relinquishing such first agreements, the holder will allow him to pay the principal in periodical instalments, with interest semi-annually on the amount remaining unpaid, instead of on demand, is equally without consideration and void. *Van Allen v. Jones*, 10 Bosw. (N. Y.) 369.

The relinquishment by a servant of a contract, the terms of which he has been rendered incapable of performing by reason of physical disability, is not a sufficient consideration for the promise of the master to pay him a certain sum. *Prior v. Flagler*, 13 Misc. Rep. (N. Y. C. Pl.) 115.

1. **The Resignation of an Office in a Corporation** is a sufficient consideration for a promissory note. *Peck v. Requa*, 13 Gray (Mass.) 407.

The Plaintiff's Relinquishment of the Command of a Ship is a sufficient consideration for the defendant's promise to pay him a sum of money. *Richardson v. Mellish*, 2 Bing. 229, 9 E. C. L. 391.

Resignation of Pastor. — A pastor and his congregation determined upon the dissolution of the pastoral relation, and in consideration of his resignation and of his long service the congregation, at a meeting called to consider the matter, agreed to allow him a credit of two thousand dollars upon a mortgage executed by him to the church. In an action to compel the trustees to credit the amount upon the mortgage, it was held that the resignation of the pastor was a sufficient consideration for the

(3) *Release of Debts of Third Person* — (a) *In General.* — If a creditor, at the instance of the promisor, release the debt of a third person, the release constitutes a valuable consideration for the promise.¹

(b) *Debts of Decedents.* — *Promise by Executor or Administrator.* — The release of debts against a decedent's estate is a valuable consideration for a promise by the executor or administrator to pay them, and such promise binds him personally.²

Promise by Widow. — It is likewise a valuable consideration for a promise by the decedent's widow.³

Promise by Distributee. — So a surrender by the creditor, of his claim, to one of the distributees of the estate, is a sufficient consideration for a note or bond executed by the distributee to the creditor.⁴

credit. *Worrell v. First Presb. Church*, 23 N. J. Eq. 95.

Relinquishment of Agency. — The defendant agreed with the plaintiff, who was his agent for the sale of a patented article in a certain district, that if he would relinquish his agency he would pay him all the expenses he had incurred in respect to it. It was held that the plaintiff's relinquishment of his right under the agreement was a sufficient consideration for the defendant's promise to reimburse him. *Perry v. Buckman*, 33 Vt. 7.

1. *Release of Debt of Third Person* — *Canada.* — *Coulthard v. Caverhill*, 25 New Bruns. 84.

California. — *Barringer v. Warden*, 12 Cal. 311; *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193; *Scribner v. Hanke*, 116 Cal. 613.

Indiana. — *Harvey v. Laffin*, 2 Ind. 477; *Crowder v. Reed*, 80 Ind. 1; *Brant v. Barnett*, 10 Ind. App. 653.

Massachusetts. — *Whitney v. Clary*, 145 Mass. 156.

Minnesota. — *Holm v. Sandberg*, 32 Minn. 427.

Mississippi. — *Wren v. Hoffman*, 41 Miss. 616.

Missouri. — *Brainard v. Capelle*, 31 Mo. 428.

New York. — *Stack v. Weatherwax*, (Supreme Ct.) 5 N. Y. Supp. 510.

South Carolina. — *Corbett v. Cochran*, 3 Hill L. (S. Car.) 41, 30 Am. Dec. 348.

Texas. — *Smith v. Westall*, 76 Tex. 509.

A was indebted to B, and C to A, in equal sums, and C assumed to pay A's debt to B, and executed his note to him therefor, and thereupon B canceled his claim against A, and receipted for the same in full. It was held that these facts constituted sufficient considerations for the note from C to B, and such note, or any one given in renewal thereof, could be enforced. *Millard v. Porter*, 18 Ind. 503.

The defendant bought a mare of one D. for which he agreed to pay fifty dollars. He paid twenty dollars on account. D. owed the plaintiff thirty dollars. The three met together, and the defendant agreed to pay the plaintiff thirty dollars instead of paying it to D., and the plaintiff agreed to surrender his claim on D. and take the defendant's note. It afterwards transpired that D. had no title to the mare, and it was recovered from the defendant by the true owner. In an action upon the note it was held that the plaintiff's release of his claim against D. was a sufficient consideration. *Sykes v. Lafferry*, 27 Ark. 407.

H. had a judgment against C., and C. had a judgment against S. By agreement of all the

parties, S. executed his promissory note to H. for the amount and in satisfaction of his judgment against C., and received a credit for the amount of his note on the judgment he owed to C. It was held that H.'s judgment against C. being valid and unobjectionable, S. could not set up as a defense to the payment of his note to H., any infirmity that might have existed in the judgment of C. against him; H. having parted with a valuable consideration for the note, was entitled to recover, even though S. had received no benefit thereby. *Sadler v. Hoover*, 31 Miss. 260.

Debtor Must Be a Party to the Agreement. — A promise to pay the debt of a third person is void unless such person be a party to the agreement. A person cannot make another his debtor without his consent. *Stoudenmire v. Ware*, 48 Ala. 589; *Whelan v. Edwards*, 29 Ga. 315; *Richardson v. Williams*, 49 Me. 558.

2. *Debts of Decedents* — *Promise by Executor or Administrator.* — Giving up securities against the testator's estate, is a sufficient consideration for a promise by the executor. *Stebbins v. Smith*, 4 Pick. (Mass.) 97.

The surrender of promissory notes made by the intestate, is a sufficient consideration to support a personal or individual note given by the administratrix to the creditor. *Harrison v. McClelland*, 57 Ga. 531.

N. being indebted to Y., who had departed this life, executed his note for the amount to L., who was about to administer on the estate of Y.; L. promising to execute a receipt for the money as administrator, after his qualification as such. He became the administrator of Y., and afterwards brought suit against N. on the note. It was held that as he could give a valid receipt for the money, there was a sufficient consideration for the note, and no demand having been made of the receipt, there was no failure of the consideration. *Nelson v. Lovejoy*, 14 Ala. 568.

See the title EXECUTORS AND ADMINISTRATORS.

3. *Release of Decedent's Debt* — *Promise by Widow* — *England.* — *Serle v. Waterworth*, 4 M. & W. 9.

Alabama. — *Hixon v. Hetherington*, 57 Ala. 165; *Nowlin v. Wesson*, 93 Ala. 509.

Iowa. — *French v. French*, 84 Iowa 655; *French v. French*, 91 Iowa 140.

Massachusetts. — *Carpenter v. Page*, 144 Mass. 315.

Tennessee. — *Taylor v. Clark*, (Tenn. 1895) 35 S. W. Rep. 442.

4. *Promise by Distributee.* — *Calhoun v. Calhoun*, 37 Miss. 668; *McCormal v. Redden*, 46 Neb. 776.

When There Are No Assets. — Whether a person other than the executor or administrator would be bound by his promise made in consideration of the promisee's release of his claim against a decedent's estate, when the estate is insolvent and there are no assets out of which the promisor might reimburse himself for the payment, has not been clearly decided. Some of the decisions hold that if the estate be without assets, the debt is valueless and its release cannot constitute a valuable consideration;¹ but there are other cases which hold that the promisor is bound, notwithstanding the total insolvency of the estate.²

e. WAIVER OF RIGHT TO RESCIND CONTRACT. — If after the breach of a contract or upon the happening of a contingency upon which, under its terms, one of the parties has a right to rescind it, the waiver of the right to do so is a valuable consideration.³

18. Permitting Something to Be Done. — It is a valuable consideration if the promisee, having the right to refuse permission, is moved by the promise to allow a certain thing to be done. The question is not, did the promisor derive any benefit from the permission, or did the promisee suffer any detriment from giving it? but merely, was it something which the latter had the right to refuse? The consideration arises from the permission irrespective of the benefits derived from it.⁴

1. When There Are No Assets — Promise by Heirs. — The plaintiff held the note of the defendants' deceased father, which he gave up to the defendants upon their promise to pay the amount. The deceased left no property, and there was no administrator, and the note was therefore worthless. It was held that the promise of the sons was *nudum pactum*. *Schroeder v. Fink*, 60 Md. 436.

Promise by Widow. — A promissory note given by a widow to a creditor of her deceased husband, for the amount of his debt, is void for want of consideration, if the husband has left no estate or assets, though the creditor gives the widow at the same time a receipted bill acknowledging payment from her husband's estate by the note. *Williams v. Nichols*, 10 Gray (Mass.) 83; *Kircher v. Sprenger*, 4 Pa. Dist. Rep. 144.

2. Judy v. Louderman, 48 Ohio St. 562.

3. Waiver of Right to Rescind Contract. — *Osborne v. O'Reilly*, 42 N. J. Eq. 467. See also *Brownlee v. Lowe*, 117 Ind. 420.

By an agreement under seal, the plaintiff agreed to manage a coal business, and the defendant to compensate him in proportion to the business done, the contract to continue for three years, but terminable by either party upon giving the other reasonable notice. By a subsequent agreement signed by the defendant alone, but not under seal, it was agreed that if the compensation fell short of one thousand five hundred dollars in any year, the defendant was to make up the deficiency at the end of the year. It was held that the forbearance of the plaintiff to assert his right to terminate the connection, and his continuance in service after it had been proven unremunerative, were a sufficient consideration to support the parol agreement and to enable the plaintiff to recover at the rate of one thousand five hundred dollars per annum. *Spangler v. Springer*, 22 Pa. St. 454.

4. Permitting Something to Be Done. — The defendant requested permission to weigh two boilers belonging to the plaintiff, and in

consideration for the privilege he promised to leave them in as perfect condition as they were in at the time of the consent. In an action against the defendant for refusal to restore the boilers to the condition in which he found them, it was contended that the promise was without consideration, but the court, by Denman, C. J., said: "It seems to me that the declaration is well enough. The defendant had some reason for wishing to weigh the boilers, and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive. The plaintiff might have given or refused leave." *Bainbridge v. Firmstone*, 8 Ad. & El. 743, 35 E. C. L. 513.

Permitting Creditor to Insure Debtor's Life. — A debtor permitted his creditor to take out a policy of insurance upon the debtor's life upon the creditor's agreement to pay the premiums, and on the debtor's decease to apply the insurance to the payment of his debt together with the amount of premiums paid and interest thereon, and to pay the balance, if any, to the debtor's wife. It was held that the permission was a valuable consideration for the promise. *Sell v. Steller*, 53 N. J. Eq. 397.

Assent to Assignment of Insurance Policy. — The assent of an insurance company to the assignment of one of its policies is a valuable consideration for a guaranty of the premium notes, when the company refused to give such assent unless the notes were guaranteed. *New England Marine Ins. Co. v. DeWolf*, 8 Pick. (Mass.) 56.

Permitting Use of Name in a Suit. — Where one, to enforce the collection for his own benefit, makes use of the name of another in a suit, he is under a moral obligation to indemnify him for any costs that may be charged against him, and such moral obligation is a sufficient consideration for a promise. *Bledget v. Skinner*, 15 Vt. 716.

Permitting Defendant to Marry Plaintiff's

19. Forbearance — *a.* **ESSENTIALS TO ITS SUFFICIENCY AS A CONSIDERATION** — (1) *There Must Be a Right.* — In order to constitute forbearance a valuable consideration there must be a subsisting legal right in the claimant which he agrees to forbear, for if the claim be invalid¹ or illegal² the forbearance is ineffectual.

Forbearance of Doubtful Rights. — However, the same principle obtains here that gives validity to the compromise of doubtful claims, and so, if both parties *bona fide* believe that the plaintiff's demand is just, his forbearance will be a valuable consideration.³

(2) *There Must Be Some One Against Whom It Is Enforceable.* — And secondly, there must be some one against whom the right or claim is enforce-

Daughter. — Past cohabitation and the agreement of the father of the female that the obligor might marry his daughter, though she was of full age and thus competent to contract marriage without his consent, were a sufficient consideration for a bond conditioned for her proper treatment, and that the obligor, her intended husband, would not desert her. *Wyant v. Leshner*, 23 Pa. St. 338.

1. Forbearance of Invalid Demands. — *Tooley v. Windham*, Cro. Eliz. 206; *Graham v. Johnson*, L. R. 8 Eq. 36; *Wade v. Simeon*, 2 C. B. 548, 52 E. C. L. 548; *Palfrey v. Portland*, etc., R. Co., 4 Allen (Mass.) 55; *Sharpe v. Rogers*, 12 Minn. 174; *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355; *State Sav. Bank v. Colcord*, 15 N. H. 119; *O. & C. R. Co. v. Potter*, 5 Oregon 228.

A promise in writing to pay the debt of another, in consideration of forbearance to sue, is founded on sufficient consideration, and is valid in law. But if the creditor has not the legal right to sue at any time during which he promises to forbear suit, the promise to pay in consideration of such forbearance is without consideration, and consequently void. *Martin v. Black*, 20 Ala. 309.

Note Executed by Feme Covert. — A married woman gave a promissory note, and after her husband's death, in consideration of forbearance, promised to pay it. In an action upon this promise, it was held to be void for want of consideration, that the note was totally void, and that forbearance where originally there is no cause of action is no consideration to raise an assumpsit. *Loyd v. Lee*, 1 Stra. 94.

A Father Was Induced While in a State of Intoxication to execute his note for the indebtedness of his adult son, which he had refused to do when sober. After the maturity of the note and while in a state of sobriety, he promised the holder to pay the note if he would wait until the fall. In an action upon this promise, it was held that the note, having been given during a state of intoxication and without any consideration whatever, was void, and that the promise of forbearance to sue thereon made by the plaintiff was not a legal consideration for the defendant's promise. *Newell v. Fisher*, 11 Smed. & M. (Miss.) 431, 49 Am. Dec. 66.

A Person in a Strange City Was Threatened with Suit upon the acceptance of a draft by a firm under the impression that he was a partner therein, when in fact he had no connection with the firm and so informed the holder of

the draft; but to avoid suit and to gain time he gave the holder his written promise to pay the draft. In an action upon this promise, it was held that as there was no liability there was no consideration. *Mulholland v. Bartlett*, 74 Ill. 58.

The Right of Action for the Seduction of a Female in Her Minority lies in the parent solely, who is entitled to her services. A promise, therefore, to pay money on the agreement of the female herself to forbear in respect to a threatened prosecution for her alleged seduction, is without consideration. *Heaps v. Dunham*, 95 Ill. 583.

Forbearance of Attachment When No Right Exists. — A promise not to attach the property of a third person, where no ground of attachment exists, is not a consideration for a promise to pay an indebtedness of such third person. *Bates v. Sandy*, 27 Ill. App. 552.

A creditor's agreement to forbear seizing certain property on attachment against his debtor, will not support a promise by a third person to pay the debt when the debtor has no interest in the property. *Rood v. Jones*, 1 Doug. (Mich.) 188.

Forbearance to Levy upon Property Exempt from Execution. — Where a party gave to a constable his written obligation to pay a sum of money, the mere consideration of which was the forbearance on the part of the officer from levying a writ of attachment on the property of a third person, and the evidence showed that there was no intention on the part of the officer to make the levy, the property being exempt from execution, it was held that the contract was void. *Hennessey v. Hill*, 52 Ill. 281.

Burden of Proof of Invalidity of Demand. — Although a promise to pay a sum of money, founded upon the forbearing to prosecute a suit which could not be maintained, is void for want of consideration; yet the defendant, in order to avail himself of such a defense, must show conclusively that the suit, which was the foundation of the promise, could not have been prosecuted to effect. *Gould v. Armstrong*, 2 Hall (N. Y.) 266.

2. Forbearance to Sue upon Illegal Debt. — A note given for a gambling debt is illegal and void, and a promise to pay such note in consideration that the holder will forbear to sue thereon is also void. *Slack v. Moss*, Dudley (Ga.) 161.

3. Bidwell v. Catton, Hob. 216; *Pooly v. Gilberd*, 2 Bulst. 41. And see *supra*, this title, *Compromise of Doubtful Claims*.

able, for otherwise it is valueless and its forbearance cannot constitute a consideration.

Claim Against Estate Not Administered Upon. — Thus, the promise of a defendant, in consideration of a creditor's forbearance, to pay the debt of a third person who has died intestate and of whose estate no administrator has been appointed, cannot be enforced.¹

(3) *There Must Be an Agreement to Forbear* — (a) **In General.** — And lastly, there must be an agreement to forbear, either express or implied. A mere forbearance voluntarily granted by the claimant will not avail.²

(b) **Express Agreement** — *aa.* **FOR A DEFINITE PERIOD.** — An express agreement to forbear for a definite period, however short, is sufficient.³

bb. **FOR AN INDEFINITE PERIOD** — **Reasonable Time.** — But it is not essential that the period of forbearance should be fixed.⁴ An agreement to forbear for a reasonable time,⁵ or until the happening of some event to be brought about by the party against whom the demand is made, will suffice.⁶

1. There Must Be Some Party Liable to Be Sued. — *Nelson v. Serle*, 4 M. & W. 795.

Where the plaintiff declared that A, since deceased, was indebted to him so much, and that after his death, in consideration of the premises, and that he, at the instance of the defendant, would forbear and give day of payment of the debt, the defendant promised, etc., but without stating against whom he was to forbear, it was held on demurrer to be no consideration for the promise; for a promise can only be sustained on a consideration of benefit to the defendant or detriment to the plaintiff, and unless there were some person whom the plaintiff could have sued for his debt, his forbearance was no detriment to him. *Jones v. Ashburnham*, 4 East 455.

2. Mere Forbearance Not a Consideration — *England.* — *Crofts v. Beale*, 11 C. B. 172, 73 E. C. L. 172.

California. — *Shadburne v. Daly*, 76 Cal. 355.

Illinois. — *Hahn v. Maxwell*, 33 Ill. App. 261; *Webbe v. Romona Oolitic Stone Co.*, 58 Ill. App. 222.

Kentucky. — *Steadman v. Guthrie*, 4 Metc. (Ky.) 147.

Massachusetts. — *Mecorney v. Stanley*, 8 Cush. (Mass.) 85; *Manter v. Churchill*, 127 Mass. 31.

Oregon. — *Arlington First Nat. Bank v. Cecil*, 23 Oregon 58.

See *supra*, this title, *At Whose Instance the Consideration Must Move*.

3. An Agreement to Forbear for a Month is a sufficient consideration for a promise to pay at the expiration of that time. *Davison v. Hanslop*, T. Raym. 211.

4. Forbearance for an Indefinite Period. — It is no objection to the validity of the defendant's agreement that there was no particular time specified in it for the forbearance. *Hakes v. Hotchkiss*, 23 Vt. 231. *Contra*, *Garnett v. Kirkman*, 33 Miss. 389.

When a promise to forbear is made in general terms, no certain or definite time being named, the law implies that the forbearance shall be for a reasonable time. *Moore v. McKenney*, 83 Me. 80, 23 Am. St. Rep. 753.

A Promise to Forbear in General is to be understood as a total and absolute forbearance. *Hamaker v. Eberley*, 2 Binn. (Pa.) 506, 4 Am. Dec. 477.

"It hath been often adjudged that where it is to forbear and no time mentioned, it must be intended during his life." *Anonymous*, 1 Freem. 66.

By a forbearance in general, without adding any particular time, is to be understood a total forbearance. And he who promises to pay the debt of another, in consideration of such forbearance, is not liable to pay it if the original debtor has been sued. *Clark v. Russel*, 3 Watts (Pa.) 213, 27 Am. Dec. 348.

Actual Forbearance for Reasonable Time. — An agreement to forbear bringing suit for a debt due for an indefinite time, if followed by actual forbearance for a reasonable time, is a good consideration for a promise to pay the debt by a person other than the debtor. *Howe v. Taggart*, 133 Mass. 284; *King v. Upton*, 4 Me. 387, 16 Am. Dec. 266; *Moore v. McKenney*, 83 Me. 80, 23 Am. St. Rep. 753; *Finch v. Skilton*, 79 Hun (N. Y.) 531.

Forbearance to sue is a sufficient consideration to support a promise to guarantee the debt of another; and it is not necessary that, at the time of the promise, there should be an express stipulation by the creditor to forbear for a definite time; but if there be an understanding, generally, that the debtor shall be indulged, and there be an actual forbearance for a reasonable time, it will be sufficient. *Thomas v. Croft*, 2 Rich. L. (S. Car.) 113, 44 Am. Dec. 279.

It seems that where a creditor whose demand is due is requested by his debtor to extend the time of payment, and a third person undertakes, in consideration of forbearance being given, to become liable as surety or otherwise, and the creditor, although he enters into an enforceable agreement, does in fact forbear for a reasonable time in reliance upon the undertaking, this furnishes a good consideration for the collateral agreement. *Strong v. Sheffield*, 144 N. Y. 392.

Sidwell v. Evans, 1 P. & W. (Pa.) 383, 21 Am. Dec. 387.

6. Forbearance until Administrator's Marriage. — In *Downs v. Beck*, 1 Lev. 222, a promise "in consideration that plaintiff would forbear to sue the defendant as administrator till he, the defendant, had married such a woman, he would pay him," was held to be founded upon a sufficient consideration.

Short Time. — But an agreement to pay on terms no more definite than the claimant's agreement to "give time," or to forbear for a "short time," is insufficient.¹

(c) **Implied Agreement.** — An agreement to forbear may sometimes be inferred from the conduct of the parties² and the nature of the transaction.

Taking Note for Antecedent Debt. — Thus where a note payable at a time certain is taken for an antecedent debt, an agreement to forbear until the maturity of the note will be presumed in the absence of proof to the contrary.³

b. INSTANCES OF FORBEARANCE — (1) *In General.* — Instances in which forbearance has been held to suffice as a consideration are much too numerous and too diverse in facts to admit of any succinct classification, but the principle that runs through them all is easily stated: If a person be possessed of a right which he may legally exercise, his forbearance at the instance of the promisor to exercise it is a valuable consideration for the promise.⁴

1. **Forbearance for "Short Time."** — A promise of forbearance, in order to constitute a sufficient consideration for a promise to pay the debt, must be made to continue for a convenient or reasonable time. A mere promise to forbear for a "short time" would not be a good consideration, since the plaintiff might bring suit in an hour after the promise was made. *Lonsdale v. Brown*, 4 Wash. (U. S.) 148; *Gates v. Hackethal*, 57 Ill. 534, 11 Am. Rep. 45; *Morgan v. Park Nat. Bank*, 44 Ill. App. 582; *Downing v. Funk*, 5 Rawle (Pa.) 69.

2. **Implied Agreements to Forbear.** — Forbearance to sue a debt due and payable, upon receiving a personal promise of payment from the assignee *in pais* of the debtor, is evidence from which a jury may infer an agreement to forbear which is a good consideration for the promise. *Boyd v. Freize*, 5 Gray (Mass.) 553.

In *Breed v. Hillhouse*, 7 Conn. 523, where the payee of a promissory note after it became due accepted the guaranty of a third person for a certain period and actually forbore suit during that period, it was held that these facts afforded *prima facie* evidence of an agreement by the plaintiff to forbear suit. In this case *Hosmer, C. J.*, delivering the opinion of the court, said: "The agreement in question to forbear was clearly proved, on a principle of probable presumption which harmonizes with common sense and is conformed to experience; and both reason and experience bear concurrent testimony to the inference of a consideration in this case. The acceptance of the indorsed guaranty by the plaintiff and his consequent forbearance prove the agreement in question, and are incompatible with any other supposition." See also *Walker v. Sherman*, 11 Met. (Mass.) 170.

3. **The Taking of a Promissory Note for an Antecedent Debt** imposes upon the creditor an obligation to wait for his pay till the note matures, without any special agreement to that effect or any understanding that the debt shall be thereby extinguished, and the delay thus obtained is a sufficient consideration for the note. *Thompson v. Gray*, 63 Me. 228. See also *New Hanover Bank v. Bridgers*, 98 N. Car. 67, 2 Am. St. Rep. 317; *Fulton v. Loughlin*, 118 Ind. 286.

Where a Man who Has a Judgment Debt Takes a Promissory Note from his debtor for the amount payable at a certain time, it must be inferred that he thereby entered into an agree-

ment to suspend his remedy for that period, and if so that is a good consideration for the giving of the note. *Per Parke, B.*, in *Baker v. Walker*, 14 M. & W. 465. And see *infra*, this section, *Forbearance to Sue — Extension of Time upon Contracts*.

4. **Forbearance to Change Employment.** — A son, after attaining majority, was employed in the shops of a manufacturing company in which his father was largely interested. He was dissatisfied with his condition and talked of leaving home to better it. To induce him to remain his father promised to make his compensation greater, the increase over the wages paid him by the company to be paid by the father personally. Under this arrangement the son remained. It was held that the father's promise was based upon a valuable consideration. *Beloit Second Nat. Bank v. Merrill*, 81 Wis. 142, 29 Am. St. Rep. 877.

Omission to Make Bequest. — A promise by a legatee to the testator that he would pay a certain sum of money to another person, in consequence of which the testator omitted to bequeath the same sum to that person, is a good consideration for notes afterwards executed by the legatee to him. *Gaulaher v. Gaulaher*, 5 Watts. (Pa.) 200.

Forbearance of Depositors to Withdraw Deposits. — Where the defendant, to stop a run upon a certain bank, agrees to guarantee the depositors in consideration of their forbearance to withdraw their deposits, the failure of the bank a few days after the execution of the guaranty dispenses with the necessity of further forbearance, and the forbearance until that time forms a sufficient consideration to support the contract. *Steadman v. Guthrie*, 4 Metc. (Ky.) 147.

The plaintiff held a certificate of deposit against a national bank of which the defendant was a director, and applied for payment upon the same. The bank then had funds sufficient for the payment of the certificate, and was engaged in its regular business, but was in fact insolvent. The officers of the bank requested the plaintiff not to draw out his money upon the certificate, but to leave it in the bank. To this the plaintiff consented upon condition that the defendant would sign the certificate. Thereupon the old certificate was surrendered, the one in suit issued, signed by the defendant upon the back, and the plaintiff forebore to call for the money until the bank passed into the

(2) *Abstinence*. — Among the instances that may be specially mentioned is that of abstinence from the use of intoxicating liquors, tobacco, etc. This has been held to be a valuable consideration.¹

hands of a receiver. It was held that upon the above facts there was a good consideration for the defendant's promise. It was immaterial that no definite time of forbearance was fixed, provided the plaintiff did in fact forbear a reasonable time. *Ballard v. Burton*, 64 Vt. 387.

Forbearance to Demand Cash at Execution Sale. — A promise by the purchaser at sheriff's sale to the defendant in execution, to resell the lands for the benefit of the latter in consideration that he would not require the payment of the surplus of the purchaser's bid over the amount due on the execution until such resale could be had, is founded on a sufficient consideration. *Robinson v. Tipton*, 31 Ala. 595.

Forbearance to Demand Security. — If a creditor, by request of a third person, forbears to insist upon having collateral security for his debt given directly to himself by his debtor, and instead thereof it is agreed that the property of the debtor shall be transferred by way of security to such third person, who shall thereupon and as part of the same transaction become responsible for the debt to the creditor, and this is accordingly done, a promissory note given by such third person to the creditor in pursuance of such agreement is for a valuable consideration. *Parsons v. Clark*, 132 Mass. 569.

Forbearance to Compromise Suit. — The plaintiff, who was upon the point of making a compromise of a controversy in respect to the title to land, was deterred from doing so by the defendant, who had an interest therein, and the defendant promised, in consideration of being permitted to defend the suit in the plaintiff's name, to save him harmless from any costs or expenses. The defense proved unsuccessful, and in an action to recover from the defendant the costs charged against the plaintiff as defendant in the former suit, it was held that the permission given to the defendant to defend the suit in the plaintiff's name was a sufficient consideration for the defendant's promise. *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572.

Where a party engaged in a business transaction with another is induced to resist a demand supposed to be unjust, made by the opposite party, by a promise to indemnify him against any loss, made by a third person who conceives himself interested, under circumstances where a compliance would involve no permanent loss while the resistance entails great damage, the promise is for a good consideration and may be enforced. *White v. Baxter*, 71 N. Y. 254.

Forbearance to Repair Fence. — The defendant was the lessee of premises adjoining those of the plaintiff and had piled a quantity of scrap iron against the dividing fence. The plaintiff was anxious to repair the fence, but the doing so would necessitate the defendant's removing the scrap iron, and the defendant therefore agreed that if the plaintiff would allow the fence to remain as it then was until the expiration of his (the defendant's) lease, he would

repair it. It was held that the plaintiff's forbearance was a valuable consideration for the promise. *Vogel v. Meyer*, 23 Mo. App. 427.

Hushing up Scandal. — It is a sufficient consideration for a promissory note that it was given to hush up a scandal in which the promisor was implicated. *Wells v. Sutton*, 85 Ind. 70.

Keeping Manufacturing Process Secret. — A covenant to make secret the mode of converting cast iron into malleable iron is founded upon a valuable consideration. *Jarvis v. Peck, Hoffm. Ch. (N. Y.)* 479.

Granting Extension of Time upon Purchase at Auction Sale. — Where the defendant in error was about to have sold at public auction, for cash in hand, pursuant to an award, certain goods and chattels belonging to the plaintiff in error, and the plaintiff in error requested the defendant to allow a certain third party to bid in the goods and chattels for his note to the defendant at sixty days date in lieu of cash, and undertook and promised, if the defendant would accede to this request, to waive all errors and irregularities in the case, it was held that the extension of time granted by the defendant was a sufficient consideration for the agreement, and the plaintiff's appeal founded upon such errors and irregularities was dismissed. *Smucker v. Larimore*, 21 Ill. 267.

Forbearance to Oppose Acceptance of Committee's Report. — The owners of land over which a highway is contemplated have a right to object to the acceptance of the report of a committee laying it out, and a forbearance of this right by them is a good consideration for a promise. *Farmer v. Stewart*, 2 N. H. 97.

A Tax Collector's Forbearance. at the promisor's request, to sell land which his duty requires him to sell for a tax, until the advertised time of sale has passed, is a valid consideration for the promise to pay him the tax. *Gove v. Newton*, 58 N. H. 359.

Forbearance to Arrest Debtor. — In *Lent v. Padelford*, 10 Mass. 230, 6 Am. Dec. 119, where, in order to delay the arrest of a debtor upon civil process, the defendant promised the plaintiff to produce the debtor upon a certain day or else pay the judgment himself, it was held that the plaintiff's forbearance was a sufficient consideration to support the promise.

1. **Abstinence from Use of Liquor, Tobacco, etc.** — A promissory note made payable on condition that the payee shall, during a specified time, abstain from intoxicating liquor imports a sufficient consideration to sustain an action on proof that its terms have been complied with. *Lindell v. Rokes*, 60 Mo. 249, 21 Am. Rep. 395.

An agreement to pay the promisee five hundred dollars if he would abandon the use of tobacco during the promisor's life is founded upon a valuable consideration, and may be enforced against his estate. *Talbott v. Stemmons*, 89 Ky. 222.

S., defendant's testator, agreed with W., his nephew, the plaintiff's assignor, that if W. would refrain from drinking liquor, using

(3) *Withholding Competition*. — So, when not opposed to public policy, is the withholding of competition in any business or in any single transaction.¹

(4) *Extension of Time upon Contracts*. — An extension of time upon a debt is a valuable consideration for a note² or mortgage³ given to secure it. It is likewise a valuable consideration for notes given for the interest accruing dur-

tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age, S. would pay him five thousand dollars. W. performed his part of the agreement; he became of age in 1875. Soon thereafter he wrote to S., advising him of such performance, stating that the sum specified was due, and asking payment. S. replied, admitting the agreement and the performance, and stating that he had the money in bank set apart, which he proposed to hold for W. until the latter was capable of taking care of it. It was thereupon agreed between the parties that the money should remain in the hands of S. on interest. In an action upon the agreement it was held that it was founded upon a good consideration and was valid and enforceable. *Hamer v. Sidway*, 124 N. Y. 538, 21 Am. St. Rep. 693.

1. Withholding Competition — Running Stage.

— One, in consideration of a dollar paid him, agreed by his deed not to run a stage on a certain road, under penalty of two hundred and ninety dollars. The agreement was held to be founded upon a valid and sufficient consideration. *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102. See also *Henshaw v. Dyde*, 1 L. C. J. 124, 7 L. C. R. 124.

Withholding Competition — Purchase of Land.

— An agreement to withhold his competition in the purchase of land by one who is in possession without title is a good consideration for a promise to convey to him a part of the land by one who purchased from the real owner. *M'Culloch v. Cowher*, 5 W. & S. (Pa.) 427.

The plaintiff mortgaged a certain piece of property to the defendant, and afterwards sold the property, the purchaser assuming the note and mortgage. He, however, failed to meet the note, and an order of foreclosure was granted. The defendant promised the plaintiff to bid in the property at a sum sufficient to cover the amount of the mortgage and costs, and, moved by this promise, the plaintiff did not attend the sale or get other purchasers to do so. The defendant, notwithstanding his promise, purchased the property at the sale for a sum much less than the amount of the mortgage and took a personal judgment against the plaintiff for the balance. In an action brought to obtain a perpetual injunction against the enforcement of this judgment it was held that if the plaintiff refrained from bidding at the sale, or influenced others to do so, by his reliance upon the defendant's promise, there was a valuable consideration for the promise. *Heim v. Butin*, (Cal. 1895) 40 Pac. Rep. 39.

2. *Promissory Note — Extension of Time upon Debt as a Consideration For* — *England*. — *Balfour v. Sea Fire L. Assur. Co.*, 3 C. B. N. S. 300, 91 E. C. L. 300; *Baker v. Walker*, 14 M. & W. 465; *Wilby v. Elgee*, L. R. 10 C. P. 497; *Wilders v. Stevens*, 15 M. & W. 208.

United States. — *Lipsmeier v. Vehslage*, 29 Fed. Rep. 175.

California. — *Hobson v. Hassett*, 76 Cal. 203, 9 Am. St. Rep. 193; *Guy v. Bibend*, 41 Cal. 322.

Delaware. — *Bush v. Peckard*, 3 Harr. (Del.) 385.

Illinois. — *Hancock v. Hodgson*, 4 Ill. 329; *Martin v. Stubbings*, 126 Ill. 387, 9 Am. St. Rep. 620; *Blackwood v. Bowen*, 43 Ill. App. 320.

Indiana. — *Fulton v. Loughlin*, 118 Ind. 286.

Iowa. — *Atherton v. Marcy*, 59 Iowa 651.

Kentucky. — *Pulliam v. Withers*, 8 Dana (Ky.) 98, 33 Am. Dec. 479.

Maine. — *Thompson v. Gray*, 63 Me. 228.

Massachusetts. — *Rice v. Howland*, 147 Mass. 407; *Wooley v. Cobb*, 165 Mass. 503.

Michigan. — *Rickey v. Morrison*, 69 Mich. 139.

Minnesota. — *Egan v. Fuller*, 35 Minn. 515; *Lundberg v. Northwestern Elevator Co.*, 42 Minn. 37.

Missouri. — *Janis v. Roentgen*, 59 Mo. App. 75.

North Carolina. — *New Hanover Bank v. Bridgers*, 98 N. Car. 67, 2 Am. St. Rep. 317.

Ohio. — *Holzworth v. Koch*, 26 Ohio St. 33. *Pennsylvania*. — *Van Gorder v. Freehold Bank*, (Pa. 1886) 7 Atl. Rep. 144; *Trauck v. Hill*, (Pa. 1888) 13 Atl. Rep. 937.

Vermont. — *Bromley v. Hawley*, 60 Vt. 46.

The Surrender of an Old Note of the Husband is a sufficient consideration for a renewal note signed by the wife as surety for her husband. *Queens County Bank v. Leavitt*, (Supreme Ct.) 10 N. Y. Supp. 194.

3. *Mortgage — Extension of Time upon Debt as a Consideration For*. — *Hill v. Yarrowborough*, 62 Ark. 320; *Sinker v. Green*, 113 Ind. 264; *Martin v. Nixon*, 92 Mo. 26; *Fuller v. Brownell*, 48 Neb. 145; *Price v. Gray*, (N. J. 1896) 34 Atl. Rep. 678; *Van Campen v. Ford*, (Supreme Ct.) 6 N. Y. Supp. 139; *Muskingum Bank v. Carpenter*, *Wright (Ohio)* 730; *Farmers', etc., Nat. Bank v. Wallace*, 45 Ohio St. 152.

A mortgage given to secure the extension of a debt due by a third person is supported by a valuable consideration, and the mortgagee's interest therein is superior to the undisclosed equitable interest of the wife of the mortgagor, though the property mortgaged was purchased with funds out of the separate estate of the wife. *Halbert v. Paddleford*, (Tex. Civ. App. 1896) 33 S. W. Rep. 592.

An extension of time for the payment of the interest due on an antecedent debt, although for one day only, is sufficient consideration to support a mortgage executed to secure the debt. *Sullivan Sav. Inst. v. Young*, 55 Iowa 132.

Mortgage of Surety. — An extension of time upon the debt of the principal is a sufficient consideration for a mortgage given by a surety. *Pennsylvania Coal Co. v. Blake*, 85 N. Y. 226.

ing the period of extension,¹ or a promise to pay back interest upon the debt,² or to pay a higher rate than it is then subject to.³

(5) *Forbearance of Legal Remedies* — (a) *In General*. — If a person has a right at law, his forbearance to institute legal proceedings to enforce or protect it is a valuable consideration.

Illustrations. — For instance, forbearance to go into bankruptcy;⁴ to take an appeal;⁵ to foreclose a mortgage upon real or personal property;⁶ to

1. *Hubbard v. Fletcher*, 61 Minn. 148.

2. *Promise to Pay Back Interest*. — The extension of the time of payment of a debt admitted to be due is a sufficient consideration to support a promise to pay back interest on such debt. *Murdock v. Lewis*, 26 Mo. App. 234.

3. *Promise to Pay Higher Rate*. — When, after the maturing of a note running one year and bearing interest at the rate of twelve per cent. per annum until paid, the payee agreed to extend the note for another year, upon the promise of the payor to pay interest at the rate of fifteen per cent. per annum, payable monthly, it was held that such promise was sufficient consideration to sustain the agreement. *Royal v. Lindsay*, 15 Kan. 591. See also *Knapp v. Mills*, 20 Tex. 123; *Foard v. Grinter*, (Ky. 1892) 18 S. W. Rep. 1034.

Promise to Pay Compound Interest. — The maker of a note bearing simple interest, being sued upon the note, agreed by a separate instrument in writing, in consideration of the dismissal of the suit, that interest thereafter to accrue upon the note if not paid when due should bear interest. It was held that the agreement was founded upon a sufficient consideration and was valid. *Jasper County v. Tavis*, 76 Mo. 13.

Debt Due by Joint Debtors. — The creditor's agreement for a delay in the payment of a debt due by the defendant and a third person is a sufficient consideration for the defendant's promise to apply to the extinguishment of the debt a note running from the creditor to himself individually. *Hawes v. Woolcock*, 26 Wis. 629.

4. *Forbearance to Go into Bankruptcy*. — An agreement by a debtor not to go into bankruptcy and thereby be discharged from a certain debt, or at least imperil its collection, furnishes a sufficient consideration to support a contract by the creditor to take less for the debt than the full amount thereof. *Dawson v. Beall*, 68 Ga. 328.

Withdrawing Opposition to Bankruptcy Proceedings and consenting to amendments and an adjudication of bankruptcy involve the surrender of valuable rights, and are therefore sufficient as a consideration to support a valid agreement. *Sanford v. Huxford*, 32 Mich. 313, 20 Am. Rep. 647.

Withdrawing Petition to Wind Up a Company. — The plaintiff having presented a petition for winding up a company, the defendants signed the following guaranty: "In consideration of your withdrawing the petition you have presented for winding up the company called J. K. & Co., Limited, we agree to pay all the costs you have incurred of and in relation to such petition, and to indemnify you against all costs (if any) you may be liable to pay to the company, or to any other parties appearing upon or in reference to the petition. We further

agree to guarantee the payment to you, within eighteen months from this date, by the company or the liquidator thereof, of the principal of your debt of £722." In an action on the second part of the guaranty it was held that the consideration applied to both promises; that the consideration was the withdrawing of the then pending petition, and not the forbearing for eighteen months to proceed with any petition to wind up the company; and that such a consideration was sufficient to support the promise. *Harris v. Venables*, L. R. 7 Exch. 235.

Forbearance to Close Insolvent Bank. — The forbearance of the banking department of a state to close an insolvent bank is a valuable consideration for a promise made by its stockholders to make good its capital stock. *Sickles v. Herold*, 11 Misc. Rep. (N. Y. C. Pl.) 583.

5. *Forbearance to Take Appeal*. — A party against whom a judgment was rendered by the territorial Probate Court in 1874 had a right to appeal to the District Court, and an executed agreement not to exercise it furnished a sufficient consideration to make a compromise of the demand valid as against the judgment, and to constitute a defense to a proceeding to revive the same. *Russell v. Daniels*, 5 Colo. App. 224.

A promise to allow a defendant a credit upon a decree against him by which he was induced to waive his right of appeal rests upon a good and valid consideration. *Matthews v. Merrick*, 4 Md. Ch. 364.

A stipulation to postpone an execution issued on a judgment fraudulently entered, on condition that no motion shall be made to set aside the judgment, is founded on a good consideration. *Read v. French*, 28 N. Y. 285.

6. *Forbearance to Foreclose Mortgage*. — The defendants were in possession of certain chattels upon which the plaintiff held a mortgage which he was about to foreclose, and, in order to induce him to refrain from taking immediate possession thereof, agreed in writing to keep the same in their possession, subject to his demand, or to pay him the sum of three hundred and twenty-five dollars. It was held a valid agreement, and in default of the delivery of the goods upon demand the defendants were liable to pay the stipulated sum. *Streeter v. Smith*, 31 Minn. 52.

Promise of Second Mortgagee. — The forbearance of a first mortgagee to foreclose his mortgage is a sufficient consideration for the promise of a second mortgagee to pay a certain sum upon the first mortgage within a given time. *Colgin v. Henley*, 6 Leigh (Va.) 85.

The promise of a second mortgagee to keep paid the interest on a first mortgage is supported by the promise of a third mortgagee to forbear foreclosing. *Burke v. Dillin*, 92 Iowa 557.

file ¹ or enforce ² a lien; the abandonment of an attachment; ³ the discontinuance of an ejectment; ⁴ and the granting of a stay of execution, ⁵ are all valuable considerations.

(b) **Forbearance to Sue.** — Forbearance to sue upon any legal demand is a valuable consideration for a promise either by the party liable ⁶ or by a third party. ⁷

An Agreement to Postpone the Sale of Mortgaged Premises for four months after an order or decree of sale is a good consideration for a promissory note from a party claiming the premises and his sureties. *Hancock v. Hodgson*, 4 Ill. 329.

1. Forbearance to File Lien. — *Cornell v. Central Electric Co.*, 61 Ill. App. 325; *Lavell v. Frost*, 16 Mont. 93; *Alley v. Turck*, 8 N. Y. App. Div. 50.

The prevention of filing liens for services rendered in grading a railway was a sufficient consideration between employees of the sub-contractor in grading the railway roadbed and the contractor, who had agreed to save the railway company harmless from such liens. *Carlisle v. Dauchy*, 26 Neb. 337.

2. Forbearance to Enforce Lien. — Where one who has a right to retake a schooner upon which he has a lien for repairs, and which has been tortiously taken from a dock in which he had placed her, forbears to do so on the promise of one interested in the vessel to pay, the forbearance is a good consideration for the promise. *Nicholson v. May*, *Wright* (Ohio) 660.

3. Abandonment of Attachment. — The release of a lien obtained by the suing out of an attachment is a good consideration for the promise of a third person to pay the debt of the party proceeded against by such process. *Smith v. Weed*, 20 Wend. (N. Y.) 184, 32 Am. Dec. 525.

Abandonment at the request of the promisor of an attachment sued out and about to be levied upon property is a sufficient consideration to sustain a promise made by an assignee, for the benefit of creditors of the property, to pay the debt of the attaching creditor. *Brewster v. Leith*, 1 Minn. 56.

4. Discontinuance of Ejectment. — A promise by a stranger to pay a debt, in consideration of a discontinuance of an ejectment and writ of estrepement by a vendor of mines to enforce payment of the purchase money, is founded on a sufficient consideration; and if the proceedings are suspended in fact for a time and discontinued before action brought on the promise, the action will lie. *McKelvy v. Wilson*, 9 Pa. St. 183.

Forbearing to eject a tenant at will whose rent was in arrear from a tenement is a good consideration for a guaranty by a third person of both the past and the future rent. *Vinal v. Richardson*, 13 Allen (Mass.) 521.

5. Stay of Execution — Promise by Third Person. — *Everly v. State*, 10 Ind. App. 15; *Russell v. Babcock*, 14 Me. 138; *Giles v. Ackles*, 9 Pa. St. 147, 49 Am. Dec. 551.

Forbearance by the plaintiff, at the defendant's request, to enforce a *fi. fa.* against the goods of a third person for £60 is a valid consideration for the defendant's promise to pay the plaintiff £107 in seven days. *Smith v. Algar*, 1 B. & Ad. 603, 20 E. C. L. 452.

A Promise Made by an Administrator to a constable, to pay the amount of an execution in his

hands if he would release his levy upon goods of the estate, is a promise on a good consideration and the administrator will be held personally liable. *West v. Hosea*, 5 Harr. (Del.) 232.

Giving Time for the Payment of a Judgment is a sufficient consideration for a note given by the defendant to the plaintiff's attorney for his fees in the suit. *Brainard v. Harris*, 14 Ohio 107, 45 Am. Dec. 525.

6. Forbearance to Sue — Promise to Confess Judgment. — The appellee was surety on a note given to the appellant, and agreed with the appellant that if he would not sue on the note, the appellee would, during the term of court then in session, confess judgment to save him expense and costs. The appellant delayed his suit for more than twenty days upon the agreement, and finally the appellee refused to confess judgment. It was held that the appellant's forbearance was a valuable consideration for the appellee's promise. *Newton v. Carson*, 80 Ky. 309.

Promise Not to Plead Statute of Limitation. — *Bridges v. Stephens*, 132 Mo. 524.

Hypothecation of Goods. — Where a creditor demands and a debtor promises security for an existing debt, the forbearance to sue implied on the part of the creditor is a sufficient consideration for the hypothecation of goods. *Alliance Bank v. Brown*, 10 Jur. N. S. 1121.

Promise to Pay Assignee of Bond. — Forbearance for a given time on the part of the assignee of a bond to sue the obligors is a good consideration for a promise by the obligors to pay the assignee at the expiration of that time. *Morton v. Burn*, 7 Ad. & El. 19, 34 E. C. L. 18.

Promise to Pay Equitable Owner of Note. — A promise that if the holder of a note having the equitable right to the money will forbear its collection for a given time the defendant will pay him is founded upon a sufficient consideration. *Ford v. Rehman*, *Wright* (Ohio) 434; *Aylwin v. Cruttenden*, 2 Rev. de Leg. 125 K. B. 1820.

An Agreement by a Surety to Forbear a Suit Against His Principal after he shall have paid the debt of the principal is a good consideration to support a promise, although at the time of the agreement the surety had no cause of action against the principal. *Hamaker v. Eberley*, 2 Binn. (Pa.) 506, 4 Am. Dec. 477.

Where a Guarantor of a Promissory Note, after the same was due, went to the payee and offered to pay him the full amount due on the note and have the note delivered to him for collection, but the payee refused to accept the amount and deliver the note, and promised to release the guarantor upon his forbearance to sue, the surrender of the right to sue by the guarantor was sufficient consideration to sustain the contract of release. *Ditmar v. West*, 7 Ind. App. 637.

7. Forbearance to Sue — Contract by Third Party — England. — *Barber v. Fox*, 2 Saund. 134; *Balfour v. Sea Fire L. Assur. Co.*, 3 C. B. N. S.

Promise by Executor or Administrator. — A promise by an executor or administrator of an estate to pay a demand if the claimant will forbear a certain time

300, 91 E. C. L. 300; *Oldershaw v. King*, 2 H. & N. 517; *Payne v. Wilson*, 7 B. & C. 423, 14 E. C. L. 69; *Emmott v. Kearns*, 5 Bing. N. Cas. 559, 35 E. C. L. 227; *Willatts v. Kennedy*, 8 Bing. 5, 21 E. C. L. 200.

Alabama. — *Martin v. Black*, 20 Ala. 309.

Connecticut. — *Sage v. Wilcox*, 6 Conn. 81; *Mascolo v. Montesanto*, 61 Conn. 50, 29 Am. St. Rep. 170.

Georgia. — *Hargroves v. Cooke*, 15 Ga. 321.

Illinois. — *Smith v. Finch*, 3 Ill. 321; *Morgan v. Park Nat. Bank*, 44 Ill. App. 582; *Fearhstone v. Hendrick*, 59 Ill. App. 497.

Indiana. — *State v. Riggs*, 92 Ind. 336.

Iowa. — *Atherton v. Marcy*, 59 Iowa 650.

Kentucky. — *Allen v. Pryor*, 3 A. K. Marsh. (Ky.) 305; *Lemaster v. Burckhart*, 2 Bibb (Ky.) 25.

Louisiana. — *Foster v. Wise*, 27 La. Ann. 538.

Maine. — *King v. Upton*, 4 Me. 387, 16 Am. Dec. 266; *Castner v. Slater*, 50 Me. 212; *Thompson v. Gray*, 63 Me. 228.

Maryland. — *Cook v. Duvall*, 9 Gill (Md.) 460; *Bowen v. Tipton*, 64 Md. 275.

Massachusetts. — *Jennison v. Stafford*, 1 Cush. (Mass.) 168, 48 Am. Dec. 594; *Robinson v. Gould*, 11 Cush. (Mass.) 55; *Howe v. Taggart*, 133 Mass. 284.

Michigan. — *Rood v. Jones*, 1 Dougl. (Mich.) 188; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 593; *Aultman, etc., Co. v. Gorham*, 87 Mich. 233; *Union Banking Co. v. Martin*, (Mich. 1897) 71 N. W. Rep. 867.

Minnesota. — *Nichols, etc., Co. v. Dedrick*, 61 Minn. 513; *Peterson v. Russell*, 62 Minn. 220; *Germania Bank v. Michaud*, 62 Minn. 459.

Nebraska. — *Mathews v. Seaver*, 34 Neb. 592.

New York. — *Stewart v. McGuin*, 1 Cow. (N. Y.) 99; *Richardson v. Brown*, 1 Cow. (N. Y.) 255; *Elting v. Vanderlyn*, 4 Johns. (N. Y.) 237; *Watson v. Randall*, 20 Wend. (N. Y.) 201; *Mechanics', etc., Bank v. Wixon*, 46 Barb. (N. Y.) 218; *Honsinger v. Mulford*, 90 Hun (N. Y.) 589; *Forrester v. Parker*, 14 Daly (N. Y.) 208; *Pennsylvania Coal Co. v. Blake*, 85 N. Y. 226; *Traders' Nat. Bank v. Parker*, 130 N. Y. 415; *Finch v. Skilton*, 79 Hun (N. Y.) 531.

Ohio. — *Brownell v. Harsh*, 29 Ohio St. 631.

Pennsylvania. — *Silvis v. Ely*, 3 W. & S. (Pa.) 420; *Kean v. McKinsey*, 2 Pa. St. 30; *Giles v. Ackles*, 9 Pa. St. 147, 49 Am. Dec. 551; *Kuns v. Young*, 34 Pa. St. 60; *Bailey v. Marshall*, 174 Pa. St. 602.

South Carolina. — *Thomas v. Croft*, 2 Rich. L. (S. Car.) 113, 44 Am. Dec. 279; *McCelvy v. Noble*, 13 Rich. L. (S. Car.) 330.

Tennessee. — *Allen v. Morgan*, 5 Humph. (Tenn.) 624.

Texas. — *Halbert v. Paddleford*, (Tex. Civ. App. 1896) 33 S. W. Rep. 592.

Vermont. — *Smith v. Rogers*, 35 Vt. 140.

Washington. — *Bell v. Waudby*, 4 Wash. 743.

West Virginia. — *Williamson v. Cline*, 40 W. Va. 194.

Hawaii. — *Macfarlane v. Sumner*, 1 Hawaiian 205.

The defendant's uncles being indebted to

the plaintiff for a considerable sum and being pressed for payment, the defendant wrote to the plaintiff, engaging, in consideration of his forbearing to press them for immediate payment, to guarantee the payment of any sum in which they might be indebted to the plaintiff upon balance of accounts with him, at any time during the next six years, to the extent of £1,000, whenever called upon to pay the same, after twelve months' previous notice. It was held that the forbearance in accordance with this letter was a sufficient consideration for the promise. *Oldershaw v. King*, 2 H. & N. 517.

The forbearance of A to collect a debt of B by giving further time is a sufficient consideration for a contract by C to guarantee the payment of a debt due from D to B, where it is done by the mutual agreement of all parties. *Underwood v. Hossack*, 38 Ill. 208.

Promise of One Debtor to Another. — Where one stands in relation to an insolvent debtor as surety or creditor, and has in his hands certain property of the debtor which he desires to retain or have applied on his claim or obligation, a promise made by him to another creditor, that if the latter will not institute legal proceedings against the common debtor he will pay the debt, if accepted will constitute a valid contract and a recovery may be had thereon. *Mathews v. Seaver*, 34 Neb. 592. See also *Smith v. Rogers*, 35 Vt. 140.

Promise by Husband to Pay Wife's Debt. — A debt due by the wife before marriage was presented during coverture to the husband, who promised to pay it "if the plaintiff would wait a few days." It was held that the plaintiff could recover against the husband on this promise, though the wife died before he brought his action. *Cook v. Duvall*, 9 Gill. (Md.) 460.

Promise by President to Pay Debt of Corporation. — The plaintiffs, who were about to commence an action upon a claim which they held against a company of which the defendant was the president and principal stockholder, were deterred from doing so by his agreement that if the plaintiffs would forbear to press the claim for a certain time, he would become personally liable for its payment. It was held that the forbearance was a sufficient consideration for the defendant's promise. *Honsinger v. Mulford*, 90 Hun (N. Y.) 589.

Promise to Pay Debt of Infant. — A promise, in consideration of forbearance, to pay the debt of an infant who ratifies the contract after arriving at full age is valid and binding on the promisor. The privilege of an infant is a personal privilege of which he alone can take advantage, and does not inure to the benefit of the promisor. *Kuns v. Young*, 34 Pa. St. Co.

An Adjournment of a Suit in a Justice's Court is a sufficient consideration for an agreement by a third party to pay the judgment which may be recovered against the defendant if he does not appear. *Stewart v. McGuin*, 1 Cow. (N. Y.) 99; *Richardson v. Brown*, 1 Cow. (N. Y.) 255.

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binds the executor or administrator personally for its payment.¹

(6) *Forbearance to Enforce Equity*. — Although courts of law take no notice of bare equities, yet the forbearance to enforce one is a sufficient consideration to support an action of assumpsit.²

VIII. INSUFFICIENT CONSIDERATIONS — 1. **Doing What One Is Legally Bound to Do** — *a*. **IN GENERAL**. — Briefly examining a few of the things, the doing of which the law deems insufficient to support a contract, it may be stated as an elementary principle that neither is the promise to do nor the actual doing of that which the promisee is bound by law to do, a sufficient consideration to support a contract in his favor.³

1. Promise of Executor or Administrator. — *Goring v. Goring*, Yelv. 10; *Fish v. Richardson*, Yelv. 55; *Thompson v. Maugh*, 3 Greene (Iowa) 342. See also *Porter v. Bille*, 1 Freem. 125.

In *Davis v. Reyner*, 1 Lev. 3, the defendant being executor and the plaintiff intending to sue him for a legacy, the defendant, in consideration of forbearance, promised to pay. The promise was held enforceable.

"If a creditor, at the request of an executor, forbears to sue him, that is considered a sufficient consideration to charge him *de bonis propriis*, whether he has assets or not at the time of the promise; and therefore it is not necessary to aver in the declaration that he had assets. As if A, to whom the testator was indebted, comes to the executor and says that he intends to sue him for the debt, whereupon the executor promises, in consideration that the plaintiff will forbear him for a reasonable time, to pay him, and A accordingly forbears to sue him for a reasonable time, that is a good consideration to charge the defendant, in an action upon the case, out of his own estate, without assets; for by this promise it is intended as well to forbear to sue the executor as to forbear the debt; and a forbearance of a suit is a good consideration, without assets at the time of the promise." 3 Williams on Executors, p. 294.

A person employed by the administrator of a deceased debtor to wind up the concerns of the deceased's business gave an undertaking to a creditor of the deceased to furnish money to meet an acceptance which such creditor had given in furtherance of an accommodation arrangement for delaying payment in the hope that funds might be forthcoming. It was held that he was liable on such undertaking, though he was merely a clerk and had no interest in the goods sold by the creditor and had not received any funds which he could apply to the discharge of the debt. The arrangement, having had the effect of preventing, the administrator from being sued, was a sufficient detriment to the creditor to constitute a consideration. *Maud v. Waterhouse*, 2 C. & P. 579, 12 E. C. L. 273.

Promise of Heir. — An heir is chargeable upon his promise to pay the bond debt of his ancestor upon which the heir is liable, if the promise be made in consideration of the plaintiff's agreement to forbear to sue. *Porter v. Bille*, 1 Freem. 125.

The defendant, being the heir, promised to pay a debt of his father if the plaintiff would forbear such a time. The promise was held enforceable. *Barber v. Fox*, 1 Vent. 159.

Forbearance to press a claim against an estate is a sufficient consideration for the promise of the sole heir to pay it. *Templeton v. Bascom*, 33 Vt. 132.

Promise of Trustee. — An agreement giving six months' time to pay a matured obligation of a trust estate is a sufficient consideration to support a note made by the trustee in his own name for the amount due. *Webster v. Switzer*, 15 Mo. App. 346.

2. Noblet v. Green, 2 Dev. L. (N. Car.) 517, 21 Am. Dec. 347.

3. Doing What One Is Legally Bound to Do. — *Ayres v. Chicago*, etc., R. Co., 52 Iowa 478; *Wendover v. Baker*, 121 Mo. 273; *Esterly Harvesting Mach. Co. v. Pringle*, 41 Neb. 265; *Conover v. Stillwell*, 34 N. J. L. 54; *M'Donald v. Neilson*, 2 Cow. (N. Y.) 139; *Crosby v. Wood*, 6 N. Y. 369; *Robinson v. Jewett*, 116 N. Y. 40; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370.

Performance of Moral Duty. — But the performance of a mere moral duty may be a valid consideration. It is only promises founded on duties imposed by law which are regarded by the law as gratuitous. *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370.

Agreement of Street Railway Company to Support its Tracks. — A contract between a city contractor for the construction of a sewer along a street, and a railroad company having a right of way over such street, that the contractor would pay the company for supporting its tracks while he built the sewer, is not supported by a consideration. The railroad company's right of way is subject to the paramount right of the city to improve the street and to construct and maintain sewers therein, and the railroad company's agreement to support its tracks was but the doing of that which it was already bound in law to do. *Kansas City, etc., R. Co. v. Morley*, 45 Mo. App. 304.

Repairing Bridge Which Promisee Is Bound in Law to Maintain. — In an action by a city against a railroad corporation to compel it to repair a bridge and approaches over a street across the company's tracks, the defendant set up a contract made with the city, by the provisions of which the city was to build and keep in repair the approaches in consideration that the defendant would build and keep in repair the bridge. It was held that under the provisions of sections 1262 and 1263 of the code, it was the duty of the railroad company to keep in repair both bridge and approaches. Thus the only consideration for the contract upon which the defendant relied was the agreement to do that which it was already bound in

b. PERFORMANCE OF DUTIES IMPOSED BY LAW — Domestic Services. — Thus services performed by the wife and minor children of the promisor do not constitute a valid consideration for a promise made to them. The husband and father is, by law, entitled to the services of the members of his household, and the rendition of such services cannot avail as a consideration.¹

law to do, and, therefore, insufficient. *Newton v. Chicago, etc., R. Co.*, 66 Iowa 422.

Surgical Aid to Injured Employees. — Where a railroad company negligently inflicts a personal injury on one of its employees and thereupon has him treated for the injury by the company's surgeon, a payment made by the company to the surgeon, even at the employee's request, is no consideration for a release by the employee to the company for all damages occasioned by the injury, the company being liable for the expenses of treatment which the injury occasioned. *Richmond, etc., R. Co. v. Walker*, 92 Ga. 485.

Resignation of Incompetent Trustee. — A trustee under a will, who was also executor of the same, was empowered to manage and sell trust property, and in the course of the business wrongfully converted trust funds to his own use. He also became inattentive to his duties and acquired personal habits which rendered him wholly unfit to retain the trust, and his beneficiaries therefore requested him to resign, which he refused to do. To induce him to do so, the beneficiaries promised to allow him for his services a sum in excess of the usual allowance proper for a faithful trustee. It was held that the promise was void, since it was the duty of the trustee under the circumstances to resign when requested to do so. *Withers v. Ewing*, 40 Ohio St. 400.

Refraining from Further Complaint as to Testamentary Distribution of Property. — In an action by an executor upon a note given to the testator by the defendant, his son, for money loaned, the defendant pleaded that he had been discharged from liability on the note, and as a consideration for the discharge pleaded the facts that he had complained to his father of the distribution which he had made of his property, and that the testator had thereupon agreed that if the defendant should cease forever to make any such complaint, he would discharge him from liability on the note. It was held that the testator had a legal right to make whatever distribution of his property he chose, and that the consideration was therefore not sufficient to support the release. *White v. Bluett*, 24 Eng. L. & Eq. 434.

Refraining from Shipping Diseased Hogs. — Where certain hogs belonging to the appellee were being treated by a doctor, for hog cholera, and the appellee told the appellant, who accompanied the doctor, that he was afraid the hogs in question were going to die and he thought he had better ship them, and the appellant said, "You leave the hogs there for the five days, and I will give you \$25 for every one that dies;" it was held that if these hogs or any of them were so diseased and the appellee had reasonable ground to suspect it, he was forbidden both by good morals and by the statute to ship them, and in such case his refraining from so doing would not be a sufficient consideration to support appellant's promise. *Voorhees v. Reed*, 17 Ill. App. 21.

Performance of Extra Services. — The plaintiff was a volunteer fire company attached to and part of the fire department of the city of Galveston. A fire broke out in the cotton warehouse of the defendant company, and after it had been subdued and the firemen released from duty by the chief of the department, the superintendent of the defendant company employed the plaintiff to stay by the cotton with its engine in case the fire should break out therein while the cotton was being taken out, and promised to pay for the service. Moved by this promise, the plaintiff remained upon the scene of the fire for thirty-two hours after the men had been discharged by the chief of the department. In an action for the value of the services rendered, the defendant contended that the plaintiff only did what it was legally bound to do and was not entitled to compensation; but it was held that the plaintiff was not bound to render further service after it had been discharged by the chief of the department, and was entitled to recover for the extra labor. *Texas Cotton-Press, etc., Co. v. Mechanics' F. Co.*, 54 Tex. 319, 38 Am. Rep. 627.

1. Performance of Domestic Duties. — A wife cannot make a contract with her husband valid as against his creditors for compensation for domestic services rendered by her either to himself or other inmate of his household. *Coleman v. Burr*, 93 N. Y. 17, 45 Am. Rep. 160.

A contract between the guardian of an insane husband and the wife, that the latter shall care for the husband and receive a certain sum for her services, is without consideration and void, since she owes the service independently of any contract. *Grant v. Green*, 41 Iowa 88.

A mere promise by a father to reward a daughter for her faithful discharge of her filial duties, in the absence of any contract or legal obligation on which an implied promise to pay her can be based, is not such an agreement as will support a mortgage subsequently executed to her, against the father's creditors. *Gardner v. Schooley*, 25 N. J. Eq. 150.

Ordinarily, where services are rendered and voluntarily accepted, the law will imply a promise on the part of the recipient to pay for them; but where the services are rendered by members of a family, living as one household, to each other, there will be no such implication from the mere rendition and acceptance of the services. In order to recover for the services, the plaintiff must affirmatively show either that an express contract for the remuneration existed, or that the circumstances under which the services were rendered were such as exhibit a reasonable and proper expectation that there would be compensation. The reason of this exception to the ordinary rule is that the household family relationship is presumed to abound in reciprocal acts of kindness and good will, which tend to the mutual comfort and convenience of the family, and are gratuitously performed; and,

Services of Emancipated Minor Child. — A father may, however, emancipate his minor children and thereafter make contracts with them to compensate them for their services, and services rendered under such a contract will be a valid consideration for a promissory note¹ or real conveyance.²

Official Duties. — The acceptance of a public office naturally imposes the obligation to perform its duties with reasonable promptness, and the performance of these duties is not, therefore, a valuable consideration.³

c. PERFORMANCE OF CONTRACT — (1) *In General.* — Again, the doing of an act which the promisee has already by contract bound himself to perform, is not a valid consideration for a promise either to pay additional compensation, or to give security, or to do any other thing which the other party to the contract may be coerced into making to secure its performance.⁴

where that relationship appears, the ordinary implication of a promise to pay for services does not arise, because the presumption which supports such implication is nullified by the presumption that, between members of a household, services are gratuitously performed. Thus, where a deed is executed by a grandfather to a granddaughter who is a member of his household, the fact that she had rendered services to the grantor both before and after becoming of age, does not raise a presumption of a valid consideration for the deed as against the creditors of the grantor. *Dodson v. Severs*, 54 N. J. Eq. 305.

Performance of Ante-nuptial Contract. — An intended wife of mature years, of sound mind and free from restraint, executed an ante-nuptial contract, whereby in consideration of the provision made for her therein, on a full disclosure at the time of all the facts as to the estate and with a full knowledge of the contents of the instrument, she released all her future interests in her intended husband's estate. After the marriage, she became dissatisfied with the settlement, estranged herself from her husband and threatened legal proceedings to annul the contract. To compromise the matter and to restore the conjugal relations, the husband promised to preserve unrevoked a codicil in his will giving her one-third of all his estate. This promise he afterwards violated, and in an action against his estate it was held that there was not a sufficient consideration for its enforcement. *Kesler's Estate*, 143 Pa. St. 386.

Services of Wife in Conducting Business. — In the absence of statute permitting her to become a free trader, the right of the husband to the services of his wife and the avails of her skill and industry is absolute. The wife can acquire no separate property in her earnings though she carry on business in her own name, and a settlement by the husband upon the wife in consideration of meritorious services is a pure gift and cannot be sustained against the attack of his creditors. *Belford v. Crane*, 16 N. J. Eq. 268, 84 Am. Dec. 155.

Labor of Husband upon Wife's Separate Estate. — If the husband merely expends his personal labor in the improvement of his wife's estate, the estate is not thereby made a debtor to the husband, nor can the creditors of the latter charge it with the value of the labor. *Hoot v. Sorrell*, 11 Ala. 386.

1. Services of Emancipated Son. — *Phelps v. Hopkinson*, 61 Ill. App. 400.

A son being about to leave his father's house to learn a trade, the father verbally agreed if he would remain at home and work on the farm until he was twenty-one years of age, he would give him one thousand dollars. The son remained, and when he reached his majority another verbal agreement was made, whereby he was to continue at home and work on the farm for the wages usually paid in the neighborhood. He remained for seven years, and when leaving, the father promised to give him five hundred dollars for his services during these years. Three years thereafter, the father finding that he was insolvent, confessed a judgment to the son for one thousand five hundred dollars, upon which execution issued, and the father's personal property was sold. Subsequent execution creditors claimed the fund, on the ground that the son's judgment was fraud upon them and void. It was held that the consideration for such a preference was valid and the debt justly due, and the judgment given therefor was valid and not a fraud upon creditors. *Brown's Appeal*, 86 Pa. St. 524.

2. Kain v. Larkin, 131 N. Y. 300.

3. Performance of Official Duty. — A promise of a reward to a constable for arresting a criminal under a warrant which he is bound by law to execute, is without consideration. *Smith v. Whildin*, 10 Pa. St. 39, 49 Am. Dec. 572.

Where one, compelled to employ a public officer, to avoid delay in his business, promises to pay an extra charge demanded for certain services, but accompanies the promise with a declaration that he does not acknowledge the legality of the charge and will immediately sue to recover back the amount, the promise is not binding, and changes in no respect the rights of the parties. *Kernion v. Hills*, 1 La. Ann. 419.

4. Performance of Contract — *California.* — *Ellison v. Jackson Water Co.*, 12 Cal. 542.

District of Columbia. — *Merrick v. Giddings*, 1 Mackey (D. C.) 394.

Indiana. — *Peelman v. Peelman*, 4 Ind. 612.

Iowa. — *Ayres v. Chicago, etc.*, R. Co., 52 Iowa 478.

Minnesota. — *King v. Duluth, etc.*, R. Co., 61 Minn. 482.

Missouri. — *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578; *Storck v. Mesker*, 55 Mo. App. 26; *Swaggard v. Hancock*, 25 Mo. App. 596.

(2) *Payment of Debt.* — Among the many illustrations that might be given of this principle may be mentioned a promise to pay or the actual payment of

New Jersey. — *Voorhees v. Combs*, 33 N. J. L. 494.

New York. — *Alley v. Turck*, 8 N. Y. App. Div. 50.

South Carolina. — *Colcock v. Louisville, etc., R. Co.*, 1 Strobb. L. (S. Car.) 329.

Texas. — *Jones v. Risley*, (Tex. 1895) 32 S. W. Rep. 1027.

Washington. — *Tolmie v. Dean*, 1 Wash. Ter. 46.

Where the Plaintiff Contracted to Do Certain Work according to specifications, and was so executing his contract, and the defendant, under threats of stopping the work, and without any further consideration, exacted and secured from the plaintiff a guaranty concerning the work not embraced in the original contract, it was held that such guaranty was not binding upon the plaintiff, and that, in an action brought by him for the contract price of the work, a failure of said guaranty could not be set up as a defense. *McCarty v. Hampton Bldg. Assoc.*, 61 Iowa 287.

Performance of Agreement to Pay Subscription to Stock. — After the formation of a corporation for the manufacture of a certain article, one of the corporators threatened that he would go no further with the enterprise and would pay no sum on his subscription unless another member of the corporation would assign a patent held by him for an improvement in the manufacture of an article to the company; and the holder of the patent, to prevent an abandonment of the enterprise, granted to the corporation a right to use the patent. It was held that the grant of the license was a mere gratuity, since the agreement of the corporator to pay his subscription was not a legal consideration. *Havana Press Drill Co. v. Ashurst*, 148 Ill. 115.

Assignment of Insurance Policy Already Stipulated For in a Mortgage. — The plaintiff made a mortgage to the defendant upon a certain steamer for the sum of three thousand dollars, and agreed therein that he would procure a policy of insurance upon such steamer in the sum of five thousand dollars and assign it to the respondent as further collateral security. An insurance policy was taken out in the name of the plaintiff, but was not assigned by him as required by the terms of the mortgage until after the destruction of the steamer. The assignment, as then made, was alleged by the plaintiff to have been made in pursuance of a special contract entered into between him and the defendant. Upon the trial of the cause he introduced evidence tending to prove such special contract, and as a part of such proof in relation thereto offered a certain witness whose testimony was excluded by the court, and this ruling was set up as the ground of an appeal. The appellate court, however, refused to decide the question of the competency of the witness, holding that, though the special contract should be fully proven, it would be invalid, the only consideration to support it being the assignment of the policy which the defendant was already bound by the mortgage to assign. *Lewis v. McReavy*, 7 Wash. 294.

Performance of Contract to Enter Military Service. — The plaintiff signed a written contract, by which he agreed to enter the military service of the United States, to the credit of a certain township, in consideration of the payment of a bounty of one hundred dollars. The defendant, as the agent of the township, accompanied the plaintiff to the mustering officer to procure his muster in and to pay him the bounty promised. While there the plaintiff was offered by others a bounty of three hundred and fifty dollars, and refused to perform his contract unless the township would pay him that amount; and the defendant thereupon, to induce the plaintiff to perform his contract, promised that he would be responsible that the township should pay him the increased amount. It was held that as the plaintiff was already bound in law by his contract to enter the military service for a bounty of one hundred dollars there was no consideration for the promise to pay him more. *Reynolds v. Nugent*, 25 Ind. 328.

Performance of Shipping Articles. — Where a crew has been shipped for a voyage and articles have been regularly executed fixing the rate of wages, if the crew at an intermediate port on the voyage compel the master, by threats of desertion, to enter into new articles at a higher rate of wages, such articles are void and not binding upon the master nor upon the owners for want of a consideration, the seamen having no right to abandon the voyage. *Bartlett v. Wyman*, 14 Johns. (N. Y.) 260.

In *Harris v. Watson*, 1 Peake N. P. (ed. 1795) 72, the master of a ship promised his crew an addition to their fixed wages, in consideration of and as an incitement to their extraordinary exertions during a storm. This promise was held to be *nudum pactum*, the voluntary performance of an act which it was before legally incumbent upon the party to perform, being in law an insufficient consideration.

Again, in *Stilk v. Myrick*, 2 Campb. 317, where in the course of a voyage some of the seamen deserted, and the captain, not being able to find others to supply their places, promised to divide the wages which would have been due to them among the remainder of the crew, it was held that his promise was void for want of a consideration. And a similar decision was rendered in *Harris v. Carter*, 3 El. & Bl. 559, 77 E. C. L. 559.

But in *Hartley v. Ponsonby*, 7 El. & Bl. 872, 90 E. C. L. 872, in a case arising upon a similar state of facts, it was held that as the seamen were not bound by their original contract of service to proceed with the diminished number of hands which increased the risk of the voyage, the undertaking to do so was a good consideration for the master's promise.

Performance of Contract a Valid Consideration for Promise of Third Party Deriving Benefit. — The performance of an act which a person has agreed with another to perform is a good consideration to support a contract with a third person, if the latter derive a benefit from the performance. *Scotson v. Pegg*, 6 H. & N. 295.

a liquidated debt. If the debt be already due, it has been held that a promise to pay it at a future time is not a sufficient consideration for the creditor's promise of forbearance;¹ nor will its actual payment be a consideration for his promise to release the accrued interest,² or to convey real estate.³

Anticipated Payment. — If, however, the debt be not due, its anticipated payment will be a sufficient consideration.⁴

(3) *Payment of Part of Debt.* — When the whole of an undisputed debt is due and payable, the payment of a portion of it will not support an agreement by the creditor to accept the part so paid in satisfaction of the whole, nor will it even suffice to render enforceable his promise to give time upon the balance.⁵

Modification of Contract. — Where the plaintiff, by an instrument under seal, agreed to erect a building at a fixed price, which was not an adequate compensation, and having done part of the work, refused to proceed, but upon a parol promise by the defendant that he should be paid for his labor and material and should not suffer, he went on and finished the building, it was held that he was entitled to recover in assumpsit upon the parol promise. This decision proceeds upon the principle that the parol agreement was a waiver of the original contract, and that the performance of the work under the substituted agreement was a sufficient consideration for it. *Munroe v. Perkins*, 9 Pick. (Mass.) 305, 20 Am. Dec. 475. And see *supra*, this title, *Valuable Considerations* — *Mutual Promises* — *Novation*.

1. **Payment of Debt Not a Consideration.** — *Deacon v. Gridley*, 15 C. B. 295, 80 E. C. L. 295; *Farrington v. Bullard*, 40 Barb. (N. Y.) 512; *Austin Real Estate, etc., Co. v. Bahn*, 87 Tex. 582; *Russell v. Buck*, 11 Vt. 166.

2. *Willis v. Gammill*, 67 Mo. 730.

3. *Tucker v. Bartle*, 85 Mo. 114; *Keffer v. Grayson*, 76 Va. 517, 44 Am. Rep. 171. See also *Harris v. Cassady*, 107 Ind. 158.

Payment of Note by Surety Not a Consideration for Promise to Convey Lands. — The defendant, who was liable as surety upon certain notes executed by the plaintiff's testator, promised that if she would pay these notes he would give her a life estate in certain lands. She paid the notes and delivered them to the defendant and afterwards sought to enforce the fulfilment of his promise. It was held that the consideration was insufficient, being merely the doing of that which the plaintiff was already bound in law to do. *Dunckel v. Dunckel*, 56 Hun (N. Y.) 25.

4. *Spann v. Baltzell*, 1 Fla. 338, 46 Am. Dec. 346.

Payment of Purchase Money Before Due. — In an action on a bond to indemnify the plaintiff against mechanic's liens on property conveyed to the plaintiff by the principal of the bond, upon which the latter was at the time of the conveyance erecting a house which he agreed to finish, it appeared that one of the considerations for giving the bond was the agreement of the plaintiff to pay the purchase money sooner than it was payable according to the terms of the contract. It was held that this was a sufficient consideration. *Reed v. McGregor*, 62 Minn. 94.

5. **Payment of Part of Debt** — *England.* — *Lynn v. Bruce*, 2 H. Bl. 317; *Deacon v. Gridley*, 15 C. B. 295, 80 E. C. L. 295; *Overton v. Banister*, 3 Hare 503, 8 Jur. 906.

Alabama. — *Barron v. Vandvert*, 13 Ala. 232.

Georgia. — *Molyneaux v. Collier*, 13 Ga. 406; *Holliday v. Poole*, 77 Ga. 159; *Bialock v. Jackson*, 94 Ga. 469.

Illinois. — *Phoenix Ins. Co. v. Rink*, 110 Ill. 538.

Indiana. — *Beaver v. Fulp*, 136 Ind. 595.

Iowa. — *Norris v. Slaughter*, 3 Greene (Iowa) 116; *State v. Davenport*, 12 Iowa 335; *Bryan v. Brazil*, 52 Iowa 350.

Kansas. — *Pemberton v. Hoosier*, 1 Kan. 108; *Royal v. Lindsay*, 15 Kan. 591.

Kentucky. — *Cutter v. Reynolds*, 8 B. Mon. (Ky.) 596; *Robert v. Barnum*, 80 Ky. 28.

Maine. — *Jennets v. Lane*, 26 Me. 475.

Maryland. — *Oberndorff v. Union Bank*, 31 Md. 126, 1 Am. Rep. 31.

Massachusetts. — *Harriman v. Harriman*, 12 Gray (Mass.) 341; *Perkins v. Lockwood*, 100 Mass. 249, 1 Am. Rep. 103; *Warren v. Hodge*, 121 Mass. 106.

Michigan. — *Leeson v. Anderson*, 99 Mich. 247, 41 Am. St. Rep. 597.

Minnesota. — *Scase v. Gillette-Herzog Mfg. Co.*, 55 Minn. 349.

Mississippi. — *Carraway v. Odeneal*, 56 Miss. 223.

Nebraska. — *Fitzgerald v. Fitzgerald, etc.*, Constr. Co., 44 Neb. 463.

New Jersey. — *Watts v. Frenche*, 19 N. J. Eq. 407; *Day v. Gardner*, 42 N. J. Eq. 199; *Isham v. Therasson*, 53 N. J. Eq. 10.

New York. — *Pabodie v. King*, 12 Johns. (N. Y.) 426; *Gibson v. Renne*, 19 Wend. (N. Y.) 389; *Hall v. Constant*, 2 Hall. (N. Y.) 185; *Conway v. Barber*, (City Ct.) 27 N. Y. Supp. 136, 6 Misc. Rep. (N. Y.) 627; *Fairchild v. Warren*, 21 How. Pr. (N. Y. Super. Ct.) 187.

South Carolina. — *Hyams v. Levy*, 1 Spears L. (S. Car.) 368.

Texas. — *Krueger v. Klinger*, 10 Tex. Civ. App. 576.

Vermont. — *Goodwin v. Follett*, 25 Vt. 386.

For a more extensive citation of authority and fuller discussion of the principle, see the title ACCORD AND SATISFACTION, vol. 1, p. 413.

Exception — Composition with Creditors. — For a modification of the principle in the case where the creditors of a common debtor mutually agree to accept a percentage of their debts in lieu of the whole, see the title COMPOSITION WITH CREDITORS, *ante*.

Release of Insolvent Debtor. — Where a party recovered judgment against another who was notoriously insolvent, and the plaintiff afterwards agreed to receive from him a less sum on the judgment, which sum was accordingly paid and a receipt was given in full settlement and discharge of the judgment, it was held that

Payment of Interest. — Thus the payment of accrued interest, or the promise to pay interest when the debt is already subject to it, is not a sufficient consideration for a promise of forbearance.¹

Disputed Debt. — If, however, as has been before discussed, the debt be disputed, the payment of a sum less than the full amount claimed is a sufficient consideration for the settlement.²

Anticipated Part Payment. — So, if the debt be not due, a part payment of it,³ or the prepayment of interest,⁴ will support a promise of forbearance.

Part Payment in Another Place. — Likewise a part payment of a debt at a place different from that at which by the terms of the contract the whole is payable, will suffice.⁵

Part Payment with Security. — Again, the giving of security for a part of a debt is a sufficient consideration for the creditor's release of the balance.⁶

Part Payment by Third Party. — So the part payment of a debt by a third party is sufficient to support the creditor's release of the whole.⁷

the fact that the defendant was insolvent and that the plaintiff was liable to lose his whole debt, rendered the acceptance of a lesser sum a valid consideration for the discharge of the judgment. *Harper v. Graham*, 20 Ohio 106.

Insurance Policy — Payment of Part of Adjusted Loss. — Where the relation of debtor and creditor exists between the insurance company and the surety by reason of the fact that the amount of loss under a policy of insurance has been adjusted and determined, and there is no *bona fide* ground of dispute concerning the company's liability, the release by the surety of the whole claim in consideration of payment of part is not based upon a sufficient consideration, and the surety may maintain an action for the whole amount due. *Sanford v. Royal Ins. Co.*, 11 Wash. 653.

Where Two Notes Are Due, the Payment of One is not a sufficient consideration for the agreement to extend the time of the other. *Pomeroy v. Slade*, 16 Vt. 220.

Payment of Costs. — The discharge of a legal obligation by a debtor to his creditor is not a sufficient consideration for the promise of the latter. Accordingly, where a party, sued upon a note, paid the costs that had accrued in the suit, upon an agreement that it was to be discontinued, and he was to have a month further time to pay the note, it was held that the promise to extend the time was void for want of sufficient consideration. *Parmelee v. Thompson*, 45 N. Y. 58, 6 Am. Rep. 33.

Cancellation of Instrument. — A debtor may be discharged from his debt, even on payment of a less sum than is due, by canceling the instrument, the evidence of the debt. *Silvers v. Reynolds*, 17 N. J. L. 275.

1. Payment of Interest — England. — *Tucker v. Laing*, 2 Kay & J. 745.

Colorado. — *Jenks v. Lehman*, 7 Colo. App. 421.

Illinois. — *Stuber v. Schack*, 83 Ill. 191.

New Hampshire. — *Russ v. Hobbs*, 61 N. H. 93.

New York. — *Reynolds v. Ward*, 5 Wend. (N. Y.) 502; *Kellogg v. Olmsted*, 25 N. Y. 189.

Pennsylvania. — *Dow v. Chambers*, 14 Phila. (Pa.) 647.

Texas. — *Helms v. Crane*, 4 Tex. Civ. App. 89.

Contra. — *Moore v. Redding*, 69 Miss. 841.

2. See *supra*, this title, *Valuable Considerations — Compromise of Doubtful Claims*.

3. Payment of Part of Debt Before Due. — *Newsam v. Finch*, 25 Barb. (N. Y.) 175.

An agreement by the owner of an execution against the inhabitants of a town that if they would at once assess the amount required and collect the same, he would make a certain discount, is founded on sufficient consideration and will be enforced. *Baileyville v. Lowell*, 20 Me. 178.

4. See *supra*, this title, *Valuable Considerations — Money — Prepayment of Interest*.

5. *Jones v. Bullitt*, 2 Litt. (Ky.) 49; *Smith v. Brown*, 3 Hawks. (N. Car.) 580.

6. Giving Security for Part of Debt. — *Singleton v. Thomas*, 73 Ala. 205; *Laboyteaux v. Swigart*, 103 Ind. 596; *Little v. Hobbs*, 34 Me. 357; *Day v. Gardner*, 42 N. J. Eq. 199. Compare *Gibson v. Renne*, 19 Wend. (N. Y.) 389; *Parmelee v. Thompson*, 45 N. Y. 58, 6 Am. Rep. 33.

The Acceptance of a Negotiable Security may be in law a satisfaction of a debt of a greater amount. *Sibree v. Tripp*, 15 M. & W. 23.

An agreement by a creditor to take less than the face of his demand upon receiving security for the amount to be paid, is a valid agreement by reason of the additional benefit arising out of the security stipulated for. *Phillips v. Berger*, 2 Barb. (N. Y.) 608, *affirmed* 8 Barb. (N. Y.) 527.

Giving Mortgage for a Part of Debt. — Merely giving a mortgage as security for a note is no consideration for the holder's promise to deduct a certain sum from the amount of it. It would seem to be otherwise where the mortgage was not given as a mere security, but as a substitute for it, as the case would then have been presented of a security higher in dignity, a specialty in place of a simple contract debt operating as an extinguishment of the latter. *Platts v. Walrath*, Hill & D. Supp. (N. Y.) 59.

7. Part Payment by Third Person. — *Logan v. Lee*, 10 Ark. 585; *Lee v. Oppenheimer*, 32 Me. 253; *Brooks v. White*, 2 Met. (Mass.) 283, 37 Am. Dec. 95; *Smith v. Gould*, 84 Hun (N. Y.) 325.

Where a creditor on a compromise with his debtor accepts the note of a third person for a less sum than the debt due to him, in full settlement of such debt, the transfer and accept-

d. SURRENDER OF THINGS WRONGFULLY WITHHELD. — When a person has in his possession goods or other things belonging to another, he cannot make his surrender of them to the rightful owner a foundation for a promise made in consideration thereof.¹

2. Doing What One Has a Legal Right to Do. — The last of the insufficient considerations to be specially mentioned is the doing of that which the promisor has a legal right to do. Instances of promises founded on this consideration are the cases of a note given for the privilege of using an unpatented article,² and of a promise made in consideration of being released from a bargain to which the promisor cannot be legally held.³ The last instance finds its reason in the strict rules of law, and might well be cited as an example of the insufficiency of a moral consideration.

IX. IMPOSSIBLE CONSIDERATIONS. — It may be stated as a general rule that a consideration, the performance of which is impossible, is a mere nullity and cannot be the foundation of a promise. What constitutes impossibility in respect to the performance of contracts will be fully treated elsewhere in this work under an appropriate title.⁴

ance of such note are a sufficient consideration for the release of the whole debt, and may be pleaded in bar of an action for the recovery of any portion of the debt beyond the sum secured by the note. *Kellogg v. Richards*, 14 Wend. (N. Y.) 116.

1. Surrender of Things Wrongfully Withheld. — *McCaleb v. Price*, 12 Ala. 753; *Sullivan v. Sullivan*, 99 Cal. 187; *Crosby v. Wood*, 6 N. Y. 370; *White v. Heylman*, 34 Pa. St. 142; *Fink v. Smith*, 170 Pa. St. 124.

The plaintiffs constructed a certain machine for B, which they delivered without requiring payment of a balance due for their work. The machine did not work successfully, and was returned to the plaintiffs to make some alterations therein. This they agreed to do, and did do, upon the defendant's promise to pay their charges therefor, which he did. Upon the plaintiffs threatening to retain possession of the machine unless the original indebtedness were paid, the defendant promised orally to pay the same, and the machine was shipped to him with the consent of B. In an action upon the promise it was held void, and that the plaintiffs were not entitled to recover; that they lost their primary lien by delivery, and acquired no new one by reason of the alterations which were paid for; and so their refusal to surrender possession was a wrong, and such surrender furnished no consideration; that the shipment to the defendant was a delivery to B, and the former obtained no right of interest in the property as the result of the delivery. *Tolhurst v. Powers*, 133 N. Y. 460.

2. Note Given for Use of Unpatented Article. — A promissory note given for the privilege of using or selling an article which all men are equally at liberty to lawfully use and sell lacks consideration to support it. *Schroeder v. Nielson*, 39 Neb. 335.

3. Release from Bargain Void by Statute of Frauds. — An executory promise to pay a sum of money to be released from a bargain which is void by the statute of frauds, as, for example, a parol contract for the sale of standing timber, is not binding for the want of consideration to support it. *Silvernail v. Cole*, 12 Barb. (N. Y.) 685.

Where a note was put up as a forfeit to secure the performance of a verbal sale of land, it was held wanting in consideration, and could not constitute a cause of action. *Weatherley v. Choate*, 21 Tex. 272.

The defendant agreed by parol to let his tavern to the plaintiff for one year. After the plaintiff had moved some of his furniture into the house, the defendant desired to break the agreement, and in a letter to the plaintiff acquainting him with this determination, said: "I shall feel bound to return your goods to Alfred or settle with you for the disappointment." In an action to compel the defendant to pay for the return of the goods, it was held that under the statute of frauds, which provides that all leases not in writing and signed by the parties shall have the force and effect of leases or estates at will only, it was the privilege of the defendant to break the lease at any time, and that consequently the promise to return the goods at his expense was without consideration, and was void. *Farnham v. O'Brien*, 22 Me. 475.

The plaintiff entered into a parol agreement for the purchase of land from the defendant, and delivered him in part payment two horses and a set of harness, and was to execute notes for the remainder of the purchase price upon execution and delivery of title bond. Before taking possession, the plaintiff disaffirmed the purchase and refused to receive bond for title or execute notes for the remainder of the purchase money, and agreed to surrender the property delivered in part payment to be released from the bargain. He afterwards regretted his action, and in a suit brought to recover the property, or the value thereof, it was held that as the agreement to purchase the land rested merely in parol, it was not enforceable, and consequently a release from such a bargain could not operate as a good consideration. *Shuder v. Newby*, 85 Tenn. 348.

The Agreement of a Son that His Father Shall Deduct a Certain Part from His Portion is no sufficient consideration. *M'Donald v. Neilson*, 2 Cow. (N. Y.) 139.

4. See the title IMPOSSIBLE CONTRACTS.

Volume VI.

X. ILLEGAL CONSIDERATIONS. — A contract founded upon a consideration which is illegal in whole ¹ or in part ² is, as between the parties and their privies,

1. Illegal Consideration — Total Illegality —
England. — *Fetherston v. Hutchinson*, Cro. Eliz. 199; *Waite v. Jones*, 1 Bing. N. Cas. 656, 27 E. C. L. 532; *Langton v. Hughes*, 1 M. & S. 593; *Shackell v. Rosier*, 2 Bing. N. Cas. 634, 29 E. C. L. 438; *Card v. Hope*, 2 B. & C. 661, 9 E. C. L. 209; *Waldo v. Martin*, 4 B. & C. 319, 10 E. C. L. 341; *Hall v. Dyson*, 17 Q. B. 785, 79 E. C. L. 785; *Clubb v. Hutson*, 18 C. B. N. S. 414, 114 E. C. L. 414.

Canada. — *Dufresne v. Guevremont*, 5 L. C. J. 278, C. C. 1859; *Biroleau v. Derouin*, 7 L. C. J. 128; *Gugy v. Larkin*, 8 L. C. Rep. 11.

United States. — *Root v. Merriam*, 27 Fed. Rep. 909.

Alabama. — *Hawley v. Bibb*, 69 Ala. 52; *Moog v. Strang*, 69 Ala. 98.

California. — *Swanger v. Mayberry*, 59 Cal. 91.

Georgia. — *Cunningham v. National Bank*, 71 Ga. 400, 51 Am. Rep. 266.

Iowa. — *Peed v. McKee*, 42 Iowa 689, 20 Am. Rep. 631; *Hanks v. Brown*, 79 Iowa 560; *Merrill v. Packer*, 80 Iowa 543; *Payne v. Raubinek*, 82 Iowa 587.

Kansas. — *Fleming v. Greene*, 48 Kan. 646.

Kentucky. — *Winebrinner v. Weisiger*, 3 T. B. Mon. (Ky.) 32; *Vanmeter v. Spurrier*, 94 Ky. 22.

Massachusetts. — *Gorham v. Keyes*, 137 Mass. 583.

New York. — *Nichols v. Lumpkin*, 51 N. Y. Super. Ct. 88.

North Carolina. — *Covington v. Threadgill*, 88 N. Car. 186.

South Carolina. — *Davis v. Arledge*, 3 Hill. L. (S. Car.) 170, 30 Am. Dec. 360.

Texas. — *Campbell v. Jones*, 2 Tex. Civ. App. 263.

Novation of Illegal by Valid Debt. — The defendant was indebted to a third person upon an illegal consideration, and such third person owed the plaintiff a valid debt, and by novation the defendant made his promissory note to the plaintiff in settlement of both debts. In an action upon the note it was held that the illegal consideration of the defendant's original debt to the third person could not be pleaded against the note so given, the plaintiff having no knowledge of the illegality. *Bower v. Webber*, 69 Iowa 286.

A Note Valid in Its Origin is not affected by the illegality which vitiates a contract made in reference to it. *Wilcoxon v. Logan*, 91 N. Car. 447.

A Bill or Note Given in Renewal Merely of Another, the consideration of which is tainted, may be defended against in the same manner as if the suit was upon the first note or bill. *Hynds v. Hays*, 25 Ind. 31.

2. Partial Illegality — England. — *Bradburne v. Bradburne*, Cro. Eliz. 149; *Coulston v. Carr*, Cro. Eliz. 847; *Crisp v. Gamel*, Cro. Jac. 128; *Robinson v. Bland*, 2 Burr. 1077; *Scott v. Gilmore*, 3 Taunt. 226; *Jones v. Waite*, 5 Bing. N. Cas. 341, 35 E. C. L. 130.

Canada. — *Carleton Branch R. Co. v. Grand Southern R. Co.*, 21 New Bruns. 339.

United States. — *Armstrong v. Toler*, 11 Wheat. (U. S.) 258.

Alabama. — *Pettit v. Pettit*, 32 Ala. 288; *Wynne v. Whisenant*, 37 Ala. 46.

California. — *Valentine v. Stewart*, 15 Cal. 387.

Georgia. — *Allen v. Pearce*, 84 Ga. 606.

Illinois. — *Henderson v. Palmer*, 71 Ill. 579, 22 Am. Rep. 117; *Bochmer v. Foval*, 55 Ill. App. 71.

Iowa. — *Braithe v. Guelick*, 37 Iowa 212.

Kentucky. — *Collins v. Merrell*, 2 Metc. (Ky.) 163; *Brown v. Langford*, 3 Bibb (Ky.) 497; *Donallen v. Lennox*, 6 Dana (Ky.) 89; *Gardner v. Maxey*, 9 B. Mon. (Ky.) 90; *Kimbrough v. Lane*, 11 Bush (Ky.) 556.

Maine. — *Deering v. Chapman* 22 Me. 488, 39 Am. Dec. 592.

Massachusetts. — *Bliss v. Negus*, 8 Mass. 46; *Warren v. Chapman*, 105 Mass. 87; *Perkins v. Cummings*, 2 Gray (Mass.) 258.

Missouri. — *Sumner v. Summers*, 54 Mo. 340; *Bick v. Seal*, 45 Mo. App. 475.

New Hampshire. — *Carleton v. Whitchee*, 5 N. H. 196; *Hinds v. Chamberlin*, 6 N. H. 225; *Clark v. Ricker*, 14 N. H. 44; *Carleton v. Woods*, 28 N. H. 290; *Carlton v. Bailey*, 27 N. H. 230.

New York. — *Crawford v. Morrell*, 8 Johns. (N. Y.) 253; *Barton v. Port Jackson*, etc., Plank-Road Co., 17 Barb. (N. Y.) 397; *Saratoga County Bank v. King*, 44 N. Y. 87.

North Carolina. — *Clemmons v. Hampton*, 64 N. Car. 264; *Covington v. Threadgill*, 88 N. Car. 186.

Ohio. — *Raguet v. Roll*, 7 Ohio, pt. 1, 76; *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664.

Pennsylvania. — *Filson v. Himes*, 5 Pa. St. 452.

Texas. — *Kottwitz v. Alexander*, 34 Tex. 689.

Vermont. — *Hinesburgh v. Sumner*, 9 Vt. 23; *Woodruff v. Hinman*, 11 Vt. 592, 34 Am. Dec. 712; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370.

When Illegal and Legal Considerations Are Separable. — Where a person has contracted to do certain things, and an illegal act is included therein, he may, nevertheless, be held to perform so much of his contract as it is lawful to perform if it can be separated from that part which is illegal; so where the consideration of a contract is in part legal and in part illegal, if the consideration is separable, a recovery may be had to the extent of the legal consideration. *Hynds v. Hays*, 25 Ind. 31.

Where one partner sells to the other all his interest in the furniture, fixtures, and stock in their saloon, including the license held by the seller, the contract is not totally void because the transfer of the license is illegal. The illegal consideration in such a case is severable from the legal, and the latter is sufficient to uphold the contract. *Pierce v. Pierce*, (Ind. App. 1897) 46 N. E. Rep. 480.

It is no defense to an action on a note given in part payment of an account, that part of the account is for goods sold in violation of law, if the amount of the items for goods lawfully sold exceeds the amount of the note. *Warren v. Chapman*, 105 Mass. 87.

Two notes were executed to cover a debt,

void and of no effect, and a court of law or of equity will not entertain any suit brought in relation to it, but will leave the parties as it finds them. If the agreement be executed, the court will not rescind it; if it be executory, the court will not aid its execution.¹ For a full discussion of what constitutes an illegal consideration, reference should be made to other parts of this work.²

XI. STATEMENT OF CONSIDERATION AND ACKNOWLEDGMENT OF PAYMENT —

1. Necessity of Statement in the Instrument — *a.* IN SIMPLE CONTRACTS — (1) *At Common Law.* — Except where it has been rendered necessary by the provisions of some statute, it is not essential to the validity of a contract in writing that the consideration should be expressed in the instrument.³

(2) *Under Statutes* — (a) *Contracts of Guaranty* — *English Statute of Frauds.* — Under the statute of frauds, 29 Charles II., c. 3, § 4, which enacts "that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, etc.," it was held that the word "agreement" included the consideration as well as the promise, and that the consideration must therefore be expressed in the writing.⁴ This decision was at one time considered of doubtful authority,⁵ but it was subsequently confirmed⁶ and was

part of which was unlawful, each note being for a greater amount than the illegal consideration. It was held that the holder could apply the unlawful consideration to one of the notes and recover on the other. *Carradine v. Wilson*, 61 Miss. 573.

The defendant lodged at a public house kept by the plaintiff, and the bill and note sued upon were given at the time for the defendant's score, being partly for board and lodgings and partly for spirituous liquors consumed by him in the public room. This last item was void in consequence of the Act of 24 Geo. II., c. 40. Small sums had been paid by the defendant at different times on account, in all greater in amount than the item for liquors. It was held that the plaintiff might apply the sums paid to the liquor items and recover upon the bill and note for the board and lodgings. *Crookshank v. Rose*, 5 C. & P. 19, 24 E. C. L. 194.

New York. — In *Jarvis v. Peck*, Hoffm. Ch. (N. Y.) 479, it appeared that an agreement was made containing a covenant restraining the carrying on of a trade generally, and also a covenant to keep secret the skill and mode of converting cast iron into malleable iron. The first covenant was declared illegal, the second valid. In the action it was held that where an agreement is made upon several express considerations, one of which, if it stood alone, would have supported it, the union with an illegal consideration shall not destroy it; but if one of the considerations is in violation of a positive statute, or *malum in se*, the whole contract fails. Although this case has not been expressly overruled, its authority has been considerably shaken by *Saratoga County Bank v. King*, 44 N. Y. 87, which is difficult to reconcile with it. In this case it was held that a contract is wholly void if covenants in restraint of trade which are illegal as against public policy enter into and form a part of the entire consideration and both parties are in fault as to these covenants. A separation of the good consideration from that which is illegal will be attempted in those cases only

where the party seeking to enforce the contract is not the wrongdoer, or the denial of relief would benefit the guilty party at the expense of the innocent.

1. *Courts Will Not Rescind Illegal Executed Contracts, Nor Enforce Executory Ones.* — *Roll v. Raguet*, 4 Ohio 419.

A court of chancery will not set aside a deed executed upon the consideration of a bet upon the result of an election, but will leave the parties as it finds them. *Thomas v. Cronise*, 16 Ohio 54.

"The distinction between an executed and executory contract, where the consideration is unlawful, is a very plain one. In the former case the court will not annul; in the latter they will not enforce; and this course, so totally opposite in the two cases, is intended to be subservient to the same end, the prevention of an immoral act. As long as the agreement continues executory, there is an incentive to the commission of the deed; but when it is executed, no further motive of this kind exists, since the estate has already vested, or the money actually been paid." *Per Grimke, J.*, in *Raguet v. Roll*, 7 Ohio, pt. ii., 70.

2. See the title *ILLEGAL CONTRACTS*.

3. *Consideration Need Not Be Expressed in the Contract.* — *Robertson v. Jones*, 8 L. C. Rep. 364; *Tingley v. Cutler*, 7 Conn. 291; *Attix v. Pelan*, 5 Iowa 336; *Mouton v. Noble*, 1 La. Ann. 192; *Cummings v. Dennett*, 26 Me. 397; *Arms v. Ashley*, 4 Pick. (Mass.) 71; *Thompson v. Blanchard*, 3 N. Y. 335; *Patchin v. Swift*, 21 Vt. 292.

4. *Writing Must Express Consideration.* — *Wain v. Warlters*, 5 East 10.

5. *Decision Questioned.* — The correctness of the decision in *Wain v. Warlters*, 5 East 10, was questioned in *Ex p. Minet*, 14 Ves. Jr. 189; *Ex p. Gardom*, 15 Ves. Jr. 286; *Phillipps v. Bateman*, 16 East 356; *Goodman v. Chase*, 1 B. & Ald. 297.

6. *Decision Confirmed.* — *Saunders v. Wakefield*, 4 B. & Ald. 595, 6 E. C. L. 616; *Raikes v. Todd*, 8 Ad. & El. 846, 35 E. C. L. 546; *James v. Williams*, 5 B. & Ad. 1109, 27 E. C. L. 280;

never afterwards questioned; but it proved a grievance to the mercantile community, and was at last swept away by the passage of the Mercantile Law Amendment Act, 19 and 20 Vict., c. 97, § 3.¹

In the United States. — In those states of the Union where the statute has been adopted or re-enacted, the construction to be placed upon the word "agreement" has been the subject of conflicting decisions, some of the courts having adopted the English construction while others have repudiated it. The statute as enacted in some of the states employs the word "promise" instead of "agreement," and on the ground of this difference it has been held in those states that the statement of the consideration is not necessary.²

(b) **English Bills of Sale Act.** — Under section 8 of the English Bills of Sale Act of 1878 as amended by the Act of 1882, a bill of sale is void unless it truly sets forth the consideration for which it is given.³ Strict literal accuracy of statement, however, is not necessary, but it is sufficient to satisfy the requirements of the statute if the consideration be stated with substantial accuracy, that is, if the legal effect or business effect of what actually took place is truly stated.⁴

Morley v. Boothby, 3 Bing. 107, 11 E. C. L. 53.

As to What Constitutes a Sufficient Statement of the consideration under the statute, see *Stadt v. Lill*, 9 East 348; *Newbury v. Armstrong*, 6 Bing. 201, 19 E. C. L. 55; *Kennaway v. Treleavan*, 5 M. & W. 498. And see generally the titles **FRAUDS, STATUTE OF; GUARANTY; SURETYSHIP.**

1. Mercantile Law Amendment Act (19 & 20 Vict., c. 97.) — Section 3 of this Act enacts that "no special promise to be made by any person after the passing of this act to be answerable for the debt, default, or miscarriage of another person, being in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding, to charge the person by whom such promise shall have been made by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written instrument."

2. See the title **FRAUDS, STATUTE OF.**

3. English Bills of Sale Act. — *Simpson v. Charing Cross Bank*, 34 W. R. 568; *Sharp v. McHenry*, 38 Ch. Div. 428.

4. Substantial Accuracy Sufficient. — *Ex p. Johnson*, 26 Ch. Div. 338.

A Small Inaccuracy in the Statement of the consideration is not sufficient to avoid a bill of sale. *Ex p. Winter*, 44 L. T. 323.

Inaccuracies in the statement of the consideration of a bill of sale will not invalidate it if it is apparent from the terms of the instrument what the consideration really was. *Roberts v. Roberts*, 13 Q. B. Div. 794.

Statements Held to Be Sufficiently Accurate. — In *Ex p. Allam*, 14 Q. B. Div. 43, where the consideration stated to be "now paid" had been in fact paid on an earlier bill of sale which turned out to be irregular, and it had been arranged to grant a new bill instead, it was held that the consideration was truly stated.

A debtor who owed a sum of money partly secured by an existing bill of sale executed a second bill of sale of the same chattels to secure a fresh advance, on the understand-

ing that out of the sum advanced he should pay off the existing debt. The bill of sale was expressed to be made in consideration of the fresh advance, without alluding to the intended application of the money. The money was actually paid to the grantor and applied by him as agreed. It was held that the consideration was duly stated in the instrument. *Thomas v. Searles*, (1891) 2 Q. B. 408.

The fact that part of the money went to other persons with the grantor's assent does not render the statement of the consideration inaccurate; it is quite competent to him to direct what shall be paid to himself and what shall be paid to others on his behalf. *Hamlyn v. Betteley*, 5 C. P. Div. 327; *Ex p. National Mercantile Bank*, 15 Ch. Div. 42; *Credit Co. v. Pott*, 6 Q. B. Div. 295; *In re Cann*, 13 Q. B. Div. 36.

For other cases holding the consideration to have been truly stated, see *Ex p. Bolland*, 21 Ch. Div. 543; *Ex p. Nelson*, 55 L. T. 819, 35 W. R. 264; *Ex p. Johnson*, 26 Ch. Div. 338.

Statements Held to Be Inaccurate. — Where a bill of sale was stated to be in consideration of £50, paid by the assignee to the assignor at or before the execution thereof, and it was shown that only £21. 10s. was paid, £3. 10s. being retained by the assignee for the expenses of the deed, and £25 for rent accruing and to accrue during the currency of the security, it was held that the consideration was not truly stated. *Ex p. Rolph*, 19 Ch. Div. 98.

In *Cochrane v. Moore*, (C. A. 1890) 25 Q. B. Div. 57, the bill of sale stated the consideration as a sum of £7,575 then owing by the vendor to the vendee, and the further sum of £2,425 then paid by the vendee to the vendor, making together the sum of £10,000, whereas, in fact, at the date of the bill of sale, the vendor was indebted to the vendee on two promissory notes, payable respectively in one and two months, and for sums amounting together to £8,300. It appeared that by an agreement arrived at at the time, this £8,300 due *in futuro* was to be taken as between the parties as represented by the sum of £7,575. It was held that this agreement should have been stated in the bill of sale, and the bill was

b. IN DEEDS OF CONVEYANCE OPERATING UNDER STATUTE OF USES. — Although deeds of conveyance which operate under the statute of uses require a consideration to give them validity,¹ the consideration need not be expressed in the instrument, but may be shown by proof *aliunde*.²

2. Effect of Acknowledgment of Payment in Deeds — Estoppel. — In England, the acknowledgment of the receipt of the consideration in a deed is regarded as conclusive evidence of its payment and estops the grantor from afterwards denying it.³ But this doctrine has never found favor in the *United States*, and the acknowledgment of payment is here considered to have no greater effect than a receipt under seal, and as such may be contradicted by extraneous evidence.⁴

therefore void as not truly stating the consideration for which it was given.

If Any Sum be Retained By the Vendee by way of interest, expenses, bonus, or commission, the statement of the consideration has been held to be false. *Ex p.* Charing Cross Advance, etc., Bank, 16 Ch. Div. 35; *Hamilton v. Chaine*, 7 Q. B. Div. 319; *Ex p.* Firth, 19 Ch. Div. 419; *Ex p.* Bernstein, 74 L. T. J. 245; *Ex p.* Chalinor, 16 Ch. Div. 260; *Cohen v. Higgins*, (1891) 8 Times L. R. 8.

In *Mayer v. Mindlevich*, 59 L. T. 400, the consideration was stated in the bill as the sum of £312 "then owing" by the grantor to the grantee. It appeared that out of the £312 a sum of £126 was, in pursuance of an agreement between the parties, retained by the grantee to meet certain acceptances of the grantor, which were in fact paid to the grantee when they became due. It was held that the consideration was not truly stated.

The consideration of a bill of sale was stated to be the payment of a sum of money by the grantee to the grantor. Part only of such sum was in fact paid over, the remainder being retained by the grantee by agreement with the grantor in satisfaction (1) of the amounts of acceptances which had been given by the grantor to the grantee and were then running; (2) of a sum agreed to be paid by the grantor to the grantee for the hire of furniture assigned by the bill of sale for a period of three months; and (3) of an agreed sum for the expenses of the transaction. It was held that none of the amounts so retained could truly be said to have been paid to the grantor, and therefore the consideration was not truly stated, and the bill of sale was void. *Richardson v. Harris*, 22 Q. B. Div. 268.

1. See *supra*, *Necessity and Sufficiency of Consideration — Specialties*.

2. See *infra*, *Admissibility of Extraneous Evidence — To Show Consideration When None is Expressed*.

3. Estoppel by Acknowledgment of Payment — English Rule. — *Shelley v. Wright*, Willes 9; *Cossens v. Cossens*, Willes 25; *Rowntree v. Jacob*, 2 Taunt. 141; *Lampon v. Corke*, 5 B. & Ald. 605, 7 E. C. L. 205; *Baker v. Dewey*, 1 B. & C. 704, 8 E. C. L. 297; *Hill v. Manchester*, etc., Water Works, 2 B. & Ad. 544, 22 E. C. L. 135. See also *Harding v. Ambler*, 3 M. & W. 279.

In Equity the acknowledgment of payment does not seem to have worked any estoppel, but parol proof of nonpayment was received. *Winter v. Anson*, 3 Russ. 488; *Coppin v. Coppin*, 2 P. Wms. 291; *Wilson v. Keating*, 27 Beav. 121.

English Statutes. — "The receipt in the body of the deed was not before 1882 conclusive in equity, but was before the Supreme Court of Judicature Act, 1873, came into operation (*i. e.*, the first November, 1875), conclusive at law, that the purchase money was paid. But the receipt in the body of or indorsed on a deed made since 1881 is conclusive in favor of a subsequent purchaser without notice. See the Conveyancing and Law of Property Act, 1881 (44 and 45 Vict., c. 41, § 55)." *Elphinstone on Deeds*, p. 151.

4. Rule in the United States — Statement of the Principle. — In *Gully v. Grubbs*, 1 J. J. Marsh. (Ky.) 387, the question to what extent and for what purposes the statement and acknowledgment of the receipt of the consideration in a deed may be varied or contradicted by parol evidence was ably discussed in the opinion of the court by Robertson, J.: "The authorities on this subject in England, as well as in the states of this Union, are various and contradictory. But we believe that the consistent doctrine, and that which accords best with analogy and with the practice and understanding of mankind, is that an acknowledgment in a deed of the receipt of the consideration is only *prima facie* evidence of payment. The acknowledgment is inserted more for the purpose of showing the actual amount of consideration than its payment; and it is generally inserted in deeds of conveyance, whether the consideration has been paid or only agreed to be paid. If the consideration has not been paid, such an acknowledgment in a deed would be intended to mean that the specified amount had been assumed by note or otherwise. An ordinary receipt is not conclusive evidence of the facts attested by it. A separate receipt for the price of land would, it seems to us, be much stronger evidence that the money had been paid than the customary acknowledgment in the deed of conveyance. At all events, it should be as cogent. But it may be contradicted; why may not the other? * * * The acknowledgment of the payment of the consideration in a deed is a fact not essential to the conveyance. It is immaterial whether the price of the land was paid or not; and the admission of its payment, in the deed, is generally merely formal. But if it be inserted for the purpose of attesting the fact of payment (as it seldom, if ever, is in this country), it is not better evidence than a sealed receipt on a separate paper would be; and, as we have already said, it seems to us that it would not be as good, for obvious reasons. The practice of inserting such acknowledgments in deeds is very common, whether the consideration had

Prevention of Resulting Trust. — However, the principle is well settled that the clause in a deed admitting the consideration to have been received has the effect of preventing a resulting trust to the grantor, for he is forever estopped, by the acknowledgment of payment, from denying the deed for the uses therein expressed.¹

been paid or not. 'For and in consideration of \$— in hand paid,' etc., is a commonplace phrase which may be found in deeds generally. And it is seldom intended as evidence of payment, or for any other practical purpose, except to show the amount of consideration. To establish the conclusiveness of such loose expressions, therefore, might produce extensive injustice. If a note had been given for the consideration, and afterwards, without payment, a deed be executed for the land, with the commonplace phraseology in relation to the price, would this be conclusive evidence that the notes had been paid off and discharged? Surely not. We concur, therefore, with those who have decided that the acknowledgment, on the deed, of the payment of the consideration is only *prima facie* evidence of the fact."

See further, *infra*, *Evidence of Consideration — Admissibility of Extraneous Evidence — To Prove Nonpayment of Consideration.*

1. Acknowledgment of Consideration Prevents Resulting Trust — Alabama. — Mobile, etc., R. Co. v. Wilkinson, 72 Ala. 286.

Connecticut. — Belden v. Seymour, 8 Conn. 304, 21 Am. Dec. 661; Meeker v. Meeker, 16 Conn. 383.

Maine. — Goodspeed v. Fuller, 46 Me. 141, 71 Am. Dec. 572.

Missouri. — Bobb v. Bobb, 89 Mo. 411.

New Hampshire. — Pritchard v. Brown, 4 N. H. 397, 17 Am. Dec. 431; Horn v. Thompson, 31 N. H. 562.

New York. — Stackpole v. Robbins, 47 Barb. (N. Y.) 212; Hebbard v. Haughian, 70 N. Y. 54.

Tennessee. — Perry v. Central Southern R. Co., 5 Coldw. (Tenn.) 138; Bayliss v. Williams, 6 Coldw. (Tenn.) 440.

"Transactions of great importance would have no stability if the parties thereto were permitted to show by parol proof that written instruments solemnly executed by them did not mean what the language of the instrument purported. An absolute deed to real property conveys from the grantor to the grantee all the title of the former, and he will not be allowed to prove by parol evidence that it was made in trust for him, or that there was a reservation in his favor of any right not expressed therein, nor that the deed is invalid for the want of consideration, where he acknowledges therein the receipt of one." Finlayson v. Finlayson, 17 Oregon 347, 11 Am. St. Rep. 836.

A recited payment of one hundred dollars, besides natural love and affection, as the consideration of a deed executed by the husband in trust for the wife, conveying property worth about twelve thousand dollars, is only a nominal consideration, but it estops the husband or his heirs, in a controversy with the wife or her devisees, from alleging that the deed was merely voluntary; and while parol evidence may be received to show that less than one

hundred dollars was paid, it is not admissible to show that nothing was in fact paid, thereby changing the character of the instrument. Ohmer v. Boyer, 89 Ala. 273.

Grantor Cannot Prove Reservation. — A farm upon which a crop of wheat was growing was sold and conveyed for a stated consideration, and the grantee went into possession. The grantor sued the grantee in assumpsit for one-third of the net proceeds of the wheat, and sought to show in support of his claim that it was verbally agreed at the time of the conveyance of the land that, as a further consideration for said conveyance, the grantee should harvest and market the wheat, and pay the grantor one-third of the net proceeds realized on such sale. It was held that, as between the grantor and grantee growing crops are a part and parcel of the land, and pass by deed absolute in its terms to the grantee, the effect of the admission of this evidence would be to permit the grantor to defeat his deed in part; the evidence should, therefore, have been rejected. Adams v. Watkins, 103 Mich. 431.

Deed by Married Woman. — As a general rule, when a deed recites the payment of a valuable consideration, the grantor and his privies are estopped to deny the recital, though they may show a valuable consideration different from that recited; but this principle does not apply to a married woman seeking relief against a conveyance of lands belonging to her statutory estate, and she may show, notwithstanding its recitals, that no consideration was in fact paid. Vincent v. Walker, 93 Ala. 165.

While the Act of 1879 (Acts 1879, Spec. Sess., p. 160) was in force, a mortgage by a married woman, to secure her husband's debts, of lands acquired by gift, was invalid, and a recital in the deed to her showing a cash consideration did not estop her from showing by parol evidence that the conveyance was in fact a gift, and not for a valuable consideration. Levering v. Shockey, 100 Ind. 558.

The principle that a party is not permitted to contradict by parol proof a notarial act of sale does not apply to a married woman who seeks to set aside an act purporting to be an act of sale, upon the ground that it was in fact a disguised donation to her husband. Thibodeaux v. Herpin, 5 La. Ann. 578.

Reversion to Donor—Statute. — The seventh section of the statute of descents of *Indiana* contains this provision: "An estate which shall have come to the intestate by gift or by conveyance, in consideration of love and affection, shall, if the intestate die without children or their descendants, revert to the donor, if living, at the intestate's death, saving to the widow or widower, however, his or her rights therein." In an action brought by a father to recover a tract of land conveyed by him to his son, and of which the latter died seised, without issue, it was held that though the deed expressed on its face a consideration of one

XII. PRESUMPTION OF CONSIDERATION — 1. Simple Contracts — a. NEGOTIABLE INSTRUMENTS. — Bills of exchange and promissory notes, and all other instruments negotiable under the law merchant, and all indorsements thereon, are presumed to be founded upon a valid and valuable consideration and *prima facie* import it.¹

b. WRITTEN CONTRACTS GENERALLY — STATUTES. — By statute in some of the states all contracts made in writing and signed by the party to be charged thereby are made to import a consideration.² In some of the states, however, the statute only applies to contracts for the payment of money or property.³

2. Specialties — a. IN GENERAL — Seal Imports Consideration. — The rule has never been doubted that the presence of a seal upon an instrument imports that it is founded upon a consideration.⁴

thousand dollars, the plaintiff might allege and prove that the true consideration was natural love and affection. *Jones v. Jones*, 12 Ind. 389; *Kenney v. Phillipy*, 91 Ind. 511.

1. See the titles **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 186; **CERTIFICATES OF DEPOSIT**, vol. 5, p. 801; **CHECKS**, vol. 5, p. 1028; **COUPONS**; **MUNICIPAL SECURITIES**; **NEGOTIABLE INSTRUMENTS**; **RAILROAD SECURITIES**; **STOCK**.

Note Payable at Maker's Death. — A promissory note imports a consideration, although payable one day after the death of the maker. *Safford v. Graves*, 56 Ill. App. 499.

Nonnegotiable Bills and Notes. — For a discussion of the question whether nonnegotiable bills and notes import a consideration, see the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 187.

Checks. — The drawing and delivery of a check implies the indebtedness of the drawer to the payee to the amount of the check, and in an action upon it it is unnecessary to aver in the declaration a consideration. *McClain v. Lowther*, 35 W. Va. 297. See also *Terry v. Ragsdale*, 33 Gratt. (Va.) 342; *Ford v. McClung*, 5 W. Va. 156.

2. Presumption of Consideration — Written Contracts — Statutes — California. — *Toomy v. Dunphy*, 86 Cal. 639.

Iowa. — *Des Moines University v. Livingston*, 57 Iowa 307, 42 Am. Rep. 42; *Commercial Exch. Bank v. McLeod*, 67 Iowa 718; *Allen v. Platt*, 79 Iowa 113; *First M. E. Church v. Donnell*, (Iowa 1895) 64 N. W. Rep. 412.

Kansas. — *Warren v. Johnson*, 38 Kan. 768.

Texas. — *Howard v. Zimpelman*, (Tex. 1890) 14 S. W. Rep. 59; *Gulf, etc., R. Co. v. Hughes*, (Tex. Civ. App. 1895) 31 S. W. Rep. 411.

A written contract in *Texas* imports a consideration, and the filing of a reply by plaintiffs under oath, alleging that the contract set up as a defense was without consideration, does not shift on the defendant the burden of proving the consideration. *Gulf, etc., R. Co. v. Hughes*, (Tex. Civ. App. 1895) 31 S. W. Rep. 411.

While under the statute a written instrument will ordinarily import a consideration, this rule will not apply where the instrument shows on its face affirmatively that it was executed without a consideration. *Gulf, etc., R. Co. v. Winton*, 7 Tex. Civ. App. 57.

Alabama. — In *Alabama* all written contracts which are the foundation of a suit import a

consideration. *Young v. Foster*, 7 Port. (Ala.) 420; *Click v. McAfee*, 7 Port. (Ala.) 62; *Nesbit v. Bradford*, 6 Ala. 746; *Holman v. Norfolk Bank*, 12 Ala. 369; *Thompson v. Hall*, 16 Ala. 204; *Doe v. Crane*, 16 Ala. 570; *Bolling v. Munchus*, 65 Ala. 558; *Ala. Civil Code*, 1886, § 2769.

A covenant which is not the foundation of the suit, but which is set up as a defense, does not import a consideration. *Keep v. Kelly*, 29 Ala. 322.

Dakota. — Section 914 of the *Dak. Civ. Code* provides "(2) A written instrument is presumptive evidence of a consideration. (3) The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it."

Florida. — Under *Rev. Stat. Florida* (section 1073), "all bonds, notes, covenants, deeds, bills of exchange, and other instruments of writing not under seal shall have the same force and effect (so far as the rules of pleading and evidence are concerned) as bonds and instruments under seal."

Tennessee. — All contracts in writing hereafter made and signed by the party to be bound, or his authorized agent and attorney, are *prima facie* evidence of a consideration. Section 3214, *Code of Tennessee*.

3. Missouri. — Under *Revised Statutes*, 1879, section 663, all promises in writing for the payment of money or property, whether conditional or absolute, import a consideration. *Wulze v. Schaefer*, 37 Mo. App. 551.

Illinois. — Under the statute of *Illinois* an instrument in writing for the payment of money imports a consideration. *Goodwin v. Goodwin*, 65 Ill. 497.

4. Seal Imports Consideration — England. — *Fallows v. Taylor*, 7 T. R. 471; *Bunn v. Guy*, 4 East 190.

Arkansas. — *Patton v. Ashley*, 8 Ark. 290.

Georgia. — *Rutherford v. Baptist Convention*, 9 Ga. 54.

Iowa. — *Brockway v. Harrington*, 82 Iowa 23.

Kansas. — *Ruth v. Ford*, 9 Kan. 17.

Maine. — *Wing v. Chase*, 35 Me. 260.

Maryland. — *Ingersoll v. Martin*, 58 Md. 67, 42 Am. Rep. 322.

Minnesota. — *McMillan v. Ames*, 33 Minn. 257; *Erickson v. Brandt*, 53 Minn. 10.

Mississippi. — *Brewer v. Bessinger*, 25 Miss. 86.

North Carolina. — *Angier v. Howard*, 94 N. Car. 27; *Wester v. Bailey*, 118 N. Car. 193.

b. CONCLUSIVENESS OF PRESUMPTION — (1) *At Common Law*. — Under the common law this presumption was conclusive, and in an action upon a sealed instrument want of consideration could not be shown.¹

(2) *Under Statutes*. — But under the statutes of many of the states the conclusiveness of the presumption has been abrogated. The provisions of these statutes and their operation and effect will be discussed elsewhere.²

XIII. EVIDENCE OF CONSIDERATION — 1. **Burden of Proof** — *a. SIMPLE CONTRACTS* — (1) *In General*. — A valuable consideration being one of the essentials of a valid contract, it follows as a necessary consequence that in an action upon it the burden of proof is upon the plaintiff to show a consideration.

(2) *When the Contract Imports a Consideration*. — In actions upon bills and notes, which according to the law merchant import a consideration, and upon other contracts which are by statute made to do so,³ the production of the instrument alone furnishes *prima facie* evidence of a consideration and casts upon the defendant the burden of proving the want or failure of it.⁴

Weight of Evidence Necessary to Rebut Presumption. — How much evidence is necessary to rebut this presumption, has been the subject of much conflict among the authorities. The conflict seems to turn upon the meaning in this connection of the term "burden of proof."⁵ Some of the authorities, regarding the term

Pennsylvania. — *In re Snyder's Estate*, 7 Kulp (Pa.) 409; *Schuykill Nav. Co. v. Harris*, 5 W. & S. (Pa.) 28; *Anderson v. Best*, 176 Pa. St. 498.

Where a note under seal was executed by a father and delivered to his daughter, or to another for her, and in an accompanying and contemporaneous paper the fact appeared that the payee was his daughter, and that the note was intended to be paid out of his estate after his death, in addition to her distributive share, it was held that such fact was not sufficient to rebut the consideration imported by the seal; and even if the note had been a voluntary bond and intended as a gift, the seal imported a consideration and rendered it enforceable. *Ducker v. Whitson*, 112 N. Car. 44, citing 8 AM. & ENG. ENCYC. OF LAW (1st ed.) p. 1321.

1. 2 Wharton on Evidence, § 1045.

2. See *infra*, *Want or Failure of Consideration*.

3. See *supra*, *Presumption of Consideration*.

4. **Bills and Notes** — **Production Prima Facie Evidence of Consideration** — *Alabama*. — *Martin v. Foster*, 83 Ala. 213.

Colorado. — *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 258.

Florida. — *Livingston v. Cooper*, 22 Fla. 292.

Georgia. — *Rowland v. Harris*, 55 Ga. 141.

Illinois. — *Safford v. Graves*, 56 Ill. App. 499.

Indiana. — *Phelps v. Younger*, 4 Ind. 450.

Iowa. — *Sullivan v. Collins*, 18 Iowa 228.

Kentucky. — *Murry v. Clayborn*, 2 Bibb (Ky.) 300.

Maine. — *Small v. Clewley*, 62 Me. 155, 16 Am. Rep. 410.

Massachusetts. — *Delano v. Bartlett*, 6 Cush. (Mass.) 364; *Perley v. Perley*, 144 Mass. 104.

Michigan. — *Manistee Nat. Bank v. Seymour*, 64 Mich. 59.

Minnesota. — *Nichols, etc., Co. v. Dedrick*, 61 Minn. 513.

New York. — *Kinsman v. Birdsall*, 2 E. D. Smith (N. Y.) 395; *Genesee College v. Dodge*, 26 N. Y. 213; *Mortimer v. Chambers*, 63 Hun (N. Y.) 335; *Olsen v. Ensign*, 7 Misc. Rep. (N. Y. C. Pl.) 682.

North Carolina. — *McArthur v. McLeod*, 6 Jones L. (N. Car.) 475; *Campbell v. McCormac*, 90 N. Car. 491.

Oregon. — *Wilson v. Wilson*, 26 Oregon 315; *Flint v. Phipps*, 16 Oregon 437.

Texas. — *Hogue v. Williamson*, (Tex. Civ. App. 1893) 22 S. W. Rep. 762.

Vermont. — *Burton v. Blin*, 23 Vt. 151.

Virginia. — *Peasley v. Boatwright*, 2 Leigh (Va.) 195.

Washington. — *McKenzie v. Oregon Imp. Co.*, 5 Wash. 409.

"It is in general true that to support an action of assumpsit the plaintiff must aver and prove a legal and valid consideration, a promise which is merely voluntary, having in contemplation of law no obligatory force; for the common law has adopted the maxim of the civil law that *ex nudo pacto non oritur actio*. This doctrine, however, is not applicable to actions founded upon mercantile instruments, these being governed by the *lex mercatoria*, and not the common law. A bill of exchange, therefore, although according to the general principles of the common law it is to be considered in the light of a simple contract, is nevertheless in this respect entitled to the privilege of a specialty, which, carrying with it internal evidence of a good consideration, constitutes the basis of the action and supersedes the necessity of averring and proving a consideration. This privilege always belonged to foreign bills, and has at length, though not without much struggle, as it is said, been conceded to inland or domestic bills. It is evident, therefore, if the instrument declared on in this case be entitled to the character of a bill of exchange, that the objection under consideration must fail." *Murry v. Clayborn*, 2 Bibb (Ky.) 300.

For further authorities, see the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 186.

5. **Meaning of the Term Burden of Proof**. — For an exposition of the twofold meaning of the term "burden of proof," see the title **BURDEN OF PROOF**, vol. 5, p. 21.

as having reference to the weight of evidence, hold that the burden is upon the defendant of proving the want of consideration by a preponderance of the evidence, and, in cases where the testimony leaves the question in doubt, hold, therefore, that the plaintiff is entitled to recover.¹ Other authorities, however, consider the term as referring merely to the burden upon the defendant of producing evidence to meet the *prima facie* case. If no evidence is introduced, the presumption prevails; but when evidence has been introduced by the defendant, the burden is again thrown upon the plaintiff to satisfy the jury by a preponderance of the evidence that there was a consideration.²

1. Defendant Must Negative Consideration by Preponderance of Evidence. — *Martin v. Foster*, 83 Ala. 213; *McKenzie v. Oregon Imp. Co.*, 5 Wash. 409.

A promissory note imports a sufficient consideration, when executed in settlement of a claim; and when its validity is attacked on the character of the claim, the burden of showing that character is upon the defendant. *Sullivan v. Collins*, 18 Iowa 228.

In an action upon a note for \$1,000 the defendant pleaded under oath that the instrument was executed for a gambling debt. At the trial, the plaintiff put the note in evidence and rested. The defendant introduced no evidence. The court instructed the jury to return a verdict for the defendant, which being done, judgment was rendered accordingly. Upon appeal, the judgment was reversed. *Hogue v. Williamson*, (Tex. Civ. App. 1893) 22 S. W. Rep. 762.

2. When Presumption Rebutted Plaintiff Must Produce Preponderance of Testimony. — *Campbell v. McCormac*, 90 N. Car. 491.

In an action on a promissory note between the original parties thereto, where a want of consideration is relied upon as a defense, and evidence is given on the one side in the affirmative, and on the other in the negative, of the fact of consideration, the burden of proof is on the plaintiff to satisfy the jury, upon the whole evidence, of that fact. *Small v. Clewley*, 62 Me. 155, 16 Am. Rep. 410.

The law creates a legal presumption of consideration for a promissory note, but this presumption may be rebutted, and though the mere plea of want of consideration may not alone suffice to throw the burden of proof upon the payee, yet, when the plea is sustained by evidence throwing doubt upon it, the payee may be required to prove it. *Clark v. Christine*, 4 Rob. (La.) 196; *Wooten v. Harrison*, 9 La. Ann. 234; *Martin v. Donovan*, 15 La. Ann. 41; *Mossop v. His Creditors*, 41 La. Ann. 291.

In *Delano v. Bartlett*, 6 Cush. (Mass.) 364, Fletcher, J., referring to the matter of burden of proof in actions upon promissory notes, says: "It was incumbent on the plaintiff to prove a consideration for the note, which was the foundation of the suit. That was a part of her case, and the burden was on her to establish that fact. But the note itself was *prima facie* evidence of a consideration; so that, by producing the note, the plaintiff made a *prima facie* case. That evidence, if not rebutted, would be sufficient to maintain the plaintiff's case. But it was competent for the defendants to rebut this evidence on the part of the plaintiff, and thus to avoid the *prima*

facie case made by her. Accordingly the defendants did offer evidence to rebut the evidence on the part of the plaintiff, and to show that there was no consideration. The evidence on both sides applied to the affirmative or negative of the same issue or proposition of fact, a consideration for the note, and the plaintiff's case requiring her to establish that fact, the burden of proof was all along on her to satisfy the jury, upon the whole evidence in the case, of the fact of a consideration for the note."

Again, in *Manistee Nat. Bank v. Seymour*, 64 Mich. 59, in an action upon a promissory note the consideration of which was disputed, the court, by Champlin, J., said: "The burden of proof was upon the plaintiff to show a consideration for the note sued upon. The plaintiff made a *prima facie* case by the introduction of the note signed by the defendant. It was not necessary to prove the actual consideration in the first instance, because a presumption of fact arises, from the usual course of dealing in commercial paper, that it was based upon a good consideration; and, in case of indorsed commercial paper, when the indorsee or holder brings suit upon it, by proving the signatures of the maker and indorser a presumption arises that the note is supported by a good consideration, and that it was indorsed at the date of the note, or, at least, before maturity, and before delivery to the holder, which presumption is sufficient *prima facie* evidence to authorize a recovery in case the fact of consideration and of indorsement before maturity is not controverted. But when evidence is introduced which, if believed, shows a want of consideration, or that the indorsement was not made until after delivery to the holder, then the evidence arising from the presumption is rebutted, and the burden of proof is still on the plaintiff to show, to the satisfaction of the jury, a consideration, and that the note was indorsed before delivery to the holder. The jury must be able to say, from the whole evidence offered on both sides, that there was a good consideration; for, if the testimony leaves it in doubt whether there was a good consideration or not, the plaintiff fails in making out his case."

Notes Between Parties Standing in Confidential Relation. — In *Huffman v. Iams*, (Pa. 1887) 11 Atl. Rep. 444, it was held, in an action upon a promissory note given by a father to his son, who was also his trustee under an assignment for benefit of creditors, that the relation of the parties was a confidential one and threw upon the son the burden of proving that the note was supported by a consideration.

But the fact that the payee of a note was an

(3) *When the Contract Acknowledges a Consideration.* — An admission in a written contract that it was made for a valuable consideration is *prima facie* evidence of that fact, and in an action upon the contract the burden is upon the defendant to rebut it.¹

b. SPECIALTIES — (1) *In General.* — As a seal imports a consideration,² it follows that in an action upon a specialty the burden is upon the defendant to show a want or failure of it.

(2) *Conveyances Presumptively Fraudulent.* — But a deed, unless made for an adequate and valuable consideration, will be presumed to be fraudulent as to existing creditors of the grantor;³ and in an action by a creditor against the grantee, the burden is upon the latter to prove a valuable and adequate consideration.⁴

2. Admissibility of Extraneous Evidence — a. TO SHOW CONSIDERATION WHEN NONE IS EXPRESSED — Simple Contracts. — When no consideration is expressed in a simple contract, the consideration upon which it is founded may always be shown by evidence *aliunde*.⁵

Bills of Exchange and Promissory Notes. — Thus the consideration of bills of exchange and promissory notes, and other contracts for the payment of money, which ordinarily do not express the consideration, may be shown by parol.⁶

educated business man professing friendship for the makers, who were ignorant persons scarcely able to read or write, but possessed of ordinary judgment, does not establish such a confidential relation between the parties as to place on the former the burden of showing that the notes were supported by a consideration. *Willard v. Pinard*, 65 Vt. 160.

1. When Contract Acknowledges Consideration. — *Whitney v. Stearns*, 16 Me. 394.

A written acknowledgment of the receipt of specific articles is a sufficient proof of consideration to support a promise to pay. *Sims v. Stilwell*, 3 How. (Miss.) 176.

2. See *supra*, *Presumption of Consideration — Specialties*.

3. See *supra*, *Necessity and Sufficiency of Consideration — Specialties*.

4. Burden of Proof — Conveyances Presumptively Fraudulent. — *Houston v. Blackman*, 66 Ala. 559, 41 Am. Rep. 756; *Mobile Sav. Bank v. McDonnell*, 89 Ala. 434, 18 Am. St. Rep. 137; *Buford v. Shannon*, 95 Ala. 205; *Miller v. Rowan*, 108 Ala. 98; *Wooten v. Steele*, 109 Ala. 563.

In the absence of any evidence to the contrary, an assignment under seal imports a valuable consideration. If, however, there be any evidence, however slight, to impeach the *bona fides* of the transaction, the assignee may be required to give full proof of consideration. *Hancock's Appeal*, 34 Pa. St. 155.

In a Controversy Between the Grantee and a Creditor of the Grantor, relative to the validity of the conveyance, its recital of the consideration is merely an admission of the grantor, and is not evidence against the creditor. In such a contest the onus of proving that the conveyance was founded on an adequate and valuable consideration is cast upon the grantee; and without regard to the motives of the parties in its execution as to the rights of existing creditors, the deed will be presumed to be fraudulent until the contrary is shown. *Hubbard v. Allen*, 59 Ala. 283.

A Post-nuptial Settlement by a Husband Who Is

Indebted is presumed to be voluntary as to his then existing creditors, and therefore fraudulent and void as to them, unless those claiming under it can show that it was made for a valuable consideration. The burden of proof is on those claiming under the settlement. *Flynn v. Jackson*, 93 Va. 341.

5. Parol Evidence — When No Consideration Is Expressed — Simple Contracts — *United States*. — *Laftie v. Shawcross*, 12 Fed. Rep. 519.

Arkansas. — *Fitzpatrick v. Moore*, 53 Ark. 4.

Connecticut. — *King v. Woodruff*, 23 Conn. 56, 60 Am. Dec. 625.

Maine. — *Warren v. Walker*, 23 Me. 453.

Massachusetts. — *Arms v. Ashley*, 4 Pick. (Mass.) 71.

New York. — *Frink v. Green*, 5 Barb. (N. Y.) 455.

Pennsylvania. — *Hill v. McDowell*, 14 Pa. St. 175; *Bowser v. Cravener*, 56 Pa. St. 132.

6. Parol Evidence of Consideration — Bills and Notes — *United States*. — *Corcoran v. Hodges*, 2 Cranch (C. C.) 452.

Alabama. — *Long v. Davis*, 18 Ala. 801.

California. — *Bennett v. Solomon*, 6 Cal. 134.

Georgia. — *Knight v. Knight*, 28 Ga. 165.

Illinois. — *Martin v. Stubbings*, 27 Ill. App. 121, affirmed 126 Ill. 387.

Iowa. — *Simpson Centenary College v. Bryan*, 50 Iowa 293.

Louisiana. — *Klein v. Dinkgrave*, 4 La. Ann. 540.

Michigan. — *Macomb v. Wilkinson*, 83 Mich. 486.

Mississippi. — *Matlock v. Livingston*, 9 Smed. & M. (Miss.) 489.

Nebraska. — *Walker v. Haggerty*, 30 Neb. 120.

New Hampshire. — *Cross v. Rowe*, 22 N. H. 77.

For additional cases, see the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 199.

Parol Evidence — Consideration for Indorsement. — Parol evidence is admissible to show the consideration for an indorsement, or that the indorsement was without consideration. *Pet-*

Conveyances Operating under Statute of Uses. — And extrinsic evidence is admissible to show the consideration of deeds operating under the statute of uses when no consideration is expressed therein.¹

b. TO SHOW WHOLE CONSIDERATION WHEN STATEMENT IS OBVIOUSLY INCOMPLETE — Simple Contracts. — When the statement of the consideration in a written contract is such as to make it apparent upon its face that the writing does not express the whole consideration upon which the contract is founded, it is competent to supply the deficiency by parol proof.²

Deeds. — So, where a deed of conveyance or assignment acknowledges the receipt of a valuable consideration, or a good consideration without specifying what it is, parol evidence is admissible to show its character.³

tibone v. Roberts, 2 Root (Conn.) 258; *Brown v. Summers*, 91 Ind. 151. And see the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, pp. 197, 199.

Parol Evidence to Show Consideration of Bond. — By bond dated July 7, 1863, B. promised to pay to W. three years after date \$2,000 without interest, in current funds in the state of Virginia, being money borrowed. In an action upon this bond it was held that parol evidence was admissible to prove the consideration thereof as throwing light upon the character of the contract; and the evidence showing that it was a contract of hazard, and that the parties contemplated the possibility, though not the probability, of the failure of the Confederacy, and intended that the bond should be discharged in the currency in use when it fell due, judgment was entered for the plaintiff for an amount equal in value to \$2,000 in United States currency then in use in Virginia, on the day it fell due, with interest from that date. *Wrightsmen v. Bowyer*, 24 Gratt. (Va.) 433.

In a suit for specific performance, on a bond for title to land, the consideration, if none be expressed in the bond, may be proved by parol. *Wheeler v. Friend*, 22 Tex. 683.

1. *White v. Weeks*, 1 P. & W. (Pa.) 486; *Wood v. Beach*, 7 Vt. 522.

2. **When Statement of Consideration Is Obviously Incomplete.** — Where a contract between the plaintiff and defendant recited "in consideration of the purchase of land from me for the location of a town site and the location of a depot at a point between stations 1670 and 1678 on the located line of the G. C. & S. F. railway," it was held that the language indicated that there was some understood agreement between the plaintiff and defendant requiring the defendant to place a depot between the stations named, and parol evidence was admissible to prove it. *Gulf, etc., R. Co. v. Jones*, 82 Tex. 156.

The defendant, who was president of the Taunton Locomotive Company, subscribed to the stock of the plaintiff railroad company, "payable in cash on the delivery of the last engine of twelve from the Taunton Locomotive Manufactory." In an action for the recovery of the amount of the subscription, it was held that it was competent for the defendant to put in evidence a contract made by the Taunton Company with the plaintiff on the same date with the subscription, for the delivery of twelve engines, and to show by parol that that was the contract referred to in the subscription and that not all of the twelve engines referred to in

it had been delivered. *Rutland, etc., R. Co. v. Crocker*, 4 Blatchf. (U. S.) 179.

In an action on a note expressed to be given "for work done on a saw and grist mill and waste-way," the defendant pleaded non-assumpsit and failure of consideration, and proposed to prove that the plaintiff warranted the work should answer the purpose for which it was done, and that if it was not well done, then the plaintiff would pay for the materials and his board and charge nothing for the work; and that the work, so far from performing well, was totally valueless. This testimony was rejected by the court upon the ground that parol evidence was inadmissible to change or alter a written contract, but upon appeal Collier, C. J., delivering the opinion of the court, said: "The fact that the consideration which induced the making of the note is expressed upon its face is not such a circumstance as conclusively indicates that the writing is a complete expression of the contract of the parties. It serves to show what was the consideration, and dispenses with additional proof to this point. It proves what was the inducement to the making of the note, but does not set out what were the stipulations in respect to the work or exclude the idea that there were any." *Self v. Herrington*, 11 Ala. 489.

In an action upon a promissory note, the consideration of which was expressed to be "the privilege of advertising purposes of one panel, each 7 x 22 inches, in fifteen cars of " a certain railroad company, it was held that the testimony of the maker was admissible to show that it was agreed that the advertising was to be put in cars on one of the several roads operated by the company. *Chase v. Senn* (C. Pl.) 13 N. Y. Supp. 266.

Where a Written Agreement Is Shown as Consideration for a Note, but not referring to it or indicating what the entire dealings were, evidence of additional consideration is admissible. *Taylor v. Dansby*, 42 Mich. 82.

3. *Munro v. Robertson*, 2 Cranch (C. C.) 262; *Sullivan v. Lear*, 23 Fla. 463, 11 Am. St. Rep. 388; *Taylor v. Preston*, 79 Pa. St. 436; *Stevens v. Griffith*, 3 Vt. 448.

Evidence Admissible to Prove Character of "Good Consideration." — When a deed purports on its face to be made, not only in consideration of natural love and affection, but also "for divers other good considerations" which are not specified, parol evidence is admissible to show what the other considerations were. *Johnson v. Boyles*, 26 Ala. 576.

Nominal Consideration. — For a like reason, where the consideration in a deed is stated to be one dollar, or five shillings, or the like, it is obvious on the face of the deed that the consideration expressed is purely nominal, and the true consideration may be shown by parol.¹

c. TO VARY CONSIDERATION WHEN IT IS APPARENTLY FULLY EXPRESSED — (1) *Older Rule.* — When the consideration of a contract or deed is apparently fully stated in the instrument, it was formerly held, according to the familiar rule, that parol evidence was inadmissible to vary, qualify, or contradict it.²

(2) *Modern Rule* — (a) **When the Statement Is Merely Formal** — *aa. IN GENERAL.* — But the view is now almost universally taken that the rule does not apply when the statement of the consideration in a contract or deed is merely formal. In such a case the consideration clause is not to be deemed an essential part of the instrument, but a mere recital of a fact, and as such is liable to contradiction.³

Where the consideration expressed in a deed is "five hundred dollars and other good causes and considerations," it is competent to aver and prove the consideration of blood. *Pomeroy v. Bailey*, 43 N. H. 118.

Deed with Consideration Clause Left Blank. — Where a deed was expressed to be "for and in consideration of the sum of — dollars, current money of the United States, received in full to my satisfaction of," etc., it was held that parol evidence was properly admitted to prove that the deed was in fact given for a valuable consideration. *Wood v. Beach*, 7 Vt. 522.

1. Nominal Consideration. — *Struthers v. Drexel*, 122 U. S. 487; *Perry v. Central Southern R. Co.*, 5 Coldw. (Tenn.) 138; *Harvey v. Alexander*, 1 Rand. (Va.) 219, 10 Am. Dec. 519.

A deed of realty of considerable value, though on its face purporting to be executed upon a nominal consideration only, may be supported against the attack of the other heirs by evidence showing that the grantee was the grantor's daughter and that the real consideration was love and affection. *Dawson v. Briscoe*, 97 Ga. 408.

In *Scott v. Scott*, 1 Mass. 527, where a deed from a father to a son was made in consideration of love and affection, and also in consideration of five shillings paid, the money consideration was held to be sufficient to open the inquiry and permit parol evidence of what valuable considerations had operated between the parties.

2. Evidence to Vary the Expressed Consideration — Older Rule. — *Mead v. Steger*, 5 Port. (Ala.) 498; *Maigley v. Hauer*, 7 Johns. (N. Y.) 341; *Schemerhorn v. Vanderheyden*, 1 Johns. (N. Y.) 139, 3 Am. Dec. 304; *Howes v. Barker*, 3 Johns. (N. Y.) 506, 3 Am. Dec. 526; *Jackson v. Delancey*, 4 Cow. (N. Y.) 427; *Winchell v. Latham*, 6 Cow. (N. Y.) 690; *Miller v. Bagwell*, 3 McCord L. (S. Car.) 563.

Where the consideration is mentioned in a deed, and nothing is said of other considerations, proof of any other cannot be entered into; otherwise where no consideration at all is mentioned in the deed. *Peacock v. Monk*, 1 Ves. 127.

3. Modern Rule — When Statement Is Merely Formal. — *Bourne v. Bourne*, 92 Ky. 211; *Dickson v. Ford*, 38 La. Ann. 736; *Dayton v. Warren*, 10 Minn. 233; *Aull Sav. Bank v. Aull*,

80 Mo. 199; *M'Crea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103. And see the authorities cited in the following notes.

Parol Evidence to Show Substitution of Consideration. — On the trial of an action for the trover and conversion of a slave, the defendant proved by a witness that a bill of sale under which the plaintiff claimed title to the slave in controversy was, by a parol agreement between the plaintiff and defendant, to be destroyed and the slave given up to the defendant if he would execute to the plaintiff a deed for the land on which he lived, and that the deed which was read in evidence was afterwards executed on the aforesaid consideration. Plaintiff's counsel moved the court to reject this evidence, but the court overruled the motion, and upon appeal the ruling was affirmed. *Trumbo v. Curtright*, 1 A. K. Marsh. (Ky.) 582.

Rescission of Contract — Restoration of Consideration. — Where a contract was rescinded by a memorandum in writing, which made no mention of money already paid on the contract, parol evidence was admitted to prove that the party who had paid the money was not to receive it back. *Clark v. Perry*, 4 How. (Miss.) 285.

Action for Infringement of Patent — Evidence of Amount of License Fee. — In an action for damages for the infringement of a patent, the amount of the license fee charged for the use of the invention is the measure of damages, and this may be shown by parol. *Wooster v. Simonson*, 20 Fed. Rep. 316.

Manner of Payment. — Parol evidence is admissible to explain the manner and to whom the purchase money of a conveyance was paid. *Calvert v. Nickles*, 26 S. Car. 304.

Evidence to Explain Consideration. — Where a deed which expresses the consideration to be land, without describing it, is sought to be impeached for fraud, it may be shown by parol what particular land was meant. *Stiles v. Giddens*, 21 Tex. 783.

Evidence to Show from Whom Consideration Moves. — A recital in a deed that the consideration was paid by the husband does not necessarily import that it was paid out of his funds; and in an action to set aside a deed as fraudulent, parol evidence may be received to establish the fact that the settlement was made upon a consideration moving from the

bb. EVIDENCE PROVING DIFFERENT CONSIDERATION FROM THAT EXPRESSED—(aa) Considerations of Same Species.—So, in actions for the recovery of the consideration¹ or for breach of the covenants in a deed,² the true consideration upon which it is founded may be shown, though differing from that stated in the instrument.

Illustrations.—Thus, it may be shown,³ when the consideration is ex-

wife's father, though the deed recites that it was paid by the husband. *Marks v. Spencer*, 81 Va. 751.

1. Action for Recovery of the Consideration.—*Perry v. Central Southern R. Co.*, 5 Coldw. (Tenn.) 138.

Actions upon Promissory Notes—True Consideration May Be Shown.—A statement in a promissory note that it was given for money loaned, is not conclusive. It is open to either party to show the actual consideration. *Miller v. McKenzie*, 95 N. Y. 575, 47 Am. Rep. 85.

In an action on a note, purporting on its face to be given for a certain consideration, where the defendant proved a failure of such consideration, the plaintiff may by parol proof show that the note was not given for the consideration expressed on its face, but for another and different consideration. *Dorsey v. Hagar*, 5 Mo. 420.

The recital in the note that it was given for the purchase money of the land could be explained by parol testimony showing the real nature of the transaction; such testimony being explanatory of the recital of a fact which the party offering it was not estopped from denying. *Hicks v. Morris*, 57 Tex. 658.

Parol evidence is admissible to show that a note payable to the plaintiff, but reciting on its face that it was given "in payment of machinery bought of" a third person, was by agreement of all the parties so made in satisfaction of a debt due to the plaintiff by such third person. *Marsh v. Lisle*, 34 Miss. 173.

It is proper to show, in defense to an action for the price of a machine which has been ordered under the terms of a written instrument by which the defendant agreed to pay a specified consideration and which provided for a test, that it was understood when the order was given, and was part of the consideration, that the plaintiff should furnish a man to set up the machine, and that it was his usage to do so. *Wood Mowing, etc., Mach. Co. v. Gaertner*, 55 Mich. 453.

2. Actions for Breach of Covenants—True Consideration of Deed May Be Shown—Alabama.—*Eckles v. Carter*, 26 Ala. 563.

Connecticut.—*Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661.

Illinois.—*Howell v. Moores*, 127 Ill. 67.

Indiana.—*Hays v. Peck*, 107 Ind. 389.

Iowa.—*Swafford v. Whipple*, 3 Greene (Iowa) 261, 54 Am. Dec. 498; *Lawton v. Buckingham*, 15 Iowa 22.

Minnesota.—*Dayton v. Warren*, 10 Minn. 233; *Donlon v. Evans*, 40 Minn. 501.

Missouri.—*Henderson v. Henderson*, 13 Mo. 151; *Guinotte v. Chouteau*, 34 Mo. 154; *Miller v. McCoy*, 50 Mo. 214.

New Hampshire.—*Morse v. Shattuck*, 4 N. H. 229, 17 Am. Dec. 419.

New York.—*Bingham v. Weiderwax*, 1 N. Y. 509.

North Carolina.—*Chesson v. Pettijohn*, 6 Ired. L. (N. Car.) 121.

South Carolina.—*Garrett v. Stuart*, 1 McCord L. (S. Car.) 514.

3. Amount Differing from Consideration Expressed May Be Shown—Actions of Covenant for Breach of Warranty of Seizin.—*Howell v. Moores*, 127 Ill. 67; *Swafford v. Whipple*, 3 Greene (Iowa) 261, 54 Am. Dec. 498; *Lawton v. Buckingham*, 15 Iowa 22; *Henderson v. Henderson*, 13 Mo. 151.

Where an Agent or Quasi Trustee of Real Estate, whose duty it is to sell for cash, departs from the strict line of his duty and receives the consideration partly in cash, and partly in other lands, and the principal elects to take the cash value of the land received by the agent, in an action against the agent for the recovery of the consideration, the sum expressed in the deed given by the agent is not conclusive upon him as to the value of the lands received in exchange. It is merely *prima facie* evidence of the value of the land, as agreed upon by the parties, and is open to explanation by parol proof. *Mains v. Haight*, 14 Barb. (N. Y.) 76.

In a Suit upon the Covenants of a Deed upon a failure of title to part of the lands conveyed, a memorandum made by the grantors in the deed, showing the different tracts conveyed and the price per acre at which the lands were sold, which memorandum was by the defendants handed to the conveyancer as showing the lands sold and the consideration paid per acre therefor, is properly admitted in evidence, to show the damage sustained by the grantee. *Guinotte v. Chouteau*, 34 Mo. 154.

The defendant conveyed a tract of land to the plaintiff by deed with covenants of seizin and warranty. The deed (in which the consideration was stated to be \$8,000) contained the following recital or stipulation: "It being expressly understood between the parties hereto that the consideration expressed above, to wit, \$8,000, is the estimated value of certain lots in Lyman Dayton's addition to St. Paul, in exchange for which lots the above described premises are hereby conveyed as aforesaid. The deed for the conveyance of said lots in D.'s addition to St. Paul, from said D. to W., bearing even date herewith." The title to the land conveyed by the defendant failed, and an action being brought to recover the damages which the plaintiff had sustained on that account, the question arose whether the measure of damages was varied by the aforesaid stipulation or recital. The court, by Wilson, C. J., said: "The language above quoted seems to have been inserted from abundant caution, for the purpose of clearly showing the facts of the case, and excluding the conclusion that would otherwise necessarily have followed from the language used—that the consideration was money. It is a mere recital of the consideration, and is therefore susceptible of explana-

pressed to be a sum of money, that the true amount is greater¹ or

tion. What the parties estimated the value of the property to be, is wholly immaterial, so long as they have not covenanted to abide by that estimate. What the value was as a matter of fact is the question to be tried in this case, and what defendant admitted in the deed or said may be evidence, but it is not conclusive of the fact." *Dayton v. Warren*, 10 Minn. 233. See also *Donlon v. Evans*, 40 Minn. 501.

In an Action to Recover for a Deficiency in Land where it is uncertain from the face of the deed or bond whether the sale was in gross or per acre, parol evidence is admissible to show the intention of the parties; and where it appears from the face of the deed or bond that the sale was in gross, it may be shown to have been a sale per acre upon allegation and proof that the deed or bond was so drawn through fraud or mistake. *Deakins v. Alley*, 9 Lea (Tenn.) 494; *Barnes v. Gregory*, 1 Head (Tenn.) 230.

True Amount of Mortgage Debt May Be Shown by Parol.—In an action by a subsequent purchaser of mortgaged premises against the mortgagee, it is competent to show by parol what the debt was for which the mortgage was given, though differing from the one expressed in the mortgage. *Durfee v. Knowles*, (Supreme Ct.) 2 N. Y. Supp. 466.

"The consideration named in a mortgage is not determinative of the amount of the mortgage, nor is it, when of record, notice of the amount due upon it, nor a limitation of the amount secured thereby. A mortgage given to secure the sum named in the consideration clause may be half paid a week after it is executed, so that it will stand as security for only half the consideration named; or it may be one of long standing, with a large accumulation of interest upon it, making the amount due upon it double the consideration named in the mortgage, so that it would stand as security for double the consideration named. In a mortgage for future advances the sum or amount named as the consideration is of no moment, as the mortgage stands as security for the amount of the liabilities and indebtedness incurred under the contract set forth in the condition, whatever the sum may be." *Per Walker, J.*, in *Keyes v. Bump*, 59 Vt. 301.

In a scire facias on a mortgage, the mortgagor may give in evidence the admissions of the mortgagee, after the mortgage was given, that it was for more money than the mortgagor had received; part only of the sum mentioned being paid. *Mackey v. Brownfield*, 13 S. & R. (Pa.) 239.

If a mortgage be executed for a valuable consideration and in good faith, and not for the purpose of defrauding the creditors of the mortgagor, its validity is not affected by the fact that it was given for a larger sum than is actually due, or that its condition misrepresents the obligation or liability in fact secured or intended to be secured; but the real consideration may be shown to repel an attack by a creditor against its validity. *Minor v. Sheehan*, 30 Minn. 419; *Berry v. O'Connor*, 33 Minn. 29; *Nazro v. Ware*, 38 Minn. 443.

But, in *Baldwin v. Raplee*, 4 Ben. (U. S.) 433, on a bill in equity filed to set aside a mortgage, it was held that a mortgage which mis-

represents the transaction it professes to recite, or the consideration on which it was executed, is liable to suspicion and must sustain a rigorous examination, and parol proof which contradicts or varies the terms of a mortgage, or is relied upon to give it effect as a security for a debt different from that which it is apparently intended to secure, should be of the most satisfactory character.

In an action brought to recover money in the hands of the defendant which had been received by him for certain property taken upon execution and sold by him as an officer, in a suit by an attaching creditor against the grantor, the grantee who claims the property by virtue of a chattel mortgage executed by the grantor to himself, may show by parol testimony the actual consideration for the mortgage. *Wheeler v. Campbell*, 68 Vt. 98.

True Consideration of Bill of Sale May Be Shown.—The plaintiff gave one W. a chattel mortgage of certain railroad ties, which provided that either party might sell the ties for not less than a price stated, and that out of the proceeds the amount of the mortgage should be paid to W., and the balance to plaintiff. W. sold the ties to the defendant, and in an action of replevin brought by the plaintiff, who claimed that the ties had been sold for a price less than that stipulated in the mortgage, it was held that parol evidence was admissible to show the true consideration agreed to be paid by the purchaser and that the consideration was erroneously stated in the written bill of sale. *Halpin v. Stone*, 78 Wis. 183.

1. Consideration May Be Shown to Be Greater than That Expressed.—*Rex v. Scammonden*, 3 T. R. 474; *Strawbridge v. Cartledge*, 7 W. & S. (Pa.) 394.

In an action for the recovery of \$50, the balance due upon the consideration for the purchase of a tract of land, evidence is admissible to show that the consideration was \$1,150, although the deed expressed the consideration to be \$1,100. *Curry v. Lyles*, 2 Hill L. (S. Car.) 404.

In an action of covenant upon a deed, the consideration of which was expressed to be \$1,800, the plaintiff, to ascertain the damages arising from the breach by showing the actual consideration paid to him by the defendants for the land, offered in evidence an exemplification of the records of the court of probate of an account of sales of land by the defendant as administrators stating the real consideration to have been \$2,800. This evidence was rejected, but upon appeal the ruling was held to be reversible error. *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661.

Where land conveyed is described by the boundaries, and as "containing four acres, more or less," and the purchaser pays the seller thereof at a certain rate per acre for four acres, the seller, on proving by parol that the boundaries in the deed would apply to a tract of land containing five acres or to a tract containing four acres, and that the purchaser made said payment upon the statement of a surveyor employed by the parties before the conveyance, to ascertain the amount of the land, under an agreement that the price

less¹ than that expressed. So it may be shown that the consideration did not consist in money presently paid, but was the extinguishment² or assumption³ of a preexisting debt, or an extension of time upon it;⁴ or that the deed was given as security for future advances,⁵ or as indemnity for liabilities assumed;⁶

should be at that rate per acre, in which statement the land surveyed was inadvertently said to be four acres, when in fact it was five, may recover for the additional acre at the rate agreed upon. *Paige v. Sherman*, 6 Gray (Mass.) 511.

1. Consideration May Be Shown to Be Less than That Expressed. — In an action for the recovery of an amount overpaid in error on the consideration of a bill of sale, it is competent for the plaintiff to show that the amount inserted in the bill of sale was wrong, there being a mistake in the calculation of the amount. *Rosboro v. Peck*, 48 Barb. (N. Y.) 92.

2. Extinguishment of Debt. — In an action upon a debt, it is admissible to show that a deed, though it recites the consideration of \$1,000, was really made in extinguishment of the debt. *Mason v. Buchanan*, 62 Ala. 110.

The defendant conveyed to the plaintiff certain leases upon real property, the consideration expressed in the instrument being \$1,892. The defendant was indebted to the plaintiff for a certain amount composed of several items, and the defendant contended that the conveyance was made in liquidation of the whole amount. In an action upon one of the items, it was held admissible for the defendant to show this by parol evidence. *Booth v. Hynes*, 54 Ill. 363.

3. Assumption of Debt. — *Mobile Sav. Bank v. McDonnell*, 89 Ala. 434, 18 Am. St. Rep. 137.

4. Extension of Time upon Debt. — *Grundy Center First Nat. Bank v. Snyder*, 79 Iowa 191.

5. Security for Future Advances. — *Foster v. Reynolds*, 38 Mo. 553; *Moses v. Hatfield*, 27 S. Car. 324.

Parol evidence is admissible to prove the true character of a mortgage and for what purpose and for what consideration it was given. Although the mortgage purports to be in consideration of a definite sum in hand paid at the time, it may be shown to have been made to secure future advances, and the amounts of the several advances and the times when they were actually made may be shown by extrinsic proof, for in such case the proof does not contradict the mortgage or alter its legal operation and effect. Again, it may be shown that the mortgage was simply one of indemnity, and in such a case the amount of the mortgage serves merely to limit the extent of the security. *Louisville Banking Co. v. Leonard*, 90 Ky. 106.

6. Indemnity for Liability Assumed. — In an action for the foreclosure of a mortgage, it is admissible for the defendant to show that though the mortgage expresses that it was given to secure the payment of a debt of \$1,000, its true purpose was to indemnify the plaintiff for becoming surety upon certain notes of the defendant, and that the plaintiff had not been called upon to pay these notes. *McAteer v. McAteer*, 31 S. Car. 313.

In an action by a mortgagee to recover the

value of personal property taken by the defendant's intestate as sheriff by virtue of an execution issued upon a judgment against the chattel mortgagor, where the mortgage recites that the mortgagor was indebted to the plaintiff in the sum of \$1,000 for money advanced, and where on the trial it was proved that the mortgagor did not owe the mortgagee the amount stated in the chattel mortgage, nor had he received any money on the execution of the mortgage, it is competent for the plaintiff to show that the real consideration was the indorsement of the note of the mortgagor and that the mortgage was given as security. *McKinster v. Babcock*, 26 N. Y. 379, reversing 37 Barb. (N. Y.) 265.

In *Dickson v. Ford*, 38 La. Ann. 736, the plaintiff sued for the cancellation of a special mortgage which she executed in favor of the defendant's assignor. The plaintiff averred that the sole purpose and true consideration of the mortgage were to secure the mortgagee from any loss or damage which might have resulted from a release bond in a litigation then pending against her, which bond had been procured for her by the mortgagee on his personal responsibility, and that said litigation having been finally settled and the demand against her having been fully satisfied, the purpose of the mortgage no longer existed and that it should therefore be canceled. The defendant set up a plea of estoppel of plaintiff's denial of an indebtedness acknowledged in an authentic act importing a confession of judgment, and demanded a judicial recognition and enforcement of the mortgage. The court, by Poché, J., said: "The serious contention in the case involves the objection to any parol evidence to show the alleged true consideration of the mortgage, on the ground of the familiar rule that such evidence cannot be admitted against or beyond what is contained in the acts. * * * The legal and true purport of the proffered parol evidence, as we understand from the record, is not to vary or contradict any of the recitals of the authentic act, not to disprove the existence of a mortgage as contemplated therein or created thereby, not to establish the non-existence of the consideration or of the principal debt which is therein stipulated as the foundation of the mortgage resulting therefrom, but simply to establish the true and covenanted source or origin of the principal debt or obligation sought to be secured, not as a means of defeating the legal force and effect of the mortgage resulting from the contract, but merely to establish the subsequent extinction of the indebtedness acknowledged by the mortgagor, the true source of which was not set forth or recited in the act, as a means of extinguishing the mortgage as the obligation accessory thereto. To that end and under that restriction the proffered parol evidence was legally admissible, and in that light we have considered it."

or that the consideration was the grantee's promise to support and maintain the grantor,¹ or to execute a will in his favor.² Again, it may be shown that the consideration was not money at all, but was real³ or personal⁴ property, or marriage,⁵ or an agreement by the grantee to build and maintain a railroad depot, or the like.⁶

(bb) *Considerations of Different Species.* — A limitation, it is true, has been placed by some adjudicated cases upon the character of the proof admitted, that is, it must be restricted to establishing a consideration of the same species as that stated;⁷ as proof of a valuable consideration when a valuable consideration is expressed, or proof of a good consideration when a good consideration is expressed.⁸ But this limitation has in some jurisdictions been disregarded,

1. Support and Maintenance of Grantor. — *Ran-kin v. Wallace*, (Ky. 1890) 14 S. W. Rep. 79.

A. purchased a tract of land and had the deed made to the defendant upon the agreement that the defendant should support A. and his wife during their lives and after their death pay \$1,000 to the plaintiff. In an action for the recovery of the \$1,000, it was held admissible to prove these facts by parol, although the consideration expressed in the deed was \$4,000. *Lamb v. Donovan*, 19 Ind. 40.

2. Promise to Execute Will. — *Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 46.

3. Conveyance of Land. — In an action on the covenants in a deed wherein the consideration is stated as \$2,500, it was competent for the defendant to show that the consideration was not money, but other lands valued at that amount. *Miller v. McCov*, 50 Mo. 214.

4. Personal Property. — In an action for the breach of a contract, the consideration may be shown to be a conveyance of personal property, although the conveyance itself recites the payment of a money consideration. *Bolles v. Sachs*, 37 Minn. 318.

Consideration Shown to Be Iron. — Where the consideration in a deed conveying lands was expressed to be money paid, it was held that parol evidence was admissible to show that the consideration, instead of money, was iron of a specified quantity, valued at a stipulated price. *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103.

Consideration Shown to Be Second Slave. — In *Garrett v. Stuart*, 1 McCord L. (S. Car.) 514, where the consideration expressed in a bill of sale of a negro was \$1,000, in an action of the warranty of soundness contained in it, it was held that the defendant might give in evidence that another negro given in exchange was the true consideration.

The plaintiff brought an action of covenant to recover damages for defendant's breach of warranty of the soundness of a slave. The bill of sale was under seal, and the consideration was expressed in it to be \$850. The court allowed the defendant against plaintiff's objection to show by parol evidence that the consideration, though expressed in the bill of sale to be a sum of money, was another slave which he had received in exchange for the defendant; that on making the exchange, mutual bills of sale under seal, containing covenants of warranty of soundness, were executed by himself and the plaintiff; and that he had sustained damage by reason of the unsoundness of the slave which he had received on the

exchange. It was held that the ruling was correct and that the defendant might recoup the damage which he had sustained by plaintiff's breach of warranty. *Eckles v. Carter*, 26 Ala. 563.

5. Consideration Shown to Be Marriage. — Although a deed may recite that it is based upon a pecuniary consideration, it may be shown by parol evidence that marriage was the true consideration. *Tolman v. Ward*, 86 Me. 303, 41 Am. St. Rep. 556.

6. Agreement to Build and Maintain Railroad Depot. — *Louisville, etc., R. Co. v. Neafus*, 93 Ky. 53; *Missouri, etc., R. Co. v. Doss*, (Tex. Civ. App. 1896) 36 S. W. Rep. 497.

Agreement to Act as Trustee. — In an action to recover \$2,000, the amount stated as the consideration of a deed of real estate, it is competent for the defendant to show by parol evidence that the real consideration was his oral promise to hold the title and manage the property in trust for the benefit of the plaintiff and her children, which promise the defendant is ready and willing to perform. *Twomey v. Crowley*, 137 Mass. 184.

Agreement in Respect to Management of Property. — In an action for the recovery of \$4,000, alleged to be the amount for which the defendant was liable for his one-eighth interest in a tract of land, the deed of conveyance for which recited a consideration of \$32,000, it was held admissible for the defendant to prove by parol that he was to manage the property for one year and to erect a mill thereon; and that if at the expiration of said year the defendant should elect to retain said one-eighth interest, he should pay to the plaintiff the sum of \$4,000; but that if the defendant at the expiration of the year should not elect to retain and pay for said property, the plaintiff agreed to pay the defendant all moneys, expenses, and liabilities which the defendant had paid out, expended, or incurred in, upon, and about the property; that the defendant had elected not to retain his interest, that he had so notified the plaintiff through his agent, and had demanded the amount expended by him in improvements. *Rhine v. Ellen*, 36 Cal. 362.

7. Pique v. Arendale, 71 Ala. 91.

8. Where a Deed Is Expressed to Be Founded upon a Valuable Consideration, parol proof of a good consideration cannot be given to sustain it. *Clarkson v. Hanway*, 2 P. Wms. 203.

If the Conveyance Itself Recites that It Is Made on Divers Good Considerations, and for kindness felt by the grantor towards the grantees, parol evidence cannot be received to show a

and it is to be questioned whether the distinction rests on any sound principle.¹

cc. EVIDENCE PROVING CONSIDERATION IN ADDITION TO THAT EXPRESSED. — So, according to the modern rule, it may be shown that the instrument does not state the whole consideration, but that there were other considerations moving between the parties in addition to that expressed.²

Illustrations. — Thus it may be shown that, in addition to the consideration stated, the grantor was to have the use of a part of the premises conveyed,³ or was to enjoy the rents and profits of the land for the current year;⁴ or that the grantee promised to pay a rent note previously given for the occupation of the same premises,⁵ or was to erect a steam sawmill thereon,⁶ or to

valuable consideration. *Potter v. Gracie*, 58 Ala. 303, 29 Am. Rep. 748.

A conveyance of lands by a husband to his wife, which purports to be made in consideration of love and affection, "and for the sum of one dollar paid to him cash in hand, * * * the receipt whereof is hereby acknowledged," is purely voluntary, and void as against the existing creditors of the husband; and when assailed by them, parol evidence cannot be received to show that it was founded on a valuable consideration. *Houston v. Blackman*, 66 Ala. 559, 41 Am. Rep. 756.

1. Considerations of Different Species May Be Shown. — *Coles v. Soulsby*, 21 Cal. 47; *Nichols v. Burch*, 128 Ind. 324; *Garrett v. Stuart*, 1 McCord L. (S. Car.) 514.

Although parol evidence is inadmissible to add to or explain a deed, yet if a conveyance, purporting to be voluntary, is impeached for fraud, it is competent to the party claiming under it to show that in fact it was made upon a valuable consideration. Its being voluntary does not render it void, but is merely evidence of a fraudulent intent; and any evidence is admissible which shows that no such intent existed. *Henderson v. Dodd*, *Bailey Eq.* (S. Car.) 139.

Evidence Inadmissible when Effect Would Be to Change Character of Instrument. — Upon a bill for the foreclosure of a mortgage for \$1,000, the defendant attempted to prove by parol that the bond and mortgage were not made to secure any money, but to secure the reconveyance of a certain other lot of land which the mortgagee had conveyed to the mortgagor for a special object and which was to be reconveyed. It was held that the effect of the admission of this evidence would have been to turn the transaction from a mortgage into a special contract of a very different nature, and the evidence was therefore properly excluded. *Meads v. Lansingh, Hopk.* (N. Y.) 124.

Maryland Doctrine. — It is decided in Maryland that where a deed is impeached for fraud, the party to whom the fraud is imputed may show the actual consideration paid, provided it be of the same kind as that stated in the deed, differing only in amount. *Smith v. Davis*, 49 Md. 470. *Citing Betts v. Union Bank*, 1 Har. & G. (Md.) 189, 18 Am. Dec. 283; *Cole v. Albers*, 1 Gill (Md.) 412; *Wolfe v. Hauver*, 1 Gill (Md.) 84; *Carr v. Hobbs*, 11 Md. 285; *Cunningham v. Dwyer*, 23 Md. 219; *Bladen v. Wells*, 30 Md. 578.

2. Additional Consideration to That Expressed May Be Shown. — *Cowan v. Cooper*, 41 Ala. 187; *Bryant v. Hunter*, 6 Bush (Ky.) 75; *Em-*

mons v. Littlefield, 13 Me. 233; *Nedvidek v. Meyer*, 46 Mo. 600; *Buckley's Appeal*, 48 Pa. St. 491; *Wood v. Moriarty*, 15 R. I. 518; *Fort v. Orndoff*, 7 Heisk. (Tenn.) 167; *Taylor v. Merrill*, 64 Tex. 494; *Wait v. Wait*, 28 Vt. 350.

General or particular recitals of consideration in contracts or conveyances are not conclusive, but are open to inquiry, and the real consideration may be shown to modify or defeat them; and hence, where a promissory note recited that it was given in part payment of a designated lot of land, parol evidence is admissible, on a bill filed to enforce the vendor's lien on the lot for the payment of the note, to show that the true consideration was not only the purchase money of the lot, but also that of another parcel of land, and the price of a stock of merchandise, sold at the same time for a gross sum. *Stringfellow v. Ivie*, 73 Ala. 209.

3. Right to Use Part of Premises Conveyed. — Where the grantor in a deed continued after its execution and delivery to use a part of the premises conveyed, it was held, in an action for use and occupation, that parol evidence was admissible to show that this was part of the bargain, its effect not being to contradict the deed, but to explain the consideration clause, which is allowable. *Aull Sav. Bank v. Aull*, 80 Mo. 109.

4. Right to Rents and Profits of Land for Current Year. — The grantor in a deed may show by parol that it was a part of the contract that he was to have the benefit of the rents and profits of the land for the current year, as that is but proof of a consideration in addition to that recited in the deed. So far as a deed is evidence merely of a fact, and not of a contract or right, it may be explained or contradicted by parol. *Bourne v. Bourne*, 92 Ky. 211.

5. Promise to Pay Rent Note for Current Year. — Where rented lands are sold and conveyed by deed, on a recited consideration of money in hand paid, it is competent for the lessor and vendor, in a subsequent action against the tenant on the rent contract, to show by parol that by the terms of the contract of sale the note for rent was reserved and retained by him, as a part of the consideration, in addition to the sum specified in the conveyance. *Steed v. Hinson*, 76 Ala. 298.

6. Agreement to Erect Steam Sawmill. — Upon the petition for specific performance and damages, the petitioner alleged that he sold and conveyed to the defendants a certain tract of timberland for the consideration of \$400 cash, and further, that the defendants were thereafter to erect and have completed on said land a

remove a warehouse therefrom.¹ Again, it may be shown that the grantee was to assume and pay a debt growing out of the property conveyed.² And likewise, where the grantee brings an action of covenant against the grantor upon the warranty against incumbrances contained in the deed,³ or where the grantee sets up the breach of such warranty as a counter-claim in an action by the grantor for the recovery of the price,⁴ it is competent for the grantor to show that the grantee had knowledge of these incumbrances and agreed as a part of the consideration for the conveyance that he was to assume and discharge them.⁵

steam sawmill, and deliver to the plaintiff good sawed lumber to the amount in value of \$100, making in lumber and money \$500, and the erection and construction and completion of said steam sawmill. This, altogether united, constituted the consideration for the sale of said tract of timberland. The defendant failed and refused to erect the mill, or to furnish the lumber as stipulated, and the plaintiff prayed a decree for specific performance of said contract and for \$500 damages. The defendant, in his answer, admitted the purchase of the land and the execution of the deed, a copy of which was set out, alleging that the only consideration for the same was \$400 as expressed in the deed, and that was all that was ever agreed to be paid. Upon the trial, it was held that the plaintiff was not estopped by the consideration expressed in the deed, but might show the true consideration by parol. *Fraley v. Bentley*, 1 Dakota 25.

1. Agreement to Remove Warehouse.—The owner of land having conveyed a lot to a railroad company, reciting in the deed as its consideration "one dollar" in hand paid, "and the benefits which will arise to the grantor from the ownership by the grantee of the property hereby conveyed," the deed does not estop him from showing, as an additional consideration, that the grantee verbally agreed to grade part of an adjacent lot belonging to the grantor, and to remove and rebuild that portion of his warehouse which was situated on the lot conveyed by the deed, and maintaining an action at law for the breach of such verbal agreement. *Mobile, etc., R. Co. v. Wilkinson*, 72 Ala. 286.

2. Agreement of Grantee to Pay Debt Growing Out of Property Conveyed.—In an action for the recovery of a sum of money which the plaintiff had been compelled to pay, it appeared that the plaintiff had sold to the defendant a five-tenths interest in a steamboat for the consideration expressed in the bill of sale to be five thousand dollars. It was held admissible for the plaintiff to show that the defendant also agreed to indemnify and save harmless the plaintiff from all liens then existing against the boat. *McMahan v. Stewart*, 23 Ind. 590.

Indemnity Against Firm Liabilities.—In an action for procuring the arrest and imprisonment of the plaintiff on an execution against him and a former partner, in favor of a third person, but assigned to the defendant, in which there is evidence that the plaintiff had sold out his interest in the firm, and that, as a part of the consideration thereof, the purchaser agreed to indemnify him against all the outstanding debts of the firm, and that the new firm had accordingly paid the execution, it is competent

to prove by parol that the defendant authorized the purchaser to make the contracts of purchase and indemnity, as his agent, before the assignment and arrest, for the purpose of showing knowledge on his part that the execution was paid. *Paget v. Cook*, 1 Allen (Mass.) 522.

3. Hays v. Peck, 107 Ind. 389; *Dearborn v. Morse*, 59 Me. 210; *Laudman v. Ingram*, 49 Mo. 212.

4. Allen v. Lee, 1 Ind. 58, 48 Am. Dec. 352; *Pitman v. Conner*, 27 Ind. 337.

5. Agreement to Cancel Mortgage.—A bargained for a farm on which there was a mortgage, which he was to pay as part of the purchase money, and the balance was to be secured by a new mortgage. By A's direction, the vendee conveyed the land to A's son, who executed the mortgage for the balance of the purchase money, and the vendor subsequently foreclosed that mortgage and bought the land at the foreclosure sale. A then brought an action to foreclose the prior mortgage, which, instead of canceling, he had procured to be assigned to himself. It was held admissible to show by parol evidence that the canceling of this mortgage was part of the consideration of the original conveyance. *Frey v. Vanderhoof*, 15 Wis. 397.

Agreement of Grantee to Pay Mortgage Debt.—Although a deed of land is made subject to a mortgage and contains a general covenant against all incumbrances except the said mortgage, and the consideration named in the deed is simply the value of the equity of redemption, yet it may be shown by parol that it was a part of the real consideration that the grantee shall assume and pay the debt secured by the mortgage. *Drury v. Tremont Imp. Co.*, 13 Allen (Mass.) 168. See also *Dobyns v. Rice*, 22 Mo. App. 448.

A made a note and mortgage to B. B assigned the note and mortgage to C. A sold the land to D. The note not being paid, C filed a complaint for foreclosure. A filed a cross-complaint against C and D, praying that any unpaid balance after the sale of the mortgaged property be made out of the property of D before resorting to that of A. It was held that it was competent to prove by parol evidence that one of the considerations of the conveyance from A to D was that D should assume the payment of the note. *McDill v. Gunn*, 43 Ind. 315.

Agreement of Grantee to Satisfy Judgment.—In an action on a bond given for a balance due for the purchase money of a tract of land, parol evidence is admissible of the transaction out of which the bond arose, so as to show its consideration, and thus lay the ground for the

Evidence of Promise to Pay Additional Consideration upon Contingency. — It is competent for the grantor to show by parol an agreement made with the grantee, at the time of the sale and conveyance of the property, to pay, upon a contingency, a sum additional to that expressed in the deed.¹

defense, and for evidence that the consideration had failed; but evidence of failure may be rebutted by evidence that the bond did not satisfy the whole consideration, and that the unpaid balance was made up by the defendant having taken the land charged with the lien of a judgment. *Miller v. Fichthorn*, 31 Pa. St. 252.

Agreement to Pay Assessment on Land — Promise of Grantee. — The board of supervisors of a city passed a resolution declaring the intention of the board to grade a certain street, and the contract for additional work was let to the defendant. The owners of property abutting upon the street were to be assessed to pay for the improvement. The defendant assigned the contract to the plaintiff, who performed the work. The consideration expressed in the assignment was one hundred dollars. The defendant was owner of a lot fronting on the street graded, on which the superintendent of public streets assessed the sum of five hundred and fifteen dollars and forty-one cents for its proportion of the sum due on the contract. In an action brought to recover this sum the defendant introduced parol evidence to show that the consideration expressed in the assignment was not the true consideration, but that it was that the defendant should be released from liability to pay his share of the tax. It was held that the evidence was properly admitted. *Hendrick v. Crowley*, 31 Cal. 471.

Promise of Grantor to Pay Taxes. — In an action upon a note given as the purchase price of land it is competent for the defendant to show, in reduction of the amount of recovery, that in addition to the consideration mentioned in the deed the plaintiff was to pay the taxes due upon the land, and that the defendant had been compelled to pay them. *Pierce v. Brew*, 43 Vt. 292.

Where, at the time of the conveyance of land by warranty deed in exchange for other land, it is agreed by the parties that the taxes due upon the lands so mutually exchanged shall be set off against each other, the taxes on the land so conveyed by warranty deed are part of the consideration for such deed, and, in an action against the vendor by the vendee or one deriving title by warranty deed from the vendee, to recover money paid by the plaintiff to remove the incumbrance of the taxes so assumed by the vendee, parol proof of such contract concerning the taxes is admissible. *Robinius v. Lister*, 30 Ind. 142, 95 Am. Dec. 674.

1. Evidence of Promise to Pay Additional Consideration upon Contingency. — Although a bill of sale of a vessel, absolute in its terms, expresses a certain sum as the consideration, the vendor may prove an oral agreement to pay an additional sum upon a certain contingency, and recover such sum upon the happening of the event. *Clark v. Deshon*, 12 Cush. (Mass.) 589.

The plaintiff sold to the defendant a piece of land and gave him a warranty deed. The

consideration named in the deed was paid at the time of the sale. A petition was pending before the county commissioners for the alteration or discontinuance of a road which passed by the land. Subsequently the road was discontinued, and damages were allowed therefor and paid to the defendant to the amount of fifty dollars. The plaintiff proved that at the time of the sale it was agreed by parol between them that in case the road should be altered or discontinued, and damages allowed therefor, the plaintiff should have the same as a part of the consideration of the sale. The admission of this testimony was objected to, but was admitted by the court, and upon appeal this ruling was sustained. *Nickerson v. Saunders*, 36 Me. 413.

Promise to Pay One Half Profits Derived from Subsequent Sale of the Property. — In an action for the recovery of the consideration it may be shown by parol that, though the consideration mentioned in the deed was one hundred dollars, it was agreed between the plaintiff and the defendant that the defendant should also pay the plaintiff one half the difference between one hundred dollars and the amount for which he might subsequently sell the premises. *Kickland v. Menasha Wooden Ware Co.*, 68 Wis. 34, 60 Am. Rep. 831.

In *Rabsuhl v. Lack*, 35 Mo. 316, in a suit to recover a sum of money, the plaintiff alleged that he was indebted to the defendant, and conveyed to him a house and lot upon the agreement that the defendant should finish the house, which was then not quite finished, and sell the house and lot, and from the proceeds of the sale pay himself his debt and pay the surplus to the plaintiff; that the defendant had sold the house and lot for a sum which paid his debt and left a surplus; and prayed judgment for the surplus. The defendant denied that the consideration of the conveyance to him was as alleged by the plaintiff, but alleged that the consideration was the sum mentioned in the deed as such, all of which had been paid. It was held that the plaintiff was not estopped by the consideration mentioned in the deed from supporting the allegations of his complaint by parol evidence.

In an action to recover damages for the breach of a special contract, by which the purchaser of a slave agreed with the vendor, at the time of the sale, to pay him one half of the profit which might be realized on a resale in addition to the sum specified in the bill of sale as the consideration, parol evidence of such agreement is admissible and does not contradict the bill of sale. *Thomas v. Barker*, 37 Ala. 392.

Evidence of Promise to Pay for Excess in Amount of Land Conveyed Admissible. — Where two joint owners of a tract of land conveyed the same by a deed in the usual form, wherein the tract was stated to contain a specified number of acres, more or less, and a certain sum was specified as the consideration, but the parties made before the sale a parol contract that if

(b) **When the Consideration Is Contractual.** — So much for the admissibility of evidence to vary the consideration expressed in a deed or written contract when the expression is merely the recital of a fact. When, however, the statement of the consideration leaves the field of mere recital and enters that of contract, thereby creating and attesting rights, as shown by the intention of the parties to be gathered from the instrument, it is no longer open to contradiction by extrinsic evidence.¹

upon survey the tract should prove to contain a greater number of acres than that named, the vendee should have a corresponding additional amount of purchase money, and only one of the grantors had received his share of the excess, the joint vendor brought suit for his proportion. It was held that evidence of the parol contract was admissible. *McConnell v. Brayner*, 63 Mo. 461.

Evidence of Promise to Refund Part of Consideration upon Contingency. — The plaintiff, defendant, and their brother A inherited certain real estate. At the time of the circumstances hereinafter detailed A had been long absent, and had not been heard of for ten or twelve years, and both the plaintiff and defendant supposed him to be dead. The plaintiff and defendant wished to make a distribution of the property, and the defendant agreed to take two hundred dollars for his distributive share, but afterwards refused to execute a quitclaim deed of all his interest in the land on the ground that such deed would cut off his interest in A's share, for which he claimed he should be paid in addition to the two hundred dollars. Finally the plaintiff paid the defendant two hundred and forty dollars, the forty dollars being for the latter's interest in A's distributive share, and the defendant gave the plaintiff a quitclaim deed of all his interest in the premises. It was agreed between the parties that in case it should turn out that A was alive, the defendant should return the forty dollars. A afterwards returned, and in an action for the recovery of the forty dollars it was held that, notwithstanding the recitals in the deed, the circumstances above set out might be shown by parol. *Holbrook v. Holbrook*, 30 Vt. 432.

1. When Consideration Is Contractual and Creates and Attests Rights. — *Miller v. Edgerton*, 38 Kan. 36; *Hilton v. Homans*, 23 Me. 136; *Baum v. Lynn*, 72 Miss. 932; *Davis v. Gann*, 63 Mo. App. 425; *Maigley v. Hauer*, 7 Johns. (N. Y.) 341; *Hubbard v. Marshall*, 50 Wis. 322.

Statement as a Recital and as Part of the Contract Distinguished. — The difference between the statement of the consideration in a deed as a mere recital of a fact and as a contractual stipulation is clearly illustrated by *Ellison, J.*, delivering the opinion of the court in *Jackson v. Chicago, etc., R. Co.*, 54 Mo. App. 636: "Suppose the consideration in a deed should be: 'In consideration of the sum of one thousand dollars to be paid to me in beef cattle weighing not less than one thousand two hundred pounds each, at five cents per pound.' Would it be contended that a consideration thus expressed contractually could be orally shown to be other than as expressed? So in the case of *M'Crea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103, where, though the

consideration was expressed to be in money, it was held that it could be shown to be iron of certain quality; if the fact had been the reverse of this and the consideration had been stated to be of a certain quality and quantity of iron, would it have been competent to show, in contradiction of this, that it was to be a given sum of money? I think not, for the reason that the mere statement of a certain amount of money, without more, as the consideration, is inattentive recital, common in conveyancing, of a consideration in most general use. It is thus spoken of in the books and adjudications. But when this common form of expression, thus reciting a sum of money, the medium of exchange which is generally used as the consideration, is departed from, and an unusual provision inserted, thereby evidencing a contractual intention, it is as binding as any other contract. But money may also be contracted for as the consideration in a written contract. And when the intention to so contract is disclosed by the written instrument, no other or additional consideration can be shown. Thus, suppose that the consideration was stated in the written contract to be 'one thousand dollars to be paid as follows: Two hundred dollars in six months from date without interest; four hundred dollars in twelve months from date with three per cent. interest; and four hundred dollars in eighteen months from date with ten per cent. interest from maturity; all to be secured by a mortgage' on certain described property. Could it be shown in contradiction to this that the consideration agreed upon was fifty head of cattle or an additional sum of money? Clearly not. The reason is that it has been contracted otherwise by the parties, and that contract has been reduced to writing."

Examples of Statements Held to Be Contractual. — The plaintiff brought an action for damages caused by the overflow of his lands. The cause of the overflow as alleged was the failure of the defendant to dig and maintain a ditch on the west side of its railway through plaintiff's lands, as he alleged it agreed to do as a part of the consideration for a deed for right of way which plaintiff executed and delivered to it. The consideration mentioned in the deed was two hundred and fifty dollars, and that "the said railway company is to provide and maintain for the said grantors one grade farm-crossing, and also one underground cattle-pass, and to haul and dump thereat all the stone desired by the said J. to pave the approaches to said cattle-pass, not exceeding four carloads. The grantors are to do the paving, railway company to haul said stone within six months after its railway is regularly running." In addition to the consideration expressed in the deed, the plaintiff attempted to prove by parol the further consideration that the defendant agreed to

d. TO PROVE OR REPEL ALLEGATIONS OF FRAUD OR ILLEGALITY —

(1) *What May Be Shown in Proof.* — Whenever it is alleged that a contract or deed is founded upon an illegal consideration, or that it has been procured by fraud upon an inadequate consideration, or that its operation and effect is to defeat or prejudice the rights of creditors, the consideration upon which the

dig and maintain the ditch. The court admitted the evidence over the defendant's objection, and upon appeal the objection was sustained and judgment reversed. *Jackson v. Chicago, etc., R. Co.*, 54 Mo. App. 636.

The plaintiff and defendants entered into an agreement whereby the defendants, in consideration of the plaintiff's undertaking to build its railroad across the defendants' land, and of building a side track on some portion of the tract, and in further consideration of one dollar, bound themselves to convey to the plaintiff a right of way eighty feet wide across this tract of land. Upon a suit in equity to compel the execution of a deed, it was held inadmissible for the defendant to show by parol evidence that the consideration was also the plaintiff's agreement to fill up a sluice-way on the westerly side of the line of the road. *Purinton v. Northern Illinois R. Co.*, 46 Ill. 297.

In *Preston v. Merceau*, 2 W. Bl. 1249, it was agreed in writing that a lease of a house should be let for twenty-one years at £26 per annum, to commence from Michaelmas then next. The lessor offered to show by parol evidence that the lessee was also to pay £2. 12s. 6d. a year for ground rent for the premises. This offer was disallowed, *Blackstone, J.*, saying: "Here is a positive agreement that the tenant shall pay £26. Shall we admit proof that this means £28. 12s. 6d.? * * * We can neither alter the rent nor the term, the two things expressed in this agreement."

Where the Shipping Articles Specify the Wages of the mate of a vessel, he cannot give parol evidence of an agreement to allow him other compensation. *Veacock v. McCall, Gilp.* (U. S.) 329.

Parol evidence cannot be admitted to vary the contract of wages in the shipping articles. *Brooks v. Enberg*, 2 Hawaiian 141.

Release Cannot Be Extended to Liabilities Other than Those Mentioned. — Where, after the death of a guardian and maturity of the ward, one who had borrowed the ward's money executes to her in settlement a conveyance of land "in consideration of the full acquittance, discharge, and release of" said grantor from all liability to the guardian or ward "for and on account of said loans," in an action by such ward on the bond of the guardian, parol evidence is not admissible to show that, by the conveyance, it was also intended to release the guardian from all liability to the ward. To permit this would import a new element into the contract. *Baum v. Lynn*, 72 Miss. 932.

In an Action to Recover a Subscription it appeared that the defendant with other abutters, attended a meeting organized for the purpose of securing the widening of an avenue, and that they agreed in writing to pay a certain sum when the avenue should be "laid out," in consideration of the plaintiff's acting as one of the executive committee of the meeting to apply the money subscribed and to carry out its

objects. The defendant offered evidence that the purpose of his subscription was only to pay for land if it should be necessary to purchase it in order to widen the avenue, and that the avenue was widened without the purchase of any land. It was held that the evidence was properly excluded, as its effect was to change the written contract, not to show the consideration of it. *Stillings v. Timmins*, 152 Mass. 147.

Where, upon the face of a contract of subscription to the capital stock of a railroad company, the consideration is expressly stated to be ten shares of the capital stock of the first division of said road, in an action upon the subscription it is inadmissible to prove by parol that the consideration of the subscription was that the said company should construct its line of road through a certain neighborhood in which the defendant had property which would be greatly increased in value by the construction of said road, and that the road had not been constructed, to show a failure of consideration, the consideration thus attempted to be shown by parol being adverse to the consideration expressed upon the face of the contract. *Gelpcke v. Blake*, 19 Iowa 263.

A contract of subscription bound the defendant to pay a certain sum to a railroad company upon the construction of its road to a depot to be located within three-quarters of a mile of the corporate limits of the town of C., for which the defendant was to receive certificates of stock. By a subsequent contract the defendant surrendered his certificates of stock on condition that the company should construct its road through the town of D. to the said town of C. In an action upon this contract it was held inadmissible for the defendant to prove by a contemporaneous parol agreement that there was to be no recovery on the contract until the road had been completed from the point of its commencement to its termination in Kansas. *Courtwright v. Strickler*, 37 Iowa 382.

Agreement to Pay Partnership Debts Cannot Be Shown to Extend to Private Debts. — Where a bill of sale recited as the consideration a sum in hand paid, and also contained a covenant on the part of the vendee to pay the partnership debts of himself and the vendor, it is not admissible to prove, for the purpose of enforcing such parol promise, that the vendee also, in consideration of the sale to him, promised by parol to pay individual debts of the vendor. *Sayre v. Burdick*, 47 Minn. 367.

Cannot Show Warranty of Thing Sold. — Where a contract for the sale to a firm of butchers of a patent refrigerating process contains no warranty as to its preserving qualities, the vendees cannot, in a suit to recover the contract price, show by parol testimony that at the time the contract was made the vendor expressly warranted that the apparatus would preserve fresh meats for a stated time, and that it failed to

deed is founded or the want of it is open to investigation. In such cases it is to be presumed that the same motives which led to the making or procuring of the contract or deed would influence the parties to insert in the instrument a statement and acknowledgment of a valid consideration, and such statement and acknowledgment is therefore the lowest form of *prima facie* evidence and may be rebutted by extrinsic proof.¹

Evidence of Illegal Consideration. — Thus it is competent to prove an agreement inconsistent with the language of a bond in order to show that the bond was given upon an illegal consideration.²

Evidence that Conveyance Was Fraudulent. — Or that the consideration expressed in a conveyance was not paid or was different in amount and species from that expressed, for the purpose of showing that the deed was fraudulent.³

(2) *What May Be Shown in Rebuttal.* — When a deed is attacked as fraudulent, to what extent the express consideration may be varied by parol evidence in rebuttal of the allegation of fraud was formerly involved in the same difficulties that beset the question in other actions upon the deed; but for like reasons that governed those cases it is now generally held to be competent to rebut the presumption of fraud by introducing evidence of the true consideration.⁴

fulfil the warranty. *McCray Refrigerator, etc., Co. v. Woods*, 99 Mich. 269. See also *Red Wing Mfg. Co. v. Moe*, 62 Wis. 240.

Mortgage Cannot Be Shown to Extend to Other Debts. — Under a bill to foreclose or to redeem, the consideration of the mortgage debt is open to inquiry; parol evidence will be received to show a want of consideration, or the failure or illegality of the consideration; also, to establish a consideration of the same kind, not inconsistent with that which is expressed. But the mortgage being a security only for the debt which was in the contemplation of the parties when it was executed, parol evidence cannot be received to show that it was intended to secure other debts, equally meritorious, then existing between them, unless under a bill to reform on the ground of fraud or mistake. *Wilkerson v. Tillman*, 66 Ala. 532.

1. *Clapp v. Tirrell*, 20 Pick. (Mass.) 247.

2. Extraneous Evidence of Illegal Consideration. — *Greville v. Attkins*, 9 B. & C. 462, 17 E. C. L. 421; *Hoyt v. Macon*, 2 Colo. 502; *Penny v. Graves*, 12 Ill. 287; *Harris v. Galbraith*, 43 Ill. 309; *Wolf v. Fletemeyer*, 83 Ill. 418; *Gardner v. Maxey*, 9 B. Mon. (Ky.) 90; *Morrill v. Goodenow*, 65 Me. 178; *Den v. Shotwell*, 23 N. J. L. 465.

Presence of Seal Does Not Deter Investigation. — The defense of illegality is not avoided by putting a seal on a note. Sealed instruments are open to this defense as well as instruments not under seal. *Morrill v. Goodenow*, 65 Me. 178.

Usury. — Where usury is pleaded parol evidence is always admissible to show the consideration, regardless of the form the transaction may assume in the writings executed by the parties. *Kidder v. Vandersloot*, 114 Ill. 133. See generally the title **USURY**.

Recovery of Land — Illegal Conveyance. — The rule of law is that no *particeps criminis* can maintain an action founded on an illegal or immoral contract. But this rule does not prohibit the vendor of land, where the sale is founded on an illegal transaction and the conveyance is void, from recovering the land; he

relies for its recovery on his prior untainted legal title, and the defendant cannot set up against that a title declared void by law. *Den v. Shotwell*, 23 N. J. L. 465.

3. Evidence of Consideration — Fraudulent Conveyances — Alabama. — *Myers v. Peek*, 2 Ala. 648; *Houston v. Blackman*, 66 Ala. 559, 41 Am. Rep. 756; *Tutwiler v. Munford*, 68 Ala. 124; *Buford v. Shannon*, 95 Ala. 205.

Louisiana. — *Mossop v. His Creditors*, 41 La. Ann. 296.

New Jersey. — *Silvers v. Potter*, 48 N. J. Eq. 539.

Pennsylvania. — *Redfield, etc., Mfg. Co. v. Dysart*, 62 Pa. St. 62.

Virginia. — *Flynn v. Jackson*, 93 Va. 341.

Wisconsin. — *Reynolds v. Vilas*, 8 Wis. 471, 76 Am. Dec. 238.

4. Admissibility of Evidence of True Consideration — To Rebut Presumption of Fraud — United States. — *Munro v. Robertson*, 2 Cranch (C. C.) 262.

Arkansas. — *Clinton v. Estes*, 20 Ark. 216. Compare *Galbreath v. Cook*, 30 Ark. 417.

California. — *Lockwood v. Canfield*, 20 Cal. 126; *Carty v. Connolly*, 91 Cal. 15.

Maine. — *Brown v. Lunt*, 37 Me. 423.

Maryland. — *Cunningham v. Dwyer*, 23 Md. 219.

Mississippi. — *Leach v. Shelby*, 58 Miss. 681.

Ohio. — *Steele v. Worthington*, 2 Ohio 182.

Pennsylvania. — *Jack v. Dougherty*, 3 Watts (Pa.) 151.

Texas. — *Finn v. Krut*, (Tex. Civ. App. 1896) 34 S. W. Rep. 1013.

Virginia. — *Harvey v. Alexander*, 1 Rand. (Va.) 219, 10 Am. Dec. 519.

The Consideration Recited in a Bill of Sale is open to explanation or contradiction by parol proof; and both parties may go fully into proof of what was really the consideration for the sale, regardless of the recitals in the bill of sale, where the object is to show, on one side, that it was obtained by fraud, and on the other, that it was a fair transaction. *Clinton v. Estes*, 20 Ark. 216.

c. TO PROVE NONPAYMENT OF CONSIDERATION — (1) *In General.* — According to the rule adopted in the *United States*, the only design and effect of the acknowledgment of the receipt of the consideration in a deed is to prevent a resulting trust to the grantor.¹ For all other purposes the acknowledgment may be contradicted by extraneous evidence.²

In Actions for the Recovery of the Consideration. — Thus, in actions for the recovery of the consideration, the acknowledgment of payment is only *prima facie* evidence of that fact, and may be rebutted by parol proof.³

Where a Conveyance by a Judgment Debtor which recites a valuable consideration is assailed by the judgment creditor by a bill in chancery alleging that the deed was executed in fraud and without any valuable consideration, the complainant is permitted to support his allegations by evidence outside of the deed; and the defendant may, by similar evidence, show that although the consideration mentioned in the deed did not exist, there was some other valuable consideration for the conveyance. *Leach v. Shelby*, 58 Miss. 681.

A Debtor Having Made a Deed to His Mother Which Was Assailed for Fraud, and the consideration stated in the deed being five dollars, evidence was offered to show an adequate pecuniary consideration. On exception to this evidence as inadmissible it was held that, considered merely as a fact, the amount of the consideration stated in the deed would be evidence of fraud, but considered as a pecuniary consideration, it established the character of the deed as belonging to a class which would be preferred to volunteers, and the amount not being conclusive on the grantee or those claiming under her, it was competent to prove a larger consideration of the same kind. *Cunningham v. Dwyer*, 23 Md. 219.

Where One Conveyed Land to His Son, the deed expressing a valuable consideration but the son verbally engaging to support the grantor as a consideration for the land, and a year afterwards the son, being about to die insolvent, gave a mortgage to the father, conditioned for the support of his father during the residue of his life, it was held, in an action by the father against one claiming the land by virtue of a sale by the son's administrator, that the mortgage was good, even against the creditors of the son, and that parol proof of the contract was admissible, notwithstanding the deed. *Tyler v. Carlton*, 7 Me. 175, 20 Am. Dec. 357.

1. See *supra*, this title, *Statement of Consideration and Acknowledgment of Payment—Effect of Acknowledgment of Payment in Deeds.*

2. **When Nonpayment of Consideration May Be Shown.** — *Mobile, etc.*, R. Co. v. *Wilkinson*, 72 Ala. 286; *Meeker v. Meeker*, 16 Conn. 383; *Morris v. Tillson*, 81 Ill. 607; *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572; *Pritchard v. Brown*, 4 N. H. 397, 17 Am. Dec. 431; *Stackpole v. Robbins*, 47 Barb. (N. Y.) 212.

3. **Action for the Recovery of the Consideration—Nonpayment May Be Shown** — *Colorado.* — *Fechheimer v. Trounstone*, 15 Colo. 386.

Connecticut. — *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661.

Maine. — *Bassett v. Bassett*, 55 Me. 127.

Maryland. — *Homer v. Grosholz*, 38 Md. 520.

Massachusetts. — *Davenport v. Mason*, 15 Mass. 85; *Wilkinson v. Scott*, 17 Mass. 249; *Ely v. Wolcott*, 4 Allen (Mass.) 506.

Minnesota. — *Kumler v. Ferguson*, 7 Minn. 442.

Missouri. — *Hogel v. Lindell*, 10 Mo. 484.

New Jersey. — *Farnum v. Burnett*, 21 N. J. Eq. 87.

New York. — *Bowen v. Bell*, 20 Johns. (N. Y.) 338, 11 Am. Dec. 286; *Hebbard v. Haughian*, 70 N. Y. 54.

North Carolina. — *Barbee v. Barbee*, 108 N. Car. 581, overruling former decisions to the contrary.

Vermont. — *Beach v. Packard*, 10 Vt. 96, 33 Am. Dec. 185; *White v. Miller*, 22 Vt. 380; *Thayer v. Viles*, 23 Vt. 494.

Applications of the Principle. — In *Wilkinson v. Scott*, 17 Mass. 249, it was held that the acknowledgment of the receipt of the consideration expressed in a deed would not estop the grantor from proving by parol evidence that the whole had not been paid. *Parker, C. J.*, delivering the opinion of the court, said: "A man is estopped by his deed to deny that he granted or that he had a good title to the estate conveyed; but he is not bound by the consideration expressed, because that is known to be arbitrary, and is frequently different from the real consideration of the bargain. * * * It is so, we think, also with regard to the acknowledgment of payment. This always makes part of the premises, and is seldom true; for in most cases credit for the whole, or for a part, is given. And if the grantor is to be bound by this expression, no remedy would be found for cases of error and mistake, which undoubtedly often occur. A receipt is always open to explanation; and this acknowledgment, although under seal, is nothing more than a receipt, for the seal gives it no additional solemnity."

The plaintiff sold the defendant a parcel of land, executed a deed therefor, and put him in possession. The deed contained a receipt for the purchase money. The proof showed that the defendant at the time of sale paid only a part of the purchase money; shortly afterwards he paid another part and gave his promissory note for the balance. Before the note fell due, the defendant took up the note by his own order on a third person for a like sum. This order the drawee refused to pay, and upon the fact of the refusal being communicated to the defendant, he asked the plaintiff to hold on to the order as the drawee must pay it. In an action of assumpsit to recover the unpaid part of the purchase money, it was held that the evidence was sufficient in point of law to go to the jury to rebut the *prima facie* evidence of the payment of the purchase money created by the receipt and release in the deed. *Morgan v. Bitzenberger*, 3 Gill (Md.) 350.

Where the plaintiff assigned a lease to the defendant in which the consideration was ex-

(2) *To Show that Deed Was an Advancement.* — Although a valuable consideration be recited in a deed from parent to child, it is competent to show by parol that no consideration, or a part only of that stated, was in fact paid, and that the conveyance was wholly or in part an advancement.¹

f. TO SHOW WHAT WAS GIVEN FOR THE CONSIDERATION. — It is competent to show by parol that the consideration expressed in a deed not only applies to the premises described therein, but also to certain personal property, and that the amount expressed in the deed is the consideration for the sale of both.²

pressed to be five hundred dollars in hand paid, under an agreement that the defendant should sell the term and pay himself a debt due from the plaintiff and pay over the balance to the plaintiff, the plaintiff, in an action for money had and received, to recover the balance from the defendant, is not estopped by the acknowledgment of the receipt of the consideration in the deed, but may show by parol that it had not been paid. *Shepherd v. Little*, 14 Johns. (N. Y.) 210.

In a Suit by a Widow for an Assignment of Dower in a piece of real property, it appeared that the property in question was deeded to the husband of the plaintiff for the consideration of two thousand dollars expressed in the deed, and that on the same day, by another deed, in which the consideration was expressed to be twenty-five dollars, he conveyed the same property to the wife of the former grantor. It was held that parol evidence was admissible to prove that no consideration in fact passed between the parties, but that the deceased acted merely as a conduit for the transfer of the legal title from husband to wife. *Fontaine v. Boatmen's Sav. Inst.*, 57 Mo. 552.

Evidence that Credit Indorsed on Contract Was Not Money Paid. — The plaintiff was indebted to the defendant upon certain notes secured by a mortgage. The notes being overdue, the defendant was about to foreclose the mortgage, and by special arrangement between the parties the defendant agreed to bid in the premises covered by the mortgage at the foreclosure sale at a certain sum, and to allow the difference between the sum so bid and the amount of the notes and mortgage in part payment of a farm which the plaintiff contracted to buy of the defendant. In accordance with this arrangement, a contract was entered into between the parties by which the defendant covenanted and agreed to sell and convey to the plaintiff the farm, in consideration of which the plaintiff covenanted to pay a certain sum in five annual instalments. One of the stipulations of the contract provided that in case the plaintiff failed to make any of the payments, or in any respect to fulfil the contract, the same was to become void if the defendant should so elect. Upon this contract the defendant indorsed a receipt for the payment of one thousand eight hundred and twenty-three dollars and forty-four cents, in accordance with the previous agreement to that effect. The plaintiff failed to make any of the payments stipulated for, and the defendant rescinded the contract and took possession of the land. In an action by the plaintiff to recover the sum of one thousand eight hundred and twenty-three dollars and forty-four cents, indorsed on

the contract, it was held that parol evidence was admissible to show that the payment was not made in money, but in accordance with the above agreement, and the plaintiff was nonsuited. *Battle v. Rochester City Bank*, 3 N. Y. 88.

1. To Show Deed Was an Advancement. — *Meeker v. Meeker*, 16 Conn. 383; *Bruce v. Slemp*, 82 Va. 352. See also *Sadler v. Huffhines*, (Ky. 1889) 12 S. W. Rep. 715; *Sanford v. Sanford*, 61 Barb. (N. Y.) 293.

Advancement in Part. — The fact that a father conveyed to his son a tract of land worth one thousand two hundred dollars for a recited valuable consideration of four hundred dollars will not prevent the grantee from being charged with the difference as an advancement if it was the purpose of the grantor to do so; and the purpose to treat it as an advancement may be proved by parol evidence. *Barbee v. Barbee*, 109 N. Car. 299. To the same effect, see *Rockhill v. Spraggs*, 9 Ind. 30, 68 Am. Dec. 607; *Gordon v. Gordon*, 1 Metc. (Ky.) 285; *Hayden v. Mentzer*, 10 S. & R. (Pa.) 329.

See generally the title *ADVANCEMENTS*, vol. I, p. 760.

2. To Show What Was Given for the Consideration. — It is competent to show by parol that a heater and gas-fixtures were to pass to the purchaser of a house, under a written agreement in which no mention was made of such articles. *Heysham v. Dettre*, 89 Pa. St. 506.

Parol evidence is admissible to show that the sum expressed in a deed to be the consideration for the conveyance, and which was received by the grantor, was in fact received by him as the consideration for the conveyance, and also as payment of a debt then due to him from the grantee. *Harwood v. Harwood*, 22 Vt. 507.

Where by a written contract F. sells his store, the stock of goods therein, his house, lumber-yard and lumber therein, barn and barnyard, to S., upon terms specified, parol evidence is admissible to show that it was verbally agreed between the parties during the negotiation, and before the contract was concluded, that S. bought with the distinct understanding that F. would not go into business in C., the place where the store was located, and that the acquisition of the good will of the store and the agreement of F. not to set up another store in C. was part of the consideration of the purchase. *Fusting v. Sullivan*, 41 Md. 162.

Upon an action of replevin brought for the recovery of certain domestic animals, it appeared that the plaintiff, who owned a tract of land and the personal property in question, joined with her husband in an agreement with

XIV. WANT OR FAILURE OF CONSIDERATION—1. Want and Failure Distinguished.—There is no very clear distinction to be drawn between want of consideration and failure of it, for failure itself creates a want, and proof that an article for which a promissory note was given turned out to be valueless will sustain a plea either of failure of consideration or of no consideration.¹ But as commonly distinguished, want of consideration is understood to imply the original lack of any consideration whatever;² while failure of consideration implies that the exchange of something of value or the performance of some act was originally contemplated by the parties, but that by reason of some inherent defect in the thing given, or the nonperformance in whole or in part of the act which the promisee had engaged to perform, it eventually happened that nothing of value was in fact given or received.

2. What Constitutes Failure of Consideration—*a. IN GENERAL.*—Before entering upon the discussion of what constitutes a failure of consideration, it may be well to preface the subject with the general observation that the value or worthlessness of the thing given or received does not depend upon whether it meets the promisor's expectation. The rule is almost elementary that

the defendant by which the farm was to be conveyed to him, and he was to maintain them during their lives. They went to an attorney to have the proper papers drawn and executed to carry out the agreement. They explained to him the terms settled on, and the deed and bond and mortgage were accordingly prepared and executed. On the trial the defendant was allowed against objection to show by the attorney and others that the animals in question were conveyed by the plaintiff to the defendant at the time of the deed and bond and mortgage, and as part of the same transaction, and that their value formed part of the consideration to support the plaintiff and her husband; that when the attorney came to read the papers as prepared it was discovered that no mention had been made of the animals, and that he then informed the parties that no writing for their transfer was necessary, and that an actual delivery would answer every purpose. Upon an appeal it was held that the admission of this testimony was no infringement of the rules of evidence. *Dean v. Adams*, 44 Mich. 117.

But in an action brought against a canal company for damages alleged to have been occasioned to the plaintiff's land by an overflow of water from the defendant's dam, it was attempted to show that the consideration mentioned in the deed from the grantor (from whom the plaintiff inherited) for the land on which the dam stood covered not only the land itself, but also any damages which the grantor might sustain by the overflow of other lands. It was held that this evidence was properly rejected. *Morris Canal, etc., Co. v. Ryerson*, 27 N. J. L. 457.

Evidence that Consideration Did Not Apply to All the Land Conveyed.—In an action of assumpsit on a promissory note given as a part of the consideration for the conveyance of land, where the defendant pleaded that a part of the land had been recovered of him by a paramount title, it was competent for the plaintiff to show that the consideration expressed in the deed applied only to a part of the land described in it, the vendor not pretending to have a title to some of the land referred to in the deed. *Sidders v. Riley*, 22 Ill. 110.

In an *Equitable Proceeding to Enforce the Specific Performance of a Verbal Contract to Convey a Right of Way*, the petition averred that the defendant agreed to sell and convey to the plaintiff a certain tract of land, describing it, and a right of way connecting the same with a certain public road. The consideration to be paid by the plaintiff for said land and right of way was five hundred dollars. Under this contract the defendant caused another, who held the title of the land, to convey the same to the plaintiff, the consideration for the land and right of way having been paid or received, and the plaintiff went into possession of the land and of the use and enjoyment of the right of way, and continued therein for near two years under said agreement, until the defendant interrupted such use by fastening up the way and denying the plaintiff's right thereto. No conveyance of the right of way was ever executed by the defendant. The relief asked was a decree requiring the defendant to execute a deed for said right of way and to secure the plaintiff in the possession and enjoyment thereof. The answer of the defendant admitted the conveyance of the land, as stated in the plaintiff's petition, but denied the agreement in regard to the right of way, and averred that the consideration of five hundred dollars was paid for the land alone. Upon the hearing the defendant contended that inasmuch as the deed recited that the consideration for the land was five hundred dollars, which was the only consideration paid by the plaintiff to the defendant, and as it could not be shown to be less or different, being incapable of contradiction, therefore it could not be shown that any part of the amount paid by the plaintiff was in consideration of the right of way, and it must be conclusively taken that the money was paid for the land and the land only, and that the agreement for the conveyance of the right of way was *nudum pactum*. It was, however, held that the plaintiff might show the true consideration by parol, and upon appeal this ruling was affirmed. A decree was therefore rendered in accordance with the prayer of the plaintiff's petition. *Puttman v. Haltey*, 24 Iowa 425.

1. *Mooklar v. Lewis*, 40 Ind. 1.

2. *Century Dict.*, title *Consideration*.

when the promisor gets all that he contracts for, he cannot be heard to complain that the consideration was not valuable.¹

Unprofitable Investment. — Thus where a patent is not so useless as to render it void, the fact that the invention is found to be of but small practical value, and in consequence an unprofitable investment, will not constitute a failure of consideration for a note given for its purchase.²

b. FAILURE FROM INHERENT DEFICIENCY IN THE CONSIDERATION —
(1) *Defect in Title to Thing Sold* — (a) **Real Property.** — The rule of law is well settled that in the absence of fraud or warranty, the purchaser of real property takes the title at his own risk, and if he has not taken the precaution to secure himself by covenants, he has no remedy for his money even on a failure of title. Failure of title, therefore, does not constitute failure of consideration.³

1. Dissatisfaction of Purchaser Does Not Affect Value. — *Baker v. Roberts*, 14 Ind. 552; *Williamson v. Hitner*, 79 Ind. 233; *Chicago, etc., R. Co. v. Derkes*, 103 Ind. 520; *Scott v. Scott*, 105 Ind. 584.

There must be an entire failure of consideration to defeat a sale or contract; an article may have an intrinsic, though no market, value; and it seems that where the purchaser gets what he intended to buy, although the thing bought be of no value, there is not a failure of consideration. *Johnston v. Smith*, 86 N. Car. 498.

2. Uselessness of Patent Does Not Constitute Failure. — *Detrick v. McGlone*, 46 Ind. 291; *Jones v. Reynolds*, 120 N. Y. 213.

The fact that an invention lacks utility does not constitute a failure of consideration for a note given for the right to vend the invention in a certain territory. *Midkiff v. Boggess*, 15 Ind. 210.

The assignment of an interest in a patent granted for an ornamental design for a "horological cradle" is a sufficient consideration to enable a party to recover on promissory notes given therefor, although the invention may be practically of but little value. *Myers v. Turner*, 17 Ill. 180.

Patent Need Not Prove Profitable. — Where notes are given for a license to sell a patented article, they are not void for want of consideration because the sale of the article is not a profitable one. *Wilson v. Hentges*, 26 Minn. 288. In this case *Gilfillan, C. J.*, delivering the opinion of the court, said: "If the patent be valid, the right to sell the article is exclusive, and is, in law, a valuable right, although it may not, in fact, be a profitable one; and as one may pay, or agree to pay, what he pleases for such a right, the grant of it to him is a valid consideration for his promise to pay for it. Where, then, it is sought to impeach a contract as without consideration on the ground that the consideration was the grant of a right to sell a patented article, and that the article is useless, it must be shown that it is useless in the sense that will avoid the patent." See also *Van Norman v. Barbeau*, 54 Minn. 388.

Contract in Consideration of Marriage — Impotence of Husband No Defense. — The defendant covenanted with the plaintiffs to pay an annuity of two hundred pounds to one I. if a marriage should be solemnized between him and the defendant's daughter. The marriage was solemnized, and in an action brought to recover the annuity the defendant pleaded that

the marriage was null and void owing to the impotence of the husband, but the court held that such marriage must be considered valid until avoided by the ecclesiastical court, and judgment was entered for the plaintiff. *Cavell v. Prince*, L. R. 1 Exch. 246.

3. Failure of Title to Real Property. — *Barkhamsted v. Case*, 5 Conn. 528; *Clark v. Sigourney*, 17 Conn. 511; *Long v. Allen*, 2 Fla. 403, 50 Am. Dec. 281; *Stokey v. Hughes*, 18 Ill. 55; *Abbott v. Allen*, 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554; *Chesterman v. Gardner*, 5 Johns. Ch. (N. Y.) 29, 9 Am. Dec. 265. And see generally the title **VENDOR AND PURCHASER**.

Where a note is given for the purchase of land, in the absence of any agreement that the title is good, or that the note shall not be paid if the title fail, and in the absence of fraud, although untrue representations are in fact made as to the title, a failure of title will not constitute a failure of the consideration of the note. *Owings v. Thompson*, 4 Ill. 502.

The mere fact that a vendor of land was aware of the existence of a judgment which was an incumbrance on the land at the time of his sale, and failed to inform the vendee of the existence of such judgment, is not a fraud so as to constitute a defense to suit on a note for the purchase money where the means of information — to wit, the county records — were equally accessible to both parties. In such case if the vendee neglect to inform himself he is guilty of negligence, and cannot set up his ignorance as a ground of fraud unless by deceit or misrepresentation it has been misled. *Ward v. Packard*, 18 Cal. 392.

Sale of Land by Guardian. — A purchaser of real estate at a guardian's sale has no right to infer, from the guardian's assurance that he will give a good title, that he has acquired a title in fee simple, and such assurance being given in good faith, without fraudulent intent, the purchaser, who thereby acquires all the interest of the ward in the land, cannot refuse to pay a promissory note given for the purchase money on the ground of a failure of consideration. *Findley v. Richardson*, 46 Iowa 103.

Judicial Sale of Land. — In the absence of all fraud a court of equity cannot relieve a purchaser at a judicial sale on the ground that the title fails. The maxim *caveat emptor* applies the same in equity as at law in respect to such sales. *Holmes v. Shaver*, 78 Ill. 578. And see generally the title **IMPLIED WARRANTY**.

Conveyance Without Covenant Against Incumbrances. — The plaintiff conveyed to the de-

and *a fortiori*, where the purchaser has knowledge of the infirmities in the title.¹

(b) **Personal Property.** — But an implied warrant of title ordinarily arises upon the sale of personal property,² and failure of title is therefore a breach of warranty; but of this, more hereafter.³

(2) **Inferiority in Quality of Thing Sold.** — Whether a defect in the quality of a thing sold, or its unfitness for the purpose for which it is bought, constitutes a failure of consideration, depends ordinarily upon whether there was any express or implied warranty in the sale of it.⁴ In the absence of fraud or warranty the maxim of the common law, *caveat emptor*, applies, and the purchaser cannot defeat his promise to pay the price for the thing bought because it turns out to be worthless.⁵

(3) **Worthless Patents and Nonpatentable Inventions.** — A note given for the sale of an invention which is adjudged to be nonpatentable,⁶ or for a patent which is void for want of novelty and utility,⁷ or from any other cause,⁸ is not enforceable.⁹

fendant certain lands by deed containing covenants for quiet and peaceful possession, but no covenants against incumbrances. Before the notes became due the defendant discovered that there was an apparent lien upon the premises, and thereupon the plaintiff agreed to deposit the purchase-money notes with a third person, to be held by him until the lien was discharged. In an action subsequently brought to enforce the payment of these notes it was held that they were valid, there being no legal liability whatsoever upon the plaintiff to procure the lien to be discharged. *O'Hara v. Robinson*, 63 Hun (N. Y.) 569.

Land Falling Short of the Quantity Described in the Deed. — Partial failure of consideration is not a good plea to an action on a promissory note given for the purchase of lands, where the failure consists in the parcel or lot of land falling short of the quantity described in the deed. *Reddick v. Mickler*, 23 Fla. 335.

1. *Dunn v. Barnum*, 51 Fed. Rep. 355, 10 U. S. App. 86; *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 656.

2. See the title IMPLIED WARRANTY.

3. See *infra*, this section, *Effect of Want or Failure—Upon Simple Contracts*.

Purchase of Goods with Knowledge of Seller's Deficient Title. — The execution of a release of all one's right, title, and interest in personal property, if fairly made, with full information to the purchaser of the doubts respecting the title and with an agreement by him to assume the risk thereof, is a good consideration for an express promise to pay the price agreed upon for the same, although it turns out that the vendor had no title whatever to the property. *Kerr v. Lucas*, 1 Allen (Mass.) 279.

4. See the titles IMPLIED WARRANTY; WARRANTY.

Goods Sold under Warranty. — In an action on a promissory note given for the price of goods sold with a warranty it is a good defense that the goods turned out to be worthless. *Shepherd v. Temple*, 3 N. H. 455.

5. **Caveat Emptor** — *Connecticut*. — *Pollard v. Lyman*, 1 Day (Conn.) 156, 2 Am. Dec. 63.

Delaware. — *O'Neal v. Bacon*, 1 Houst. (Del.) 215.

Indiana. — *Weller v. Bectell*, 2 Ind. App. 228.

Maryland. — *Wheat v. Cross*, 31 Md. 100.

Massachusetts. — *Hunting v. Downer*, 151 Mass. 275.

New Hampshire. — *Reed v. Prentiss*, 1 N. H. 174, 8 Am. Dec. 50.

Texas. — *Haley v. Manning*, 2 Tex. Civ. App. 17.

Vermont. — *Bryant v. Pember*, 45 Vt. 487.

Virginia. — *Mason v. Chappell*, 15 Gratt. (Va.) 572. And see generally the title SALES.

If an article sold be of the slightest value to either the vendor or vendee, it will suffice by way of consideration for a promise to pay the agreed price, however disproportionate to the real value. Accordingly, where one purchased mulberry trees which turned out to be of no value to him by reason of being decayed and almost lifeless, it was held that as there was neither fraud nor warranty in the case, this constituted no defense to an action on the note given for the price. *Johnson v. Titus*, 2 Hill (N. Y.) 606.

A exchanged his horse for the horse of B and B's note. In an action upon the note B set up the defense that A's horse was unsound, and consequently that the note was without consideration, but the court held that in the absence of any warranty the rule of *caveat emptor* applied, and judgment was given for the plaintiff. *Beninger v. Corwin*, 24 N. J. L. 257.

6. *Hodge v. Mason*, 21 D. C. 181.

7. **Patent Void for Want of Novelty and Utility.** — *Sturgis First Nat. Bank v. Peck*, 8 Kan. 660; *Chemical Electric Light, etc., Co. v. Howard*, 148 Mass. 352; *Bierce v. Stocking*, 11 Gray (Mass.) 175; *Jolliffe v. Collins*, 21 Mo. 338; *Parrot v. Farnsworth, Brayt.* (Vt.) 174; *Rowe v. Blanchard*, 18 Wis. 441, 86 Am. Dec. 783.

8. **Patent Void for Noncompliance with Statute.** — Where a note is given for the exclusive right to use an invention in a certain district under a patent claimed by the plaintiff, the letters patent of which are void by reason of noncompliance with the terms of the statute, the note is void. *Earl v. Page*, 6 N. H. 477, 26 Am. Dec. 711.

9. **Void Patent Is No Consideration.** — Where the purchaser of a patent right gave therefor his promissory note, and the patent proved to be void, the note was held to be entirely without consideration, notwithstanding the vendor

(4) *Rescission of Rules, Judgments, etc.* — Where a note is given in satisfaction of a rule absolute or a judgment, the discharge of the rule or the setting aside of the judgment constitutes a failure of consideration.¹

(5) *Mutual Mistakes of Fact.* — It is a good plea of failure of consideration in an action upon a promissory note, that it was given in settlement of the balance of an account mistakenly supposed to exist in favor of the plaintiff, when in truth nothing was due.²

c. FAILURE FROM OMISSIONS OF THE PROMISEE — (1) *When Performance Is a Condition Precedent* — (a) *Failure to Deliver Goods or Make Title to Land.* — Where a note is given for the purchase price of goods or land, the delivery or conveyance of which is a condition precedent to the payment of the note, the failure of the promisee to deliver the goods³ or to convey a valid title to the land⁴ constitutes a failure of consideration.

covenanted that he had a good right to sell and convey the patented privileges, and that he would warrant the same against the claims of all persons. *Dickinson v. Hall*, 14 Pick. (Mass.) 217, 25 Am. Dec. 390.

In an action upon a promissory note given for the assignment of a patent right, plaintiff cannot recover if in fact the pretended assignment did not vest any right in the defendants, and in such case it is immaterial that plaintiff intended to make a valid assignment, or that defendants have been unmolested in the use of the right. *Snyder v. Kurtz*, 61 Iowa 593.

1. *Rescission of Rules, Judgments, etc.* — Failure of consideration is a good plea to a note given by the sheriff in discharge of a rule absolute against him to pay the money due on an execution, when that rule is subsequently rescinded as illegal and unjust. *Barron v. Chipman*, 4 Ga. 200.

If a note be given in payment and satisfaction of a judgment, and the judgment be afterwards set aside upon a writ of *audita querela*, these facts constitute a good defense to an action upon the note. *Dennison v. Brown*, 3 Vt. 170.

Where, on the return of *non est inventus* on the *ca. sa.* against the principal in a suit, the bail gave a note for the amount of the judgment, which was afterwards reversed on a writ of error, it was held that as the bail was not fixed, and the judgment was reversed, there was a failure of the consideration of the note, and the plaintiff was not entitled to recover. *Tappen v. Van Wagenen*, 3 Johns. (N. Y.) 465.

Note of Infant No Satisfaction of Debt When Infancy Is Pleaded. — The defendant being indebted to the plaintiff, the latter agreed to receive, and did receive, the note of the defendant's son, who was an infant, in satisfaction of the debt. To a suit upon the note the son set up his infancy as a defense, and prevailed. In an action upon the original debt it was held that as the note received proved to be of no value there was a failure of consideration for the agreement to take it in satisfaction of the debt. *Wentworth v. Wentworth*, 5 N. H. 410.

2. *Mercer v. Clark*, 3 Bibb (Ky.) 224; *Hathaway v. Hagan*, 59 Vt. 75.

Note Given for Nonexisting Liability. — Where one who is surety for another gives a promissory note in discharge of the obligation in its original form, and the obligation has already been discharged by the principal debtor, the

surety being ignorant of the fact, the note so given by the latter is without consideration, whether the maker had or had not inquired of the principal debtor to ascertain whether the original debt still subsisted or had been paid. *Pettyjohn v. Liebscher*, 92 Ga. 149. See also *Meakin v. Anderson*, 11 Barb. (N. Y.) 222.

In an action on a promissory note given by the defendant to the plaintiff in satisfaction of an injury done the latter by the circulation of false reports injurious to the character of the plaintiff's wife, supposed to have been put in circulation by the defendant, it is competent for the defendant to prove, as showing want of consideration, that at the time the note was given the plaintiff agreed that if the defendant would satisfy him that he did not originate such reports the note should be canceled. *Sanders v. Howe*, 1 D. Chip. (Vt.) 363.

In an action by an indorsee against the maker of a promissory note it appeared that the defendant was indebted to A's estate, and that the estate was indebted to B. By an agreement between the parties the defendant gave the note in suit to B, the latter assigning his claim to the defendant and the administrator crediting the amount of the claim upon the defendant's debt to the estate. Afterwards, in the absence of the administrator, A's widow paid to B's attorney the full amount of B's claim. It was held that this fact constituted a total failure of consideration for the note. *Cundiff v. McLean*, (Tex. 1888) 8 S. W. Rep. 43.

In an action by the transferee against the maker of a promissory note the consideration of which was the assignment of a judgment by the payee to the maker, the fact that the payee afterwards, but before the transfer of the note to the plaintiff, collected a part of the assigned judgment, shows a partial failure of consideration. *Harper v. Columbus Factory*, 35 Ala. 127.

3. *Nondelivery of Goods.* — *Shoe, etc.*, Nat. Bank v. Wood, 142 Mass. 563; *Sawyer v. Chambers*, 44 Barb. (N. Y.) 42; *Second Nat. Bank v. Anderson*, 14 Pa. Co. Ct. Rep. 513. See also *Maxfield v. Jones*, 76 Me. 135.

4. See the title *VENDOR AND PURCHASER*.

Failure to Make Title to Land. — It is a good defense to an action by the payee against the makers of a promissory note given in part payment for a tract of land, that the vendor was unable, at the time stipulated, to make a good title in consequence of the existence of incumbrances greater in amount than the

(b) **Failure to Perform Service.** — Upon a like principle, when the consideration of a note is the payee's engagement to do some act or perform some service, his nonperformance of the act or service constitutes a failure of consideration.¹

purchase money then payable. *Garrett v. Crosson*, 32 Pa. St. 373.

In *Campbell v. Brown*, 6 How. (Miss.) 106, where it did not appear that the vendee of land had received a deed, or been let into possession, and there had been a total failure of title, on a suit for the purchase money the vendee was permitted to set up failure of consideration in bar of the action.

To a suit by the payees of a promissory note, given in consideration of the conveyance of certain land by them to the maker, and commenced after the time appointed by contract for the execution of the conveyance, it is a sufficient defense to show that at the time when the conveyance was, by contract, to have been executed, the plaintiffs were not the owners of the land. *Gorham v. Reeves*, 3 Ind. 83.

Partial Failure to Convey. — The plaintiff agreed to convey to the defendant certain lands upon the payment of one thousand dollars in cash and the execution of the notes in suit. The defendant paid the thousand dollars and executed the notes. The plaintiff conveyed a portion of the lands, worth less than the thousand dollars paid, and refused to convey the remainder, and the defendant was not in possession thereof. It was held that the consideration for the notes had failed, and that the plaintiff could not recover thereon. *Cooper v. King*, 73 Iowa 136. See also *Murray v. Whitcomb*, 58 N. H. 50.

1. Omission to Perform Act Stipulated — *California*. — *Billings v. Everett*, 52 Cal. 661.

Georgia. — *Powell v. Subers*, 67 Ga. 448; *Toombs v. West*, 94 Ga. 280.

Illinois. — *Paton v. Stewart*, 78 Ill. 481.

Indiana. — *Freeman v. Matlock*, 67 Ind. 99; *Booth v. Fitzer*, 82 Ind. 66.

Maine. — *Savage v. Whitaker*, 15 Me. 24.

Massachusetts. — *Taft v. Montague*, 14 Mass. 282, 7 Am. Dec. 215.

Mississippi. — *Mary Washington Female College v. McIntosh*, 37 Miss. 671.

New York. — *Denniston v. Bacon*, 10 Johns. (N. Y.) 198; *Miller v. Ritz*, 3 E. D. Smith (N. Y.) 253; *Pittsburgh Bessemer Steel Co. v. Buckley*, 51 N. Y. Super. Ct. 342.

Oregon. — *Andros v. Childers*, 14 Oregon 447.

Texas. — *Pope v. Hays*, 19 Tex. 375.

West Virginia. — *Gerow v. Riffe*, 29 W. Va. 462.

Failure to Construct Railroad on Time. — It was stipulated in a promissory note, given for the common capital stock in a certain railroad, that the maker, for the purpose of aiding in the construction of said railroad, and in consideration thereof, promised to pay, upon the arrival of the first train of cars on said road at a certain place, to the order of the railroad company, at a bank in Indiana, a certain sum of money; and that if said road was not completed by a certain day, and the cars running to said place, said note should be null and void. In a suit upon the note by the assignee of the payee thereof the evidence showed that the cars which ran to the place and on the day mentioned in the note were not run over the

located and established line of the road, but over a temporary track laid down for the purpose, and that it was four months after that day before the cars were running to said place on said road. It was held that the road was not completed within the meaning of the note, and that the note was therefore void. *Freeman v. Matlock*, 67 Ind. 99.

Constructing Railroad under Different Charter.

— But a deed to property which is delivered in accordance with the provisions of a bond the consideration of which is that on or before a certain date a certain railroad should be extended to the vicinity of the lands so conveyed is not void because the extension is made under the charter of another and different company. *Northup v. Mollett*, (Ky. 1896) 35 S. W. Rep. 268.

Failure to Indemnify Against Liabilities. —

Where, upon the dissolution of a partnership, one of the members executes a note to the other in consideration of the undertaking to hold the maker harmless against liabilities for the debts of the firm, and a large number of judgments are afterwards recovered against the firm, these facts constitute a good plea of failure of consideration. *Pope v. Hays*, 19 Tex. 375.

Failure to Erect Bridge in Substantial Manner.

— Where one had contracted, for a price agreed, to erect a bridge in a particular manner, and he executed the contract so unfaithfully that, although the bridge served its intended use for a time, yet, from the manner of building it, it gave way, and was finally carried away by a flood, he could not recover on the special contract, because he had not fulfilled it; nor on a *quantum meruit*, because the defendants had received no benefit from his labors. *Taft v. Montague*, 14 Mass. 282, 7 Am. Dec. 215.

Failure to Procure Employment for Third Person.

— Where the payee of a promissory note procured the same to be executed by stipulating with the maker that he, the payee, would procure employment for a third person (for whose benefit the note was given and who received the entire consideration therefor) by which the latter would earn enough money to pay off the note, a total breach of this stipulation is a defense to an action brought upon the note by the payee. *Toombs v. West*, 94 Ga. 280.

Failure to Effect Cure. — Where a note is given for medical services rendered under a contract that if the payee did not permanently cure the patient he should receive no compensation, and the note is obtained by false representations that the payee had effected a cure, the establishment of these facts upon trial is sufficient to show failure of consideration. *Andros v. Childers*, 14 Oregon 447.

Failure to Render Assignment of Contract Effectual. — In *Savage v. Whitaker*, 15 Me. 24, the consideration of the note in suit was an agreement to assign a contract made by a third person to carry the United States mail on a certain route, and which had been assigned to the payee of the note by such third person.

(2) *When Promises Are Independent.* — But where two contracts between the same parties are distinct and to be performed at different times, the non-performance of the one is no defense to an action on the other.¹

The consent of the post office department was not obtained, and the postmaster general afterwards availed himself of his right to consider the contract as forfeited by such assignment and made a new contract with a different person. It was held that the consideration of the note had failed. *Weston, C. J.*, said: "This assignment, made or to be made, is assumed as the basis and subject matter of the plaintiff's contract. Bunker had undertaken to make that effectual. If it failed, the plaintiff had nothing to transfer, and the defendants obtained nothing. If that took effect, he had still a duty to perform in causing the interest to be transferred to the defendants. An engagement to do a certain thing involves an undertaking to secure and use effectually all the means necessary to accomplish the object; and among these the most important and essential was to obtain the written consent of the postmaster general. It was not the mere chance that this might be effected which formed the consideration for the note. The defendants were to stand in the place of Bunker, and to enjoy the emoluments which were expected to be derived from the contract with the government." See also *Ewing v. Chase*, 2 Del. Ch. 278.

Failure to Return Original Note upon Renewal. — In an action by the payee of a promissory note against the maker, it is a good defense that the note was given to the plaintiff to renew a previous note, upon the plaintiff's agreement to return it to the maker, and that the plaintiff has never returned such previous note. *Miller v. Ritz*, 3 E. D. Smith (N. Y.) 253; *Powell v. Subers*, 67 Ga. 448.

Death of Executor Before Administering upon Estate. — A appointed B his executor, and gave him his promissory note, payable on demand, in consideration of the trouble he would have in the office of executor after his death. B died in A's lifetime, not having put the note in suit, and in an action upon it by B's executor it was held that the consideration had totally failed, and that the action was therefore not maintainable. *Solly v. Hind*, 6 C. & P. 316, 25 E. C. L. 416.

Breach of Agreement to Allow New Trial. — The plaintiff recovered a judgment against the defendant, and the defendant entered a motion for a new trial. Pending this motion, and at the same term of the court, the defendant proposed to give his note to the plaintiff for the amount of damages assessed on condition that the plaintiff would assent to the granting of a new trial, and then dismiss her suit. The offer was accepted, and a written agreement stating its terms was drawn up and the note delivered to the plaintiff. On the argument of the motion for a new trial the defendant produced this paper, but the motion was resisted by the plaintiff's counsel (not at her instance, as they testified, but because they supposed the object of the arrangement was to deprive them of their fees), and the motion was overruled by the court. In an action upon the note it was held that there was an entire failure of

the consideration of the note. *Bryant v. Bryant*, 35 Ala. 315.

Failure of Purpose for Which Note Was Given. — A party who has given his note for the price of a scholarship in an incorporated seminary of learning cannot be compelled to pay it after the corporation has become insolvent and abandoned the keeping of the school contemplated in the charter, if it was understood between the parties at the time of the purchase that the price of the scholarship was to constitute a part of a permanent endowment fund, the interest on which alone was to be expended. *Mary Washington Female College v. McIntosh*, 37 Miss. 671. See also *Simpson Centenary College v. Tuttle*, 71 Iowa 596.

Failure to Perform Declarations Made at Sale of Land. — In an action upon a promissory note given for a town lot, the maker, to show that the consideration had failed, offered to prove that the payees of the note, as proprietors of the town in which the lot was situated, publicly proclaimed on the day of the sale of the lot that they would build a storehouse in the town by a certain day after the day of sale, and that they would construct a bridge across the river at the town; but that they had failed so to do. It was held that the declarations of the payees of their intention to build the house and bridge could not be considered a part of the consideration of the note, and that unless the proprietors of the town made such declarations deceitfully the note was valid. *Miller v. Howell*, 2 Ill. 499, 32 Am. Dec. 36.

Note Payable upon Contingency. — In an action on a note, a plea which sets up that the maker and payee of the note were owners of land, and that the payee took a conveyance of the land in order to sell it on joint account, and gave the note as security for the prompt payment of the purchase money when the land should be sold, that it remains unsold, etc., the payee being anxious to sell, etc., is good, as showing a want of consideration. *Marsh v. Bennett*, 22 Ill. 313.

1. Mutual and Independent Contracts — Non-performance of One Not Failure of Consideration of the Other. — *Turner v. Rogers*, 121 Mass. 12.

In an action upon a promissory note, the defendant pleaded the general issue and relied upon a receipt for the note in which the defendant promised to procure and deliver up a certain execution issued in favor of a third party against the defendant, which execution he attempted to show had never been so delivered up. Upon appeal from a verdict in favor of the plaintiff, the court, by *Shaw, C. J.*, overruling the defendant's exceptions, said: "This is a note, unlimited in its terms, for \$105.37, payable to the plaintiff, or the same thing. Can the defendant set up the receipt in defense? What is the undertaking? That Springer will procure and deliver up the execution. That is a good consideration for the note. Is it a condition precedent to a recovery upon it? We think not. Here was one undertaking to pay money, another to deliver up the execution. Neither was precedent to the

Exchange of Promissory Notes. — Thus, where promissory notes are given in exchange, each for the other, if both notes are overdue and each remains in the hands of its payee, the one may doubtless be set off against the other; but the two contracts, though mutual, are independent, and if they are for the payment of money at different times, each must be performed according to its terms.¹

Note Given for Bond to Make Title. — Where the vendor of land executes a bond conditioned to make title to the vendee generally, and the vendee in consideration thereof makes a promissory note payable to the vendor on a day certain, the failure to complete the title is not an available bar to an action at law upon the note. The remedy is to compel a performance.²

d. FAILURE OCCASIONED BY PROMISOR'S OWN ACT. — When the performance of an act which is the consideration of the promise is rendered impossible by the act of the promisor himself, nonperformance does not ordinarily constitute a failure of consideration.³

other. The stipulation to procure and deliver up the execution on receiving the note is a mutual and independent stipulation, executory in its character, a failure to perform which gives a good ground of action against the party undertaking it. Suppose the defendant were sued on the judgment, and these facts could not be proved in defense. Then the other party would be responsible on the undertaking to procure and deliver up the execution, which is, in effect, a contract to indemnify. The contracts were to be fulfilled at different times, and were independent, though mutual." *Waterhouse v. Kendall*, 11 Cush. (Mass.) 128.

1. *Strangborough v. Warner*, 4 Leon. 3; *Traver v. Stevens*, 11 Cush. (Mass.) 167.

2. *George v. Stockton*, 1 Ala. 135. And see generally the title **VENDOR AND PURCHASER**.

Bond for Title a Sufficient Consideration. — Where, in an action upon a promissory note, the consideration of which was the plaintiff's bond for a deed of the sawmill, the defendant who had received possession pleaded that the mill had been destroyed by fire since the bond was given, the court, by Shepley, J., said: "The defendant had received a valuable consideration for the notes in the bond obliging the plaintiff to convey the estate to him upon payment of them. That consideration had not been impaired or varied by the destruction of the mill. He was in no condition to inquire whether the plaintiff could or could not perform, until he had performed on his own part. Then he would be entitled to a conveyance or to damages to be recovered by a suit upon his bond. Whether the plaintiff had contracted to sell to another, or whether the property had been destroyed by the elements, was in a legal sense immaterial to him, until he had by his own performance become entitled to a conveyance." *Todd v. Whitney*, 27 Me. 480.

It is no defense to an action by the payee against the maker of a promissory note that the payee had agreed to convey an estate to the maker in consideration of a sum of money then paid or secured to be paid to the maker (being the sum mentioned in the note), and of a further sum to be paid at a future day, and that such estate had never been conveyed. *Spiller v. Westlake*, 2 B. & Ad. 155, 22 E. C. L. 49. See also *Jones v. Jones*, 6 M. & W. 84.

But a note given in consideration of a bond for title to land which is declared void for uncertainty is also void. *Wilkinson v. Davis*, Freem. (Miss.) 53.

Agreement to Execute Lease. — A having agreed to execute a lease of premises to B, who was to pay a certain sum for it, if B, who was let into possession, accept a bill for the consideration money, drawn on him by A, it is no defense to an action on the bill by A against B that the former refused to execute the lease; but his remedy is on the agreement. *Moggridge v. Jones*, 14 East 486.

Contract to Convey a Pew. — A promissory note given in consideration of a sale of pews, followed with possession in the vendee, cannot be avoided on the ground that the vendor refuses to convey. The remedy is by compelling a performance. *Freligh v. Platt*, 5 Cow. (N. Y.) 494.

It is no defense to a note that the consideration thereof was a promise by the payee to give a deed of a pew by a certain time thereafter, which was not done within the time specified, nor until after the commencement of an action on the note. *Chapman v. Eddy*, 13 Vt. 205.

Agreement to Convey Slave. — A purchased a slave of B and executed his note for \$300. B executed an obligation to A to make him a title upon the payment of the purchase money for the value of the slave. It was held that A must pay the note before he could demand a title of B. Second, that the slave having been emancipated by the government, B was excused from making a title to the slave. *Thompson v. Warren*, 5 Coldw. (Tenn.) 644.

3. Failure Occasioned by Promisor's Own Act. — If a person who is indicted for a crime employs a lawyer and executes his note for the amount of the fee, and then before his trial commits suicide, the note is not void for failure of consideration, since the cause of the nonperformance of the lawyer's services which are the consideration for the note resulted from the act of the promisor himself. *Mitcherson v. Dozier*, 7 J. J. Marsh. (Ky.) 53, 22 Am. Dec. 116.

The plaintiff and another were the holders of a promissory note for \$2,500 in respect to which there was some dispute, but upon which the maker was willing to pay \$1,250 as a compromise. The plaintiff wished to accept this

c. FAILURE FROM ACCIDENTAL AND UNFORESEEN CAUSES — (1) *In General*. — Whether, when the performance of the act is prevented, or the subject-matter of the contract is destroyed, by accidental and unforeseen causes, the loss falls upon the promisor or upon the promisee, depends largely upon the character of the contract and whether it is executory or executed.¹

(2) *When the Contract Is Executory*. — When the contract is executory, as where the promisee engaged to do some act, he cannot enforce the promise if the act be not performed, though prevented by some accident against which he could not guard.²

Destruction of Goods under Conditional Sale. — So where notes are given for the purchase price of goods sold under the condition that the title to them shall remain in the vendor until the payment of the notes, and the goods are accidentally destroyed by fire while in the vendee's possession, their destruction constitutes a failure of consideration.³

(3) *When the Contract Is Executed* — *Destruction of Leased Premises by Fire or Storm*. — But when the contract is executed, as where a note is given for the rent of a house, the subsequent destruction of the premises by fire or storm does not, in the absence of statutory provision or of a covenant in the lease to the contrary, constitute a failure of consideration.⁴

Depreciation in Value of Stock. — So where a note is given as the purchase price of stock in a corporation or joint stock company, the fact that the stock subsequently depreciates in value or becomes worthless will not constitute partial or total failure of consideration.⁵

agreement, but the other preferred to sue for the full amount, and the plaintiff, to avoid this litigation, sold his interest in the note to the defendant for \$625, taking his note for the amount. In a suit upon the original note, it was declared void, and this fact was set up by the defendant to establish a failure of consideration for his note. Paterson, J., delivering the opinion of the court, said: "How can it be said * * * that plaintiff parted with nothing of value? It was not his fault that defendant afterwards failed to recover on the note. The latter preferred to litigate. He took the chance of getting more than the amount offered in compromise and lost. Plaintiff parted with his right to compromise, relying upon defendant's promise to pay him the \$625, and is entitled to recover." *Bean v. Proseus*, (Cal. 1892) 31 Pac. Rep. 49.

1. See generally the title SALES.

2. *Failure from Accidental Causes*. — A plea of failure of consideration for a note averred that the payee was to plant a hedge for the maker which should become a protection against stock in from three to five years; that the plants were winter-killed and useless, never having grown, and that it was then out of the power of the payee to make the hedge according to the agreement. It was held that the fact that it was out of the payee's power to perform the contract within the time stipulated constituted a failure of consideration. *Edwards v. Pyle*, 23 Ill. 354.

3. *Arthur v. Blackman*, 63 Fed. Rep. 536.

4. *Destruction of Premises by Fire or Storm*. — *Izon v. Gorton*, 5 Bing. N. Cas. 501, 35 E. C. L. 198; *Diamond v. Harris*, 33 Tex. 634.

In an action upon two joint promissory notes executed by a principal and surety, against the latter only, the defendant offered to show that the notes were two of a series of four given for the future occupancy by the principal, for a

year from their date, of a hotel, and that the hotel had been before the expiration of the year wholly destroyed by a tornado. It was held that the testimony was inadmissible as being irrelevant; the contract for the future occupancy of the hotel for a year, though in parol, under our statute was a valid lease; and as there was no reservation by the makers of the note against responsibility in case of accident, neither law nor equity could relieve them from their express agreement to pay the rent; the surety being in such case in no better condition than the principal. *Payne v. Devinal*, 11 Smed. & M. (Miss.) 400.

See generally the title LANDLORD AND TENANT.

5. *Subsequent Depreciation in Value of Stock*. — Where a note is given for an assignment of stock in a company whose principal asset is a piece of land upon which there is a mortgage, and the mortgage is afterwards foreclosed and the land sold for much less than the price the company paid for it, the depreciation in the value of the stock caused thereby will not constitute a failure of consideration for the note. *Button v. Clark*, 16 Ohio 297.

Where a promissory note is given as the price of certain shares of stock in a corporation, the maker cannot plead failure of consideration because a steamboat which is the sole property of the corporation is afterwards lost and the stock thereby becomes worthless. *Kerchner v. Gettys*, 18 S. Car. 521.

Reduction in Mail Contract. — Where a note is given for the price of the assignment of a mail route which is liable to be reduced by the department, a subsequent reduction will not constitute a failure of consideration. *Wells v. Carr*, 25 Fed. Rep. 541.

Purchasing Account upon Speculation. — Where a person purchases a book account upon speculation for one-half of the amount, he

3. Effect of Want or Failure — a. UPON SIMPLE CONTRACTS — (i) Want of Consideration — (a) Total Want. — A valuable consideration being one of the requisites of a valid contract,¹ it follows, as a necessary consequence, that where there is an entire absence of consideration the contract is void.²

(b) **Partial Want.** — Where the want of consideration is merely partial, the contract is avoided only *pro tanto*.³

Invalidity of One of Several Considerations. — Thus where a contract rests upon several considerations, and one of them is invalid, the contract can be enforced only to the extent of the valid consideration.⁴

cannot plead failure of consideration for a note given therefor if it subsequently transpires that the debtor is insolvent and the account worthless. *Daniel v. Tarver*, 70 Ga. 203.

Emancipation of Slaves by Government Not a Breach of Warranty. — In an action brought to recover the amount of a promissory note given prior to the war for certain slaves sold, which the vendor warranted to be slaves for life, it is no valid defense to the action, that, by the results of the war, said slaves had become free, and were, therefore, not slaves for life. *Hand v. Armstrong*, 34 Ga. 232; *Wilkinson v. Cook*, 44 Miss. 367; *Thompson v. Warren*, 5 Coldw. (Tenn.) 644; *Loggins v. Buck*, 33 Tex. 113.

1. See *supra*, this title, *Necessity and Sufficiency of Consideration — Simple Contracts*.

2. **Entire Want of Consideration.** — Where A, wishing to borrow two hundred dollars from B, executed several small notes, amounting in the aggregate to three hundred and nineteen dollars, payable to C, who indorsed them to B and received the two hundred dollars, which he handed over to A, and A subsequently took up a part of the notes, and paid to B various sums, amounting in all to two hundred dollars — it was held that B, in an action on the balance of the notes, was not entitled to recover against C. The contract being entire, and B having received the sum advanced by him, there was a want of consideration for the balance of the notes. *Hutchins v. McCann*, 7 Port. (Ala.) 94. See also *More v. Calkins*, 95 Cal. 435, 29 Am. St. Rep. 128.

3. *Doebler v. Waters*, 30 Ga. 344; *Lowe v. Bryant*, 32 Ga. 235; *Gamble v. Grimes*, 2 Ind. 392. And see the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 195.

Partial Want of Consideration. — Where on a settlement of certain bills of exchange, an amount is included in a new bill given for the balance, as statutory damages for the dishonor of the bills settled, and the statute allows no such damages, the new bill is to that extent without consideration. *Collins Iron Co. v. Burkam*, 10 Mich. 283.

Where a note is given in part payment of an account, and the credit given the maker on account of the note is an amount less than the amount of the note, the maker and the indorser of the note are only liable for the amount credited on the account. *Robson v. McKoin*, 18 La. Ann. 544.

Where a note is procured from the maker by false representations of the payee that he had paid the amount thereof to a third party for the maker's benefit, when in fact he had paid a much less sum, it is valid for the sum actu-

ally paid, but void as to the residue. *Griffiths v. Parry*, 16 Wis. 218.

The defendant employed the plaintiff to purchase an improvement upon the public land; the plaintiff made the purchase, but fraudulently represented to the defendant that he gave for the improvement \$100 more than its actual cost; the defendant gave his note, the one sued on, to the plaintiff, for a balance due him on the purchase, including the \$100 so falsely represented to have been given for the improvement. It was held that there was a partial want of consideration to that amount, of which the defendant could take advantage by plea. *Keller v. Vowell*, 17 Ark. 445.

4. **Invalidity of One of Several Considerations.** — Where a promissory note is given upon two distinct and independent considerations, and one is a consideration which the law deems valid and sufficient to support a contract, and the other not, the note will be apportioned by the court as between the original parties or such as have the same relative rights, and the holder will recover to the extent of the valid consideration and no further. But where the parts of the note are not respectively liquidated and defined, the question what amount is founded on one consideration and what on the other is to be settled by the jury upon the evidence. *Parish v. Stone*, 14 Pick. (Mass.) 198, 25 Am. Dec. 378; *Loring v. Sumner*, 23 Pick. (Mass.) 98.

Where a promissory note signed by one member of a partnership of which the defendant is a member, in the firm name, is given in payment of debts, some of which were contracted before the defendant came into the firm and the rest thereafter, in an action thereon by the payee, in the absence of evidence of actual fraud on his part or of knowledge when the defendant entered the partnership, he is entitled to recover for the amount of the debts covered by the notes after the defendant became a member. *Guild v. Belcher*, 119 Mass. 257.

Where parties to a settlement ascertain the amount due from one to the other, and the debtor, at the solicitation of the creditor, without any other or valuable consideration, adds thereto the amount of an unjust claim of the latter, for which there is no foundation, and executes a note for the whole amount as between the parties, the note is without legal consideration and void as to the amount thus added. *Briscoe v. Kinealy*, 8 Mo. App. 76.

Equity Will Not Declare an Entire Note Void where it is given in part for a fictitious consideration, except when it is given with fraudulent intentions as against creditors. *Phelps v. Hopkinson*, 61 Ill. App. 400.

(2) *Failure of Consideration* — (a) **Total Failure** — *aa. IN GENERAL.* — The entire failure of consideration has the same effect as its original and total absence, and therefore the contract is void and no rights can issue out of it.¹

bb. FAILURE OF TITLE — (*aa*) *Real Property* — **Older Rule.** — Consonant with the principle that mutual promises are valid considerations each for the other, it was held in the earlier cases that where a promissory note was given for the purchase price of land conveyed by deed containing covenants of warranty and seizin, and the title to the land failed, the covenants in the deed formed a sufficient consideration for the note, and that the purchaser could not plead failure of title as a defense, but must pay the note, and for his relief resort to a cross-action upon the covenants.²

Modern Rule. — But this rule, savoring more of superfluous refinement than of practical wisdom, has now happily passed away, and it is the modern practice, where there has been a total failure of title, to allow this to be set up in defense to an action upon the note as a total failure of consideration.³

1. Total Failure of Consideration Avoids Contract — *England.* — *Solly v. Hind*, 6 C. & P. 316, 25 E. C. L. 416; *Wells v. Hopkins*, 5 M. & W. 7.

United States. — *Arthur v. Blackman*, 63 Fed. Rep. 536.

Alabama. — *Corbin v. Sistrunk*, 19 Ala. 203; *Bryant v. Bryant*, 35 Ala. 315; *Hudson v. Tindall*, 1 Stew. & P. (Ala.) 237.

California. — *Billings v. Everett*, 52 Cal. 661.

Delaware. — *Ewing v. Chase*, 2 Del. Ch. 278.

Georgia. — *Barron v. Chipman*, 4 Ga. 200;

Powell v. Subers, 67 Ga. 448; *Toombs v. West*, 94 Ga. 280.

Illinois. — *Edwards v. Pyle*, 23 Ill. 354; *Paton v. Stewart*, 78 Ill. 481.

Indiana. — *Freeman v. Matlock*, 67 Ind. 99; *Booth v. Fitzer*, 82 Ind. 66.

Iowa. — *Snyder v. Kurtz*, 61 Iowa 593.

Kansas. — *Sturgis First Nat. Bank v. Peck*, 8 Kan. 660.

Kentucky. — *Mercer v. Clark*, 3 Bibb (Ky.) 224.

Louisiana. — *LeBlanc v. Sanglair*, 12 Martin (La.) 402, 13 Am. Dec. 377.

Maine. — *Savage v. Whitaker*, 15 Me. 24; *Maxfield v. Jones*, 76 Me. 135.

Massachusetts. — *Taft v. Montague*, 14 Mass. 282, 7 Am. Dec. 215; *Shoe, etc., Nat. Bank v. Wood*, 142 Mass. 563; *Chemical Electric Light, etc., Co. v. Howard*, 148 Mass. 352; *Bierce v. Stocking*, 11 Gray (Mass.) 175.

Mississippi. — *Mary Washington Female College v. McIntosh*, 37 Miss. 671.

Missouri. — *Joliffe v. Collins*, 21 Mo. 338.

New Hampshire. — *Tillotson v. Grapes*, 4 N. H. 444; *Wentworth v. Wentworth*, 5 N. H. 410; *Earl v. Page*, 6 N. H. 477, 26 Am. Dec. 711.

New York. — *Tappen v. Van Wagenen*, 3 Johns. (N. Y.) 465; *Denniston v. Bacon*, 10 Johns. (N. Y.) 198; *Miller v. Ritz*, 3 E. D. Smith (N. Y.) 253; *Pittsburgh Bessemer Steel Co. v. Buckley*, 51 N. Y. Super. Ct. 342; *Meakim v. Anderson*, 11 Barb. (N. Y.) 222; *Sawyer v. Chambers*, 44 Barb. (N. Y.) 42.

Oregon. — *Andros v. Childers*, 14 Oregon 447.

Pennsylvania. — *Second Nat. Bank v. Anderson*, 14 Pa. Co. Ct. Rep. 513.

Texas. — *Pope v. Hays*, 19 Tex. 375; *Cundiff v. McLean*, (Tex. 1888) 8 S. W. Rep. 43.

Vermont. — *Dennison v. Brown*, 3 Vt. 170;

Parrot v. Farnsworth, *Brayt. (Vt.)* 174; *Hathaway v. Hagan*, 59 Vt. 75.

West Virginia. — *Gerow v. Riffe*, 29 W. Va. 462.

Wisconsin. — *Rowe v. Blanchard*, 18 Wis. 441, 86 Am. Dec. 783.

For other authorities, see the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 195.

Note Payable Without "Plea or Offset." — Where the maker of a note promises on its face to pay its amount "without plea or offset," he cannot refuse payment on the ground of failure of consideration to the knowledge of the holder, though entitled by the laws of the state where the note was executed to set up against subsequent holders any defense which he might have opposed to the original payee. *Grand Gulf R., etc., Co. v. Stanbrough*, 1 La. Ann. 261.

2. *Long v. Allen*, 2 Fla. 403, 50 Am. Dec. 281; *Lloyd v. Jewell*, 1 Me. 352, 10 Am. Dec. 73. See also *Clark v. Jones*, 16 Ind. 191.

3. Failure of Title Constitutes Failure of Consideration — *Colorado.* — *Heaton v. Myers*, 4 Colo. 59.

Connecticut. — *Cook v. Mix*, 11 Conn. 432.

Illinois. — *Mason v. Wait*, 5 Ill. 131; *Slack v. McLagan*, 15 Ill. 242.

Louisiana. — *Lapene v. Delaporte*, 27 La. Ann. 252.

Massachusetts. — *Rice v. Goddard*, 14 Pick. (Mass.) 293.

Minnesota. — *Durment v. Tuttle*, 50 Minn. 426.

New York. — *Frisbie v. Hoffnagle*, 11 Johns. (N. Y.) 50; *Tibbets v. Ayer, Hill & D. Supp.* (N. Y.) 174.

In *Cook v. Mix*, 11 Conn. 432, where in an action upon a promissory note given for the purchase price of land, failure of title was pleaded as failure of consideration, the court, by Bissell, J., said: "We do not assent to the proposition, that the covenants in the deed formed any part of the consideration for the note. What, it may be asked, is to be understood by a total failure of consideration? It is very obvious that when the party does not get that which by the terms of the contract he was to receive, and for which his note is given, the consideration of the note fails and fails wholly. * * * On a sale of personal

(bb) *Personal Property*. — Upon the sale of personal property, there is an implied warranty of title in the vendor, and in an action upon the note given for the price, it is a valid defense that the property was recovered from the purchaser by one having a superior title.¹

(b) *Partial Failure* — *aa. RESCISSION OF CONTRACTS*. — Where, upon a contract of sale, the thing delivered does not come up to agreement, the purchaser may decline to accept it or tender it back to the seller, and plead such breach of contract as a total failure of consideration in an action upon a note given for the price,² or may recover from the seller a deposit made with him.³

bb. *IN ACTIONS FOR THE PRICE*. — But a purchaser of goods is not bound to return them in order to entitle him to damages for the breach of warranty, but may keep them, and in an action against him for the price show such inferiority in reduction of damages, and the seller can only recover from him their actual value.⁴

property, there is always an implied warranty of title. But it turns out that the vendor has no title. Was it ever supposed that he could recover the purchase money, and turn the vendee over to his remedy on the warranty? And is there any well founded distinction between a sale of real estate with covenants, and a sale of personal property with warranty? We suppose not. And we suppose it to be perfectly well settled, that where a total failure of consideration is shown, it is an answer to the action."

A father abandoned his family and property and left the state, his whereabouts being unknown for more than six years. Five years after his disappearance, both believing him to be dead, a daughter conveyed to a brother by quitclaim deed her interest in real estate, the latter paying a part of the consideration in money and giving his promissory note for the balance. The father subsequently returned, excluded his son from possession of the land, and sold it. In an action upon the note, it was held that there was a failure of consideration. *Fleetwood v. Brown*, 109 Ind. 567.

Subsequent Sale of Land at Suit of Grantor's Creditors. — Where a note is given as the purchase price of land, and the property is afterwards sold at the suit of creditors of the vendor, the note is void for failure of consideration. *Lapene v. Delaporte*, 27 La. Ann. 252; *Frisbie v. Hoffnagle*, 11 Johns. (N. Y.) 50.

Sale of Right to Cut Timber Found to Be Void. — The sale of a right, as for instance a right to cut timber on public lands, which is afterwards found to be void, is not a sufficient consideration for a promissory note. *Long v. Hopkins*, 50 Me. 318.

Defective Deed. — A sold to B certain personal property and real estate, taking in payment an amount in money greater than the value of the personal estate, and a promissory note for the residue. The deed of the property was defective as to the real estate, because not under seal. It was held that A could not maintain an action against B on the promissory note, although B entered into possession of the real estate and remained in possession until after the action was brought upon the note. *Curtis v. Clark*, 133 Mass. 509. See also *Hacker v. Brown*, 81 Mo. 68.

1. Failure of Title — Personal Property. — *Chenault v. Bush*, 84 Ky. 528.

A qualified as executor on a will of C, ad-

mitted to probate in common form, sold the goods and chattels of the testator and took sealed notes for the purchase money. A later will appointing B executor was afterwards discovered and admitted to probate, and A's letters testamentary were revoked and declared null and void. B, having qualified as executor, sued the purchasers from A in trover, and against some he recovered, and others delivered up the property. It was held that the consideration of the single bill given to A had failed, and that he could not recover thereon. *Vance v. Davenport*, 11 Rich. L. (S. Car.) 517.

The plaintiff held notes against the defendant; the defendant delivered goods to the plaintiff in payment of the notes; before the notes were surrendered to the plaintiff the defendant was declared a bankrupt, and the sale became thereby void. It was held that the plaintiff could recover upon the notes upon the ground that the consideration for a promised surrender of the notes had failed. *Maxfield v. Jones*, 76 Me. 135.

2. Lewis v. Cosgrave, 2 Taunt. 2; *Street v. Blay*, 2 B. & Ad. 456, 22 E. C. L. 122; *Barr v. Baker*, 9 Mo. 850. And see generally the title *RESCISSION*.

3. Rescission of Contracts — Recovery of Deposit. — *Chapman v. Brooklyn*, 40 N. Y. 372.

The plaintiff and the defendant entered into a contract, in which it was recited that the defendant was possessed of an interest in a public house for a term, of which eight years and a half had yet to run, and that the plaintiff had contracted and agreed for the purchase of the interest and good will of the same for a certain sum of money therein mentioned. The plaintiff paid a deposit of £5 to the defendant on signing the agreement, but afterwards, upon looking into the defendant's title, it appeared that he had an interest of six years only, whereupon the plaintiff refused to accept the assignment and brought an action to recover his deposit of £5. It was held that the interest which the defendant delivered was not the interest which the plaintiff had contracted to buy, and that the latter might repudiate the purchase and recover his deposit. *Farrer v. Nightingal*, 2 Esp. N. P. 639.

4. Breach of Warranty — Recoupment in Action for the Price — England. — *Street v. Blay*, 2 B. & Ad. 456, 22 E. C. L. 122; *Germaine v. Burton*, 3 Stark. 32, 14 E. C. L. 152; *Basten v. Butler*, 7 East 479; *King v. Boston*, 7 East

cc. AS A DEFENSE TO BILLS AND NOTES — (aa) *Liquidated Damages*. — When the consideration of a bill or note partially fails, and the amount of such failure is liquidated or can be definitely ascertained by computation, all the authorities agree that such partial failure can be pleaded as a defense *pro tanto*.¹

(bb) *Unliquidated Damages* — aaa. *English Rule*. — But according to the English practice a different rule obtains where the failure is not a liquidated amount but a question of fact for the jury. It is there the rule that in all instances wherein a party is injured either by a partial failure of consideration for the contract, or by the non-fulfilment of the contract or of a warranty, the person so injured cannot defend himself on an action on the contract by proving these facts, but can find redress only in a cross-action against the plaintiff.²

481, note b; Farnsworth v. Garrard, 1 Campb. 38; Denew v. Daverell, 3 Campb. 451; Caswell v. Coare, 1 Taunt. 566; Poulton v. Lattimore, 9 B. & C. 259, 17 E. C. L. 373.

United States. — Miller v. Smith, 1 Mason (U. S.) 437.

New Hampshire. — Butler v. Northumberland, 50 N. H. 33.

New York. — Warren v. Van Pelt, 4 E. D. Smith (N. Y.) 202; Muller v. Eno, 14 N. Y. 597; Renaud v. Peck, 2 Hilt. (N. Y.) 137.

A sold to B for £95 two pictures, representing them as "a couple of Poussin's;" they were, in fact, not originals, but very excellent copies; B did not offer to return them. It was held that if the jury thought that B believed, from the representation of A, that they were originals, he was not bound to pay the price agreed upon; but that, as he kept them, he was liable to pay such sum as the jury might consider to be the value. Lomi v. Tucker, 4 C. & P. 15, 19 E. C. L. 255.

Where a party contracted to supply and erect a warm-air apparatus, for a certain time, it was held in an action for the price (the defense of which was, that the apparatus did not answer), that, if the jury thought it was substantial in the main, though not so complete as it might be under the contract, and could be made good at a reasonable rate, the proper course would be to find a verdict for the plaintiff, deducting such sums as would enable the defendant to do what was requisite. Cutler v. Close, 5 C. & P. 337, 24 E. C. L. 348.

A Defendant Cannot Plead a Total Failure of Consideration unless the article involved was worthless, not only for the purpose for which he bought it, but for every other purpose, and, where it is not worthless for every purpose, he must return or offer to return it before he can avail of such defense. Fenwick v. Bowling, 50 Mo. App. 516. See also Garrett v. Heaston, 5 Blackf. (Ind.) 349.

Where machinery is bought for a certain purpose, and after its reception it proves upon trial not to be adapted to the purpose, but the purchaser nevertheless retains it, an action for the price cannot be defeated upon a plea of total failure of consideration, unless the evidence shows that the machinery was wholly valueless for any purpose. Hardee v. Carter, 94 Ga. 482.

1. Partial Failure — Liquidated Amount. — Chalmers' Bills of Exchange, § 30, rule 4; Archer v. Bamford, 3 Stark. 175, 14 E. C. L. 176; Agra, etc., Bank v. Leighton, L. R. 2 Exch. 56; Star Kidney Pad Co. v. Greenwood,

5 Ont. Rep. 28; McGregor v. Bishop, 14 Ont. Rep. 7. See also Drew v. Towle, 27 N. H. 412, 59 Am. Dec. 380; Riddle v. Gage, 37 N. H. 519, 75 Am. Dec. 151. And see the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 195.

2. Unliquidated Damages — English Rule. — Obbard v. Betham, M. & M. 483, 22 E. C. L. 363; Fleming v. Simpson, 1 Campb. 40, note; Morgan v. Richardson, 1 Campb. 40, note; Tye v. Gwynne, 2 Campb. 346; Archer v. Bamford, 3 Stark. 175, 14 E. C. L. 176; Day v. Nix, 9 Moo. 159, 17 E. C. L. 121; Warwick v. Nairn, 10 Exch. 762; Mills v. Blackall, 11 Q. B. 358, 63 E. C. L. 358.

In Farnsworth v. Garrard, 1 Campb. 38, where, upon an action of assumpsit for work and labor done and material found for the building of a house, the defendant pleaded that the house had been negligently constructed and was in great danger of tumbling down, Lord Ellenborough, who sat in the case, said: "If the defendant has derived no benefit from his [the plaintiff's] services, he deserves nothing, and there must be a verdict against him. There was formerly considerable doubt upon this point. The late Mr. Justice Buller thought (and I, in deference to so great an authority, have at times ruled the same way) that in cases of this kind a cross-action for the negligence was necessary, but that if the work be done the plaintiff must recover for it. I have since had a conference with the judges on the subject; and I now consider this as the correct rule, — that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence."

In Obbard v. Betham, M. & M. 483, 22 E. C. L. 363, Lord Tenterden, C. J., referring to the cases of Morgan v. Richardson, 1 Campb. 40, note, and Tye v. Gwynne, 2 Campb. 346, says: "I take it to have been settled by those cases and acted upon ever since as law, that the party holding bills given for the price of goods supplied can recover upon them unless there has been a total failure of consideration. If the consideration fails partially, as by the inferiority of the article furnished to that ordered, the buyer must seek his remedy by a cross-action. The warranty relied on in this case makes no difference."

Early American Cases Following English Rule. — *United States*. — Varnum v. Mauro, 2 Cranch

Partial Failure of Title. — Thus any partial defect in the title to land or in the deed conveying it is not inquirable into by a court of law in an action on the note for the purchase price, but the defendant's remedy should be sought by an action of covenant broken.¹

bbb. Rule in the United States. — But the English rule, though it was for a time very generally followed in the United States, has been found unsatisfactory and has in later times been repeatedly overruled by our courts, acting in some jurisdictions by virtue of a statutory license or provision, and in others merely upon the principles of justice and convenience and with the view of preventing circuitry of action and additional litigation and expense; and it may now be stated as the almost universal rule in the United States, that where fraud has occurred in the obtaining or the performance of contracts,² or where there has

(C. C.) 425; *Elminger v. Drew*, 4 McLean (U. S.) 388; *Scudder v. Andrews*, 2 McLean (U. S.) 464.

Connecticut. — *Pulsifer v. Hotchkiss*, 12 Conn. 234.

Delaware. — *Carpenter v. Phillips*, 2 Houst. (Del.) 524.

Georgia. — *Jordan v. Jordan, Dudley* (Ga.) 181; *Hinton v. Scott, Dudley* (Ga.) 245.

Kentucky. — *Williams v. Briscoe*, 1 A. K. Marsh. (Ky.) 168; *Ball v. Jackson*, 1 A. K. Marsh. (Ky.) 176; *Wise v. Kelly*, 2 A. K. Marsh. (Ky.) 545; *Kelso v. Frye*, 4 Bibb (Ky.) 493.

Maine. — *Clark v. Peabody*, 22 Me. 500.

Massachusetts. — *Noble v. Smith, Quincy* (Mass.) 254.

Minnesota. — *Walters v. Armstrong*, 5 Minn. 448; *Leighton v. Grant*, 20 Minn. 345.

New Hampshire. — *Drew v. Towle*, 27 N. H. 412, 59 Am. Dec. 380; *Riddle v. Gage*, 37 N. H. 519, 75 Am. Dec. 151.

New York. — *Payne v. Ladue*, 1 Hill (N. Y.) 116.

North Carolina. — *Washburn v. Picot*, 3 Dev. L. (N. Car.) 390.

Vermont. — *Williams v. Hicks*, 2 Vt. 36; *Stone v. Peake*, 16 Vt. 213; *Burton v. Schermerhorn*, 21 Vt. 289; *Richardson v. Sanborn*, 33 Vt. 75; *Harrington v. Lee*, 33 Vt. 249; *Cragin v. Fowler*, 34 Vt. 326, 80 Am. Dec. 680; *Foster v. Phaley*, 35 Vt. 303.

1. Partial Failure of Title. — *United States.* — *Greenleaf v. Cook*, 2 Wheat. (U. S.) 13.

California. — *Reese v. Gordon*, 19 Cal. 147.

Maine. — *Wentworth v. Goodwin*, 21 Me. 150; *Jenness v. Parker*, 24 Me. 289; *Morrison v. Jewell*, 34 Me. 146; *Thompson v. Mansfield*, 43 Me. 490; *Hodgdon v. Golder*, 75 Me. 293.

Mississippi. — *Gridley v. Tucker, Freem.* (Miss.) 209.

New Hampshire. — *Chase v. Weston*, 12 N. H. 413; *Fletcher v. Chase*, 16 N. H. 38.

New York. — *Lattin v. Vail*, 17 Wend. (N. Y.) 188.

Vermont. — *Hoyt v. McNally*, 66 Vt. 38.

2. Fraud in Sale. — *Bryant v. Sears*, 16 Ill. 288; *Hill v. Enders*, 19 Ill. 163; *Burnett v. Smith*, 4 Gray (Mass.) 50; *Nichols v. Hunton*, 45 N. H. 470; *Burton v. Stewart*, 3 Wend. (N. Y.) 236, 20 Am. Dec. 692; *Sill v. Rood*, 15 Johns. (N. Y.) 230.

Fraudulent Representations in Respect to Goods Sold. — In an action by the payee against the maker of a promissory note given for the price of a chattel, it is competent for the maker to prove, in reduction of damages, that the sale

was effected by means of false representations of the value of the chattel, on the part of the payee, although the chattel has not been returned or tendered to him. *Harrington v. Stratton*, 22 Pick. (Mass.) 510.

Representations in Respect to Quantity of Goods. — The tenant of the plaintiff, owning a quantity of hay, subject to a lien thereon in favor of the latter, sold the same to the defendant, who gave his promissory note therefor, to the plaintiff, to be applied in payment of said tenant's rent. In an action upon such note, it appearing that the tenant, in presence of the plaintiff, misrepresented the value and quantity of said hay, and that the defendant had received only a part of the same, and refused to take the remainder; it was held, that there was a partial failure of the consideration of said note, and that the plaintiff was only entitled to recover the value of the hay actually used by the defendant. *Andrews v. Wheaton*, 23 Conn. 112.

Representations in Respect to Quality. — A promissory note, given by a purchaser of goods in settlement of an account, is not wholly avoided by proof that the prices of some of the articles charged in the account were fraudulently overcharged, and that some of the goods were inferior in quality to those bargained for; though such fraud, if duly specified in defense to an action on the note, might be given in evidence in reduction of damages. *Haycock v. Rand*, 5 Cush. (Mass.) 26.

Fraudulent Representation in Respect to Land. — The fraudulent misrepresentations of the vendor, as to the quantity of his river bottom land, which constituted a material inducement to the trade, and which the vendee was prevented by high water from examining, will entitle the purchaser to relief. *Gauldin v. Shehee*, 20 Ga. 531.

Representation in Respect to Quantity of Timber. — A partial failure of consideration for a note, given in payment for land sold, not arising out of a failure of title, but out of fraudulent misrepresentations respecting the quantity of timber trees then upon it, may be given in evidence in defense in a suit upon such note, while it remains in the hands of the seller, or in the hands of one having no superior rights. *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598. See also *Coburn v. Ware*, 30 Me. 202.

Representations in Respect to Quality of Land. — A defendant may show that he was induced

been a partial failure of title to land,¹ or a breach of warranty, fraudulent or

to enter into the bargain for the purchase of land by the false and fraudulent representations of the plaintiff as to its location and quality, in order to lay the foundation for a claim that there was a partial want or failure of consideration of the note given for the purchase money of said land. *Swain v. Saltmarsh*, 54 N. H. 9.

Representations in Respect to Number of Acres.—In an action upon a promissory note given for the price of land, a plea that the land was sold by the acre and that there was fraud or mistake in reckoning the number of acres, is a good plea of partial failure of consideration. *Hamilton v. Conyers*, 28 Ga. 276.

Representations in Respect to Contemplated Improvements.—In a suit at law upon a promissory note, given in payment for a lot bought of the trustees of a town, it is competent for the defendant, in establishing a failure of consideration, to prove false representations by the trustees that induced the sale; and also to prove that the lot of ground had become of no value, by the neglect of the trustees to make promised improvements. *Brewer v. Harris*, 2 Smed. & M. (Miss.) 84, 41 Am. Dec. 587.

Representation in Respect to Mill-seat.—In *Gray v. Handkinson*, 1 Bay (S. Car.) 278, in an action of debt on a bond given for a tract of land, the defense set up was that the object which the defendant had in view in the purchasing of the tract, was a mill-seat which was represented to be on it (the tract was only valuable on that account, being chiefly pine land); and that shortly after the purchase, it was discovered that an elder survey included this seat and a considerable quantity of fine land adjoining it, by which the great object the purchaser had in view was defeated and the rest of the tract rendered of little value. The court charged the jury "that this was a kind of equitable defense which formerly belonged to the jurisdiction of a court of chancery, but that courts of law had lately let the parties into it in a court of common law, as well as in a court of equity, on the ground of fraud. That this fraud might arise either from the intent and design of one party to impose upon another, or it might arise from circumstances which neither party knew of, or could foresee at the time of the contract. But that from whatever cause it arose, it was a proper subject for investigation in this court, wherever it could be discovered, or traced out, and came as well within the province of a jury, as before any other tribunal. That every case, however, of this nature required the exercise of good sense and sound discretion in a jury, in order to distinguish between [this] kind of contracts, which ought to be rescinded entirely; and those where the party was entitled to an abatement of the price only, in proportion to the injury. That the rules of the civil law, which had been incorporated with the common law on this head, were of excellent use in determining every question of this nature. The first was, that wherever the defects of a thing sold were so great as to render it unfit for the use the purchaser intended and the seller represented, in such case the contract ought to be rescinded. Secondly, where

the defects were not so great as to warrant a rescission of the sale *in toto*, then such abatement of the price ought to be made as might be just and reasonable, according to the nature and extent of the defects. By these rules, the jury would judge of the present case. If the mill-seat was the great object which the defendants' testator had in view at the time of the purchase, and the remainder of the land would be of little value without it then it would be the duty of a jury to find for the defendants. But if, again, this mill-seat had been only a secondary object of the purchaser, and the remainder of the land would not be materially injured by it, they ought to make such a reasonable abatement as would make the party whole for any injury he might sustain on account of the deficiency or defect, which could be deducted from the amount of the bond." The jury returned a verdict for the defendants. In a foot-note to this case, the reporter remarks: "Upon the principles of the foregoing case, a great number of causes have been determined, both for defects in the quantity and quality of lands; and for unsoundness and defects in negroes, and other personal property."

Fraudulent Representations in Respect to Assignment of Lease.—To a declaration upon a promissory note, the defendant pleaded that he was induced to enter into and make the said agreement and promises by means of fraud, covin, and misrepresentations of the plaintiffs, and others in collusion with them, in this: that, on, etc., the plaintiffs sold him their warehouse, situate, etc., for fifteen hundred dollars, including one corn-sheller, etc.; that he was induced to enter into said contract by the representations of the plaintiffs that they could and would procure for him an assignment of the lease from the railroad company for the ground upon which the warehouse and appurtenances were situated, which representations the plaintiffs knew to be false at the time; that the defendant, relying on said representations, entered into said contract, and in payment thereof executed his notes as follows: for the sum of five hundred dollars each, payable in four, eight, and twelve months, respectively, the last one of which is the one declared on, the others having been paid; that the plaintiffs did not and could not procure an assignment of the grounds on which the warehouse and appurtenances were situated, but that the railroad company, after such sale, before they would assign said lease of the plaintiffs to the defendant, took possession of a portion of the grounds and compelled the defendant to remove a portion of said warehouse, and deprived him of the use of a portion of said grounds, to his great damage, to wit, the sum of five hundred dollars, of all which the plaintiffs had notice, etc. It was held that the plea was substantially good as a plea of partial failure of consideration. *Mann v. Smyser*, 76 Ill. 365.

1. Partial Failure of Title to Land.—*Torinus v. Buckham*, 29 Minn. 128; *Steinhauer v. Witman*, 1 S. & R. (Pa.) 438; *Hart v. Porter*, 5 S. & R. (Pa.) 201.

P. and wife executed to T. a deed with full

otherwise,¹ all or any of these facts may be relied on in defense by a party when sued upon a bill or note given for the performance of the contract; and

covenants, conveying thirty-five acres of land for the price of \$3,500. One-half of the amount was paid down, and for the remainder T. executed to P. his promissory note. The title to thirty acres of the land failed. It was held in an action to recover on the note that this might be interposed as a defense. *Durment v. Tuttle*, 50 Minn. 426.

The parties to a sale of land, at the time of the delivery of the deed and the giving of a note for the purchase money, executed an agreement in writing, stipulating that if it should be determined, in a suit then pending between other parties, in which one part of a certain line was in issue, another part of which affected the boundaries of the premises conveyed, that the grantor was not entitled to a certain part of the land included in the deed, he should repay to the grantee a certain portion of the purchase money. It was held that by this agreement the grantor's right and title to convey was made to depend upon the final decision of the suit between the other parties; and that if such decision was unfavorable to the grantor, it might be shown in defense *pro tanto*, to an action on the note given for the purchase money. *Daggett v. Daggett*, 8 Cush. (Mass.) 520.

Incumbrances.—In an action upon a promissory note given in payment for land conveyed with covenant against incumbrance, the defendant can recoup what he has been compelled to pay to free the land from incumbrance. *Davis v. Bean*, 114 Mass. 358; *Schuchmann v. Knoebel*, 27 Ill. 175.

Dower.—A note was given for a piece of land which the payee conveyed by a warranty deed. Subsequently a right of dower was recovered against the land. It was held that in an action upon the note the value of this dower right could be set off as a partial failure of consideration. The tables showing the probabilities of life, by which the value of dower rights can be computed, are recognized by the courts as the proper means of proving such value. *McHenry v. Yokum*, 27 Ill. 160.

Creditors' Liens.—The plaintiff purchased land of the defendant and executed his note for part of the purchase money. After the purchase, some of the defendant's creditors held the land liable for his debts. In an action upon the note, it was held that the defendant was entitled to a credit on the note for the amount of the debts, to the payment of which the land had been subjected by creditors. *Edwards v. Porter*, 2 Coldw. (Tenn.) 42.

Incumbrances Not a Defense When Grantee Has Not Discharged Them.—In *Cheney v. City Nat. Bank*, 77 Ill. 562, where, to an action upon a promissory note given for the purchase money of land, the defendant pleaded that the land was conveyed by warranty deed with full covenants and that the land was not free of incumbrance but was encumbered and charged with the payment of certain taxes which had not been paid but were still a lien upon the land, it was held that the plea was bad on demurrer as it failed to show that the grantee had paid the incumbrance or had been

disturbed in the possession of the land in consequence of the same. Craig, J., delivering the opinion of the court, said: "The question presented by this plea is, whether the purchaser of land, who receives a warranty deed with covenants against incumbrances, and who gives his notes in payment, can defeat payment on the ground that the land was encumbered, the vendee not having been disturbed in the possession, and he not having paid or discharged the incumbrance. Had appellant discharged the incumbrance, the amount paid to clear the land might have been interposed under the plea of a partial failure of consideration. But we are aware of no well-considered authority which would sanction the right of appellant, where he has not been disturbed in the possession of the premises, and has not paid off the lien, to interpose the defense to an action brought upon the note given for the purchase money. Had appellant sued upon the covenants in the deed without first paying the incumbrance, he could have recovered no more than nominal damages." See also *Willets v. Burgess*, 34 Ill. 494; *Vining v. Leeman*, 45 Ill. 246. Compare *Hart v. Porter*, 5 S. & R. (Pa.) 201.

1. Breach of Warranty—United States.—*Withers v. Greene*, 9 How. (U. S.) 213.

Florida.—*Stafford v. Anders*, 8 Fla. 34.

Illinois.—*Beers v. Williams*, 16 Ill. 69.

Iowa.—*McCormick Harvesting Mach. Co. v. Brower*, 94 Iowa 144.

Kansas.—*Thompson v. Wheeler, etc.*, Mfg. Co., 29 Kan. 476.

Massachusetts.—*Perley v. Balch*, 23 Pick. (Mass.) 283, 34 Am. Dec. 56.

Missouri.—*Wade v. Scott*, 7 Mo. 509; *Barr v. Baker*, 9 Mo. 850; *Gamache v. Grimm*, 23 Mo. 38; *Murphy v. Gay*, 37 Mo. 536; *Compton v. Parsons*, 76 Mo. 455; *Brown v. Weldon*, 99 Mo. 568, affirmed in 27 Mo. App. 251.

New Hampshire.—*Butler v. Northumberland*, 50 N. H. 33.

New Jersey.—*Wyckoff v. Runyon*, 33 N. J. L. 107.

New York.—*Spalding v. Vandercook*, 2 Wend. (N. Y.) 431; *Payne v. Cutler*, 13 Wend. (N. Y.) 605; *Buhrman v. Baylis*, 14 Hun (N. Y.) 608; *Lewis v. Wilson*, 1 Edw. Ch. (N. Y.) 305.

Pennsylvania.—*Steigleman v. Jeffries*, 1 S. & R. (Pa.) 477, 7 Am. Dec. 626.

Texas.—*Nations v. Thomas*, 25 Tex. Supp. 221.

Wisconsin.—*Butler v. Titus*, 13 Wis. 429.

If the purchaser of a chattel gives his note for the price he may avail himself of a partial failure of consideration, or of deception in the quality or value of the chattel, or of a breach of warranty, to reduce the damages, in an action brought by the vendor upon such note; and he is not obliged to resort to a separate action for the deceit or upon the warranty. *Perley v. Balch*, 23 Pick. (Mass.) 283, 34 Am. Dec. 56.

In an action upon a promissory note given by the defendant to the plaintiff, the defendant set up by way of counterclaim that the

he shall not be driven to assert them, either for protection or as a ground for compensation, in a cross-action.¹

b. UPON SPECIALTIES — *Want of Consideration* — *Effect of Statutes*. — Although in many of the states it has been rendered permissible by statute to impeach the consideration of specialties in the same manner as if the instrument were unsealed,² it has been held that these statutes do not affect specialties originally

note was given for putting a water-wheel in the defendant's mill, which was agreed to be put in in a good and workmanlike manner and warranted to perform in a certain way, and that it was not done in a workmanlike manner and did not perform as warranted, whereby he was damaged in a certain sum. It was held that the damages sustained should be allowed as an offset upon the note. *Butler v. Titus*, 13 Wis. 429.

Where a promissory note was given for the construction of a house, the fact that the house fell down in consequence of the use by the plaintiff, the payee of the note, and of bad material in its construction, and of the unskilfulness of the workmanship, may be set up by the maker of the note as a partial failure of consideration. *Gamache v. Grimm*, 23 Mo. 38.

1. Reasons of the United States Rule. — This modern doctrine rests on the principle that it is always desirable to prevent a cross-action when full and complete justice can be done in a single suit, and it is on this ground that the courts have been disposed to extend to the greatest length compatible with the legal rights of the parties the principle of allowing evidence in defense or in reduction of damages to be introduced, rather than to compel the party to resort to his cross-action. *Harrington v. Stratton*, 22 Pick. (Mass.) 510.

In *Wyckoff v. Runyon*, 33 N. J. L. 107, the English rule was abrogated. Beasley, C. J., delivering the opinion of the court, refers to the unsatisfactoriness of the English rule in these words: "But continued as this mode of proceeding has been, I think it may be safely affirmed that it has never given satisfaction either to the bench or to the legal profession. And it would have been singular if this distaste of the rule had not prevailed, for to reject a defense merely on the ground that a note has passed between the parties, in cases in which such defense would otherwise be legitimate, certainly savors more of superfluous refinement than of practical wisdom. In the absence of the note now in suit a partial failure of the subject of the sale could have been shown as a defense *pro tanto*. Why, then, between the same parties should the giving of the note cut off such defense? There is clearly no more inconvenience in trying the question of a partial failure of consideration in the one case than in the other; nor is a defendant in any degree more liable to be taken by surprise when his action is based upon a note than he would be if he resorted to the consideration of the note as the foundation of his action, while, on the other hand, the obvious inconvenience, not to say palpable injustice, of the operation of the rule in question is often painfully manifest. Its inevitable result, whenever applied, is to double litigation, for the failure of the consideration, the proof of which is excluded, lays the ground for a cross-action;

and in those cases in which the plaintiff in the first suit chances to be insolvent, such cross-action fails altogether to retrieve the money which has been unjustly taken from the defendant. In such a formula I can see nothing but an obstacle to the attainment of an ultimate decision on the merits of the case. Nor does it seem to me that this court is bound to retain this rule as one of its methods in the trial of causes. It is clearly no part of the ancient common law, for no trace of its existence, in the proceedings of the courts at Westminster, prior to the beginning of the present century, can be found. Being therefore, with us, a mere course of practice, adopted from a supposed convenience and not resting in any fundamental maxims, it can be changed whenever such a step may be deemed judicious. In the case of *Bouker v. Randles*, 31 N. J. L. 341, an intimation was given that the practice in this respect might be altered, and the present case now presents the point, in a direct form, for decision. The conclusion to which my reflections have led me is that the old rule which has heretofore prevailed should be abandoned, and that hereafter a partial failure of the consideration upon which a note is founded may be received in evidence in a suit between the original parties to it, to the same extent as though such consideration had formed the basis of the action."

For Other Cases Allowing Partial Failure of Consideration to Be Shown in reduction of amount of recovery upon a bill or note, see:

Alabama. — *Agnew v. Walden*, 84 Ala. 502.

Arkansas. — *Pettillo v. Hopson*, 23 Ark. 196.

Florida. — *Ahren v. Willis*, 6 Fla. 359; *Staford v. Anders*, 8 Fla. 34; *Jones v. Streeter*, 8 Fla. 83; *Prescott v. Johnson*, 8 Fla. 391; *Reddick v. Mickler*, 23 Fla. 335.

Illinois. — *Great Western Ins. Co. v. Rees*, 29 Ill. 272.

Kansas. — *Dodge v. Oatis*, 27 Kan. 762.

Maine. — *Herbert v. Ford*, 29 Me. 546.

Massachusetts. — *Sawyer v. Wiswell*, 9 Allen (Mass.) 39; *Stacy v. Kemp*, 97 Mass. 166.

Mississippi. — *Rasberry v. Moye*, 23 Miss. 320.

New Mexico. — *Staab v. Garcia y Ortiz*, 3 N. Mex. 53.

Ohio. — *Holzworth v. Koch*, 26 Ohio St. 33.

Oregon. — *Davis v. Wait*, 12 Oregon, 425.

Vermont. — *Thrall v. Horton*, 44 Vt. 386.

West Virginia. — *Williamson v. Cline*, 40 W. Va. 194.

Wisconsin. — *Peterson v. Johnson*, 22 Wis. 21, 94 Am. Dec. 581.

Vermont Statute. — Under the Stat. of Vermont (Rev. Laws, § 911), partial failure of consideration can only be shown in defense when the action is between the original parties to the instrument itself. *Hoyt v. McNally*, 66 Vt. 38; *Burgess v. Nash*, 66 Vt. 44.

2. See *infra*, Evidence of Failure—Specialties.

intended to be voluntary. If no consideration was in fact contemplated by the parties at the inception of the instrument, it will be good notwithstanding there was no consideration for it.¹

Failure of Consideration.—When a conveyance of land is made, and by a contemporaneous agreement the grantee contracts to perform some act, it has been held that the failure to perform the act does not affect the deed but merely gives the grantor a right of action upon the agreement.² In other

1. Want of Consideration—Specialties—Effect of Statutes.—In *Aller v. Aller*, 40 N. J. L. 446, where, in an action by the payee against the maker of a sealed note, it was contended that under the Act of April 6, 1875, which provides that "in every action upon a sealed instrument, or where a setoff is founded on a sealed instrument, the seal thereof shall be only presumptive evidence of a sufficient consideration, which may be rebutted, as if such instrument was not sealed, etc.," the instrument was open to the defense of want of sufficient consideration, as if it were a simple contract, and that being shown, the contract became inoperative. Scudder, J., delivering the opinion of the court, said: "Suppose the presumption that the seal carries with it, that there is a sufficient consideration, is rebutted, and overcome by evidence showing there was no such consideration, the question still remains whether an instrument under seal, without sufficient consideration, is not a good promise, and enforceable at law. It is manifest that here the parties intended and understood that there should be no consideration. * * * The mischief which the above-quoted law was designed to remedy was that where the parties intended there should be a consideration they were prevented by the common law from showing none, if the contract was under seal. But it would be going too far to say that the statute was intended to abrogate all voluntary contracts, and to abolish all distinction between specialties and simple contracts. It will not do to hold that every conveyance of land or of chattels is void by showing that no sufficient consideration passed when creditors are not affected. Nor can it be shown by authority that an executory contract, entered into intentionally and deliberately, and attested in solemn form by a seal, cannot be enforced." After quoting numerous authorities showing the distinction between specialties and simple contracts, the court continues: "These statements of the law have been thus particularly given in the words of others because the significance of writings under seal, and their importance in our common-law system, seem in danger of being overlooked in some of our later legislation. If a party has fully and absolutely expressed his intention in a writing sealed and delivered, with the most solemn sanction known to our law, what should prevent its execution where there is no fraud or illegality? But because deeds have been used to cover fraud and illegality in the consideration, and just defenses have been often shut out by the conclusive character of the formality of sealing, we have enacted in our state the two recent statutes above quoted. The one allows fraud in the consideration of instruments under seal to be set up as defense; the other takes away the conclusive evi-

dence of a sufficient consideration heretofore accorded to a sealed writing, and makes it only presumptive evidence. This does not reach the case of a voluntary agreement, where there was no consideration and none intended by the parties. The statute establishes a new rule of evidence, by which the consideration of sealed instruments may be shown, but does not take from them the effect of establishing a contract expressing the intention of the parties, made with the most solemn authentication, which is not shown to be fraudulent or illegal. It could not have been in the mind of the legislature to make it impossible for parties to enter into such promises; and without a clear expression of the legislative will, not only as to the admissibility, but the effect of such evidence, such construction should not be given to this law. Even if it should be held that a consideration is required to uphold a deed, yet it might still be implied where its purpose is not within the mischief which the statute was intended to remedy. It was certainly not the intention of the legislature to abolish all distinction between simple contracts and specialties, for in the last clause of the section they say that all instruments executed with a scroll, or other device by way of scroll, shall be deemed sealed instruments. It is evident that they were to be continued with their former legal effect, except so far as they might be controlled by evidence affecting their intended consideration."

Where a contract of suretyship under seal is executed without the parties contemplating the passing of any valuable consideration to the surety, equity will not relieve the surety merely on the ground of want of consideration. *Meek v. Frantz*, 171 Pa. St. 632.

Under section 5, c. 172 *Virginia Stat.*, it is held that the words "failure in the consideration," as used in the statute, refer to contracts originally founded on a valuable consideration, and not to contracts without consideration. *Cunningham v. Smith*, 10 Gratt. (Va.) 255, 60 Am. Dec. 333; *Watkins v. Hopkins*, 13 Gratt. (Va.) 743; *Harris v. Harris*, 23 Gratt. (Va.) 737.

2. Effect of Failure of Consideration upon Specialties.—An instrument under seal does not by law require any consideration to support it, and though an illegal consideration may be shown and will vitiate it, and, if a consideration be stated on the face of a deed, a different one may be proved in order to raise a legal defense, yet a mere failure of consideration which once existed may have no more effect than a total want of consideration in the first instance. *Cooch v. Goodman*, 2 Q. B. 580, 42 E. C. L. 817. See also *Miller v. Reynolds*, 72 Hun (N. Y.) 482.

The failure to deliver property agreed upon as the consideration of a conveyance does not invalidate the deed, but merely furnishes the grantor a right of action for the value of the

jurisdictions, however, it has been held that the grantor is entitled to a cancellation of the conveyance.¹

4. Evidence of Failure — *a. SIMPLE CONTRACTS* — (1) *Burden of Proof* — *Bills and Notes*. — When failure of consideration is pleaded as a defense to bills and notes, the ordinary rule is that the onus lies on the defendant to show the failure, although this involves the proof of a negative, and if the consideration consists of covenants, the defendant must prove a breach.²

Defense by Sworn Plea. — Under the statutes of some of the states the defendant may assert failure of consideration by a sworn plea, and the plaintiff is then required to give full proof of the consideration.³

(2) *Admissibility of Parol Evidence*. — Parol evidence is admissible to show that the consideration of a contract has wholly or partially failed.⁴ It is even competent to show that the consideration is different from that expressed in the instrument, in order to prove that there has been a failure of consideration and the extent of it.⁵

consideration stipulated. *Lake v. Gray*, 35 Iowa 459.

Where the consideration of an undertaking is the promise of the obligee to perform some other act in the future, the neglect of the latter to perform will not defeat the consideration or show its failure, as the obligor may still enforce the contract of the obligee. *Gage v. Lewis*, 68 Ill. 604.

Where a conveyance is made for the express consideration of one dollar, and the grantee agrees by parol to maintain and support the grantor during life, the agreement is to be regarded as a condition subsequent, and after the conveyance has been fully executed and delivered it will not be set aside when, at least, there has been a partial performance, and the parties cannot be placed in the same position they were in at the time the conveyance was made. *Gardner v. Lightfoot*, 71 Iowa 577.

1. Failure of Consideration — *Cancellation of Deed*. — *Poirier v. Brule*, 20 Can. Supreme Ct. 97; *Boyes v. Green Mountain Falls Town, etc.*, Co., 3 Colo. App. 295; *Kramer v. Williamson*, 135 Ind. 655; *Cree v. Sherfy*, 138 Ind. 354.

In *Wilfong v. Johnson*, 41 W. Va. 283, where the consideration of a deed for land was the grantee's promise to give a bond conditioned for the support of the grantor's parents and the grantee refused to give such bond, a cancellation of the deed was decreed.

Grantee's Engagement to Pay Grantor's Debts. — A executes a deed by which he conveys to B his lands, on the consideration that B shall pay his debts and pay him five hundred dollars a year for his life. B does not execute the deed, but accepts it, and takes possession and holds the land. It was held that B was personally liable for the debts of A, and that the land so conveyed while held by B will be subject to a court of equity to pay the debts of A. *Vanmeter v. Vanmeter*, 3 Gratt. (Va.) 142.

A Deed Conveying Land and Reserving a Lien upon It for the unpaid purchase money is treated in *Texas* as an executory contract, and it is accordingly held that whenever the vendee refuses to pay, the vendor may claim an immediate rescission and may recover the land. *Lanier v. Foust*, 81 Tex. 186.

For a full discussion of the effect of failure upon deeds, see the title **DEEDS**.

2. Pryor v. Coulter, 1 Bailey L. (S. Car.) 517. See also the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 200, note 3.

3. Reddick v. Mickler, 23 Fla. 335.

4. Failure of Consideration — *Parol Evidence Admissible to Prove* — *Alabama*. — *Corbin v. Sistrunk*, 19 Ala. 203; *Dickinson v. Lewis*, 34 Ala. 638.

Connecticut. — *Smith v. Vincent*, 15 Conn. 1, 38 Am. Dec. 52.

Georgia. — *Smith v. Brooks*, 18 Ga. 440.

Illinois. — *Morgan v. Fallenstein*, 27 Ill. 31; *Mann v. Smyser*, 76 Ill. 365.

Iowa. — *Dicken v. Morgan*, 54 Iowa 684.

Massachusetts. — *Hill v. Buckminster*, 5 Pick. (Mass.) 391.

Mississippi. — *Buckels v. Cunningham*, 6 Smed. & M. (Miss.) 358.

Hawaii. — *Grimes v. Walker*, 1 Hawaiian 16.

The administrators of a deceased person, at the sale of his personal property, proclaimed that the slaves about to be sold were subject to judgment liens, and offered and agreed that in case they should be seized under the judgments the sale should be considered as void and the notes of the purchaser be given up. The slaves accordingly sold for their full value, and in an action brought by the administrators on a note given for the purchase money, it was held that the defendants might show that the slaves for the price of which the note was given were taken out of their possession and sold by judgments against the estate, and that the consideration of the note had thus failed. *Buckels v. Cunningham*, 6 Smed. & M. (Miss.) 358.

5. Different Consideration from That Expressed May Be Proven to Show Failure. — *Stufflebeem v. Arnold*, 57 Cal. 11; *Gage v. Lewis*, 68 Ill. 604; *Pollen v. James*, 45 Miss. 129; *Wheeler v. Billings*, 38 N. Y. 263.

When a written agreement states a consideration in general terms, it is competent to show by parol the particulars included in the general description, in order to show that there has been a failure of consideration and the extent of it. *Lufburrow v. Henderson*, 30 Ga. 482.

In *Wilfong v. Johnson*, 41 W. Va. 283, in an action by a grantor to set aside a deed the consideration of which was expressed to be fifty dollars, on the ground of failure of consider-

b. SPECIALTIES. — At common law the presence of a seal was conclusive evidence that the instrument to which it was affixed was founded upon a sufficient consideration, and it was therefore inadmissible in an action upon it to show either want or failure.¹ But in many of the states this conclusive presumption of consideration which formerly arose from the presence of a seal has been greatly modified by statute, and it is now open to the maker of such an instrument to allege and prove the absence or failure of consideration as a defense.²

CONSIGN — CONSIGNEE — CONSIGNOR. (See also the titles *BILLS OF LADING*, vol. 4, p. 507; *CARRIERS OF GOODS*; *CONTRACTS OF AFFREIGHTMENT AND CHARTER PARTIES*; *EXPRESS COMPANIES*; *FACTORS*.) — To "consign" in mercantile law is ordinarily to send or transmit goods to a merchant or factor for sale; and a consignee is consequently the person to whom they are consigned, shipped, or otherwise transmitted. The term implies agency.³

ation, the plaintiff was permitted to prove that the real consideration was the grantee's promise to execute a bond binding him to support the grantor's aged parents, and that the grantee had refused to execute this bond.

1. See *supra*, *Presumption of Consideration — Specialties*.

2. *Indiana.* — In *Indiana*, by statute, the obligor has a right to go into and impeach the consideration of a specialty. *Leonard v. Bates*, 1 Blackf. (Ind.) 172.

New York. — A seal upon an executory instrument is only presumptive evidence of a sufficient consideration, which may be rebutted as if the instrument were not sealed. Section 840, Code of Civ. Pro. N. Y.; *Wilson v. Baptist Education Soc.*, 10 Barb. (N. Y.) 308; *Case v. Boughton*, 11 Wend. (N. Y.) 106; *Morgan v. Smith*, 7 Hun (N. Y.) 244, *affirmed* in 70 N. Y. 537; *Gray v. Barton*, 55 N. Y. 68, 14 Am. Rep. 181; *Torry v. Black*, 58 N. Y. 185; *Best v. Thiel*, 79 N. Y. 15; *Baird v. Baird*, 145 N. Y. 665.

Tennessee. — Under sections 3213, 3214, and 3215 of the Code of Tennessee, which abolishes the use of private seals and places sealed instruments on the footing of parol contracts, want or failure of consideration may be pleaded to a sealed instrument as it might have been pleaded to an unsealed instrument before the code. *McLean v. Houston*, 2 Heisk. (Tenn.) 37.

West Virginia. — Under the provisions of section 5 of chapter 126 of the code of this state, in any action on a contract, whether the contract be by deed or by parol, the defendant may file a plea alleging any such failure in the consideration of such contract, or fraud in its procurement, as would entitle him either to recover damages at law from the plaintiff, or to relief in equity, in whole or in part; and if such plea is sufficient in form he is entitled to prove facts showing such failure in the consideration in whole or in part. *Fisher v. Burdett*, 21 W. Va. 626.

See also the statutes of *Alabama*, *Michigan*, *New Jersey*, *Oregon*, *Virginia*, and *Wisconsin*.

Pennsylvania and South Carolina. — In *Pennsylvania* and *South Carolina* it would seem to have been the practice to allow the obligor of a bond to show want or failure of consideration, irrespective of any statutory provision.

Swift v. Hawkins, 1 Dall. (Pa.) 17; *Matlock v. Gibson*, 8 Rich. L. (S. Car.) 437.

3. *Powell v. Wallace*, 44 Kan. 659, *citing* 3 AM. AND ENG. ENCYC. OF LAW 667; *Sturm v. Boker*, 150 U. S. 326; *Gillespie v. Winberg*, 4 Daly (N. Y.) 320; *Rolker v. Great Western Ins. Co.*, 3 Keyes (N. Y.) 17.

The term *consign* does not import a sale. *Powell v. Wallace*, 44 Kan. 659.

Elevators — Consignment. (See also the title *ELEVATORS*.) — See *Chicago*, etc., R. Co. v. *National Elevator*, etc., Co., 153 Ill. 84, 50 Ill. App. 356.

Title. — The term *consignment* means title in the *consignor*. *Dittmar v. Norman*, 118 Mass. 324.

But the term may be controlled by other provisions of the contract. *Schenck v. Saunders*, 13 Gray (Mass.) 37; *Dittmar v. Norman*, 118 Mass. 324.

Same — Right to Possession. — In *Hardy v. Munroe*, 127 Mass. 64, it was held that one who *consigns* goods to another to be paid for only as they are sold by him has not such immediate possession or right to immediate possession as will support an action of tort for the conversion of the goods. The court said: "The uncontradicted evidence was that the goods alleged to have been converted were *consigned* by the plaintiffs to one Harvey to be paid for only as they were sold by him. This gave the legal possession of the property to the *consignee*. *Fairbank v. Phelps*, 22 Pick. (Mass.) 535."

Consignee. — To *consign*, in the mercantile law, is ordinarily to send or transmit goods to a merchant or factor for sale; and a *consignee* is consequently the person to whom they are *consigned*, shipped, or otherwise transmitted. The radical meaning of *consign* is to transfer or deliver as a charge or trust. When used in connection with a vessel, it ordinarily refers to the goods shipped by her, for the vessel herself is in charge of the master, who is, by his office, clothed with power to do whatever is essential to his employer's interests. But both vessel and cargo may be *consigned* to a person at the port of destination; or the vessel alone may be *consigned*. "And where a person is authorized to take charge of her upon her arrival, to collect the freight, pay all her expenses, obtain a cargo for her, and who, by

CONSIGNATION.—"Consignation" is a deposit which the debtor makes of the thing that he owes, into the hands of a third person, and under the authority of a court of justice.¹

CONSISTENT.—"Consistent" means compatible, congruous, standing together or in agreement.²

CONSISTING.—See note 3.

CONSOLIDATE.—"Consolidate" means something more than "rearrange" or "redivide." In a general sense it means to unite into one mass or body, as to consolidate the forces of an army, or various funds. In parliamentary usage, to consolidate two bills is to unite them into one. In law, to consolidate benefices is to combine them into one.⁴

CONSOLIDATION.—See the titles CONSOLIDATION OF CORPORATIONS; COUNTIES; MUNICIPAL CORPORATIONS; TOWNS AND TOWNSHIPS.

CONSOLIDATION OF ACTIONS.—See ENCYC. OF PLEADING AND PRACTICE, title CONSOLIDATION OF ACTIONS, vol. 4, p. 673.

virtue of this authority, enters and clears the vessel at the customs, he may, I think, be termed the *consignee*, for she is for that purpose and to that extent *consigned* to him." *Gillespie v. Winberg*, 4 Daly (N. Y.) 321.

Ship's Husband.—Where duties of this description are discharged at the home port or place where the vessel belongs, by a person appointed by the owners, he is known by the maritime term of the "ship's husband." *Story's Agency*, § 35; *Abbott's Shipping*, part 1, c. 3, p. 105, 8th Lond. ed.; 1 *Parsons on Ship. & Ad.* 109. From opinion by Daly, C. J., *Gillespie v. Winberg*, 4 Daly (N. Y.) 321.

New York Pilot Laws.—N. Y. Laws of 1857, p. 502, c. 243, providing that pilotage shall be paid by the master, "owners, or *consignees*, where the master refuses to take a pilot upon coming into the port of New York by way of Sandy Hook," applies to the "ship's husband" who has just been described. *Gillespie v. Winberg*, 4 Daly (N. Y.) 321.

N. Y. Laws 1853, p. 925, c. 567, § 18 (of which said Act of 1857 is amendatory), providing that the pilotage shall be payable by the master, owner, *consignee*, or agent clearing the vessel, means by *consignee* the *consignee* of the vessel, and not of the goods. *Gillespie v. Winberg*, 4 Daly (N. Y.) 321.

1. French Law. (See generally the title *TENDER*.)—See 1 *Pothier's Obligations*, 376. For distinction between the French *consignation* and 'tender' in our law, see *Weld v. Hadley*, 1 N. H. 304.

Though not an actual payment, the *consignation* is equivalent thereto. To be valid, it ought to be preceded by offers of payment, which place the creditor *in demeure*. It discharges the debtor. The augmentation or

diminution in value of what is consigned inures to the profit or loss of the creditor, if the *consignation* is valid. Index to *Pothier's Obligations* Lond. ed. 1806.

2. Visscher v. Hudson River R. Co., 15 Barb. (N. Y.) 44.

3. Consisting.—A testator declared his worldly goods to *consist* of a house and lot in the city of St. Louis, together with other things mentioned; it was argued from this that he considered that piece of real estate as covered by the term "worldly goods." The court said: "In the first place, if we could accept the transposition as truly reproducing the original meaning, the plaintiff's conclusion would by no means follow. We are not shown any reason why the words '*consisting of*' should be perverted from their common acceptation. They are not synonymous with the word '*including*,' as the argument would require. This, when used in connection with a number of specified objects, always implies that there may be others which are not mentioned. 'A party of men, including the plaintiff's five brothers,' may imply that there were some who were not brothers of the plaintiff. But 'a party *consisting of* the plaintiff's five brothers,' comprehends nobody outside of that number or relation. Webster defines the expression '*to consist of*,' as meaning '*to be composed or made up of*,' and adds that it is used when we wish to indicate the parts which '*unite to compose a thing*.' Other lexicographers give a like definition. According to this, the testator did not intend to bequeath anything but what was specifically mentioned as '*uniting to compose*' his worldly goods. The land in controversy was omitted from the category." *Farrish v. Cook*, 6 Mo. App. 331.

4. Independent Dist. v. Durland 45 Iowa 56.

Volume VI.

CONSOLIDATION OF CORPORATIONS.

BY BRISCOE B. CLARK.

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For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *CORPORATIONS*; *DISSOLUTION OF CORPORATIONS*; *EMINENT DOMAIN*; *EXEMPTIONS (TAXATION)*; *MUNICIPAL AID*; *OFFICERS AND AGENTS (OF PRIVATE CORPORATIONS)*; *REORGANIZATION OF CORPORATIONS*; *STOCK AND STOCKHOLDERS*; *TAXATION (CORPORATE)*; *ULTRA VIRES*.

I. DEFINITION. — A consolidation occurs where the rights, franchises, and effects of two or more corporations are by legal agreement combined into one whole and committed to a single corporation, the stockholders of which are composed of those (so far as they choose to become such) of the corporations thus agreeing, whether such single corporation, called a consolidated corporation, be a new one then created or one of the original corporations continued in existence with larger rights, capacities, and powers.¹

Amalgamation. — The term is analogous to "amalgamation," as used in the law of England, which is said to occur "where two or more corporations agree to abandon their respective articles of association and register under new articles as one body."²

Reorganization is to be distinguished from consolidation. The former term is used to designate the formation of an entirely new and distinct corporation for the purpose of purchasing the property of another corporation and superseding it in business, without incurring any liability to the creditors of the latter.³

1. Consolidation Defined. — *Meyer v. Johnston*, 64 Ala. 656.

The consolidation of corporations does not create a new corporation, with powers of its own, distinct from, greater or less than, those enjoyed by the constituent corporations separately. It is a method provided by law for the formation of a copartnership between railroad corporations, by which, if the expression may be used, they pool their franchises and property and are enabled to act in complete harmony. *Per* Simonton, Cir. J., in *Phinizy v. Augusta*, etc., R. Co., 62 Fed. Rep. 678.

Where corporations are merged into and constitute one, it is a consolidation. *Philadelphia*, etc., R. Co. *v.* *Howard*, 13 How. (U. S.) 333.

In *Chicago*, etc., R. Co. *v.* *Ashling*, 160 Ill. 373, it was held that a transaction whereby one railroad company conveyed all its property to another, the latter stipulating to assume the indebtedness of the former and to issue its stock to the stockholders of such company in exchange for their stock, was a consolidation and not a purchase and sale. A consolidation could be made by continuing in existence one of the original corporations. See also *Hill v. Nisbet*, 100 Ind. 341.

However, in *Powell v. North Missouri R. Co.*, 42 Mo. 63, it was held that in a consolidation it was necessary that the constituent corporations should continue to exist.

An agreement between two railroad companies providing that one shall take charge of and operate the road of the other for nine hundred and ninety-nine years, for which it is to be allowed sixty-five per cent. of the

gross receipts, the remaining thirty-five per cent. to be applied to the payment of interest on the mortgage bonds of the second company, and the surplus on the said thirty-five per cent. to be paid over to such company for the benefit of its stockholders, and in case the thirty-five per cent. should not be sufficient for the payment of interest on the bonds, the first company to advance the balance needed, is not a contract of consolidation. *Archer v. Terre Haute*, etc., R. Co., 102 Ill. 493.

2. Amalgamation in English Law. — *Higg's Case*, 2 Hem. & M. 657.

In *Dougan's Case*, 28 L. T. N. S. 60, the vice-chancellor said: "Two companies may be united, either by fusion into a third, or by one absorbing the other. The latter process seems to correspond most nearly with the popular sense of the word 'amalgamation;' and I believe nobody really knows what 'amalgamation' means."

In *Midland Great Western R. Co. v. Leech*, 3 H. L. Cas. 872, it was held that an Act of Parliament merely changing the name of one corporation to that of another did not constitute an amalgamation.

3. Reorganization. — *Meyer v. Johnston*, 53 Ala. 237.

The purchase of the property and franchises of a railroad company at a foreclosure sale, and the creation by the legislature of a new company with rights, privileges, and franchises similar to those enjoyed by the former, and the transfer of the property to the latter, is not a consolidation. *Bruffett v. Great Western R. Co.*, 25 Ill. 353. See the title *REORGANIZATION*.

Sale and Purchase. — A consolidation is also to be distinguished from the sale of the property and franchises of one corporation to another, where such transfer is authorized by law. The transaction in the latter case is merely a surrender or abandonment of the old charter by the incorporators and a grant *de novo* of a similar charter to the so-called purchasers or transferees.¹

A Lease by one corporation of the entire property of another is also distinct from a consolidation.²

In a consolidation, the stockholders of the constituent corporations retain, to a certain extent, control of their corporate property, but by a lease the stockholders of the leasing company part with the control of their corporate property and hand it over to others and abandon their enterprise.³

A Railway Association formed by several railways for the purpose merely of fixing and maintaining the rates to be charged is not a consolidation.⁴

II. REQUISITES OF CONSOLIDATION — 1. **Legislative Authority** — *a*. **NECESSITY FOR.** — Since the effect of the consolidation of corporations is either to transfer the franchises of one corporation to another or to create a new corporation with the franchises, powers, and property of the constituent corporations, corporations cannot consolidate without legislative authority.⁵

b. **SUFFICIENCY OF** — (1) *In General.* — The power to consolidate may be granted in the charters of the corporations,⁶ by acts passed prior to their incorporation,⁷ by acts subsequent to their incorporation,⁸ and also by the subsequent ratification of an unauthorized consolidation, which may be either by express ratification⁹ or by legislative recognition of the consolidated corporation.¹⁰

1. **Sale and Purchase.** — *State v. Sherman*, 22 Ohio St. 428.

Ownership of the franchises and property of another corporation, by purchase at judicial sale, does not work a consolidation. *Gulf, etc., R. Co. v. Newell*, 73 Tex. 334, 15 Am. St. Rep. 788. See also *Houston, etc., R. Co. v. Shirley*, 54 Tex. 125, wherein the corporation whose property was sold was declared by statute to be "merged" with the corporation purchasing its franchises and property.

Nor does the purchase by one corporation of a majority of the stock of another corporation, thereby securing control of the latter, constitute a consolidation. *Einstein v. Rochester Gas, etc., Co.*, 77 Hun (N. Y.) 149.

2. **Lease.** — *Balsley v. St. Louis, etc., R. Co.*, 119 Ill. 68, 59 Am. Rep. 784; *State v. Vanderbilt*, 37 Ohio St. 638; *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 596; *Middletown v. Boston, etc., R. Co.*, 53 Conn. 351.

3. *Mills v. Central R. Co.*, 41 N. J. Eq. 1.

4. **Railway Association.** — An agreement between railway companies, and the formation of an association thereunder, to maintain reasonable rates, each company maintaining its own organization, electing its own officers, and delegating no power to the association to govern the transactions of its routine business, but simply requiring each company to charge rates fixed by the association, is not a consolidation. *U. S. v. Trans-Missouri Freight Assoc.*, 53 Fed. Rep. 440.

5. **Legislative Authority Necessary** — *England.* — *Clinch v. Financial Corp.*, L. R. 5 Eq. 460; *Charlton v. Newcastle, etc., R. Co.*, 5 Jur. N. S. 1096; *Burgess v. Burgess*, 3 De G. M. & G. 904.

United States. — *Pearce v. Madison, etc., R.*

Co., 21 How. (U. S.) 441, *per Davis, J.*; *Clearwater v. Meredith*, 1 Wall. (U. S.) 39; *Shields v. Ohio*, 95 U. S. 319.

Indiana. — *State v. Bailey*, 16 Ind. 46; *Aspinwall v. Ohio, etc., R. Co.*, 20 Ind. 492, 83 Am. Dec. 329; *Shelbyville, etc., Turnpike Co. v. Barnes*, 42 Ind. 498.

Nebraska. — *State v. Atchison, etc., R. Co.*, 24 Neb. 143, 8 Am. St. Rep. 164.

New Jersey. — *Black v. Delaware, etc., Canal Co.*, 24 N. J. Eq. 455; *Mills v. Central R. Co.*, 41 N. J. Eq. 4.

New York. — *New York, etc., Canal Co. v. Fulton Bank*, 7 Wend. (N. Y.) 412; *Blatchford v. Ross*, 5 Abb. Pr. N. S. (N. Y. Supreme Ct.) 434, 54 Barb. (N. Y.) 42.

Texas. — *Gulf, etc., R. Co. v. Newell*, 73 Tex. 334, 15 Am. St. Rep. 788; *East Line, etc., R. Co. v. State*, 75 Tex. 434; *Missouri Pac. R. Co. v. Owens*, 1 Tex. App. Civ. Cas., § 384.

See the title *ULTRA VIRES*.

6. *Fisher v. Evansville, etc., R. Co.*, 7 Ind. 407.

7. *Black v. Delaware, etc., Canal Co.*, 24 N. J. Eq. 455.

8. *Sparrow v. Evansville, etc., R. Co.*, 7 Ind. 369.

9. *Racine, etc., R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 331, 95 Am. Dec. 595; *Mitchell v. Deeds*, 49 Ill. 416, 95 Am. Dec. 621.

Where the consolidation of two corporations is unauthorized, it may be sanctioned and validated by an act of the legislature, without further action on the part of the stockholders or directors of the corporations. *Bishop v. Brainerd*, 28 Conn. 289.

10. **The Passage of a Legislative Act After the Consolidation**, whereby the existence of a consolidated corporation is expressly recognized

(2) *Construction* — (a) *In General*. — It has been said that acts authorizing the consolidation of corporations are not subject to the same strict rules of construction as apply to acts creating corporations, since in a certain sense they do not create any franchise or original right, but relate rather to the transfer of those already granted.¹

Although the contrary has been held,² yet the better authority seems to be that all of the constituent corporations must have the power to consolidate; it is not sufficient that the charter of one authorizes it to consolidate with other corporations, on the ground that such power implies a grant of authority to other corporations to consolidate with the corporation having such charter power.³

(b) *Manufacturing Corporations*. — An act authorizing the consolidation of "manufacturing" corporations has been held to include electric light companies,⁴ and also undoubtedly includes gas companies and corporations for the production of ice by artificial means,⁵ but excludes ice companies merely collecting and selling ice created by natural causes.⁶

(c) *Corporations of Same Nature*. — Acts of several of the states also authorize the consolidation of corporations of the same nature and covering the same territory. Such an act has been held to include gas companies, and water companies organized to furnish water for the same village.⁷

(d) *Street Railways*. — Street railways have been held to be included in an act

is a ratification of, and legalizes, the consolidation. *Louisville Trust Co. v. Louisville, etc., R. Co.*, 75 Fed. Rep. 433; *U. S. v. Southern Pac. R. Co.*, 14 Sawy. (U. S.) 620, 45 Fed. Rep. 596; *Southern Pac. R. Co. v. Poole*, 32 Fed. Rep. 451; *Nugent v. Putnam County*, 19 Wall. (U. S.) 241; *Mead v. New York, etc., R. Co.*, 45 Conn. 199; *McAuley v. Columbus, etc., R. Co.*, 83 Ill. 348; *Atlantic, etc., R. Co. v. St. Louis*, 66 Mo. 228.

1. *General Rule of Construction*. — *Black v. Delaware, etc., Canal Co.*, 22 N. J. Eq. 130.

New York. — Laws 1892, c. 668, § 1, par. 1, authorizing the consolidation of "two" corporations, authorizes the consolidation of more than "two." *People v. Rice*, 66 Hun (N. Y.) 139, 29 Abb. N. Cas. (N. Y.) 233, *affirmed* in 138 N. Y. 615.

However, the power to consolidate is not to be implied merely from a prohibition to consolidate with a certain specified class of corporations. A prohibition against consolidating with parallel or competing railroads does not impliedly authorize a consolidation with a railroad neither parallel nor competing. *East Line, etc., R. Co. v. State*, 75 Tex. 434.

2. *Matter of Prospect Park, etc., R. Co.*, 67 N. Y. 371; *New York, etc., R. Co. v. New York, etc., R. Co.*, 52 Conn. 274.

And in *Knoxville v. Knoxville, etc., R. Co.*, 22 Fed. Rep. 758, it was held that a grant of power to one railroad corporation to purchase other lines was an implied grant to other corporations of the power to sell.

3. *Whether All the Corporations Must Have the Power to Unite*. — *Morrill v. Smith County*, (Tex. 1896) 36 S. W. Rep. 56; *East Line, etc., R. Co. v. Rushing*, 69 Tex. 306; *East Line, etc., R. Co. v. State*, 75 Tex. 434. See also *Boston, etc., R. Co. v. New York, etc., R. Co.*, 13 R. I. 275, wherein Potter, J., dissenting, said: "The respondents have referred us to a decision in *New York, Matter of Prospect Park, etc., R. Co.*, 67 N. Y. 377, holding that

where two corporations wish to unite, it is enough if the charter of one of them contains a power to unite, * * * and if it does, the other company gets power to unite from the charter of the one which contains it. If such a decision was made, it is certainly a strange one, but not stranger than another made in the same state in *Gould v. Hudson River R. Co.*, 6 N. Y. 522."

In *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, it was held that a railroad company having general power to consolidate could not consolidate with a company prohibited by a general law from consolidating. In *State v. Consolidation Coal Co.*, 46 Md. 1, it was held that a corporation authorized to lease railroad lines could not lease from other corporations unless the latter also had power to lease. See generally the title *ULTRA VIRES*.

4. *Consolidation of Manufacturing Corporations*. — *Beggs v. Edison Electric Illuminating Co.*, 96 Ala. 295, 38 Am. St. Rep. 94. See also *People v. Wemple*, 129 N. Y. 543; *Com. v. Northern Electric Light, etc., Co.*, 145 Pa. St. 105.

5. *People v. Knickerbocker Ice Co.*, 99 N. Y. 181.

6. *People v. Knickerbocker Ice Co.*, 99 N. Y. 181.

7. *Statutes Authorizing Consolidation of Corporations of the Same Nature*. — *Cameron v. New York, etc., Water Co.*, 62 Hun (N. Y.) 269, 133 N. Y. 336.

See, however, *New Orleans Gas Light Co. v. Louisiana Light, etc., Co.*, 4 Woods (U. S.) 90, wherein it was held that an act authorizing any manufacturing corporations whose objects and business are in general of the same nature to consolidate, does not authorize the consolidation of a corporation having the exclusive franchises to furnish gas to a city until a certain day with a corporation having the exclusive franchise to furnish gas to such city after such day.

authorizing the consolidation of "railroad companies." ¹

(e) **Railroads.** — As a general rule the statutes of the several states authorize the consolidation of "connecting" lines, or of railroads whose lines permit the passage of cars "continuously" over each other's lines. To bring railroads within the operation of such acts their roads must be so located as to permit the cars of one road to pass to the other without the transshipment of freight or passengers; ² and by some courts it has been held that such an act did not authorize the consolidation of railroad companies whose lines were connected merely by leased lines, ³ whereas other courts have held the contrary. ⁴

Competing or Parallel Lines. — Nor do such acts authorize the consolidation of competing or parallel lines. ⁵

Trunk Lines. — The Supreme Court of the United States has held that the leasing of trunk lines was within an act authorizing the leasing of other lines, provided the line so leased should be so constructed as to form a continuous line. ⁶

Unconstructed Roads. — It is not necessary that the roads of the connecting lines should have been entirely constructed, provided that when constructed they will form a continuous line. ⁷

1. *Matter of Washington St., etc., R. Co.*, 115 N. Y. 442, *affirming* 52 Hun (N. Y.) 311. But see *Philadelphia v. Thirteenth, etc., Co.*, (Pa.) 1 Leg. Gaz. Rep. 165, wherein an act for the incorporation of railroads was held not to apply to street railways.

2. **Railroads.** — *Central R., etc., Co. v. Macon*, 43 Ga. 646.

Nebraska. — Comp. Stat., c. 16, § 89, authorizing the consolidation of railroad corporations whose lines permit of the passage of cars "continuously" over each other's lines, only authorizes consolidation of railroad companies where their lines will form a continuous line without interruption. *State v. Atchison, etc., R. Co.*, 24 Neb. 143, 8 Am. St. Rep. 164.

A road which intersects another at its terminus may be a connecting road. *Wallace v. Long Island R. Co.*, 12 Hun (N. Y.) 460.

3. **Continuous Lines.** — *Ohio Rev. Stat.*, § 3379, authorizing the consolidation of railroads located so as to permit the carriage of freight and passengers over their lines "continuously," without break or interruption, does not authorize the consolidation of lines of roads connected by leased lines. *State v. Vanderbilt*, 37 Ohio St. 590.

Connecting Lines. — And in *Texas* it was held that a railroad company authorized to consolidate with "connecting" roads cannot consolidate with a road connected with it merely by a leased or purchased road. *East Line, etc., R. Co. v. State*, 75 Tex. 434. See also *Central R. Co. v. Collins*, 40 Ga. 582.

4. *New Jersey Act* 1870, Mar. 17, authorizing the United Railroad and Canal Companies of New Jersey to consolidate with any other corporation whose works shall form continuous or connected lines with their own, was held to authorize a consolidation with a railroad company, though their lines were connected by an intervening road. *Black v. Delaware, etc., Canal Co.*, 22 N. J. Eq. 130. But see the same case, 24 N. J. Eq. 455, wherein a consolidation with a foreign railroad was held unauthorized. See also, in support of the first proposition, *Hervey v. Illinois Midland R.*

Co., 28 Fed. Rep. 169, *affirmed* 117 U. S. 434, under title of *Union Trust Co. v. Illinois Midland R. Co.*; *Atchison, etc., R. Co. v. Fletcher*, 35 Kan. 236; *Venner v. Atchison, etc., R. Co.*, 28 Fed. Rep. 581. And see *Cleveland, etc., R. Co. v. Erie*, 27 Pa. St. 380, wherein it was held that where a railroad company was authorized to build a road along a certain line, or to purchase a road already built, and to connect "their railroad" with other roads, it was immaterial whether the road was a purchased one or one constructed by them.

5. **Competing or Parallel Lines.** — *Ohio Rev. Stat.*, § 3379, authorizing the consolidation of railroads located so as to permit the carriage of freight or passengers over their lines "continuously" without break or interruption, does not authorize the consolidation of parallel and competing lines. *State v. Vanderbilt*, 37 Ohio St. 590. See also *State v. Atchison, etc., R. Co.*, 24 Neb. 158, 8 Am. St. Rep. 164.

Acquiescence by the State in several purchases by a railroad company of local parallel lines will not be treated as a contemporaneous construction of its charter, authorizing consolidation with a parallel and competing line. *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677.

6. **Trunk Lines.** — *Hancock v. Louisville, etc., R. Co.*, 145 U. S. 409.

7. **Unconstructed Lines.** — *Livingston County v. Portsmouth First Nat. Bank*, 128 U. S. 102, wherein it was held that the *Missouri Act* of March 2, 1869, authorizing the consolidation of any railroad company organized under the laws of Missouri with any company "whose tracks shall at the line of the state connect with the track" of the Missouri company, authorized a consolidation though the other company had not constructed its line. See also *Washburn v. Cass County*, 3 Dill. (U. S.) 251, wherein *Krekel, J.*, said that legislative authority to consolidate railroad corporations having "railroads constructed wholly or in part" did not require that the roads of both of the corporations should be constructed wholly or in part. But see *Clarke v. Omaha, etc., R. Co.*, 4 Neb. 459.

c. CONSTITUTIONAL OBJECTIONS -- Impairment of Obligation of Contracts. — The existence of contracts between the constituent corporations and third persons does not prevent the legislature from authorizing a consolidation on the ground that the obligations of such contracts are thereby impaired.¹

Constitutional Provision Against Extending Charters. — Nor does a constitutional provision against extending the charters of the constituent corporations prevent a consolidation.²

Creation of Corporations by Special Acts. — However, a constitutional provision against the creation of corporations by special acts undoubtedly includes consolidation.³

Interstate Consolidation. — Corporations created by different states may be consolidated by the concurrent action of the several states.⁴

It is questionable, however, whether authority merely to consolidate with other corporations authorizes consolidations between corporations of different states.⁵

Interstate Commerce. — In the absence of legislation by Congress, state legislation authorizing the consolidation of railroads of several states is not in violation of the Federal Constitution, as a regulation of interstate commerce.⁶

2. Assent of Stockholders — *a. NECESSITY FOR.* — As a General Rule, due to the fact that the charter of a corporation is a contract between the stockholders and the corporation as well as between the corporation and the state, the unanimous consent of the stockholders is essential to a consolidation by state

1. Impairment of Obligation of Contracts. — Where the act of consolidation requires the consolidated corporations to discharge the liabilities of the constituent corporations, the existence of contracts between one of the constituent corporations and an individual does not inhibit the legislature, under its power of altering, modifying, and amending the charter of said corporation, from authorizing a consolidation. *Pennsylvania College Cases*, 13 Wall. (U. S.) 222. See also *Smith v. Chesapeake, etc., Canal Co.*, 14 Pet. (U. S.) 45, wherein it is fairly intimated that a consolidation of corporations may be authorized without especially providing for payment of the claims of the creditors of the constituent corporations. And *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, wherein it was held that where at the time of the issuance of bonds by one of the constituent corporations the act authorizing consolidation was in force, the contracts of bondholders were subject thereto.

2. A Consolidated Corporation Becomes a Distinct and Entirely New Corporation, and therefore an objection that the consolidation would extend the constituent corporations beyond the statutory limits cannot be sustained. *Market St. R. Co. v. Hellman*, 109 Cal. 571.

3. Atkinson v. Marietta, etc., R. Co., 15 Ohio St. 21; *Shields v. Ohio*, 95 U. S. 319.

4. Corporations Created by Different States — *United States.* — *Philadelphia, etc., R. Co. v. Maryland*, 10 How. (U. S.) 392; *Ohio, etc., R. Co. v. Wheeler*, 1 Black. (U. S.) 286; *Baltimore, etc., R. Co. v. Harris*, 12 Wall. (U. S.) 65; *Tomlinson v. Branch*, 15 Wall. (U. S.) 460; *Wilmer v. Atlanta, etc., Air Line R. Co.*, 2 Woods (U. S.) 417; *Copeland v. Memphis, etc., R. Co.*, 3 Woods (U. S.) 651; *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164; *Muller v. Dows*, 94 U. S. 444; *Maine Cent. R. Co. v. Maine*, 96 U. S. 499.

Alabama. — *Meyer v. Johnston*, 53 Ala. 237.

Connecticut. — *Bishop v. Brainerd*, 28 Conn. 289; *Mead v. New York, etc., R. Co.*, 45 Conn. 199.

Illinois. — *Ohio, etc., R. Co. v. Weber*, 96 Ill. 443.

Indiana. — See, however, *quære* in *Paine v. Lake Erie, etc., R. Co.*, 31 Ind. 285.

Kentucky. — *Newport, etc., Bridge Co. v. Woolley*, 78 Ky. 523.

New York. — *Sage v. Lake Shore, etc., R. Co.*, 70 N. Y. 220.

Pennsylvania. — *Allegheny County v. Cleveland, etc., R. Co.*, 51 Pa. St. 228.

Vermont. — *Richardson v. Vermont, etc., R. Co.*, 44 Vt. 613.

5. Consolidation with "Other Corporations." — *Bishop v. Brainerd*, 28 Conn. 289; *Black v. Delaware, etc., Canal Co.*, 24 N. J. Eq. 455, reversing 22 N. J. Eq. 130, wherein it was held that the power to lease to any other corporation, "in this state or otherwise," did not authorize a lease to a foreign corporation.

However, in *Adelbert College v. Toledo, etc., R. Co.*, 3 Ohio N. P. 15, it was held that the Act of May 1, 1856, authorizing a domestic railroad corporation to consolidate with corporations operating roads in an adjoining state, authorizes a consolidation with a company operating, in an adjoining state, a road which extended into a third state.

And it has been held that a power to purchase and hold stock in "any other" connecting "railroad" authorized the purchase of the stock of a foreign connecting railroad. *Pittsburg, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 131 U. S. 371; *Day v. Ogdensburg, etc., R. Co.*, 107 N. Y. 129; *Boston, etc., R. Co. v. Boston, etc., R. Co.*, 65 N. H. 393.

6. Boardman v. Lake Shore, etc., R. Co., 84 N. Y. 157.

authority.¹

Quasi-public Corporations.—However, it has been held as regards quasi-public corporations that the legislature may authorize a consolidation without the unanimous consent of the stockholders, where provision is made for compensation to dissenting stockholders for the value of their stock. The decision was placed on the ground that stock in a corporation was subject to the power of eminent domain.²

And Equity Will Enjoin a Consolidation, unauthorized for want of the unanimous consent of the stockholders, at the instance of a single dissenting stockholder.³

1. Assent of Shareholders—*United States*.—*Pearce v. Madison*, etc., R. Co., 21 How. (U. S.) 441; *Mowrey v. Indianapolis*, etc., R. Co., 4 Biss. (U. S.) 78.

Alabama.—*Nathan v. Tompkins*, 82 Ala. 437. *Kentucky*.—*Botts v. Simpsonville*, etc., Turnpike Road Co., 88 Ky. 54.

Michigan.—*Tuttle v. Michigan Air Line R. Co.*, 35 Mich. 247.

Mississippi.—*New Orleans*, etc., R. Co. *v. Harris*, 27 Miss. 517.

New Jersey.—*Kean v. Johnson*, 9 N. J. Eq. 401.

New York.—*Taylor v. Earle*, 8 Hun (N. Y.) 1; *Troy*, etc., R. Co. *v. Kerr*, 17 Barb. (N. Y.) 581.

Ohio.—*Chapman v. Mad River*, etc., R. Co., 6 Ohio St. 120.

Texas.—*Gulf*, etc., R. Co. *v. Newell*, 73 Tex. 334, 15 Am. St. Rep. 788.

Vermont.—*Stevens v. Rutland*, etc., R. Co., 1 Am. L. Reg. 154.

But see *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 393, 66 Am. Dec. 490, wherein the power of a trading corporation, by a majority vote of the stockholders, to sell its property for stock in another corporation for the purpose of winding up its business, in consideration of stock in such other corporation, was upheld. And also *Sprague v. Illinois River R. Co.*, 19 Ill. 174, wherein it was held that an amendment to the charter of a railroad company authorizing its consolidation with another railroad was not such a change in the object of the corporation as would release a stockholder from liability on his subscription.

Mutual Insurance Societies cannot be consolidated, without the consent of all the members, so as to entitle the new corporation to recover in a subscription of a dissenting member of one of the constituent corporations. *Hamilton Mut. Ins. Co. v. Hobart*, 2 Gray (Mass.) 543.

Unincorporated Societies.—Consolidation of a voluntary unincorporated association with a corporation cannot be consummated without the consent of all of the members of the former. *Mason v. Finch*, 28 Mich. 282.

Division of Corporations.—A division of one corporation into two requires also the consent of all the stockholders. *Carlisle v. Terre Haute*, etc., R. Co., 6 Ind. 316; *Indiana*, etc., Turnpike Road Co. *v. Phillips*, 2 P. & W. (Pa.) 184; *Fulton County v. Mississippi*, etc., R. Co., 21 Ill. 338.

2. Quasi-public Corporations.—*Black v. Delaware*, etc., Canal Co., 24 N. J. Eq. 455.

Though a dissenting member cannot be forced into the consolidated corporation unless the power of consolidation is given by the

charter of the constituent corporation of which he is a member, or is reserved to the legislature by power to amend or alter the charter of such corporation, nevertheless, on payment to such dissenting stockholder of the value of his stock, the consolidation of railroads may be effected, even against his dissent. *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42, 72 Am. Dec. 685.

New Jersey Act 1880, p. 230, authorizing railroad companies to consolidate, without providing compensation to the dissenting stockholders, does not authorize a consolidation except with the unanimous consent of the stockholders. *Mills v. Central R. Co.*, 41 N. J. Eq. 1.

3. Consolidation Enjoined.—*Blatchford v. Ross*, 54 Barb. (N. Y.) 42, 5 Abb. Pr. N. S. (N. Y.) 434; *Charlton v. Newcastle*, etc., R. Co., 5 Jur. N. S. 1096; *Botts v. Simpsonville*, etc., Turnpike Road Co., 88 Ky. 54; *Glymont Imp.*, etc., Co. *v. Toler*, 80 Md. 278; *Mowrey v. Indianapolis*, etc., R. Co., 4 Biss. (U. S.) 78. See generally the title *ULTRA VIRES*. And see *Zabriskie v. Hackensack*, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617, wherein the right of a dissenting stockholder to enjoin the extension of the railroad was upheld. And also *Stevens v. Rutland*, etc., R. Co., 29 Vt. 545; *Young v. Rondout*, etc., Gas Light Co., 129 N. Y. 57.

Payment of Value of Stock as a Defense.—Where an illegal consolidation is attempted to be set aside by a dissenting stockholder the court will not decree payment to the complainant for the value of the stock, where the legislature has not provided for the condemnation of the stock of dissenting stockholders under the power of eminent domain. *Mills v. Central R. Co.*, 41 N. J. Eq. 1.

However, it has been held, though undoubtedly against the great weight of authority, that where the amount of the dissenting stock is inconsiderable in comparison with the stock the owners of which have acquiesced in the consolidation, equity may refuse an injunction and merely require security to be given for the payment to the dissenting stockholders of the value of their stock. *McVicker v. Ross*, 55 Barb. (N. Y.) 247. And see also *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42, 72 Am. Dec. 685; *State v. Bailey*, 16 Ind. 46.

Laches.—A dissenting stockholder may by his laches be precluded from seeking to enjoin the consolidation. *Chapman v. Mad River*, etc., R. Co., 6 Ohio St. 126.

Delay of two years may estop dissenting stockholders from seeking to enjoin consolidation. *International*, etc., R. Co. *v. Bremond*, 53 Tex. 96.

Good Faith of Complainant.—The fact that the dissenting stockholder in attempting to enjoin an unauthorized consolidation, is not acting in good faith for the interest of his corporation, has been held to be no defense.¹

Need Not First Apply to Corporation.—To entitle a dissenting stockholder to such an injunction it is not necessary that he should have first sought aid through his corporation.²

Estoppel.—One of the constituent corporations, however, cannot, after consenting to the consolidation, object to its validity on the ground that all of the stockholders did not assent thereto.³

In England, however, there being no restrictions upon Parliament as regards the amendment or alteration of charters, consolidations may in all cases be authorized without the unanimous consent of the stockholders.⁴

b. IMPLIED ASSENT—(1) *Power to Amend Charter.*—When the legislature retains the power to alter or amend the charter of a corporation, it may authorize a consolidation without the unanimous consent of the stockholders.⁵

"Stock."—Where a consolidation was authorized on the consent of the owners of three-fourths in value of all the stock of the corporation, the word "stock" was held to mean only stock actually outstanding.⁶

(2) *Power Contained in Charter.*—A provision in the charter of a corporation authorizing consolidation is a part of the contract between the stockholders, and in such a case a consolidation may be effected without the unanimous consent of the stockholders.⁷

Delay of four years may also have a like effect. *Atchison, etc., R. Co. v. Fletcher*, 35 Kan. 236.

A dissenting stockholder, however, is only required to make reasonable haste to bring suit to set aside an illegal consolidation. Delay of sixty days after the lessees had taken possession under an illegal lease was held not to preclude a dissenting stockholder, on the ground of laches, from relief. *Mills v. Central R. Co.*, 41 N. J. Eq. 1. See the title **ULTRA VIRES**.

1. *Central R. Co. v. Collins*, 40 Ga. 582.

2. *Nathan v. Tompkins*, 82 Ala. 437. See, however, *Mozley v. Alston*, 1 Phil. 790. See the title **ULTRA VIRES**.

3. *Market St. R. Co. v. Hellman*, 109 Cal. 571. See also *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 33 Fed. Rep. 440.

4. **Rule in England.**—*Maunsell v. Midland Great Western R. Co.*, 11 Hem. & M. 130; *Simpson v. Denison*, 10 Hare 51.

5. **Presumption of Power of Alteration and Amendment.**—*Market St. R. Co. v. Hellman*, 109 Cal. 571; *Hale v. Cheshire R. Co.*, 161 Mass. 443; *Pennsylvania College Cases*, 13 Wall. (U. S.) 190.

Where the power of amending a charter of a corporation is reserved to the legislature, it may by its own direct enactment consolidate the corporation with another. *Per Storrs, C. J.*, in *Bishop v. Brainerd*, 28 Conn. 289.

Where the charter of one of the constituent corporations shows that one of its purposes was to consolidate with another corporation, and the legislature reserves the power to amend or repeal the charter, the legislature may authorize the consolidation of the corporation as against a dissenting stockholder. *Hanna v. Cincinnati, etc., R. Co.*, 20 Ind. 30. And see *Durfee v. Old Colony, etc., R. Co.*, 5 Allen (Mass.) 230, wherein the power to authorize a lease without the unanimous consent of stockholders was upheld.

However, in *Botts v. Simpsonville, etc., Turnpike Road Co.*, 88 Ky. 54, *per Pryor, J.*, it was held that the legislature, under the power to amend the charter, could not authorize a consolidation without the unanimous consent of the stockholders where it affects the rights of the stockholders by increasing their liabilities or diminishing the value of their stock. See also *Zabriskie v. Hackensack, etc., R. Co.*, 18 N. J. Eq. 178, 90 Am. Dec. 617, wherein Chancellor Zabriskie said: "It is also settled, upon the principles of the common law in this state, and most of the states of the Union, that when a number of persons * * * become members of a corporation for definite purposes and objects specified in their charter, which in such case is their contract, and for a time settled by it, that the objects and business of the * * * corporation cannot be changed, or abandoned, or sold out, within the time specified, without the consent of all the partners or corporators; one partner or corporator, however small his interest, can prevent it. And this is so, although by law a majority in either case can control or manage the business against the will and interest of the minority, so long as it is within the scope of the * * * charter. This rule is founded on * * * the great principle of protecting every man and his property by contracts entered into." And see *Mills v. Central R. Co.*, 41 N. J. Eq. 1; *Pearce v. Madison, etc., R. Co.*, 21 How. (U. S.) 441; *Mowrey v. Indianapolis, etc., R. Co.*, 4 Biss. (U. S.) 78; *Kenosha, etc., R. Co. v. Marsh*, 17 Wis. 13.

6. *Market St. R. Co. v. Hellman*, 109 Cal. 571.

7. **Where Charter Contains the Power.**—*Nugent v. Putnam County*, 19 Wall. (U. S.) 241; *Sparrow v. Evansville, etc., R. Co.*, 7 Ind. 369; *Hanna v. Cincinnati, etc., R. Co.*, 20 Ind. 30; *Bish v. Johnson*, 21 Ind. 299; *Atchison, etc., R. Co. v. Phillips County*, 25 Kan. 261.

Effect of Subscription to Stock. — And it has been said that the mere subscription to the stock of a corporation whose charter authorizes its consolidation with other corporations was probably a sufficient consent on the part of the subscribers to the consolidation.¹

(3) *Consolidation Authorized by Act at Time of Subscription.* — A stockholder becoming a subscriber after the passage of an act authorizing the consolidation of the corporation with another cannot prevent a consolidation for want of consent on his part.²

(4) *Acquiescence.* — A stockholder may by acquiescence in the consolidation be held to have assented thereto.³

3. Formal Requisites. — The statutes authorizing consolidation generally prescribe the manner in which the consolidation should be effected; and in such a case, as in the case of original incorporation, the essential requisites must be strictly complied with,⁴ and especially where the validity of the con-

1. Subscription to Stock as an Assent. — *Fisher v. Evansville, etc., R. Co., 7 Ind. 407, per Perkins, J.* But where the articles of association of a corporation prohibit its consolidation without the consent of the stockholders, and also contain a clause providing for an amendment of the articles by a vote of the executive committee and the trustees, a consolidation cannot be had without the consent of a majority of the stockholders, though an attempt to amend the articles of the association so as to authorize the consolidation is made. *Blatchford v. Ross, 54 Barb. (N. Y.) 42.*

2. *Wilson v. Salamanca, 99 U. S. 499; Bish v. Johnson, 21 Ind. 299; Mansfield, etc., R. Co. v. Brown, 26 Ohio St. 223.*

3. Acquiescence of Stockholder. — A stockholder of one of the constituent corporations cannot, after acquiescing in the consolidation and after the new corporation has taken full charge and control of the property of the constituent corporation, attack the validity of the consolidation on the ground that he did not assent thereto. *Phinizz v. Augusta, etc., R. Co., 62 Fed. Rep. 678.*

A stockholder in one of the constituent corporations is estopped by taking an active part in the consolidation to allege a want of consent on his part thereto. *Glymont Imp., etc., Co. v. Toler, 80 Md. 278.* See also *In re United Ports, etc., Ins. Co., 41 L. J. Ch. 157; Boston, etc., R. Co. v. New York, etc., R. Co., 13 R. I. 264; Union Canal Co. v. Young, 1 Whart. (Pa.) 410, 30 Am. Dec. 212; Branch v. Atlantic, etc., R. Co., 3 Woods (U. S.) 481.*

Stockholders consenting to the consolidation, which was made under legislative sanction, cannot afterwards object on the ground that the amendment of the charter of their corporation, so as to authorize the consolidation, was unauthorized. *Deaderick v. Wilson, 8 Baxt. (Tenn.) 108.*

Acquiescence of Officers. — Acquiescence by the officers alone of an unincorporated society, in its merger in a corporation, will not bind the members, the activity and existence of the society having been continued. *Mason v. Finch, 28 Mich. 282.* And see *Hamilton Mut. Ins. Co. v. Hobart, 2 Gray (Mass.) 543; Gardner v. Hamilton Mut. Ins. Co., 33 N. Y. 421.*

A stockholder of one of the constituent corporations, by acquiescing in the consolidation for five years, during which time mortgage

bonds had been executed by the consolidated corporation, is estopped to attack the consolidation on the ground that it was fraudulent. *Bell v. Pennsylvania, etc., R. Co., (N. J. 1887) 10 Atl. Rep. 741.*

Agency — Ratification. — Where the assent of a stockholder to the consolidation is given by an agent acting under a defective power of attorney, the stockholder, by surrendering his stock and accepting stock in the consolidated corporation, ratifies the assent of the agent. *Market St. R. Co. v. Hellman, 109 Cal. 571.*

4. Filing Agreement of Consolidation. — Where the statute authorizing the consolidation requires the filing of the agreement of consolidation, and further provides that the secretary of state shall neither file nor record such agreement unless the fees therefor are first paid, payment of such fees is essential to consolidation. *State v. Chicago, etc., R. Co., 145 Ind. 229.*

Where the consolidation act provides that the constituent corporations shall be deemed one corporation upon the filing of the agreement of consolidation with the secretary of state, the filing of such agreement is a condition precedent to the consummation of the consolidation. *Mansfield, etc., R. Co. v. Brown, 26 Ohio St. 223.*

Interstate Consolidation. — A statute authorizing the consolidation of a domestic corporation with a corporation of an adjoining state "in accordance with the laws of the adjoining state" does not require that the proceedings for consolidation, such as the mode of acquiring the consent of the stockholders, should be in accordance with the laws of such adjoining state. *Bradford v. Frankfort, etc., R. Co., 142 Ind. 383.*

The provision of the statute requiring as a requisite to the incorporation of railroads a subscription of a certain amount per mile applies only to domestic corporations, and therefore the validity of a consolidation between a domestic corporation and a foreign one is not affected by the fact that the specified amount per mile had not been subscribed for the road of the foreign corporation. *Monroe v. Fort Wayne, etc., R. Co., 28 Mich. 272.*

Directors. — A provision of the General Corporation Act of *New Jersey* requiring directors to be stockholders does not apply to a corporation consolidated under an act requiring the

solidation is attacked on quo warranto proceedings,¹ or by a dissenting stockholder to escape liability on his subscription to one of the constituent corporations, which is sought to be enforced by the consolidated corporation,² or when the consolidated corporation relies upon the consolidation as conferring rights upon it as the successor, so to speak, of the constituent corporations.³

agreement of consolidation to state the names of the first board of directors, who are to hold office until their successors are appointed, without requiring the first directors, to be stockholders of the new corporation. *Camden Safe-Deposit, etc., Co. v. Burlington Carpet Co.*, (N. J. 1895) 33 Atl. Rep. 479.

Acceptance of Consolidation Act. — In *Leavenworth County v. Chicago, etc.*, R. Co., 134 U. S. 688, affirming 25 Fed. Rep. 219, it was held that a provision of the consolidation act requiring constituent corporations to file with the secretary of state an acceptance of the provisions of the act before they should consolidate was directory, and a failure to comply therewith did not affect the consolidation as between stockholders and the holder of bonds issued by the consolidated corporations. See also *Humphreys v. St. Louis, etc.*, R. Co., 37 Fed. Rep. 307.

Notice of Consolidation. — Under a statute requiring notice of consolidation to be published "one month" in certain newspapers, the publication in five consecutive issues of a weekly paper, and also from the 18th of October to the 17th of November, inclusive, in a daily paper, was held sufficient. *Market St. R. Co. v. Hellman*, 109 Cal. 571.

Filing Articles of Association. — Under Comp. Stat. *Nebraska* 1881, p. 148, § 91, providing that upon filing a duplicate of the articles of association in the office of the secretary of state, the corporations shall be merged, etc., the articles must be so filed to entitle the consolidated corporation to exercise the power of eminent domain. *Trester v. Missouri Pac. R. Co.*, 33 Neb. 171.

Notice of Directors' Meeting. — Where the consolidation act does not require notice to be given to the directors of the meeting of the board to act upon the proposed agreement of consolidation, unanimous ratification by a majority of the directors at a meeting held without notice to all of the directors is valid. *Wells v. Rodgers*, 60 Mich. 525.

Certificate of Assent of Corporations. — Though the certificate of the secretaries of all of the constituent corporations is the best evidence of the consent on the part of the corporations to the consolidation, nevertheless, the indorsement of such certificates upon the agreement of consolidation is not essential. *Phinizy v. Augusta, etc.*, R. Co., 62 Fed. Rep. 678.

1. Residence of Directors. — The failure to set forth in the agreement of consolidation the residence of the new directors and their number, as required by the act of consolidation (Rev. Stat., *Ohio*, § 3381), renders the consolidation invalid, when attacked in quo warranto proceedings by the state. *State v. Vanderbilt*, 37 Ohio St. 590.

Sufficiency of Filing. — But where the consolidation act requires the agreement of consolidation to be filed with the secretary of state,

proof that the agreement was deposited with the secretary is a sufficient compliance with the statutes though the validity of the consolidation is attacked on quo warranto proceedings. *Com. v. Atlantic, etc.*, R. Co., 53 Pa. St. 9.

2. Mansfield, etc., R. Co. *v. Stout*, 26 Ohio St. 241.

To Render Valid a Consolidation as Against a Dissenting Stockholder, the notice of stockholders' meetings, as required by the consolidation act, must have been given by the constituent corporations. *Tuttle v. Michigan Air Line R. Co.*, 35 Mich. 247. But see *Chicago, etc.*, R. Co. *v. Stafford County*, 36 Kan. 121.

De Facto Corporation. — It is not sufficient to authorize the recovery by a consolidated corporation, upon subscriptions to the capital stock of one of the constituent corporations, that the consolidated corporation be shown to be a corporation *de facto*, entitled as such to enforce contracts as against persons dealing with it; to acquire the rights of the original corporation, in its contract with its subscribers, otherwise than by assignment, it is essential that the statutory requirements of a transfer by succession be complied with, at least in the absence of any participation by such subscriber as a stockholder in the consolidated corporation, such as would estop him from disputing the consolidation. *Mansfield, etc.*, R. Co. *v. Drinker*, 30 Mich. 124.

3. When Consolidated Corporation Claims Rights as Successor. — "As the suit is brought * * * on a contract made with an original and single company confined to this state, the question whether the consolidation is good for other purposes cannot settle this case. Unless the consolidation is shown to be the legally created successor of the old * * * company, it has no concern with its individual contracts with third persons; and, if so identified, it can only have or give to its assignees a right to recover by proof that all conditions of recovery have been complied with." *Brown v. Dibble*, 65 Mich. 520.

Approval of Articles of Consolidation. — Under Laws Mich. 1883, p. 187, requiring articles of consolidation of two railroad companies to be submitted to and approved by a board consisting of the attorney-general, commissioner of railroads, and the secretary of state, a certificate which is signed only by the railroad commissioner and another person, describing themselves as chairman and secretary of the board of railroad consolidation, is not alone sufficient evidence of such approval, in the absence of any statute authorizing the board to organize under the name used and to appoint one of their number chairman and another person, not of their number, secretary. *Brown v. Dibble*, 65 Mich. 520.

Where the consolidation act provides for the consolidation of the corporations upon the approval of the agreement of consolidation by the constituent corporations, and requires the

Failure to State Manner of Consolidation. — Where the act authorizing the consolidation does not specify the manner in which the consolidation is to be consummated, the mode of consolidation is to be determined by the corporations.¹

Direct Act of Legislature. — Consolidation may be effected by direct act of the legislature without any action on the part of the corporations.²

An Agreement to Consolidate in the future will not constitute a consolidation.³

Collateral Attack. — As a general rule, third persons cannot attack collaterally the validity of the consolidation.⁴

Estoppel. — The constituent corporations, and their stockholders, as well, may also be estopped to attack the validity of the consolidation.⁵

Defeating Foreclosure of Mortgage. — The consolidated corporation cannot defeat the foreclosure of a mortgage given by it by showing the illegality of the consolidation.⁶

III. EFFECT OF CONSOLIDATION — 1. Status of Consolidated Corporation. — The effect of the consolidation upon the status of the consolidated corporation and the constituent corporations depends upon the statute under which the con-

election of a board of directors of the consolidated corporation as a condition to the succession by the consolidated corporation to the rights of the constituent corporations, an election of the board of directors prior to the approval of the agreement of consolidation is a nullity. *Mansfield, etc., R. Co. v. Drinker*, 30 Mich. 124.

1. Mode of Consolidation. — *Drummond, J., in Dimpfel v. Ohio, etc., R. Co.*, 8 Rep. 641, said: "In authorizing, by the general language which has been referred to in the legislation of this state, the union and consolidation of different lines of road, the means by which the result is to be or has been obtained have not been clearly designated, but that has been left to be adjusted by contracts mutually executed between the parties."

2. *Bishop v. Brainerd*, 28 Conn. 289.

3. *Shrewsbury, etc., R. Co. v. Stour Valley R. Co.*, 21 Eng. L. & Eq. 628.

4. Collateral Attack. — *Washburn v. Cass County*, 3 Dill. (U. S.) 251; *Pacific Railroad Removal Cases*, 115 U. S. 15; *Leavenworth County v. Chicago, etc., R. Co.*, 25 Fed. Rep. 219.

A Subscriber to the Stock of the Consolidated Corporation cannot attack the validity of the corporation on the ground that the consolidation was unauthorized, being with a parallel, and not a connecting, road. *Lewis v. Clarendon*, 6 Rep. 609; *Leavenworth County v. Barnes*, 94 U. S. 70.

Ejectment. — The existence of a *de facto* consolidated corporation cannot be attacked in ejectment to disprove title in the plaintiff who claims through such corporation. *Tarpey v. Deseret Salt Co.*, 5 Utah 494.

Nonexistence of a Constituent Corporation. — In a suit by a stockholder of one of the constituent corporations to declare void bonds issued by the consolidated corporation, on the ground of the invalidity of the consolidation, the consolidation cannot be attacked on the ground that one of the constituent corporations had no legal existence. *Bell v. Pennsylvania, etc., R. Co.*, (N. J. 1887) 10 Atl. Rep. 741.

The Grantee of a Consolidated Corporation cannot defeat a mortgage by the corporation by showing the illegality of the consolidation. *Hasselmann v. U. S. Mortgage Co.*, 97 Ind. 365.

Bondholder of Constituent Corporation. — It has been held, however, that where county bonds are issued to one of the constituent corporations in payment of a subscription to it after an invalid consolidation, the holder in an action thereon may assert the invalidity of the consolidation. *Morrill v. Smith County*, (Tex. 1896) 36 S. W. Rep. 56.

5. Estoppel. — Where one of the constituent corporations and its stockholders have acquiesced in the consolidation for four years, during which time bonds have been issued and the property operated by the consolidated corporation, neither such constituent corporation nor its stockholders can attack the validity of the consolidation. *Dimpfel v. Ohio, etc., R. Co.*, 8 Rep. 641. See also *Carey v. Cincinnati, etc., R. Co.*, 5 Iowa 357; *Adelbert University v. Toledo, etc., R. Co.* (Com. Pl.) 3 Ohio N. P. 15.

A member of one of the constituent corporations who recognized the validity of the consolidation by assuming with others the right to act as such is estopped to deny the validity of the consolidation in a suit by creditors to enforce payment of subscription to one of the constituent corporations. *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389.

One of two railroad corporations which were authorized to consolidate was, by supplemental act, authorized to purchase the stock of the other company. A purchase of the stock was made for the purpose of consolidation, and an actual consolidation of the roads made. It was held that the transaction was a valid consolidation so far as the validity of a mortgage executed by the consolidated corporation was concerned. *Williamson v. New Jersey Southern R. Co.*, 26 N. J. Eq. 398.

6. *Wallace v. Loomis*, 97 U. S. 146; *Racine, etc., R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 331, 95 Am. Dec. 595.

Nor can the consolidated corporation defend an action against it on a liability of one of the constituent corporations which is made binding upon the consolidated corporation by the act of consolidation, by showing that the consolidation was accomplished by a sale and purchase, instead of in the manner provided for by the act authorizing the consolidation. *Chicago, etc., R. Co. v. Ashling*, 160 Ill. 373.

solidation is effected and the intention of the legislature therein manifested.

New and Distinct Corporation — Merger — Alliance. — The effect may be (1) the creation of the consolidated corporation as a new and distinct corporation — and this is generally held to be the effect of the consolidation of domestic corporations; ¹ (2) the merger of one corporation into another, and the continuance in existence of the latter, as in the case of the purchase of the franchise, stock, etc., of one corporation by another; ² or (3) an alliance between the

1. New and Distinct Corporation — United States. — The consolidation of several corporations is a dissolution of the original corporations, and at the same instant the creation of a new corporation, with property, liabilities, and stockholders derived from those passing out of existence. The question, in this case, as to the status of the consolidated corporation arose in an action against a person on his guaranty that the stock of one of the corporations consolidated should have a certain value, and judgment was refused the plaintiff on the ground that he had consented to the consolidation of the corporation, thereby rendering impossible a performance of the guaranty. *Clearwater v. Meredith*, 1 Wall. (U. S.) 39. See also *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587.

Where the consolidation act authorizes two corporations to consolidate and form one consolidated corporation, holding and enjoying all the rights, etc., belonging to the constituent corporations, the old corporations are dissolved and a new corporation is created. *Per Pardee, Cir. J., New Orleans Gas Light Co. v. Louisiana Light, etc., Co.*, 4 Woods (U. S.) 90. *Connecticut.* — *Bishop v. Brainerd*, 28 Conn. 289.

Georgia. — *Central R., etc., Co. v. State*, 54 Ga. 401.

Indiana. — The effect of a consolidation is the dissolution of the companies consolidated, and at the same time the creation of a new corporation with property, liabilities, and stockholders derived from those passing out of existence. *McMahan v. Morrison*, 16 Ind. 173, 79 Am. Dec. 418. See also *Ohio, etc., R. Co. v. People*, 123 Ill. 467.

Iowa. — On consolidation the constituent corporations cease to exist. *Carey v. Cincinnati, etc., R. Co.*, 5 Iowa 357.

Louisiana. — Where the consolidation act authorizes the consolidation of two corporations into "one consolidated company, holding and enjoying all the rights," etc., belonging to each, the consolidated corporation is a new corporation, the members of the constituent corporations being transmuted into members of the consolidated corporation. *Fee v. New Orleans Gas Light Co.*, 35 La. Ann. 413. See also *Charity Hospital v. New Orleans Gas Light Co.*, 40 La. Ann. 382.

Maine. — Where the consolidation act provides that certain corporations shall be consolidated into "one" corporation, and that the name of the "new" corporation thus created shall be the M. Co., a new and distinct corporation is created by the consolidation. *State v. Maine Cent. R. Co.*, 66 Me. 488.

Massachusetts. — *Hamilton Mut. Ins. Co. v. Hobart*, 2 Gray (Mass.) 543. Though, strictly speaking, the constituent corporations and the consolidated corporation are not the same,

yet the legislature has the power to say how far the new corporation shall be, as it were, the heir, executor, or continuer, for the purpose of remedies at the hands of creditors of the constituent corporation. *John Hancock Mut. L. Ins. Co. v. Worcester, etc., R. Co.*, 149 Mass. 214; *Day v. Worcester, etc., R. Co.*, 151 Mass. 302.

See *Hale v. Cheshire R. Co.*, 161 Mass. 443, wherein it is held that the consolidation of a corporation with another is not a liquidation or winding up of its affairs so as to render applicable thereto Public Statutes, c. 105, §§ 41, 42, putting common and preferred stockholders on the same footing, in case of an ordinary liquidation or winding up of its affairs.

Missouri. — *State v. Keokuk, etc., R. Co.*, 99 Mo. 30. Strictly speaking, consolidated corporations are a new legal entity. *Kinlon v. Kansas City, etc., R. Co.*, 39 Mo. App. 382.

New York. — The act for the consolidation of domestic corporations is to be taken as the organization of a new corporation. *People v. Rice*, 57 Hun (N. Y.) 486, *affirmed* in 128 N. Y. 591. See also *People v. New York, etc., R. Co.*, 129 N. Y. 474.

Ohio. — The consolidation is to be regarded as "a surrender or relinquishment of the several individual charters of the companies so uniting and the acceptance of a charter de novo from the state." *Shields v. State*, 26 Ohio St. 86.

Pennsylvania. — *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42, 72 Am. Dec. 685. See also *Com. v. Atlantic, etc., R. Co.*, 53 Pa. St. 9.

South Carolina. — A consolidation dissolves the original companies and creates an entirely new one, with rights and franchises not dependent on, nor derived from the charter of the original company, but upon the act authorizing the consolidation and the law governing corporations. *Charlotte, etc., R. Co. v. Gibbes*, 27 S. Car. 385. See also *McCandless v. Richmond, etc., R. Co.*, 38 S. Car. 103.

2. Merger. — *New York Cent. R. Co. v. Saratoga, etc., R. Co.*, 39 Barb. (N. Y.) 289; *Central R., etc., Co. v. Georgia*, 92 U. S. 665; *State v. Keokuk, etc., R. Co.*, 99 Mo. 30. It is possible for one of the corporations consolidated to exist for certain purposes after the consolidation. *Per Storrs, C. J. Bishop v. Brainerd*, 28 Conn. 289.

Where consolidation is accomplished by the transfer by one of the corporations consolidated to the other of all its property, the latter corporation continues in existence and does not become a new corporation. *Chicago, etc., R. Co. v. Ashling*, 160 Ill. 373.

In *Meyer v. Johnston*, 64 Ala. 603, several corporations were authorized to unite and consolidate their roads stock and franchises on such terms and to such extent as they might

constituent corporations, each of which remains in existence.¹

The last case is chiefly exemplified in cases of the consolidation of corporations of different states.²

agree. The agreement between the roads for consolidation provided that, until a common name should be lawfully given under which the franchises of each of said companies were to be united, the A. & T. R. R. Co. should be the active and controlling company, and the organization of the other companies might be continued until then for the purpose only of preserving and enabling the acting and controlling company to exercise the franchises thereby consolidated with the franchises of said acting and controlling company; and that all the contracts and obligations which might be entered into or made for said consolidated company should be done, until a common name should be lawfully given as aforesaid, in the name and in accordance with the franchises of the A. & T. R. R. Co. Subsequently, a new name was given to the consolidated company. It was held that the consolidated company was merely the continuation of the A. & T. R. R. Co. with enlarged franchises. The question arose in litigation as to the effect of a mortgage executed by the A. & T. R. R. Co.

1. Alliance Between the Corporations.—*State v. Keokuk, etc., R. Co.*, 99 Mo. 30. The consolidation is not a dissolution of the constituent corporations. The new corporation lives from the life of the old ones; their several lives are transferred into it. *Baltimore, etc., R. Co. v. Musselman*, 2 Grant's Cas. (Pa.) 348.

In *Edison Electric Light Co. v. New Haven Electric Co.*, 35 Fed. Rep. 233, the consolidation act provided that no claim against either of the constituent corporations should be impaired by the consolidation, and another act provided that on the dissolution of a corporation the directors should have power to settle its affairs. It was held that on the consolidation of two corporations, a constituent corporation continues in existence so as to enable it to assign in writing, in accordance with the acts of Congress, a patent owned by it to the consolidated corporation. See also *U. S. v. Southern Pac. R. Co.*, 46 Fed. Rep. 683.

2. United States.—*Delaware Railroad Tax*, 18 Wall. (U. S.) 206; *Clark v. Barnard*, 108 U. S. 436.

Arkansas.—*Central Trust Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 551.

Illinois.—*Racine, etc., R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 331, 95 Am. Dec. 595; *Ohio, etc., R. Co. v. Weber*, 96 Ill. 443; *Ohio, etc., R. Co. v. People*, 123 Ill. 467.

Massachusetts.—*Peters v. Boston, etc., R. Co.*, 114 Mass. 127.

Michigan.—*Lake Shore, etc., R. Co. v. People*, 46 Mich. 193.

Minnesota.—*In re St. Paul, etc., R. Co.*, 36 Minn. 85.

Nebraska.—*Trester v. Missouri Pac. R. Co.*, 33 Neb. 171.

New York.—*People v. New York, etc., R. Co.*, 129 N. Y. 474, reversing 61 Hun (N. Y.) 66.

A Corporation Formed by the Consolidation of Three Corporations of Different States, "although it bears the same name in the three states, has one board of directors and the same sharehold-

ers, and operates the road as one entire line, and is designed to accomplish the same purposes, and exercises the same general corporate powers and functions in all the states, * * * is not the same corporation in each state, but a distinct and separate entity in each. It is a corporate trinity, having no citizenship of its own distinct from its constituent members, but a citizenship identical with each. By the consolidation the corporation of one state did not become a corporation of another, nor was either merged in the other. The corporation of each state had a distinct legislative pater-nity, and the separate identity of each as a corporation of the state by which it was created, and as a citizen of that state, was not lost by the consolidation. Nor could the consolidated company become a corporation of three states without being a corporation of each or of either. While the consolidated corporation is a unit, and acts as a whole in the transaction of its corporate business, it is not a corporation at large, nor is it a joint corporation of the three states. Like all corporations, it must have a legal dwelling place. Every corporation not created by act of Congress dwells in a state. This consolidated corporation dwells in three states, and is a separate and single entity in each." *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. Rep. 812.

The Supreme Court of Illinois, in speaking of the status of a corporation formed by the consolidation of a corporation of that state and one created by the state of Missouri, said: "The legislatures of this state and of Missouri cannot act jointly, nor can any legislation of the last-named state have the least effect in creating a corporation in this state. Hence, the corporate existence of appellants, considered as a corporation of this state, must spring from the legislation of this state, which, by its own vigor, performs the act. The states of Illinois and Missouri have no power to unite in passing any legislative act. It is impossible, in the very nature of their organizations, that they can do so. They cannot so fuse themselves into a single sovereignty, and as such create a body politic which shall be a corporation of the two states, without being a corporation of each state or of either state. As argued by appellee, the only possible status of a company acting under charters from two states is that it is an association incorporated in and by each of the states, and when acting as a corporation in either of the states it acts under the authority of the charter of the state in which it is then acting, and that only, the legislation of the other state having no operation beyond its territorial limits." *Quincy Railroad Bridge Co. v. Adams County*, 88 Ill. 615.

Where a corporation created by the laws of Massachusetts is consolidated with a corporation created by another state, the consolidated corporation remains a corporation of Massachusetts, within the meaning of Stat. 1882, c. 180, authorizing any railroad corporations created by the state of Massachusetts to

In the Case of Interstate Consolidation a decree of dissolution in one state does not affect the consolidated corporation in the other states, but only its franchises in that state where the decree was rendered.¹

Liability for Obligations of Consolidated Corporation. — The constituent corporations cannot be sued for liabilities of the consolidated corporation.²

2. Charter and Property of Consolidated Corporation. — The powers of the consolidated corporation are fixed by the act of consolidation, which generally provides that the consolidated corporation shall succeed to all the rights, privileges, etc., of the constituent corporations, the consolidation being regarded as a surrender or relinquishment of the several individual charters of the corporations consolidated, and the issuance of a charter *de novo* from the state containing by implication the powers granted in the several charters of the corporations consolidated.³

It May Compromise and Settle Claims against one of the constituent corporations.⁴

It May Apply Subscriptions to the Stock of one of the constituent corporations in payment of the debts of another constituent corporation.⁵

Transaction of Business in One State for All. — And where formed by interstate consolidation, the corporation may transact its business in one state for all.⁶

Alteration of Charter. — Where the effect of the consolidation is to create a new corporation, its charter is subject to alteration and repeal by the legislature under a power reserved in a general law at the date of the consolidation.⁷

lease the road of any other corporation so created. *Peters v. Boston, etc., R. Co.*, 114 Mass. 127.

An Act Prohibiting Foreign Corporations from Doing Business without Compliance with Certain Laws does not apply to a foreign corporation consolidated with a domestic corporation. *State v. Chicago, etc., R. Co.*, 25 Neb. 156. See, however, *Providence Coal Co. v. Providence, etc., R. Co.*, 15 R. I. 303, wherein it was held that a railroad corporation chartered and operated in two states, consolidated and made subject to all the duties and liabilities under one charter and the laws of one state, as if wholly located therein, was one entity, so as to entitle the courts of one state to enforce discriminations in rates to points out of the state.

1. *State v. Metz*, 32 N. J. L. 199.

2. *Day v. New Orleans Pac. R. Co.*, 37 La. Ann. 131.

3. **Powers Fixed by Consolidating Act.** — *Shields v. State*, 26 Ohio St. 86; *Charlotte, etc., R. Co. v. Gibbes*, 27 S. Car. 385.

Purchase and Retirement of Bonds. — The directors of a consolidated corporation have authority without the vote of the stockholders to purchase and retire bonds of one of the constituent corporations which are a lien upon the property acquired from such corporation, but which impose no personal liability upon the consolidated corporation. *Shaw v. Norfolk County R. Co.*, 16 Gray (Mass.) 407.

Power to Mortgage. — A consolidated corporation formed by a consolidation of corporations of different states, which by the several acts of consolidation succeeds to all the rights, privileges, etc., of the constituent corporations, succeeds to the right in the several states of the constituent corporations to issue mortgage bonds in such several states. *Mead v. New York, etc., R. Co.*, 45 Conn. 199. See also *Du Pont v. Northern Pac. R. Co.*, 18 Fed. Rep. 467.

A consolidated corporation authorized to issue mortgage bonds may do so for the purpose of taking up bonds previously issued by a constituent corporation. *Mead v. New York, etc., R. Co.*, 45 Conn. 199.

Where corporations of different states are consolidated, a mortgage by the consolidated corporation upon the property of one of the constituent corporations is a valid mortgage of property of the latter corporation. *Racine, etc., R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 331, 95 Am. Dec. 595.

Where the liabilities of a constituent corporation are continued against the consolidated corporation, which is given power to issue bonds in payment of such liabilities, it has power to execute mortgage bonds in payment. *Camden Safe-Deposit, etc., Co. v. Burlington Carpet Co.*, (N. J. 1895) 33 Atl. Rep. 479.

4. *Paine v. Lake Erie, etc., R. Co.*, 31 Ind. 283.

5. *Cooper v. Shropshire Union R., etc., Co.*, 13 Jur. 443.

6. **Interstate Consolidation.** — A railroad corporation formed by the consolidation of several corporations chartered by different states which bears the same name in all the states, and under one management is operated as an entirety, in the absence of statutory provision to the contrary, may transact its business in one state for all; and the contracts it enters into in one state are binding on it in all, and may be enforced against it in either when the action is transitory. *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. Rep. 812. See also *Graham v. Boston, etc., R. Co.*, 118 U. S. 161. But see *Aspinwall v. Ohio, etc., R. Co.*, 20 Ind. 492, 83 Am. Dec. 329, in which the contrary is held as regards corporate meetings.

7. **Power to Alter Charter of Consolidated Corporation.** — *Shields v. Ohio*, 95 U. S. 319; *Maine Cent. R. Co. v. Maine*, 96 U. S. 499; *Atlantic, etc., R. Co. v. Georgia*, 98 U. S. 359; *Charlotte, etc., R. Co. v. Gibbes*, 27 S. Car. 385.

Taxation. — And in case of interstate consolidation, the property of each of the constituent corporations remains in its original position as regards taxation in each state.¹

Directors. — And also in case of an interstate consolidation, a law of the state of one of the constituent corporations requiring a majority of the directors of any corporation formed under the laws of that state to be citizens of that state does not apply to the consolidated corporation.²

Government Contract. — Where railroad corporations are consolidated without provisions as to the application of moneys to be due them under contracts with the federal government, the moneys earned on the different roads under government mail contracts are to be applied as if no consolidation had taken place.³

Judgments. — In the case of the consolidation of corporations of different states, a judgment recovered against the consolidated corporation in one state is binding upon it in all.⁴

3. Property Rights and Franchises of Constituent Corporations — *a.* IN GENERAL. — As a general rule, in the absence of any restrictions in the consolidation act, the consolidated corporation succeeds to all the privileges and immunities of the constituent corporations.⁵

A consolidated corporation organized under a general act authorizing consolidation, and formed from constituent corporations organized under special acts, is a corporation organized under a general law, within a constitutional provision authorizing the General Assembly to alter and regulate rates chargeable by such companies. The consolidation is to be regarded as a surrender or relinquishment of the several individual charters of the corporations so united and the issuance of a charter *de novo* from the state. *Shields v. State*, 26 Ohio St. 86.

Where the consolidation act authorized the two constituent corporations to unite and consolidate the stocks, rights, franchises, etc., of the two corporations under the name and charter of one of the corporations, and provided that the stockholders of the constituent corporations should receive an equal number of shares of the stock of the consolidated corporation, the consolidated corporation is a new corporation, and therefore subject to the laws in force at the time of the consummation of the consolidation, as regards the right of the state to repeal its franchises. *Central R., etc., Co. v. State*, 54 Ga. 401. See also *Mobile Ins. Co. v. Columbia, etc., R. Co.*, 41 S. Car. 408, 44 Am. St. Rep. 725; *McCandless v. Richmond, etc., R. Co.*, 38 S. Car. 103. Compare, however, *Citizens' St. R. Co. v. Memphis*, 53 Fed. Rep. 715.

1. Taxation. — *Lake Shore, etc., R. Co. v. People*, 46 Mich. 193; *Delaware Railroad Tax*, 18 Wall. (U. S.) 206; *Clark v. Barnard*, 108 U. S. 436; *Ohio, etc., R. Co. v. Weber*, 96 Ill. 443; *Quincy Railroad Bridge Co. v. Adams County*, 88 Ill. 615. See the title TAXATION (CORPORATE).

2. Statute as to Directors. — *Ohio, etc., R. Co. v. People*, 123 Ill. 467. See also *People v. New York, etc., R. Co.*, 129 N. Y. 474, *reversing* 61 Hun (N. Y.) 66.

3. Pacific Railroad Cases, 16 Ct. of Cl. 353.

4. Judgments. — *Union Trust Co. v. Rochester, etc., R. Co.*, 29 Fed. Rep. 609; *Horne v. Boston, etc., R. Co.*, 18 Fed. Rep. 50, 12 Am.

& Eng. R. Cas. 287; *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 19 Fed. Rep. 804, 16 Am. & Eng. R. Cas. 488; *Graham v. Boston, etc., R. Co.*, 118 U. S. 161.

Specific Performance. — In the case of interstate consolidation, the courts of one state, however, cannot compel specific performance of a contract in another state. *Port Royal R. Co. v. Hammond*, 58 Ga. 523.

Foreclosure Sale. — And it has been held that a foreclosure sale by the courts of one state would not pass property of the consolidated corporation in another. *Pittsburgh, etc., R. Co. v. Rothschild*, (Pa. 1886) 4 Cent. Rep. 107.

5. General Rule — Succeeds to Privileges and Immunities of Constituent Corporations — *United States*. — *Tomlinson v. Branch*, 15 Wall. (U. S.) 460; *Washburn v. Cass County*, 3 Dill. (U. S.) 251; *Central R., etc., Co. v. Georgia*, 92 U. S. 665; *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587; *Ridgway Tp. v. Griswold*, 1 McCrary (U. S.) 151; *Harrison v. Arkansas Valley R. Co.*, 4 McCrary (U. S.) 264; *Brum v. Merchants' Mut. Ins. Co.*, 16 Fed. Rep. 140.

Arkansas. — *Zimmer v. State*, 30 Ark. 677; *Sappington v. Little Rock, etc., R. Co.*, 37 Ark. 23; *Lewis v. Clarendon*, 6 Rep. 609.

Georgia. — *Selma, etc., R. Co. v. Harbin*, 40 Ga. 706; *Montgomery, etc., R. Co. v. Boring*, 51 Ga. 582.

Illinois. — *Robertson v. Rockford*, 21 Ill. 451; *St. Louis, etc., R. Co. v. Miller*, 43 Ill. 199; *Peoria, etc., R. Co. v. Coal Valley Min. Co.*, 68 Ill. 489; *Chicago, etc., R. Co. v. Moffitt*, 75 Ill. 524.

Indiana. — *Indianapolis, etc., R. Co. v. Jones*, 29 Ind. 465; *Paine v. Lake Erie, etc., R. Co.*, 31 Ind. 283; *Louisville, etc., R. Co. v. Boney*, 117 Ind. 501.

Kansas. — *Atchison, etc., R. Co. v. Phillips County*, 25 Kan. 261.

Maryland. — *Baltimore v. Baltimore, etc., R. Co.*, 6 Gill (Md.) 288.

Massachusetts. — *Abbott v. New York, etc., R. Co.*, 145 Mass. 453; *John Hancock Mut. L.*

Contract to Purchase Books. — Not all contracts, however, will inure to the benefit of the consolidated corporation, and it has been held that the consolidation of two corporations relieves a person from liability on his contract with one of the constituent corporations to purchase the bonds of such corporation.¹

Property Acquired Subject to All Claims. — The consolidated corporation does not occupy the position of a *bona fide* purchaser for value, but takes the property subject to all claims against it which were binding upon the constituent corporation from which the property was acquired.²

The Choses in Action acquired from the constituent corporations may be enforced in the name of the consolidated corporation.³

b. SUBSCRIPTIONS — Dissenting Stockholders. — Where the consolidation was authorized by the charters of the constituent corporations, or by an act in force at the time of the subscription by a stockholder to the stock of one of the constituent corporations, or under power of the legislature to alter or amend the charters of the constituent corporations, the consolidated corporation may enforce subscriptions to the stock of the constituent corporations, even against dissenting stockholders; they are not released by the consolidation.⁴ But where the consolidation was not so authorized, a dissenting

Ins. Co. *v.* Worcester, etc., R. Co., 149 Mass. 214.

Michigan. — Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456.

Missouri. — Thompson *v.* Abbott, 61 Mo. 176; Daniels *v.* St. Louis, etc., R. Co., 62 Mo. 43.

New York. — New York Cent. R. Co. *v.* Saratoga, etc., R. Co., 39 Barb. (N. Y.) 289.

Pennsylvania. — Baltimore, etc., R. Co. *v.* Musselman, 2 Grant's Cas. (Pa.) 348.

Tennessee. — Miller *v.* Lancaster, 5 Coldw. (Tenn.) 514.

Virginia. — Barksdale *v.* Finney, 14 Gratt. (Va.) 338.

Indemnity Bond. — A consolidated corporation which succeeds to all the securities of the constituent corporations may recover on a bond given to one of the constituent corporations for the performance of the duties of one of its own employees for breaches by such employee after consolidation. Eastern Union R. Co. *v.* Cochrane, 24 Eng. L. & Eq. 495. See also Miller *v.* Lancaster, 5 Coldw. (Tenn.) 514; Pennsylvania, etc., R. Co. *v.* Harkins, 149 Pa. St. 121.

Patents. — A consolidated corporation which succeeds to all the powers, rights, etc., of the constituent corporations is entitled to use a patent which both of the old corporations had been licensed to use. Lightner *v.* Boston, etc., R. Co., 1 Lowell (U. S.) 338.

Lands. — The lands of the constituent corporations vest in the consolidated corporation. Cashman *v.* Brownlee, 128 Ind. 266. See also Tarpey *v.* Deseret Salt Co., 5 Utah 494.

The consolidated corporation succeeding to all the "rights," etc., of the constituent corporations, succeeds to their right to hold land in aid of the construction of the roads. Georgia Pac. R. Co. *v.* Wilks, 86 Ala. 478.

1. New Jersey Midland R. Co. *v.* Strait, 35 N. J. L. 322.

2. **Nature of Title Acquired.** — Vilas *v.* Page, 106 N. Y. 439; McAlpine *v.* Union Pac. R. Co., 23 Fed. Rep. 168; The Key City, 14 Wall. (U. S.) 653.

3. **Choses in Action.** — Cumberland College *v.* Ish, 22 Cal. 641; Miller *v.* Lancaster, 5

Coldw. (Tenn.) 514; State University *v.* Baxter, 42 Vt. 99.

4. **Authorized Consolidation — Dissenting Stockholders** — *England.* — Cork, etc., R. Co. *v.* Paterson, 18 C. B. 414, 86 E. C. L. 414, 37 Eng. L. & Eq. 398; Nixon *v.* Brownlow, 3 H. & N. 686.

Connecticut. — Bishop *v.* Brainerd, 28 Conn. 289.

Delaware. — Delaware R. Co. *v.* Tharp, 1 Houst. (Del.) 149.

Illinois. — Sprague *v.* Illinois River R. Co., 19 Ill. 174; Terre Haute, etc., R. Co. *v.* Earp, 21 Ill. 291. Compare Illinois Grand Trunk R. Co. *v.* Cook, 29 Ill. 237.

Indiana. — Sparrow *v.* Evansville, etc., R. Co., 7 Ind. 369; Hanna *v.* Cincinnati, etc., R. Co., 20 Ind. 30; Bish *v.* Johnson, 21 Ind. 299.

Kentucky. — Fry *v.* Lexington, etc., R. Co., 2 Metc. (Ky.) 314.

Michigan. — Wells *v.* Rodgers, 60 Mich. 525.

Missouri. — Pacific R. Co. *v.* Renshaw, 18 Mo. 210.

New York. — Schenectady, etc., Plank-road Co. *v.* Thatcher, 11 N. Y. 102.

Pennsylvania. — Hamilton *v.* Clarion, etc., R. Co., 144 Pa. St. 34.

Ohio. — Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223.

Wisconsin. — Kenosha, etc., R. Co. *v.* Marsh, 17 Wis. 13.

Subscriptions by Municipal Corporations — United States. — Washburn *v.* Cass County, 3 Dill. (U. S.) 251; Nugent *v.* Putnam County, 19 Wall. (U. S.) 241; East Lincoln *v.* Davenport, 94 U. S. 801; Wilson *v.* Salamanca, 99 U. S. 499; New Buffalo *v.* Cambria Iron Co., 105 U. S. 73; Bates County *v.* Winters, 112 U. S. 325; Livingston County *v.* Portsmouth First Nat. Bank, 128 U. S. 102.

Kansas. — Atchison, etc., R. Co. *v.* Phillips County, 25 Kan. 261; Chicago, etc., R. Co. *v.* Stafford County, 36 Kan. 121.

Texas. — Morrill *v.* Smith County, (Tex. 1896) 36 S. W. Rep. 56.

But where merely the vote authorizing the county court to subscribe to one of the constituent railroad corporations had been taken, but no subscription made, before the consolidation,

stockholder is released from liability.¹

The Constituent Corporations themselves have been permitted to sue for subscriptions to their stock, notwithstanding the consolidation.²

Valid Consolidation.—However, to entitle the consolidated corporation to recover in the absence of estoppel, it must show a valid consolidation; proof merely of its existence as a *de facto* corporation is insufficient.³

Creditors — Acquiescence of Stockholders.—When a subscription to one of the constituent corporations is sought to be enforced by creditors of the consolidated corporation, the stockholders, by acquiescence in the consolidation, may be estopped to deny its validity.⁴

Conditional Subscriptions.—The consolidated corporation may perform the conditions in a conditional subscription to the stock of one of the constituent corporations.⁵

The conditions are, of course, binding upon the consolidated corporation.⁶

Calls for Subscriptions.—And where calls for the payment of stock subscriptions are made by one of the constituent corporations pending consolidation proceedings, such calls continue in force for the benefit of the consolidated corporation, even though the consolidation became completed before they became due.⁷

c. FRANCHISES AND IMMUNITIES — (1) *In General*—**Presumption.**—Where two corporations are authorized to consolidate, the presumption is that the consolidated corporation succeeds to all the franchises and privileges of the constituent corporations.⁸

Where Officers of One of the Corporations Exempt from Jury Duty.—A provision in the charter of one of the constituent corporations exempting its officers from jury

the consolidated corporation is not entitled to receive bonds in payment of the subscription. *Harshman v. Bates County*, 3 Dill. (U. S.) 150.

1. **Unauthorized Consolidation.**—*Charlotte First Nat. Bank v. Charlotte*, 85 N. Car. 433; *New Orleans, etc., R. Co. v. Harris*, 27 Miss. 517; *Shelbyville, etc., Turnpike Co. v. Barnes*, 42 Ind. 498; *McCray v. Junction R. Co.*, 9 Ind. 358; *Booe v. Junction R. Co.*, 10 Ind. 93. See, however, *Hanna v. Cincinnati, etc., R. Co.*, 20 Ind. 30; *Dougan's Case*, 28 L. T. N. S. 60.

Where the act consolidating several mutual fire insurance companies into a new corporation provides that the consolidation shall not affect the legal rights of any person, a dissenting member of one of the constituent corporations is released by the consolidation from liability for subsequent assessments by the consolidated corporation. *Hamilton Mut. Ins. Co. v. Hobart*, 2 Gray (Mass.) 543.

2. **Right of Constituent Corporations to Sue.**—*Hanna v. Cincinnati, etc., R. Co.*, 20 Ind. 30; *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 403. See, however, *Pennsylvania College Cases*, 13 Wall. (U. S.) 190, *per* Clifford, J., wherein it is held that the constituent corporations cannot sue for any cause of action subsequent to the consolidation.

3. **Valid Consolidation Must be Shown.**—Where the consolidation act provides that "upon the election of the first board of directors" of the consolidated corporation, all the rights and franchises of the constituent corporations are to be deemed transferred to, and vested in, the consolidated corporation, it is a condition precedent to the right of the consolidated corporation to enforce stock subscriptions to one

of the constituent corporations that the election of the board of directors should have been had. *Mansfield, etc., R. Co. v. Drinker*, 39 Mich. 124.

Where the consolidation act provides that the consolidated corporation shall succeed to the rights of the constituent corporations upon the filing of the duplicate of the agreement of consolidation in the office of the secretary of state, the filing of such agreement is a condition precedent to the right of the consolidated corporation to enforce subscriptions to one of the constituent corporations. *Peninsular R. Co. v. Tharp*, 28 Mich. 506.

Where the act of consolidation provides that the consolidated corporation succeeds to all the rights and privileges of the constituent corporations upon the election of the first board of directors, the election of such board of directors is essential to the vesting of any of the rights of the constituent corporations in the new corporation. *Mansfield, etc., R. Co. v. Brown*, 26 Ohio St. 223.

Assignee of Consolidated Corporation.—In the absence of evidence showing a valid consolidation of two railroads, an assignee of the alleged consolidated company cannot sue on a contract made with one of the roads out of which the consolidated company was formed. *Brown v. Dibble*, 65 Mich. 520.

4. *Hamilton v. Clarion, etc., R. Co.*, 144 Pa. St. 34.

5. *Mansfield, etc., R. Co. v. Stout*, 26 Ohio St. 241.

6. *Mansfield, etc., R. Co. v. Pettis*, 26 Ohio St. 259.

7. *Mansfield, etc., R. Co. v. Stout*, 26 Ohio St. 241.

8. *Green County v. Conness*, 109 U. S. 104.

duty inures to the benefit of the consolidated corporation, in the absence of any restrictions in the consolidation act.¹

Street Railways — Use of Streets. — The right of one of the constituent street railways to the use of the streets of a city has been held to pass to the new concern.²

Successive Consolidations. — But it has been held that a railroad company authorized to consolidate with "any other railroad company," by consolidating with another company exhausts the power, which does not pass with its other powers and privileges to the consolidated company.³

Subject to Original Conditions. — The consolidated corporation takes the rights thus acquired subject to the original conditions imposed thereon.⁴

(2) **Municipal Aid.** — The consolidated corporation, in the absence of restrictions in the consolidation act or in the general statutes or constitution at the time of the consolidation, succeeds to the right of one of the constituent corporations, to receive aid from municipal corporations.⁵

The consolidated corporation also succeeds to a donation made by a town to one of the constituent corporations.⁶

(3) **Exemptions from Taxation.** — And in the absence of such restrictions, exemptions from taxation contained in the charters of the constituent corporations inure to the benefit of the consolidated corporation.⁷

Extent of Exemption. — But such an exemption in the charter of one of the constituent corporations extends only to the property acquired from such corporation. That portion of the property acquired which was exempt under the charter of the constituent corporations will remain exempt, and that portion which was subject to taxation will remain so subject.⁸

1. *Zimmer v. State*, 30 Ark. 677.

2. *Africa v. Knoxville*, 70 Fed. Rep. 729.

3. *Morrill v. Smith County*, (Tex. 1896) 36 S. W. Rep. 56. Here the court said that authority "to unite with any other railroad company" meant any one company, and did not confer a continuing authority to make successive consolidations. See, however, *Zimmer v. State*, 30 Ark. 677.

4. **Rights Acquired Subject to Original Conditions.** — *Consolidated Traction Co. v. Elizabeth*, 58 N. J. L. 619; *Tomlinson v. Branch*, 15 Wall. (U. S.) 460.

The consolidated corporation acquiring all the "rights, privileges, and franchises" of the constituent corporations takes the rights thus acquired subject to the original conditions, and therefore the right of one of the constituent corporations to use the street rail it deems the most approved does not extend to the line of the other corporations. *Wilbur v. Trenton Pass. R. Co.*, 57 N. J. L. 212.

5. **Municipal Aid.** — *Henry County v. Nicolay*, 95 U. S. 619; *East Lincoln v. Davenport*, 94 U. S. 801; *Scotland County v. Thomas*, 94 U. S. 682; *Livingston County v. Portsmouth First Nat. Bank*, 128 U. S. 102; *Lewis v. Clarendon*, 6 Rep. 609; *Thomas v. Scotland County*, 3 Dill. (U. S.) 7; *Empire Tp. v. Darlington*, 101 U. S. 87; *Baker v. Greene County*, 54 Mo. 540. See generally the title MUNICIPAL AID.

"When the legislature, by the same act which conferred the power on the city to lend its credit to each of these companies, also empowered them to consolidate their roads, it must have been intended that the power of the city might be exercised after such consolidation as effectually as before that event occurred." *Robertson v. Rockford*, 21 Ill. 451.

But where the consolidation was not effected until after the adoption of a constitutional provision prohibiting county subscriptions without a vote of the people, the consolidated corporation did not acquire the right of one of the constituent corporations to receive aid without the sanction of such vote. *Wagner v. Meety*, 69 Mo. 150.

6. *Niantic Sav. Bank v. Douglas*, 5 Ill. App. 579; *Scott v. Hansheer*, 94 Ind. 1.

7. **Exemptions from Taxation.** — *Southwestern R. Co. v. Georgia*, 92 U. S. 676, note; *Central R., etc., Co. v. Georgia*, 92 U. S. 665; *Atlantic, etc., R. Co. v. Allen*, 15 Fla. 637; *State v. Philadelphia, etc., R. Co.*, 45 Md. 361, 24 Am. Rep. 511. See also *Green County v. Conness*, 109 U. S. 104. See generally the title EXEMPTIONS FROM TAXATION.

8. **Extent of Exemption.** — *Central R., etc., Co. v. Georgia*, 92 U. S. 665; *Chesapeake, etc., R. Co. v. Virginia*, 94 U. S. 718; *Tomlinson v. Branch*, 15 Wall. (U. S.) 460; *Charleston v. Branch*, 15 Wall. (U. S.) 470, note; *Delaware Railroad Tax*, 18 Wall. (U. S.) 206; *Philadelphia, etc., R. Co. v. Maryland*, 10 How. (U. S.) 376.

By an act of the legislature of New Jersey the C. Railroad Company and the D. Canal Company were consolidated. By the charter of the former concern it enjoyed an exemption from taxation as to all property "suitable and proper for carrying into execution the powers granted to the corporate body." The title to some of the land occupied and used for the necessary purposes of the railroad was in the canal company, and it was insisted that such lands were not exempt to the consolidated corporation. The consolidating act provided that the consolidation should be subject to all the provisions, reservations, and conditions con-

Constitutional Inhibition Against Exemptions at Time of Consolidation. — Where, however, at the time of the consolidation, the constitution prohibits legislative exemptions from taxation, the consolidated corporation will not acquire an exemption contained in the charter of one of the constituent corporations, granted before the adoption of the constitutional provision, the consolidation being the creation of a new corporation, which would therefore be subject to all constitutional provisions in force at the time.¹

Express Repeal of Exemption. — Of course when the consolidation act expressly provides that the taxation exemptions of the constituent corporations shall not inure to the benefit of the consolidated corporation, the latter does not acquire such exemptions.²

(4) **Eminent Domain.** — The consolidated corporation also succeeds, under a consolidation act conferring on it all the franchises, privileges, etc., of the constituent corporations, to the right to take property under the power of eminent domain granted to one of the constituent corporations.³

In **Interstate Consolidation** the consolidated corporation does not, under the power granted by one state to the constituent corporation of that state to take land under the power of eminent domain, acquire power to take land in the other state.⁴

4. Liabilities of Constituent Corporations — *a.* **IN GENERAL** — **Contractual Liabilities.** — When two or more corporations are consolidated into a new corporation with a new name, and the constituent corporations go out of existence, if no arrangements are made respecting their property and liabilities the consolidated corporation will be answerable for their liabilities,⁵ at least to the

tained in the original charters. And the court held that this carried the exemption to all property owned by the said companies which was necessary for the uses of either, saying: "There is an absolute community of interest between them, and so far as taxation is concerned, it matters not to which company the estate may have been conveyed." *State v. Woodruff*, 36 N. J. L. 94.

Improvements. — Any repairs or improvements made upon the original line or property of the constituent railroad corporations would be subject to the same rules of taxation as the original line of property. *Branch v. Charleston*, 92 U. S. 677.

Conditional Exemptions. — An exemption from taxation, conditional on certain reports being made by the officers of the constituent corporations, and which the new corporation was not compelled or able to notice, does not inure to the benefit of the latter. *Maine Cent. R. Co. v. Maine*, 96 U. S. 499.

1. Constitutional Provision Against Exemptions at Time of Consolidation. — *State v. Keokuk*, etc., R. Co., 99 Mo. 30; *Keokuk*, etc., R. Co. v. Scotland County, 41 Fed. Rep. 305. See also *Atlantic*, etc., R. Co. v. *Georgia*, 98 U. S. 359; *Maine Cent. R. Co. v. Maine*, 96 U. S. 499, *affirming* 66 Me. 488; *St. Louis*, etc., R. Co. v. *Berry*, 113 U. S. 465, *affirming* 41 Ark. 509; *Louisville*, etc., R. Co. v. *Palmer*, 109 U. S. 244; *Arkansas Midland R. Co. v. Berry*, 44 Ark. 17; *Atlanta*, etc., *Air-Line R. Co. v. State*, 63 Ga. 483; *State v. Butler*, 13 Lea (Tenn.) 400.

2. *Petersburg v. Petersburg R. Co.*, 29 Gratt. (Va.) 773.

3. Power of Eminent Domain. — *Boston*, etc., R. Corp. v. *Midland R. Co.*, 1 Gray (Mass.) 340.

Whether the consolidated corporation takes this power as a quasi-successor of the constituent corporation to which it was originally granted, or whether the transfer operates as a new grant of the power in the same terms as the old, *quære*. *Abbott v. New York*, etc., R. Co., 145 Mass. 450.

Inchoate Rights of One of the Constituent Corporations under condemnation proceedings instituted by one of the constituent corporations, an appeal in which was pending at the time of the consolidation, pass to the consolidated corporation. *Day v. New York*, etc., R. Co., 58 N. J. L. 677.

Interstate Consolidation. — A corporation formed by the consolidation of a corporation of Nebraska and corporations of other states is a corporation of the former state so as to entitle it to exercise the power of eminent domain granted to corporations of such state. *Trester v. Missouri Pac. R. Co.*, 33 Neb. 171. See also *Toledo*, etc., R. Co. v. *Dunlap*, 47 Mich. 456.

For a Full Discussion of this subject, see the title EMINENT DOMAIN.

4. *Pittsburg*, etc., R. Co. v. *Reich*, 101 Ill. 157.

5. Contractual Liabilities — *United States*. — *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587; *Wabash*, etc., R. Co. v. *Ham*, 114 U. S. 587.

Illinois. — *Columbus*, etc., R. Co. v. *Skidmore*, 69 Ill. 566; *Chicago*, etc., R. Co. v. *Moffitt*, 75 Ill. 524.

Indiana. — *Indianapolis*, etc., R. Co. v. *Jones*, 29 Ind. 465; *Columbus*, etc., R. Co. v. *Powell*, 40 Ind. 37; *Louisville*, etc., R. Co. v. *Boney*, 117 Ind. 501.

Kansas. — *Berry v. Kansas City*, etc., R. Co., 52 Kan. 774, 39 Am. St. Rep. 381.

extent of the property acquired from the constituent corporation whose liability is sought to be enforced against the consolidated corporation.¹

Torts.— This rule includes a liability for the torts of the constituent corporations.²

Public Duties.— And the consolidated corporation is also required to perform all the public duties which devolved upon the constituent corporations.³

Extent of Liability.— The liability of the consolidated corporation, however, is no greater than that which devolved upon the constituent corporations.⁴

Consolidation by Purchase.— But where the consolidation is effected by the purchase by one corporation of the properties of the other at foreclosure sale, and the merger of the latter in the former, the consolidated corporation is not liable for claims against the latter which did not continue liens upon the property purchased.⁵

Statutory Liability.— The consolidation act generally contains special provisions in regard to the liabilities of the constituent corporations.⁶

Missouri.— *Thompson v. Abbott*, 61 Mo. 176.

Virginia.— *Langhorne v. Richmond R. Co.*, 91 Va. 369.

One corporation, however, is not necessarily merged in another so as to render it liable for the debts of the latter by a purchase by one of the stock of the other. *St. Louis, etc., R. Co. v. Ritz*, 30 Kan. 30.

1. *Barksdale v. Finney*, 14 Gratt. (Va.) 338; *Brum v. Merchants' Mut. Ins. Co.*, 16 Fed. Rep. 140; *Harrison v. Arkansas Valley R. Co.*, 4 McCrary (U. S.) 264.

2. **Personal Injuries**— *United States*.— *Tomlinson v. Branch*, 15 Wall. (U. S.) 460.

Alabama.— *Warren v. Mobile, etc., R. Co.*, 49 Ala. 582.

Arkansas.— *St. Louis, etc., R. Co. v. Marker*, 41 Ark. 542.

Georgia.— *Selma, etc., R. Co. v. Harbin*, 40 Ga. 706; *Montgomery, etc., R. Co. v. Boring*, 51 Ga. 582; *Coggin v. Central R. Co.*, 62 Ga. 685, 35 Am. Rep. 132.

Indiana.— *Indianapolis, etc., R. Co. v. Jones*, 29 Ind. 465; *Paine v. Lake Erie, etc., R. Co.*, 31 Ind. 283; *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 48; *Cleveland, etc., R. Co. v. Prewitt*, 134 Ind. 557.

Kansas.— *Berry v. Kansas City, etc., R. Co.*, 52 Kan. 759, 39 Am. St. Rep. 371.

Maryland.— *State v. Baltimore, etc., R. Co.*, 77 Md. 489.

Virginia.— *Langhorne v. Richmond R. Co.*, 91 Va. 369.

3. **Public Duties.**— *Peoria, etc., R. Co. v. Coal Valley Min. Co.*, 68 Ill. 489.

Taxation.— *Tomlinson v. Branch*, 15 Wall. (U. S.) 460.

4. See *Charity Hospital v. New Orleans Gas Light Co.*, 40 La. Ann. 382.

Contract to Use Certain Kind of Cars.— Where several corporations are merged into one, the consolidated corporation taking the name of one of the constituent corporations, such corporation is still a new and definite corporation, and therefore, though it is liable on all contracts with the constituent corporations, yet its liability on a contract by a constituent corporation, to use certain cars over all lines controlled by it, is only to use such cars on the lines acquired from such constituent corporation. *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587.

Duty to Fence.— A consolidated corporation which succeeded to all the rights, etc., of one of the constituent railroads is only under the same obligation to fence lines acquired from the several railroads as they respectively were. *Daniels v. St. Louis, etc., R. Co.*, 62 Mo. 43. See also *Chicago, etc., R. Co. v. Kansas City, etc., R. Co.*, 38 Fed. Rep. 58.

5. **Consolidation by Purchase.**— *Gray v. National Steamship Co.*, 115 U. S. 116; *Sappington v. Little Rock, etc., R. Co.*, 37 Ark. 23; *Stewart's Appeal*, 72 Pa. St. 291; *Houston, etc., R. Co. v. Shirley*, 54 Tex. 125; *Bruffett v. Great Western R. Co.*, 25 Ill. 353; *Gulf, etc., R. Co. v. Newell*, 73 Tex. 334, 15 Am. St. Rep. 788; *Gilman v. Sheboygan, etc., R. Co.*, 37 Wis. 317.

Railroads—Stopping Trains.— The purchaser of consolidated railroads at a foreclosure sale is not bound by a stipulation in the contract between a county and one of the constituent companies binding it, in consideration of municipal aid, to stop all trains at the depot of the county seat. *People v. Louisville, etc., R. Co.*, 120 Ill. 48.

Banks.— Where a debtor bank, on consolidating with another corporation, caused trustees to be appointed to wind up its affairs, the consolidated corporation was held not liable for the debts of the bank. *Donnelly v. Hearnston*, 41 W. Va. 519.

Estoppel.— The fact that the purchaser claims by its purchase to own the franchise and property of the former owner, and claims the right to operate and control the road, does not estop it to deny its consolidation with such former owner in order to avoid liability on the contract with the plaintiff, where it did nothing to induce the plaintiff to enter into the contract. *Gulf, etc., R. Co. v. Newell*, 73 Tex. 334, 15 Am. St. Rep. 788.

6. **Statutes Defining the Liabilities.**— Under *New York Laws 1869, c. 917, § 5*, providing that all the liabilities of the constituent corporations, except mortgages, shall attach to the consolidated corporation, an action will lie against it on the coupons of one of the constituent corporations, though they are secured by mortgage. *Polhemus v. Fitchburg R. Co.*, 123 N. Y. 502.

Where the transfer to the consolidated corporation is made subject to "all liens, charges, and equities," an obligation on the part of one of the constituent corporations to

Statute Not Retroactive. — An act providing that consolidated corporations shall be liable for all debts of the constituent corporations cannot have a retroactive effect, so as to apply to consolidations already consummated.¹

Bonds Convertible into Stock. — And it has been held that where the consolidated corporation is made liable on all contracts of the constituent corporations, the holder of bonds of one of the constituent corporations which are convertible into stock is entitled to demand stock in the new corporation.²

b. REMEDY — Action at Law — Personal Judgment. — A number of courts have held that this liability of the consolidated corporation may be enforced by an action at law, in which a personal judgment is recoverable against it.³

Reasons for Doctrine. — The privity necessary to sustain an action at law by a creditor of one of the constituent corporations against the consolidated cor-

exchange land is binding on the consolidated corporation. *Union Pac. R. Co. v. McAlpine*, 129 U. S. 305. See also *Mobile, etc., R. Co. v. Gilmer*, 85 Ala. 422.

Under Sp. Laws Minn. 1881, c. 414, which authorized the purchase of the Plainview Railroad Company by the Winona & St. Peter Railroad Company "subject to all * * * claims * * * against said Plainview Company," the Winona & St. Peter Railroad Company succeeded to the liabilities of the latter company. *Plainview v. Winona, etc., R. Co.*, 36 Minn. 505; *Elgin v. Winona, etc., R. Co.*, 36 Minn. 517, note.

Where the consolidation act imposes upon the consolidated corporations the duty to carry out all the unexecuted contracts of either of the constituent corporations, and also renders it liable for the debts of such corporations, it is liable for the contract price for work performed under a contract with one of the constituent corporations, partly before and partly after the consolidation. *Western Union R. Co. v. Smith*, 75 Ill. 497.

1. *Hatcher v. Toledo, etc., R. Co.*, 62 Ill. 477.

2. **Bonds Convertible Into Stock.** — *Day v. Worcester, etc., R. Co.*, 151 Mass. 302. See also *John Hancock Mut. L. Ins. Co. v. Worcester, etc., R. Co.*, 149 Mass. 214.

A holder of bonds of one of the constituent corporations, which authorized their exchange for stock in such corporation, cannot be deprived of such privilege by consolidation unless prior to the consolidation he is given a chance to avail himself of such privilege. *Rosenkrans v. Lafayette, etc., R. Co.*, 18 Fed. Rep. 514.

3. **Action at Law — Personal Judgment — Alabama.** — *Warren v. Mobile, etc., R. Co.*, 49 Ala. 582.

Georgia. — *Montgomery, etc., R. Co. v. Boring*, 51 Ga. 582.

Illinois. — *Columbus, etc., R. Co. v. Skidmore*, 69 Ill. 566; *Arbuckle v. Illinois Midland R. Co.*, 81 Ill. 429.

Indiana. — *Indianapolis, etc., R. Co. v. Jones*, 29 Ind. 465; *Louisville, etc., R. Co. v. Boney*, 117 Ind. 501.

Kansas. — *Berry v. Kansas City, etc., R. Co.*, 52 Kan. 774, 39 Am. St. Rep. 381.

Maryland. — *State v. Baltimore, etc., R. Co.*, 77 Md. 489.

Texas. — *Indianola R. Co. v. Fryer*, 56 Tex. 609; *Missouri Pac. R. Co. v. Owens*, 1 Tex. App. Civ. Cas., § 384; *Houston, etc., R. Co. v. Shirley*, 54 Tex. 125.

Rule Stated. — "There has been some question whether the consolidated company could be sued in an action at law for the liabilities of the companies composing it, or whether the proceeding must be in equity. But the better view seems to be that, when a consolidation has been authorized and made, it confers all the rights, property, and franchises of the old company upon the new or consolidated company, and subjects it to all the liabilities of the old companies; and an action at law may be brought against the new or consolidated company for the debts or torts of the old companies. The question is not whether the consolidation compels a creditor to accept the defendant corporation as a new debtor against his will, or a person who has been injured to resort to a stranger for satisfaction, but whether it empowers the creditor or the person injured to resort, if he desires to do so in the first instance, to the corporation which by the terms of the consolidation is made liable to him." *Langhorne v. Richmond R. Co.*, 91 Va. 369. See also *New Bedford R. Co. v. Old Colony R. Co.*, 120 Mass. 397.

A consolidated corporation, for the purpose of answering for the liabilities of the old corporations, is deemed the same as each of its constituent corporations, and may be sued under its new name for their debts as if no change had been made. *Houston, etc., R. Co. v. Shirley*, 54 Tex. 125.

But see *Shaw v. Norfolk County R. Co.*, 16 Gray (Mass.) 407, wherein it was held, under an act for the consolidation of several railroad corporations, providing that on consolidation the property, franchises, etc., of the constituent corporations should vest in the consolidated corporation and that the constituent corporations should not be relieved from any of their liabilities, that the consolidated corporation did not assume personal liability for the obligations of the constituent corporations. And also *Whipple v. Union Pac. R. Co.*, 28 Kan. 474.

Where the Consolidation Act Requires, as a Condition Precedent to the consolidation, that the consolidated corporation pay all judgments against the constituent corporations without specifying the remedy of a judgment creditor, he may sue the consolidated corporation thereon. *St. Louis, etc., R. Co. v. Miller*, 43 Ill. 199.

For a Full Treatment of this phase of the subject, see the title CORPORATIONS, 5 ENCYC. OF PL. AND PR., p. 52.

poration is by some courts said to be created by the statute authorizing the consolidation and the purchase and conveyance under it. Other authorities place the right to bring such an action on the ground that the effect of the consolidation is, as to the liabilities of the old corporation, not to dissolve the corporation which is the immediate debtor, but to continue its existence in the consolidated corporation.¹

Evidence — Admissions by Constituent Corporation. — Admissions by one of the constituent corporations, before consolidation, are admissible in evidence in an action against the consolidated corporation on a claim against such constituent corporation.²

5. Stockholders of Constituent Corporations. — Where the consolidation is valid its effect upon the stockholders of the constituent corporations is to transmute them into members of the consolidated corporation.³

Compelling Issuance of Stock. — And they may sue the consolidated corporation to compel the issuance of the shares of stock in the consolidated corporation to which they are entitled.⁴

Unpaid Balance on Subscription — Paid-up Certificates. — A stockholder is not entitled to a paid-up certificate of stock in the consolidated corporation, the agreement of consolidation providing for the issuance of two shares of stock in the consolidated corporation for each share of the constituent corporation, unless he tenders the unpaid balance of his subscription to the constituent corporation.⁵

Invalid Consolidation. — And where the consolidation is invalid for want of consent of the stockholders, a dissenting stockholder, besides being entitled to enjoin the consolidation⁶ and being released from his subscription,⁷ can recover from the consolidated corporation the value of his stock in the constituent corporation,⁸ and may also sue to set aside the consolidation.⁹

1. See *Langhorne v. Richmond R. Co.*, 91 Va. 369.

2. *Philadelphia, etc., R. Co. v. Howard*, 13 How. (U. S.) 307.

3. *Ridgway Tp. v. Griswold*, 1 McCrary (U. S.) 151.

4. **Compelling Issuance of Stock in Consolidated Corporation.** — *Anthony v. American Glucose Co.*, (N. Y. 1895) 41 N. E. Rep. 23; *Fee v. New Orleans Gas Light Co.*, 35 La. Ann. 413.

A statute forbidding directors of a corporation to pay to the stockholders any part of the capital stock does not prevent, in the case of the consolidation of two corporations, the division of the stock of the consolidated corporation, after payment of all the debts of the constituent corporations, *pro rata*, among the stockholders of the constituent corporations. *Kohl v. Lilienthal*, 81 Cal. 378.

Duties Owed to All Stockholders. — But a stockholder of the constituent corporations who also becomes a stockholder of the consolidated corporation cannot sue to enforce a stipulation in the agreement of consolidation which imposes a duty upon the consolidated corporation which is owing to all of the stockholders, and not merely to a class, such as the duty to complete the line of one of the constituent corporations. *Port Clinton R. Co. v. Cleveland, etc., R. Co.*, 13 Ohio St. 545.

"If a court of equity were to assume jurisdiction in such a case, could it do so without opening its doors to all parties interested in corporations, or joint companies, or private partnerships, who, although a small minority of the body to which they belong, may wish to interfere with the conduct of the majority? This cannot be done; and the attempt to in-

troduce such a remedy ought to be checked, for the benefit of the community." *Lord v. Copper Miners' Co.*, 1 H. & Tw. 85.

5. *Babcock v. Schuylkill, etc., R. Co.*, 133 N. Y. 420.

6. See *supra*, *Requisites of Consolidation — Assent of Stockholders*.

7. See *supra*, *Requisites of Consolidation — Assent of Stockholders*.

8. **Invalid Consolidation — Recovery of Value of Stock in Constituent Corporation.** — *International, etc., R. Co. v. Bremond*, 53 Tex. 96; *Deposit Bank v. Barrett*, (Ky. 1890) 13 S. W. Rep. 337.

Laches. — A delay of two years on the part of the dissenting stockholder will not preclude him, on the ground of laches, from recovering from the consolidated corporation the value of his equitable interest in the property of one of the constituent corporations. *International, etc., R. Co. v. Bremond*, 53 Tex. 96.

Failure to demand the value of the stock in one of the constituent corporations before the consolidation is consummated, or to make an attempt to agree with the consolidated corporation in regard thereto, does not defeat the right of the stockholders to be paid the value thereof under the statute requiring the consolidation to pay the value of the stock owned by any dissenting stockholders. *Pittsburgh, etc., R. Co. v. Garrett*, 50 Ohio St. 405.

Liability of Directors. — The directors of a corporation are not personally liable to a dissenting stockholder as for a conversion where the consolidation was authorized by a vote of the stockholders. *International, etc., R. Co. v. Bremond*, 53 Tex. 96.

9. *Boardman v. Lake Shore, etc., R. Co.*, 84 N. Y. 157; *Chase v. Vanderbilt*, 62 N. Y. 307.

Preferred Stockholders. — When the consolidated corporation assumes all the obligations of the constituent corporations, preferred stockholders of one of the constituent corporations may recover their guaranteed dividends from the consolidated corporation.¹

6. Creditors of Constituent Corporations. — The creditors of the constituent corporations, of course, are not required to accept the liability of the consolidated corporation, but may enforce their claims against the property of the debtor constituent corporation in the hands of the consolidated corporation, as the property of a corporation cannot be transferred except for value, so as to defeat the claims of its creditors;² or where the constituent corporations are continued in existence they may sue them.³

Liability of Directors. — Directors of an insurance company have been held, under a statute rendering them liable in case of a diversion of the corporate funds, liable in case of an unauthorized consolidation.⁴

Liens. — Of course all liens upon the property of one of the constituent corporations remain unaffected by the consolidation.⁵

Equitable Lien. — An agreement by the consolidated company to "protect" the unsecured bonds of one of the constituent corporations has been held to give the bondholders an equitable lien on the property of the consolidated corporation.⁶

Interstate Consolidation — Jurisdiction. — It has been held that the consolidation of corporations of different states did not give the courts of one state jurisdiction *in rem* over the property of the constituent corporation created by the

1. Preferred Stockholders — Guaranteed Dividends. — *Becker v. Gulf City St. R., etc., Co.*, 80 Tex. 475.

Compare, however, *Prouty v. Lake Shore, etc., R. Co.*, 52 N. Y. 363, wherein it was held that where an action to compel payment of dividends on preferred stock was pending against one of the constituent corporations at the time of the consolidation, in which a report of the referee restrained the payment of dividends on other stock until the dividends on the preferred stock were paid, it was error to substitute the consolidated corporation as defendant.

2. Rights of Creditors of Constituent Corporations. — *Montgomery, etc., R. Co. v. Branch*, 59 Ala. 139; *The Key City*, 14 Wall. (U. S.) 653.

Bona Fide Purchasers. — A creditor of one of the constituent corporations cannot, after consolidation, enforce his claim against property of such constituent corporation which has been transferred by the consolidated corporation to a *bona fide* purchaser. *McMahan v. Morrison*, 16 Ind. 173, 79 Am. Dec. 418.

A transfer by one of the constituent corporations of its property to the consolidated corporation, in consideration of the assumption by the consolidated corporation of the liabilities of such constituent corporation, is not invalid as to creditors of such constituent corporations, at least where their claims accrued subsequent to the transfer. *Bishop v. Brainerd*, 28 Conn. 289.

3. Gale v. Troy, etc., R. Co., 51 Hun (N. Y.) 470. See the title CORPORATIONS, 5 ENCYC. OF PL. AND PR., p. 52.

4. Grayson v. Willoughby, 78 Iowa 83.

5. Liens. — *Blair v. St. Louis, etc., R. Co.*, 24 Fed. Rep. 148; *Racine, etc., R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 331, 95 Am. Dec.

595; *Eaton, etc., R. Co. v. Hunt*, 20 Ind. 457; *Mississippi Valley Co. v. Chicago, etc., R. Co.*, 58 Miss. 846; *Hamlin v. Jerrard*, 72 Me. 62.

Purchase-Money Lien. — The consolidated corporation takes the railroad which was purchased by one of the constituent corporations, partly on credit, subject to a lien for the unpaid purchase price. *Branch v. Atlantic, etc., R. Co.*, 3 Woods (U. S.) 481.

Maritime Lien. — Where the consolidated corporation was required to pay all the debts of one of the constituent corporations from the dividends to be paid upon its stock, payment of a maritime lien upon its property will be compelled. *The Key City*, 14 Wall. (U. S.) 653.

Improvements by the consolidated corporations, on the line of one of the constituent railroad corporations which was subject to a mortgage, are covered by the mortgage. *Williamson v. New Jersey Southern R. Co.*, 25 N. J. Eq. 13.

6. Equitable Lien. — *Tysen v. Wabash R. Co.*, 11 Biss. (U. S.) 510.

A provision in the agreement of consolidation that "all rights of creditors and all liens upon the property of either of said corporations shall be preserved unimpaired," and that the constituent corporations may be deemed to be in existence to preserve the same, does not give creditors of one of the constituent corporations a lien upon its property as against mortgage bondholders of the consolidated corporation. *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587. But see *Compton v. Wabash, etc., R. Co.*, 45 Ohio St. 592, wherein the same bond issue involved in the case of *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, was involved, and the court refused to follow the latter case and held that the bondholders had an equitable lien. See the title EQUITABLE LIENS.

other state, situated in such other state, so as to enable it to foreclose a mortgage on such property.¹

7. Pending Suits — Abatement. — By the weight of authority the consolidation does not abate actions by or against the constituent corporations, pending at the time of the consolidation, but they may be continued in the name of or against the consolidated corporation.²

In Kansas, however, the courts hold the contrary doctrine.³

1. Interstate Consolidation — Jurisdiction. — *Eaton, etc., R. Co. v. Hunt*, 20 Ind. 457. And see *Pittsburgh, etc., R. Co. v. Rothschild*, (Pa. 1886) 4 Cent. Rep. 107.

In *Connecticut*, however, it was held that where corporations of several states have consolidated, either state has jurisdiction to foreclose a mortgage executed by the consolidated corporation, as to the property within both states. *Mead v. New York, etc., R. Co.*, 45 Conn. 199. See also *Central Trust Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 551.

2. Effect of Consolidation Upon Pending Suits — California. — Under Code of Civ. Pro., providing that in case of the death or disability of a party the court may allow the action to proceed by or against his representative or successor in interest, condemnation proceedings may be continued in the name of the consolidated corporation. *California Cent. R. Co. v. Hooper*, 76 Cal. 404.

Illinois. — Under the Act of March 26, 1872, § 7, providing that the consolidation of corporations shall not affect suits pending, nor causes of action, nor the rights of any persons in any particular, a judgment recovered against one of the corporations consolidated, in an action pending at the time of the consolidation, may be enforced against the consolidated corporation. *Chicago, etc., R. Co. v. Ashling*, 160 Ill. 373.

Michigan. — Consolidation pending an action by one of the constituent corporations for an assessment on a subscription is at most merely matter pleadable in abatement. *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389.

Mississippi. — Where an action is pending against one of the constituent corporations at the time of the consolidation, the plaintiff may, for the prosecution of his action, treat such constituent corporation as continuing its separate existence, and upon the recovery of judgment, *scire facias* may be the appropriate remedy to charge the consolidated corporation — analogous to the proceeding at the common law to charge a husband with a judgment recovered against his wife, in an action pending against her at the time of her marriage. *Shackleford v. Mississippi Cent. R. Co.*, 52 Miss. 159.

Missouri. — Where one corporation has consolidated with another pending an action against it for personal injuries, the action does not abate, but may be prosecuted to judgment against such constituent corporation. *Evans v. Interstate Rapid Transit R. Co.*, 106 Mo. 594.

As affects the rights of the creditors of the constituent corporations, the consolidation should be regarded as continuing the old companies under the new name, and therefore the consolidated corporation may be substituted as a party defendant in a suit against

one of the constituent corporations, without the issue of process. *Kinion v. Kansas City, etc., R. Co.*, 39 Mo. App. 382. See also *Evans v. Interstate Rapid Transit R. Co.*, 106 Mo. 594.

New Jersey. — Where the consolidation act transfers to the consolidated company all the rights, privileges, etc., of the constituent corporations, condemnation proceedings by one of the constituent corporations are not abated by the consolidation, but the consolidated corporation may be substituted in place of the constituent corporation. *Day v. New York, etc., R. Co.*, 58 N. J. L. 677.

New York. — Laws 1884, c. 367, p. 448, providing that consolidation shall not abate pending suits, is binding on the federal courts. *Edison Electric Light Co. v. Westinghouse*, 34 Fed. Rep. 232; *Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 52 Fed. Rep. 300.

In *Prouty v. Lake Shore, etc., R. Co.*, 52 N. Y. 363, it was held error to substitute the consolidated corporation as defendant in the place of a constituent corporation, in a suit to compel payment of preferred dividends, and in which the report of the referee had been made at the time of the consolidation.

Pennsylvania. — Where the consolidation act continues the liability of the constituent corporations, consolidation does not abate an action against one of the constituent corporations, as the liability of the consolidated corporation to attend to the action and answer the judgment rendered thereon is one of the liabilities continued against it; and even without such provision the voluntary consolidation will not be considered as equivalent to the death of either of the constituent corporations, so as to abate pending actions. *Baltimore, etc., R. Co. v. Musselman*, 2 Grant's Cas. (Pa.) 348.

Tennessee. — Where the consolidated corporation prosecutes an appeal from a judgment rendered against one of the constituent corporations in an action pending at the time of the consolidation, it will be estopped to assert that the action was abated by the consolidation. *East Tennessee, etc., R. Co. v. Evans*, 6 Heisk. (Tenn.) 607.

3. Kansas Rule. — Since on consolidation a constituent corporation ceases to exist as a corporation, a suit by or against a constituent corporation, commenced before consolidation, cannot afterwards be prosecuted by or against it in its original name. *Council Grove, etc., R. Co. v. Lawrence*, 3 Kan. App. 274. See also *Kansas, etc., R. Co. v. Smith*, 40 Kan. 192; *Cunkle v. Interstate R. Co.*, 54 Kan. 194; *Chicago, etc., R. Co. v. Butts*, 55 Kan. 660.

In *Texas* it has been held that a judgment recovered against a constituent corporation in an action commenced after consolidation is void. *Indianola R. Co. v. Fryer*, 56 Tex. 609.

And in Georgia it has been held that where the liabilities of the constituent corporations are by the act of consolidation continued against the consolidated corporation, and the act also provides that each of the constituent corporations shall continue liable, a judgment cannot be taken against the consolidated corporation without the proper steps to bring it before the court.¹

8. Federal Jurisdiction. — A corporation formed by the consolidation of several corporations of different states, being a corporation of each of the states creating any one of the constituent corporations, cannot, when sued in one of the states, claim the right of removal to the federal courts on the ground that it is a citizen of another state.²

9. Invalid Consolidation — Contracts. — Where the consolidation is invalid the question has arisen as to the effect of contracts, entered into by the consolidated corporation, upon the property of the constituent corporations, and it has been held that where, after the consolidation of two corporations, a consolidation of the consolidated corporation is attempted with another corporation, a subsequent mortgage by the consolidated corporation is not affected, as to the property of the first two corporations, by the invalidity of the consolidation with the third corporation.³ And it has also been held that when the consolidation is effected by the transfer of the property of one corporation to another for stock in the latter corporation, the validity of the stock so issued cannot be questioned by a stockholder of the latter corporation unless the property received by it is returned.⁴

Personal Injuries. — And it has been held, where a consolidation of railroads was invalid, that one of the constituent corporations was liable for injuries to a passenger while on its line caused by the negligence of the consolidated company.⁵

Suit Between Constituent Corporations. — The fact that the consolidation was prohibited by statute does not deprive one of the constituent corporations from suing the other for an accounting by the latter for property received by it through the consolidation.⁶

Judgment Against Consolidated Corporation — Consolidation Dissolved. — And an execution on a judgment recovered against the consolidated corporation was, after the consolidation had been dissolved by judicial decree, allowed against the constituent corporations.⁷

1. *Selma, etc., R. Co. v. Harbin*, 40 Ga. 706.

2. **Removal of Causes — United States.** — *Fitzgerald v. Missouri Pac. R. Co.*, 45 Fed. Rep. 812; *Muller v. Dows*, 94 U. S. 444; *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 136 U. S. 382; *Paul v. Baltimore, etc., R. Co.*, 44 Fed. Rep. 513; *Central Trust Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 551; *Union Trust Co. v. Rochester, etc., R. Co.*, 29 Fed. Rep. 609.

Georgia. — *Angier v. East Tennessee, etc., R. Co.*, 74 Ga. 634.

New Hampshire. — *Horne v. Boston, etc., R. Co.*, 62 N. H. 454.

See also the titles CORPORATIONS; UNITED STATES COURTS. And see the title REMOVAL OF CAUSES, in the ENCYC. OF PL. AND PR.

The fact that two railroad corporations created by different states have been consolidated under the laws of those states and the railroad operated by virtue of that consolidation as one entire line of road will not prevent one of the corporations from bringing suit in the federal courts, as a corporation of the state where it was created, against the corporation with which it was consolidated and which was created by another state. *St. Louis, etc., R. Co. v. Indianapolis, etc., R. Co.*, 9 Biss. (U. S.) 144, 118 U. S. 290.

In *Baltimore, etc., R. Co. v. Harris*, 12 Wall. (U. S.) 82, Swayne, J., said: "The jurisdictional effect of the existence of [a consolidated] corporation, as regards the federal courts, is the same as that of a copartnership of individual citizens residing in different states."

3. *Racine, etc., R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 331, 95 Am. Dec. 595.

However, where two corporations are consolidated without legislative authority, bonds executed by the consolidated corporation are not binding on the constituent corporations, after the consolidation is dissolved, where they are issued for purposes beyond the scope of the constituent corporations. *Pearce v. Madison, etc., R. Co.*, 21 How. (U. S.) 441.

4. *Buford v. Keokuk Northern Line Packet Co.*, 69 Mo. 611, 3 Mo. App. 159.

5. *Latham v. Boston, etc., R. Co.*, 38 Hun (N. Y.) 265.

6. *Manchester, etc., R. Co. v. Concord R. Co.*, 66 N. H. 100.

7. *Ketcham v. Madison, etc., R. Co.*, 20 Ind. 260, wherein Worden, J., said: "The two corporations which constituted the judgment defendant under the name of the Madison, Indianapolis and Peru Railroad Company [the name of the consolidated corporation] are the

Quo Warranto — Relator. — The holders of income bonds of one of the constituent corporations cannot have the use of the writ of quo warranto to test the validity of the consolidation.¹

IV. CONSOLIDATION OF COMPETING CORPORATIONS — 1. In General. — Within the past twenty years a great number of the states have, by either constitutional or statutory provisions, prohibited the consolidation of certain corporations, chiefly railroad, telegraph, and express companies. Such prohibitions generally extend to the consolidation of "parallel and competing" lines, or authorize the consolidation of "connecting" lines only, whereas in other states the "consolidation or combination" of corporations of any kind whatever to prevent competition is prohibited.

A consideration of this subject will naturally raise the questions, (1) as to what are "parallel and competing" lines and also as to what are "connecting" lines;² (2) as to what are "consolidations or combinations," and (3) owing to the fact that such constitutional and statutory provisions have been adopted by the states subsequently to the grant of the charters of most railway corporations, as to the effect of the prohibitions upon such corporations, where their charters authorized them to consolidate with other corporations.

2. What Constitutes Consolidation — Leases. — A constitutional or statutory provision against the "consolidation" of competing railroads includes any agreement whereby the roadbed, rolling stock, and equipments of one competing line are to be operated and controlled by another. The word is used in the sense of "join" or "unite," and has been held to include leases by the one to the other.³

Guaranty of Bonds — Transfer of Stock to Guarantor. — And a contract by which one railroad agrees to guarantee the bonds of a parallel and competing road, in consideration of which half the stock of the latter road is to be transferred to the former road or to a trustee for its use, has also been held to be within a provision that no railroad shall consolidate with or in any way control any parallel or competing line.⁴

real defendants, and still exist, although the association and the assumed name in which judgment was rendered are discontinued."

1. *Terhune v. Potts*, 47 N. J. L. 218.

2. See *supra*, this title, *Requisites of Consolidation — Railroads*.

3. *Leases.* — In *State v. Atchison, etc.*, R. Co., 24 Neb. 164, 8 Am. St. Rep. 164, the court, in regard to article 11, § 3, of the Constitution, which provides that no railroad or express company shall "consolidate," etc., stock, franchises, or earnings in whole or in part with any other company owning a parallel or competing line, said: "This is an absolute prohibition against a railroad corporation consolidating its stock, property, franchises, or earnings, in whole or in part, with any other railroad corporation owning a parallel or competing line. The word 'consolidate' is here used in the sense of join, or unite. The constitutional convention aimed at practical results. The character of the title of the parties operating a railway is of but little moment to the general public, while the requirement that different roads shall continue to be competing lines, as when they were constructed, is of the utmost importance to all. The law cannot be evaded, therefore, by substituting a lease for a deed of conveyance."

And in *Manchester, etc.*, R. Co. v. *Concord R. Co.*, 66 N. H. 100, wherein it was objected that a lease was within a statutory prohibition

against consolidation, the court said: "The purpose of the legislature was to make the act in question an effective instrumentality against the consolidation of competing roads through contracts or arrangements between them by means of which competition is removed." See also *Currier v. Concord R. Corp.*, 48 N. H. 325; *Missouri Pac. R. Co. v. Owens*, 1 Tex. App. Civ. Cas., § 384.

4. *Guaranty of Bonds — Transfer of Stock to Guarantor.* — *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, wherein the court said: "Under the proposed arrangement, however, the Northern Pacific as a company, in return for a guaranty which the individual stockholders could not give, turns over to a trustee for the entire body of stockholders of the Great Northern one-half of its stock, with the almost certainty of the latter securing the complete control, and probably the ultimate amalgamation, of the two companies. If such amalgamation were once effected, it would in all probability be final. We think the proposed arrangement is a plain violation of the acts of the state legislature passed in 1874 and 1881, prohibiting railroad corporations from consolidating with, leasing or purchasing, or in any other way becoming the owner of or controlling any other railroad corporation, or the stock, franchises, or rights of property thereof, having a parallel or competing line." See also *Pennsylvania R. Co. v. Com.*, (Pa.

Purchase of Property of Competing Line. — And the purchase by one railroad company of the property of another parallel and competing line has been held to be within an inhibition against the making of any contracts between corporations tending to defeat or lessen competition in their respective businesses.¹

3. What Are Competing Corporations — Railroads. — As a general rule, to render railroads competing roads, the competition between the two must be of some practical importance, such as is liable to have an appreciable effect on rates.²

Need Not Be Parallel. — However, it is not necessary to competition that the roads be parallel.³

Common Termini. — Two lines having the same termini may also be competing, though at intermediate points upon these lines the roads are very far apart.⁴ And it has been held that lines may be competing though they have only one common terminus, where the one by traffic arrangements with other lines is given access to the other terminus of the other road;⁵ and lines with only

1886) 29 Am. & Eng. R. Cas. 149; Langdon v. Branch, 37 Fed. Rep. 449. But compare Pullman's Palace Car Co. v. Missouri Pac. R. Co., 115 U. S. 587, wherein Waite, C. J., in speaking of the effect of a purchase of the stock of one company by another, said: "Practically it [the purchaser], may control the company, but the company alone controls the road."

1. Hamilton v. Savannah, etc., R. Co., 49 Fed. Rep. 412, *reaffirming* Langdon v. Branch, 37 Fed. Rep. 449.

Combination. — However, in Cameron v. New York, etc., Water Co., 62 Hun (N. Y.) 269, *affirmed* 133 N. Y. 336, it was held that a statute prohibiting corporations from combining did not prohibit a consolidation. Pratt, J., said: "There is a great difference between the consolidation of two corporations into one new corporation and the combination between two existing corporations for the prevention of competition."

2. What Are Competing Roads. — Kimball v. Atchison, etc., R. Co., 46 Fed. Rep. 888, wherein it was held that two railroads which do not touch at any two common points, and between which for a distance of forty miles another road is interposed, and whose traffic, except an unimportant amount, would in no event pass over the other, are not competing lines.

3. Roads Need Not Be Parallel. — East Line, etc., R. Co. v. Rushing, 69 Tex. 306, wherein Willie, C. J., said: "It may be that this court, judicially knowing the geography of the state, might take notice from the general direction of these two roads as fixed by the statutes under consideration, that their lines must necessarily cross each other, and could therefore treat them as connecting lines, and not parallel to each other. But as to whether they were competing lines, we could have no judicial knowledge whatever. Competition between railroads may exist, and yet their lines not run parallel, but cross each other at some point in their route." See also East Line, etc., R. Co. v. State, 75 Tex. 434; Texas, etc., R. Co. v. Southern Pac. R. Co., 41 La. Ann. 970, 17 Am. St. Rep. 445.

4. Common Termini. — Texas, etc., R. Co. v. Southern Pac. R. Co., 41 La. Ann. 970, 17 Am. St. Rep. 445, wherein Poché, J., said: "Now, as at certain points, both in Texas and in Louisiana, it appears that the respective

lines of the plaintiff's and of the defendant's systems of roads are very far apart, there is no pretension that they are parallel roads, but from the record, as shown by the foregoing statement, it appears very clearly that for the traffic between El Paso and New Orleans and between El Paso and Galveston they were unquestionably competing lines." See also Louisville, etc. R. Co. v. Kentucky, 161 U. S. 677.

5. Where There Is Only One Common Terminus. — Pennsylvania R. Co. v. Com., (Pa. 1886) 7 Atl. Rep. 368, wherein Simonton, P. J., in the court below, said: "We have found, as a fact, that the line of the South Pennsylvania Railroad Company connects at Port Perry with the line of the Pittsburgh, McKeesport & Youghiogheny Railroad Company, and that it has a traffic contract with that company giving it access to Pittsburgh. A line running from Harrisburg to Port Perry could hardly be said to be a 'parallel or competing line' to and with the Pennsylvania Railroad, although if extended from Port Perry to Pittsburgh it certainly would be such. But defendants contend that the fact of the traffic contracts ought not to be taken into consideration, and that, as the line of the South Pennsylvania does not itself extend to Pittsburgh, we must conclude that this corporation does not own or control a parallel or competing line. We are unable to adopt this view. The traffic contract gives it the right to use the Youghiogheny road between Port Perry and Pittsburgh. Section 1 of article 17 of the Constitution secures it the right to have its cars received and transferred over all railroads in the state with which it may connect. We cannot doubt that it would in fact compete; and it is competition in fact which the constitution designs to encourage, as it was competition in fact which the defendants were endeavoring in this case to prevent, and which they knew would occur over this line if it were not 'taken out of the railroad situation,' to use Mr. Morgan's expressive phrase." See also East Line, etc., R. Co. v. State, 75 Tex. 434, wherein it is held that a railroad by its relations to other roads may be a competing line with a road with which it is not parallel and does not connect. And see Texas, etc., R. Co. v. Southern Pac. R. Co., 41 La. Ann. 970, 17 Am. St. Rep. 445.

one common terminal point have been held competing lines in the absence of traffic arrangements with other roads.¹

Unconstructed Line. — And the prohibition against acquiring a parallel or competing line includes an unconstructed line.²

Proof of Competition. — The question of competition must be proved, as any other fact; the court cannot take judicial notice of it,³ though it seems that the court may take judicial notice of the fact whether railroads are parallel.⁴

4. Extent of Power to Consolidate. — Authority given a corporation to consolidate does not confer authority upon another road to consolidate with it, but the power is in effect limited to a union with another corporation having a like power.⁵

Interchange of Traffic — Terminal Facilities. — The right to consolidate with another road has been held to include the right to make any fair and lawful agreement with it for the interchange of traffic and use of terminal facilities.⁶

Purchase of Stock — Sale of Road — Lease. — This power also authorizes the purchase of the stock of another corporation with a view to consolidation;⁷ also a sale to the corporation with which it was authorized to consolidate;⁸ but it has been held not to include the power to lease.⁹

Power to "Unite." — Again it has been held that the power to "unite" did not authorize a consolidation.¹⁰

Ratification by the State, of the acquisition by a railroad company of a few short local lines parallel to certain of its branch lines, does not warrant the conclusion that the state intended to approve the consolidation with a parallel and competing line between its two principal termini.¹¹

5. Obligation of Contracts — Vested Rights. — Since corporations have no power to consolidate without legislative authority,¹² a prohibition by a state against the consolidation of competing corporations does not impair any of the contractual or vested rights of corporations which are not given by their charters the power to consolidate, or whose charters are subject to amendment or repeal.¹³

1. *State v. Vanderbilt*, 37 Ohio St. 590, wherein two roads from Cincinnati to Lake Erie, the one terminating at Cleveland and the other at Toledo, were held to be competing roads.

2. **Unconstructed Line.** — *Pennsylvania R. Co. v. Com.*, (Pa. 1886) 7 Atl. Rep. 368, 29 Am. & Eng. R. Cas. 145, wherein Simonton, P. J., in the court below, said: "Manifestly the term line is used to designate the surveyed route. * * * The purpose undoubtedly was to promote competition in railroad traffic. But if a corporation engaged in constructing a competitive road may be controlled by its rival until the road is completed, it would be entirely within the power of the rival to determine whether that event should ever happen; as, of course, it never would, when it was the interest of the rival to prevent it, for no company would complete a road to hand it over to a competitor. For these reasons we think the proper construction of the phrase, a 'parallel or competing line,' is that it includes a projected road, surveyed, laid out, and in process of construction, as we have found to be the fact in this case, if such road, when completed and in operation, would actually compete with the road seeking control. Before completion it is 'parallel'; when completed it becomes 'competing.'"

3. *East Line, etc., R. Co. v. Rushing*, 69 Tex. 306.

4. *East Line, etc., R. Co. v. Rushing*, 69 Tex. 306.

5. See *supra*, this title, *Requisites of Consolidation*.

6. **Interchange of Traffic — Terminal Facilities.** — *Pearsall v. Great Northern R. Co.*, 73 Fed. Rep. 933. See also *Dewey v. Toledo, etc., R. Co.*, 91 Mich. 351.

7. **Purchase of Stock.** — *Pearsall v. Great Northern R. Co.*, 73 Fed. Rep. 933; *Hill v. Nisbet*, 100 Ind. 341.

8. **Sale of Road.** — *Branch v. Jesup*, 106 U. S. 468. See *contra*, *Tippecanoe County v. Lafayette, etc., R. Co.*, 50 Ind. 85; and also *Southern Pac. R. Co. v. Esquibel*, 4 N. Mex. 337, wherein it was held that power given to a company to consolidate did not authorize it to sell where the act provided that on consolidation all the rights of both corporations should vest in the corporation given such power.

9. **Leases.** — *Mills v. Central R. Co.*, 41 N. J. Eq. 5; *Archer v. Terre Haute, etc., R. Co.*, 102 Ill. 493; *Tippecanoe County v. Lafayette, etc., R. Co.*, 50 Ind. 85, cited in *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 312; *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393; *State v. Vanderbilt*, 37 Ohio St. 590.

10. *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677.

11. *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677.

12. See *supra*, this title, *Requisites of Consolidation*.

13. *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396.

Charter Provision Authorizing Consolidation. — It has been broadly stated that the power to consolidate, when granted to a corporation in a charter which is not subject to alteration or repeal, is protected by the constitutional provision that no state shall pass any law impairing the obligation of contracts.¹

Police Power. — But it is entirely competent for the state, in the exercise of its police power, to prohibit the consolidation of a railroad with a parallel or competing road, and the effect of such an enactment would be to render any such consolidation thereafter made unlawful, even in the case of a road having general power under its charter to acquire other roads.²

Vested Rights. — A bare unexecuted power to consolidate is not a "vested right" within the meaning of such words in a charter, which is subject to alteration, saving "vested rights," so as to prevent the state, by virtue of its police power, from prohibiting consolidation with a competing or parallel railroad.³ Unless the power to alter the charters of the corporations is reserved, it is probable that a prohibition against the consolidation of competing corporations will not affect contracts and rights already acquired under a power to consolidate.⁴

1. Violation of Obligation of Contracts. — *Zimmer v. State*, 30 Ark. 677.

But in *Southwark R. Co. v. Philadelphia*, 47 Pa. St. 314, it was held that city authority to build a road so as to connect with the track of a city railway was not an irrevocable grant of a power to connect so as to prevent the city from removing its tracks and thereby preventing a connection. See generally the titles CONSTITUTIONAL LAW; FRANCHISES; IMPAIRMENT OF OBLIGATION OF CONTRACTS.

2. Police Power. — *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, wherein the court said, in regard to a prohibition against the consolidation of competitive railroad companies: "We think, for the reasons stated in the *Pearsall* case, that, under its police power, the people, in their sovereign capacity, or the legislature, as their representatives, may deal with the charter of a railway corporation so far as is necessary for the protection of the lives, health, and safety of its passengers or the public, or for the security of property, or the conservation of the public interests, provided, of course, that no vested rights are thereby impaired. In other words, the legislature may not destroy vested rights, whether they are expressly prohibited from doing so or not, but otherwise may legislate with respect to corporations, whether expressly permitted to do so or not. While the police power has been most frequently exercised with respect to matters which concern the public health, safety, or morals, we have frequently held that corporations engaged in a public service are subject to legislative control, so far as it becomes necessary for the protection of the public interests." See also *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, reversing 73 Fed. Rep. 933.

3. Vested Rights. — *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, reversing 73 Fed. Rep. 933, wherein the court said: "As applied to railroad corporations, it may reasonably be contended that the term [vested rights] extends to all rights of property acquired by executed contracts, as well as to all such rights as are necessary to the full and complete enjoyment of the original grant, or of property legally ac-

quired subsequent to such grant. If, for example, the legislature should authorize the construction of a certain railroad, and by a subsequent act should take away the power to raise funds for the construction of the road in the usual manner, by a mortgage, or the power to purchase rolling stock or equipment, such acts might perhaps be treated as so far destructive of the original grant as to render it valueless, although there might in neither case be an express repeal of any of its provisions. * * * But where the charter authorizes the company, in sweeping terms, to do certain things which are unnecessary to the main object of the grant, and not directly and immediately within the contemplation of the parties thereto, the power so conferred, so long as it is unexecuted, is within the control of the legislature, and may be treated as a license, and may be revoked, if a possible exercise of such power is found to conflict with the interests of the public." Compare *Cameron v. New York, etc., Water Co.*, 133 N. Y. 336, wherein it was held that *New York Laws 1890, c. 563, 567, repealing Laws 1867, c. 960, and Laws 1877, c. 374*, which authorized the consolidation of corporations engaged in a similar business, but providing that the repeal should not affect or impair any act done, or right accruing, accrued, or acquired, did not preclude the completion of the consolidation of two corporations, where prior to the passage of the repealing act the corporations had entered into an agreement for the consolidation through their trustees, and a stockholders' meeting had been called to ratify the agreement.

4. Pearsall v. Great Northern R. Co., 161 U. S. 646.

In *New Hampshire* it has been held that, though such a prohibition will have no *ex post facto* application, yet it will prevent the further operation of a leased road under a lease which was executed prior to the passage of an act prohibiting the leasing of competing lines. *Manchester, etc., R. Co. v. Concord R. Co.*, 66 N. H. 100. See also *Currier v. Railroad Co.*, N. H. (Dec. Law Term 1871, unreported opinion of Bellows, J.), cited and referred to in preceding case.

6. Interstate Commerce.—The assumption by the state of the right to forbid the consolidation of parallel and competing railroads is not an interference with interstate commerce.¹

CONSORTIUM. (See also the titles *CRIMINAL CONVERSATION*; *DIVORCE*; *HUSBAND AND WIFE*.)—"Consortium" is the right to the conjugal fellowship of the wife; to her company, co-operation, and aid in every conjugal relation.²

CONSPICUOUS. See note 3.

1. Interstate Commerce.—*Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, wherein the court said: "If it be assumed that the states have no right to forbid the consolidation of competing lines, because the whole subject is within the control of Congress, it would necessarily follow that Congress would have the power to authorize such consolidation in defiance of state legislation—a proposition which only needs to be stated to demonstrate its unsoundness. As we have already said, the power of one railway corporation to purchase the stock and franchises of another must be conferred by express language to that effect in the charter; and hence, if the charter of the L. & N. Co. had been silent upon that point, it will be conceded that it would have no power to make the proposed purchase in this case. As the power to purchase, then, is derivable from the state, the state may accompany it with such limitations as it may choose to impose. It results, then, from the argument of the appellant, that if there be any interference with interstate commerce, it is in imposing limitations upon the exercise of a right which did not previously exist; and hence, if the state permits such purchase or consolidation, it is bound to extend the authority to every possible case, or expose itself to the charge of interfering with commerce. This proposition is obviously untenable."

In a number of cases the constitutional power of the state in this particular was recognized, though not directly passed upon. See *Baltimore, etc., R. Co. v. Maryland*, 21 Wall. (U.

S.) 470; *Shields v. Ohio*, 95 U. S. 319; *Wallace v. Loomis*, 97 U. S. 154; *New Buffalo v. Cambria Iron Co.*, 105 U. S. 73; *Leavenworth County v. Chicago, etc., R. Co.*, 134 U. S. 699; *Livingston County v. Portsmouth First Nat. Bank*, 128 U. S. 102; *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301; *Ashley v. Ryan*, 153 U. S. 438; *Langdon v. Branch*, 37 Fed. Rep. 449; *Kimball v. Atchison, etc., R. Co.*, 46 Fed. Rep. 888; *Hamilton v. Savannah, etc., R. Co.*, 49 Fed. Rep. 412; *Clarke v. Central R., etc., Co.*, 50 Fed. Rep. 338; *Texas, etc., R. Co. v. Southern Pac. R. Co.*, 41 La. Ann. 970, 17 Am. St. Rep. 445. See also *Harper v. Railroad Co.*, 29 Wkly. L. Bul. (Ohio) 68; *State v. Atchison, etc., R. Co.*, 24 Neb. 143, 8 Am. St. Rep. 164; *Gulf, etc., R. Co. v. State*, 72 Tex. 404, 13 Am. St. Rep. 815; *East Line, etc., R. Co. v. Rushing*, 69 Tex. 306; *Pennsylvania R. Co. v. Com.* (Pa. 1886) 7 Atl. Rep. 368; *Gyger v. Philadelphia, etc., R. Co.*, 136 Pa. St. 96; *Currier v. Concord R. Corp.*, 48 N. H. 325.

2. Jacobsen v. Siddal, 12 Oregon 284.

3. Conspicuous Place. (See *PLACE*; and see the *ENCYC. OF PLEADING AND PRACTICE*, title *SERVICE OF PROCESS*.)—In the absence of an attorney from his office, the service of a notice on him is sufficiently made by depositing a copy thereof through the door of his office into a postal-box which had been placed there for the reception of documents. Such a postal-box is a *conspicuous* place, within the meaning of section 1011 of the California Code of Civil Procedure. *January v. Superior Ct.*, 73 Cal. 537. See also *Elder v. Frevert*, 18 Nev. 278.

CONSPIRACY.

BY ARCHIBALD R. WATSON.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 4, p. 706.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ACCESSORY*, vol. 1, p. 257; *ACCOMPLICES*, vol. 1, p. 389; *AIDER AND ABETTOR*, vol. 2, p. 29; *ATTEMPTS TO COMMIT CRIME*, vol. 3, p. 250; *CONFESSIONS*; *CONTEMPT*; *CRIMINAL LAW*; *ELECTIONS*; *LABOR COMBINATIONS*; *MONOPOLIES*; *PRESUMPTIONS*; *RES GESTÆ*; *SOLICITATION*; *TRADE COMBINATIONS AND CORPORATE TRUSTS*; *STRIKES*; and the various Crimes and Offenses under their appropriate titles.

I. CONSPIRACY AS A CRIMINAL OFFENSE — 1. Definition and General Observations — Uncertain State of the Law. — Not a little difficulty has been experienced by

both judges and text-writers in attempting to frame a definition for conspiracy, considered in its criminal aspect, which possesses the requisite definitive characteristics;¹ a difficulty resulting in a large measure from the fact that the law upon the subject of conspiracy, except where settled by legislative enactment, is, beyond certain limits, in a very uncertain state;² the cases beyond such limits, which have been adjudged to be conspiracies, appearing, it has been said, "to stand apart by themselves" and to be "devoid of that analogy to each other which would render them susceptible of classification."³

Conspiracy, Therefore, Is Rather Described than Defined, and the description which seems to have the widest recognition and approval by the authorities declares a criminal conspiracy to consist of a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object, or an object neither criminal nor unlawful by criminal or unlawful means;⁴ or, as

1. The Difficulty of Defining Conspiracy. —

With reference to the definition and description of the offense of conspiracy, Shaw, C. J., delivering the opinion of the court in *Com. v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346, said: "But the great difficulty is in framing any definition or description to be drawn from the decided cases which shall specifically identify this offense—a description broad enough to include all cases punishable under this description, without including acts which are not punishable."

"To attempt to define the limit or extent of the law of conspiracy, as deducible from the English decisions, would be a difficult if not an impracticable task, and we shall not attempt it at the present time. We may safely assume that it is indictable to conspire to do an unlawful act by any means, and also that it is indictable to conspire to do any act by unlawful means." Caton, C. J., in *Smith v. People*, 25 Ill. 17, 76 Am. Dec. 780. See also opinion of Beasley, C. J., in *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649.

2. Uncertainty at Common Law. — "The offense of conspiracy," said Savage, C. J., in *People v. Fisher*, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501, "seems to have been left in greater uncertainty by the common law than most other offenses." See also opinion of Gibson, C. J., in *Mifflin v. Com.*, 5 W. & S. (Pa.) 461, 40 Am. Dec. 527.

3. See opinion of Beasley, C. J., in *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649.

Gibson, C. J., delivering the opinion of the court in *Mifflin v. Com.*, 5 W. & S. (Pa.) 461, 40 Am. Dec. 527, said: "The law of conspiracy is certainly in a very unsettled state. The decisions have gone on no distinctive principle; nor are they always consistent." The fact of which latter statement would seem to be the logical consequence of the lack of distinct principle.

4. The Offense Described. — 2 Stephen's Hist. Crim. L. of Eng. 227; 2 Bishop's Cr. L. (7th ed.), § 175; 2 Archbold's Crim. Pr. & Pl. 1829; Bouv. Law Dict., Conspiracy; Abbott's Law Dict., Conspiracy.

England. — Reg. v. Vincent, 9 C. & P. 91, 38 E. C. L. 48; Reg. v. Bunn, 12 Cox C. C. 316; Rex v. Robinson, 1 Leach C. C. 37; Rex v. Journeymen Taylors, 8 Mod. 11; Rex v. Edwards, 8 Mod. 320.

Canada. — See Reg. v. Downie, 13 Rev. Lég. 429, (Q. B. 1885); Reg. v. Sternberg, 8 Leg. N. 122, (Q. B. 1885); Horsemann v. Reg., 16 U. C.

Q. B. 543; *Armstrong v. Lewin*, 34 U. C. Q. B. 629.

United States. — *Pettibone v. U. S.*, 148 U. S. 203; *U. S. v. Cassidy*, 67 Fed. Rep. 698; *U. S. v. Whalan*, 7 Int. Rev. Rec. 161; *U. S. v. Babcock*, 3 Dill. (U. S.) 585.

Connecticut. — *State v. Rowley*, 12 Conn. 101.

Illinois. — *Smith v. People*, 25 Ill. 17, 76 Am. Dec. 780; *Heaps v. Dunham*, 95 Ill. 583; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320.

Iowa. — *State v. Potter*, 28 Iowa 556.

Maine. — *State v. Bartlett*, 30 Me. 134; *State v. Hewett*, 31 Me. 398; *State v. Mayberry*, 48 Me. 218.

Maryland. — *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

Massachusetts. — *Parsons, C. J.*, in *Com. v. Judd*, 2 Mass. 329, 3 Am. Dec. 54; *Com. v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287.

Michigan. — *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321.

New Hampshire. — *State v. Burnham*, 15 N. H. 396.

New York. — *Oil Company v. Everest*, 30 Hun (N. Y.) 588.

Ohio. — *State v. Snell*, 2 Ohio N. P. 55.

Pennsylvania. — *Com. v. Ridgway*, 2 Ashm. (Pa.) 247; *Hinchman v. Richie*, Bright. (Pa.) 143; *Com. v. Bliss*, 12 Phila. (Pa.) 580.

South Carolina. — *Moses, C. J.*, in *State v. Jackson*, 7 S. Car. 283.

"By Some Concerted Action." — *Copeland, J.*, in *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321, said: "Notwithstanding, however, the apparent diversity of judicial opinion exhibited in the earlier authorities in respect to this subject, there is a very general concurrence of authority as to the general definition of the offense; that to constitute an indictable conspiracy there must be a combination of two or more persons, by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means." See also, to the same effect, the case of *Com. v. Hunt*, 4 Met. (Mass.) 123, 38 Am. Dec. 346, in which Shaw, C. J., said: "Without attempting to review and reconcile all the cases, we are of opinion that as a general description, though perhaps not a precise and accurate definition, a conspiracy must be a combination of two or more persons, by some

it has been more concisely expressed, "the combination of two or more [persons] to do something unlawful, either as a means or as an ultimate end."¹

Source of Uncertainty. — As it will be hereafter seen, the lack of unanimity in the law of conspiracy results principally from a diversity of construction in determining to what extent the term "unlawful," as applied to the ultimate end or the means to be adopted, exceeds in scope and meaning that class of acts which are offenses against law, and for which, as such, a punishment is prescribed.²

2. Origin and Antiquity of Criminal Conspiracy at Common Law — *a.* IN GENERAL. — Conspiracy was an offense known to the ancient English common law, antedating all legislative enactments.³ It is not true, as has been supposed

concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means." And see the definition contained in the opinion of the court in *Heaps v. Dunham*, 95 Ill. 586, and *Anderson's Law Dict., Conspiracy*.

If this interpolation, "by some concerted action," is intended to mean that the conspirators must agree to act in unison in the accomplishment of the common object, it is in conflict with the weight of authority. It is necessary that they agree, expressly or impliedly, to act towards a common end, but it is frequently arranged that one conspirator shall perform one part of the programme at one place, and another conspirator shall, in furtherance of the same design, do something entirely dissimilar at another time and at another place. See *U. S. v. Cassidy*, 67 Fed. Rep. 698.

Archbold's Enumeration. — "In *Arch. Cr. Pl.* 507," said *Wing, J.*, in *People v. Richards*, 1 Mich. 216, 51 Am. Dec. 75, "the author says a conspiracy is an agreement between two or more persons: 1. Falsely to charge another with a crime punishable by law, either from a malicious or vindictive motive or feeling towards the party, or for the purpose of extorting money from him; 2. Wrongfully to injure or prejudice a third person or any body of men in any other manner; 3. To commit an offense punishable by law; 4. To do an act with an intent to pervert the course of justice, etc."

Another Enumeration. — "A conspiracy," said *Collier, C. J.*, in *State v. Murphy*, 6 Ala. 765, 41 Am. Dec. 79, "is said to be a consultation or agreement between two or more persons, either falsely to accuse another with a crime punishable by law, or wrongfully to injure or prejudice a third person or any body of men in any other manner, or to commit any offense punishable by law, or to do any act with intent to prevent the course of justice, or to effect a legal purpose with a corrupt intent or by improper means."

Deductions from a Long Course of Decisions. — *Buchanan, J.*, in *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, after an exhaustive examination of the common-law authorities upon the subject of what constitutes the indictable offense of conspiracy, deduces from "a course of decisions running through a space of more than four hundred years, from the reign of Edward III. to the 59 of George III., without a single conflicting adjudication," that an indictment will lie at common law: 1. For a conspiracy to do an act not illegal, nor pun-

ishable if done by an individual, but immoral only; 2. For a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to injure the public; 3. For a conspiracy to extort money from another, or to injure his reputation by means not indictable if practiced by an individual; 4. For a conspiracy to cheat or defraud a third person, accomplished by means of an act which would not in law amount to an indictable cheat, if effected by an individual; 5. For a malicious conspiracy to impoverish or ruin a third person in his trade or profession; 6. For a conspiracy to defraud a third person by means of an act not *per se* unlawful, and although no person be thereby injured; 7. For a bare conspiracy to cheat or defraud a third person, though the means of effecting it should not be determined on at the time. And the further principle is deduced from the same source: A conspiracy is a substantive offense, and punishable at common law, though nothing be done in execution of it.

1. *Colt, J.*, in *Com. v. Waterman*, 122 Mass. 57.

2. Construction of the Term "Unlawful." — Although the term "unlawful" in its connection with the law of conspiracy is not restricted in its meaning to that which is criminal, and punishable by law, it cannot be safely said that it "includes every act which violates the legal rights of another, giving that other a right of action for a civil remedy." *Per Caton, C. J.*, in *Smith v. People*, 25 Ill. 17, 76 Am. Dec. 780. "And we are not now prepared to say," continued the court, "where the line can be safely drawn." See also *infra*, this title, *A Criminal or Unlawful Object—Where the Object Is Merely Unlawful*.

3. *Buchanan, J.*, in *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

Primitive Signification of "Conspiracy." — In 2 *Stephen's Hist. Crim. Law of England*, 227, it is stated that "in early times the word had a completely different meaning from that which we attach to it;" a meaning which has been gradually enlarged to the extended signification of "conspiracy" at the present time.

It is doubtful if this statement is altogether accurate. From a review of the cases on the subject of conspiracy made by *Buchanan, J.*, in *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, it would seem that very much the same principles existed in early times as now. There certainly has been no such considerable extension as the authority quoted indicates.

by some, that this offense was created by the statute of 33 Edw. I.,¹ nor can it be correctly stated that this statute either abrogated or restricted the principles applicable to conspiracy as it existed at common law.²

b. PROPER CONSTRUCTION OF THE STATUTE 33 EDW. I. — The fact is, the statute 33 Edw. I. must be considered either as only declaratory of the common law, as far as it goes, operating to remove doubts and difficulties which may have existed with reference to the conspiracies which it enumerates, by giving them a particular and definite description, or as superadding them to other classes of conspiracy already known to the law, leaving the common law unaffected beyond the express provisions of the statute.³

3. The Common Law of Conspiracy as Prevailing in the United States. — Unless abrogated or modified by legislative enactment, the common law of conspiracy exists in the several states of the Union,⁴ being included in the constitutional

1. Statute 33 Edw. I. — *Buchanan, J.*, in *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

2. Johnson, J., delivering the opinion of the court in *State v. DeWitt*, 2 Hill L. (S. Car.) 282, 27 Am. Dec. 371, commenting upon the statute of 33 Edw. I., observes, after stating that it was of force in South Carolina, that such statute "would seem to have been intended to define the offense of conspiracy, and limit it to such as confederated together, falsely and maliciously, to indict or move and maintain pleas against others, or who undertake to hear or maintain quarrels, pleas, or debates, that concern other parties. But the authorities all agree," continues the court, "that this statute is declaratory of the common law, and that other acts, not therein enumerated, constituted conspiracy, and are indictable at the common law."

Taylor, C. J., delivering the opinion of the court in the case of *State v. Younger*, 1 Dev. L. (N. Car.) 357, 17 Am. Dec. 571, states that "conspiracy was anciently confined to imposing, by combination, a false crime upon any person, or conspiring to convict an innocent person by perjury and a perversion of the law." It is certain, however, that this statement is inaccurate. One or more early English statutes contain enumerations of circumstances which should, it was declared, constitute the offense; but these statutes were not restrictive of the common-law principles applicable to conspiracy which existed long anterior to the enactment of any statutes on the subject. The object of these statutes seems to have been in most instances to enumerate circumstances theretofore regarded, perhaps, as doubtful cases of conspiracy, so as to bring the enumerated instances under the operation of such pre-existing principles. For an exhaustive review of the law on this subject see opinion of *Buchanan, J.*, in *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

Not Prohibitory nor Restrictive. — This statute is not prohibitory, nor is the existence of other punishable conspiracies than those which it enumerates at all repugnant to or inconsistent with any of its provisions; and according to any known rule of construction, the common law of conspiracy, such as it was before, may well stand together with the statute, for surely the merely declaring of one act to be an offense, which act, as well as others, was so before in contemplation of the law, cannot

render these others punishable; nor will one act which in law amounts to a particular offense cease to be so because another act is merely declared by statute, without any negative words, to amount to the same offense. *Per Buchanan, J.*, in *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534. And see 2 Coke Inst. 561.

3. Buchanan, J., in *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

4. Common Law of Conspiracy in United States. — Tracing the law of conspiracy from its English common-law origin to the time of its recognition in the judicial tribunals in this country, *Buchanan, J.*, in *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, said, with reference to the migration of the common law of conspiracy to this country, that as the English colonists "brought with them all the rights and privileges of native Englishmen, they consequently brought with them also, as their birthright, all the laws of England which were necessary to the preservation and protection of those rights and privileges. And it would be difficult to show that the law of conspiracy was not, at the time of their emigration, quite as necessary to them here in their new and colonial condition as it was in England, unless it can also be shown that there was less necessity here than there for the preservation of life, liberty, reputation, and property, or protection against falsehood, malice, and fraud. If, then, they did bring with them the common law of conspiracy, which is assumed as undeniable (though it may have existed potentially only), they brought it as it is now settled and known in England; for what it is now it was then, if any reliance can be had on ancient authorities; and it is to judicial decisions that we are to look, not for the common law itself, which is nowhere to be found, but for the evidences of it."

How Far Affected by Local Law. — "The general rule of the common law," said *Shaw, C. J.*, delivering the opinion of the court in *Com. v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346, "is that it is a criminal and indictable offense for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual. This rule of law may be equally in force as a rule of the common law in England and in this commonwealth; and yet it must depend upon

adoption, provision for which is made in the constitutions of all of the states, of such pre-existing laws as are not in conflict with the provisions of the several constitutions.¹ And the common law of conspiracy, as recognized in the jurisprudence of the several states, embraces not only the principles of the ancient common law of England, but also the early English statutes on the subject.²

4. Conspiracy as Affected by State Legislation. — It is doubtless unnecessary to observe that any statement of the doctrines and principles of the law of conspiracy in this or any general discussion of the subject must, in particular states, be considered in connection with, or as modified or abrogated by, specific statutes, where any such legislation exists.

a. INSTANCES OF STATUTORY MODIFICATIONS — Overt Acts. — In several states the common-law principle that no overt act pursuant to the joint design is necessary to constitute the complete offense³ has been changed by statute, making it requisite, in order to convict upon the charge of conspiracy, to prove not only the unlawful combination but also some act done by one or more of the alleged conspirators in furtherance of their plan.⁴

Again, Statutory Superadditions to the Common Law of conspiracy, consisting of enumerated cases regarded as doubtful or uncertain conspiracies at common law, are frequently met with.⁵

the local laws of each country to determine whether the purpose to be accomplished by the combination, or the concerted means of accomplishing it, be unlawful or criminal in the respective countries. All those laws of the parent country, whether rules of the common law or early English statutes, which were made for the purpose of regulating the wages of laborers, the settlement of paupers, and making it penal for any one to use a trade or handicraft to which he had not served a full apprenticeship, not being adapted to the circumstances of our colonial condition were not adopted, used, or approved, and therefore do not come within the description of the laws adopted and confirmed by the provision of the Constitution already cited. This consideration will do something towards reconciling the English and American cases, and may indicate how far the principles of the English cases will apply in this commonwealth, and show why a conviction in England, in many cases, would not be a precedent for a like conviction here."

See also *Com. v. Ward*, 1 Mass. 473; *Com. v. Judd*, 2 Mass. 329, 3 Am. Dec. 54; *Com. v. Tibbetts*, 2 Mass. 536; *Com. v. Warren*, 6 Mass. 74. See the title *COMMON LAW*, *ante*.

1. Constitution of Mississippi. — Section 5 of the schedule to the first Constitution of the state of Mississippi (adopted in 1817) provided that "all laws and parts of laws now in force in the Mississippi territory, and not repugnant to the provisions of this constitution, shall continue and remain in force as the laws of this state, until they expire by their own limitation, or shall be altered or repealed by the legislature thereof." This provision has been retained, substantially, in subsequent constitutions and revisions.

Constitution of Massachusetts. — Referring to a similar provision contained in the Constitution of Massachusetts, Shaw, C. J., delivering the opinion of the court in the case of *Com. v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346, said: "We have no doubt that by the operation of the constitution of this commonwealth

the general rules of the common law, making conspiracy an indictable offense, are in force here, and that this is included in the description of laws which had, before the adoption of the constitution, been used and approved in the province, colony, or state of Massachusetts Bay, and usually practiced in the courts of law. Const. Mass., c. 6, § 6."

2. The Common Law of This Country. — See opinion of Shaw, C. J., in *Com. v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346. And see opinion of Johnson, J., in *State v. DeWitt*, 2 Hill L. (S. Car.) 282, 27 Am. Dec. 371. See also 1 Kent's Com. 473, where it is stated that all English statutes passed before the emigration of our ancestors, applicable to our situation and in amendment of the common law, constitute a part of the common law of this country. See the title *COMMON LAW*, *ante*.

3. See *infra*, this title, *Constituent Elements of the Offense — Acts Done in Execution of the Conspiracy*.

4. Overt Act. — *People v. Daniels*, 105 Cal. 262; *State v. Clary*, 64 Me. 369; *State v. Norton*, 23 N. J. L. 33; *State v. Hickling*, 41 N. J. L. 208, 32 Am. Rep. 198; *Wood v. State*, 47 N. J. L. 180; *People v. Chase*, 16 Barb. (N. Y.) 498; *People v. Olson*, (Buffalo Super. Ct.) 15 N. Y. Supp. 778; *People v. Flack*, 125 N. Y. 324.

Under the Revised Statutes of New York, in all cases of conspiracy except agreements to commit a felony upon the person of another, or to commit arson or burglary, some overt act done pursuant to the conspiracy must be proved. *People v. Chase*, 16 Barb. (N. Y.) 495.

Under the Penal Code of California, § 184, no combination, except to commit a felony, amounts to a conspiracy unless some act, pursuant to the agreement, be done to effect the object of the conspiracy. *People v. Daniels*, 105 Cal. 262.

5. Superadditions to Common Law. — See *State v. Norton*, 23 N. J. L. 33; Rev. Stat. Iowa, § 4087. And see *State v. Stevens*, 30 Iowa 391; *State v. Flynn*, 28 Iowa 267; *State v. Pot-*

Statutory Enumeration Superseding Common Law. — In other states the statutory enumeration is made expressly to supersede the common law as to what shall constitute a conspiracy, by the declaration that only the enumerated cases shall be so regarded.¹

And the Grade of the Offense has, in some instances, been changed from that of a misdemeanor, as it was at common law,² to a felony under statute, by the prescription of terms of imprisonment in the penitentiary for its commission.³

Inherent Nature of Offense Not Affected. — None of these statutes, it may be said, really affect the inherent nature of the offense of conspiracy as it existed at common law. The statutory enumerations which exclude the common law as to what shall constitute a conspiracy leave the common-law principles and doctrines of free and unimpaired application to the cases which are held to constitute the crime; and the requirement that an overt act shall be proved has in strictness, it has been held, reference to the evidence necessary to convict, rather than to the nature of the offense itself.⁴

6. CONSTRUCTION AND INTERPRETATION OF SUCH STATUTES — General Rule Applicable. — Statutes on the subject of conspiracy, passed in aid of or in conflict with the common law, are subject to the same rules of construction as statutes passed with reference to any other common-law subject.

Absence of Negative Terms. — Thus it has been held that a mere statutory enumeration of certain circumstances which should constitute, and be punished as, conspiracies, without words of negation or abrogation, do not affect the common law as already existing.⁵

Proof of Overt Act. — And the legislative enactment requiring proof of an overt act done pursuant to the conspiracy in order to convict does not render it necessary that the object of the conspiracy should have been accomplished.⁶

ter, 28 Iowa 554; *State v. Savoye*, 48 Iowa 562; *State v. Jones*, 13 Iowa 269.

1. In *New York* the law of conspiracy as to what shall constitute the offense is confined within a statutory enumeration, no combinations other than those mentioned being punishable criminally. See *People v. Fisher*, 14 Wend. (N. Y.) 9, 23 Am. Dec. 501. So also in *California*; see *Deering's Penal Code of California*, § 182.

2. **Grade of Offense.** — See *infra*, this title, *Grade of Offense*.

3. The definition or description of the offense is thus left as at common law, the statutory provisions having reference to its prosecution and punishment. See opinion of Shaw, C. J., in *Com. v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346.

In *Indiana* the grade of the offense has been changed by statute to the extent of making a conspiracy to commit a felony itself a felony. See *Landrigham v. State*, 49 Ind. 186; *State v. McKinstry*, 50 Ind. 465.

4. **Inherent Nature of Offense Unaffected.** — Benedict, J., delivering the opinion of the court in *U. S. v. Donau*, 11 Blatchf. (U. S.) 168, which was a trial upon an indictment under § 5440 of the Rev. Stat. of the United States, which requires that an overt act be proved before criminal liability attaches to the parties to an alleged conspiracy, said: "The requirement that some act to effect the object of the conspiracy be done by some one of the conspirators is intended to afford a *locus penitentie*. Until some act be done by some one of the conspirators to effect the object of the unlawful agreement, all parties to the

agreement may withdraw and thus escape the effect of the statute. After such an act all are liable to the penalty. The act to effect the object of the conspiracy which the statute calls for is not designated as an overt act, and was not intended to be made an element proper of the offense. The offense is the conspiracy. Some act by some one of the conspirators is required to show, not the unlawful agreement, but that the unlawful agreement, while subsisting, became operative. The offense of conspiracy is committed when to the intention to conspire is added the actual agreement; and this intent to conspire, coupled with the act of conspiring, completes the offense intended to be created by the statute, notwithstanding the requirement that the prosecution show, by some act of some one of the conspirators, that the agreement went into actual operation."

5. **Principle of Construction of the Statutes.** — In the case of *State v. Norton*, 23 N. J. L. 33, the *New Jersey* statute on the subject of conspiracy was construed by the court. This statute merely enumerated certain offenses declared thereby to constitute conspiracies, with the further provision that some overt act must be done in order to complete the crime, without containing any further abolition of the common-law principles. The effect of this statute was held to be simply to bring within the operation of the pre-existing law the enumerated cases, subject, of course, to the qualification mentioned. See, generally, the title *STATUTES*.

6. *State v. Hickling*, 41 N. J. L. 208, 32 Am. Rep. 198; *People v. Chase*, 16 Barb. (N. Y.) 495; *Adams v. People*, 9 Hun (N. Y.) 89.

Nature of Overt Act. — And it has been further held, with reference to such a statute, that the overt act proved need not even be unlawful, so it be done pursuant to such a combination as would amount to a conspiracy in law.¹

5. Conspiracy as Affected by Federal Legislation — **Common Law of United States.** — As there can be no common-law offenses against the United States,² conspiracy, as such, is not cognizable in the federal courts.³ Under the federal statutes, however, punishment is prescribed for certain enumerated conspiracies.

Enumeration of Offenses. — Thus a combination to deter a party or witness from attending or testifying in a federal court, or to influence a verdict or indictment,⁴ or in any manner to impede the due course of justice,⁵ or to hinder or prevent citizens from voting or qualifying to vote at an election,⁶ or to injure, intimidate, or oppress citizens for having exercised or in the exercise of the rights and privileges secured by the Constitution and laws of the United States,⁷ or to prevent persons from holding office under the United States, or to induce a federal officer to leave the state, or to injure such officer,⁸ or to defraud the United States by false claims,⁹ or by revenue officers to defraud¹⁰ or to commit treason against the United States, to impede the due execution of its laws, or to seize its property,¹¹ or to cast away a vessel with intent to injure underwriters,¹² or, finally, to commit any offense against or to defraud the United States in any manner, where one of the parties to the combination does some act in execution of the design,¹³ are declared to constitute offenses.

1. *Adams v. People*, 9 Hun (N. Y.) 89.

2. *U. S. v. Martin*, 4 Cliff. (U. S.) 156; *U. S. v. Hudson*, 7 Cranch (U. S.) 32; *U. S. v. Coolidge*, 1 Wheat. (U. S.) 415; *U. S. v. Britton*, 108 U. S. 199. See the title COMMON LAW, *ante*.

3. *U. S. v. Martin*, 4 Cliff. (U. S.) 156.

4. **United States Statutes.** — Rev. Stat. U. S., § 5406.

5. Rev. Stat. U. S., § 5407.

6. Rev. Stat. U. S., § 5506.

7. Rev. Stat. U. S., §§ 5508, 5509, 5519, 5520; *U. S. v. Cruikshank*, 92 U. S. 542; *U. S. v. Waddell*, 112 U. S. 76; *U. S. v. Lancaster*, 44 Fed. Rep. 896.

Construction of "Citizen." — In the case of *Baldwin v. Franks*, 120 U. S. 678, it was held that the word "citizen," as used in these statutes, is to be taken in its political sense with the same meaning which it had in the Fourteenth Amendment to the Constitution, and not as being synonymous with "resident," "inhabitant," or "person."

8. Rev. Stat. U. S., § 5518.

9. Rev. Stat. U. S., §§ 1342, 1624, 3490, 5438.

10. Rev. Stat. U. S., § 3169.

11. Rev. Stat. U. S., § 5336.

12. Rev. Stat. U. S., § 5364.

13. Offenses Against United States. — Rev. Stat. U. S., § 5440. *U. S. v. Rindskopf*, 6 Biss. (U. S.) 259; *U. S. v. Ulrici*, 3 Dill. (U. S.) 532; *U. S. v. Walsh*, 5 Dill. (U. S.) 58; *U. S. v. De Grief*, 16 Blatchf. (U. S.) 20; *U. S. v. Miller*, 3 Hughes (U. S.) 553; *U. S. v. Dennee*, 3 Woods (U. S.) 47; *U. S. v. Jennison*, 1 McCrary (U. S.) 226; *U. S. v. Sanche*, 7 Fed. Rep. 715; *U. S. v. Milner*, 36 Fed. Rep. 890; *U. S. v. Reichert*, 32 Fed. Rep. 142; *U. S. v. Wootten*, 29 Fed. Rep. 702.

Necessity for Overt Act — **When Committed Affects All.** — Persons may conspire together to commit an offense against the United States, but if the proceeding stops with an agreement, and no act is done to carry into effect the ob-

ject of the agreement, no criminal offense has been committed. But the moment any act is done to effect the object of a conspiracy, that moment criminal liability is fixed; and this act to effect the object, though it be done by only one of the parties, binds each and all of the parties to the conspiracy and completes the offense as to all, for in that case the act of one becomes the act of all. *U. S. v. Goldberg*, 7 Biss. (U. S.) 175; *U. S. v. Jennison*, 1 McCrary (U. S.) 226; *U. S. v. Wootten*, 29 Fed. Rep. 702; *U. S. v. Reichert*, 32 Fed. Rep. 142; *U. S. v. Rindskopf*, 6 Biss. (U. S.) 259; *U. S. v. Smith*, 2 Bond. (U. S.) 323.

"The statutes of the United States do not undertake to define what a conspiracy is, or to create any new offense. They merely speak of the crime of conspiracy as a crime already recognized by law, and we have got to go to the common law and the decisions of the English and American courts to find out just what a conspiracy is, and what the limitations are. All the provision extra is that in order to complete the offense, so that an indictment will lie, there must be some overt act. The Congress of the United States, as well as the legislatures of most of the states, have modified the common law to that extent — that in order to be indicted and punished for conspiracy, the gist of the offense being an unlawful combination, there must be an overt act." *Bunn, D. J.*, in *U. S. v. McCord*, 72 Fed. Rep. 159. See also *U. S. v. Benson*, 17 C. C. A. 297.

Object Need Not Be Accomplished. — Under section 5440 of the Rev. Stat. of the United States, merely agreeing or combining together will constitute the offense, without any loss to the government whatever, if any of the parties has taken a step towards the execution of the joint design. *U. S. v. Sacia*, 2 Fed. Rep. 754.

Must Be to Effect Object of Conspiracy. — The act pursuant to the conspiracy required by section 5440 of the Rev. Stat. of the United States must be one to effect the object of the

Act Pursuant to the Conspiracy. — To what extent the requirement contained in this last section of the Revised Statutes, that an act shall be done pursuant to the conspiracy, applies to the conspiracies described in the other sections, does not seem to have been determined. It has been held, however, to apply to all conspiracies to defraud the federal government, whether one of the enumerated conspiracies or not, and though the specific statutory description makes, according to its terms, the mere combination a crime, containing no reference to acts done pursuant thereto.¹

The Words "Any Offense Against the United States" have been held to apply only to such offenses as are made criminal by federal statutes;² but in this instance it would seem that the specific conspiracies enumerated elsewhere are not included so as to require the commission of an overt act before one of such offenses can be regarded as complete.³

II. CONSTITUENT ELEMENTS OF THE OFFENSE — 1. In General. — As the definition of conspiracy imports, the essential requisites of the offense are (1) a combination (2) between two or more persons (3) to accomplish an object criminal or unlawful in itself, (4) or to resort to criminal or unlawful means in the accomplishment of an object not unlawful nor criminal.

2. The Combination or Confederacy — *a. IN GENERAL.* — To adopt a phrase frequently met with in the reports and text-books, the combination is the "gist of the offense;"⁴ the object of the conspiracy being only so far material as it

conspiracy. It is not sufficient that it is an act which is part of a conspiracy. It must not be one of a series of acts constituting the agreement or conspiring together, but it must be a subsequent independent act following the completed conspiracy, and done to carry into effect the object of the original combination. *U. S. v. Goldberg*, 7 Biss. (U. S.) 175.

Conspiracy to Violate Census Act. — Persons who conspire to violate section 13 of the Census Act by doing that which is a misdemeanor thereunder, and one of whom actually does some act in execution of the plan, are liable to indictment under this section of the Revised Statutes. *U. S. v. Stevens*, 44 Fed. Rep. 132.

Conspiracy to Commit Perjury. — Two persons may be indicted for a conspiracy to commit an offense against the United States for the commission of which they could not be jointly indicted; as, for example, there might be a conviction of two for a conspiracy to commit perjury, though a perjury committed by two would not be a joint offense. *U. S. v. Martin*, 4 Cliff. (U. S.) 156.

1. *U. S. v. Reichert*, 32 Fed. Rep. 142. And see *U. S. v. Owen*, 32 Fed. Rep. 534.

2. "Any Offense Against the United States" **Construed.** — In the case of *In re Wolf*, 27 Fed. Rep. 606, section 5440 of the Rev. Stat. of the United States is construed, and the definition of the offense of conspiracy under such section is said to be: "An agreement between two or more persons to do some act which, by the laws of the United States, is a crime, and the doing of some act, by one or more of those who had so agreed, in furtherance of or to effect the object of the agreement." See also *U. S. v. Payne*, 22 Fed. Rep. 426. But see *U. S. v. Gordon*, 22 Fed. Rep. 250.

3. **Right to Vote.** — The case of *U. S. v. Mitchell*, 1 Hughes (U. S.) 439, was the trial of an indictment of conspiracy unlawfully to hinder, prevent, and restrain a certain class of

persons therein named from the future exercise of the right to vote at an election on account of their race, color, or previous condition of servitude, and it was also charged that the defendant, with others, did conspire to injure a certain named person because he had previously exercised the right to vote. In this case *Bond, J.*, charged that the thing to be punished was the unlawful conspiracy and not particular cases done in pursuance; that the conspiracy was a crime, even though nothing had been done in execution thereof. See also *U. S. v. Lancaster*, 44 Fed. Rep. 896; *U. S. v. Gardner*, 42 Fed. Rep. 829.

4. **Essential Requisites of Offense — A Combination** — *England.* — *Rex v. Gill*, 2 B. & Ald. 204; *Rex v. Rispal*, 3 Burr. 1320, 1 W. Bl. 368; *Reg. v. Button*, 11 Q. B. 929, 63 E. C. L. 929; *Child v. North*, 1 Keb. 203; *Rex v. Armstrong*, Vent. 304; *Rex v. Skirrett*, 1 Sid. 312; *Reg. v. Mackarty*, 2 Ld. Raym. 1179; *Rex v. Wheatly*, 2 Burr. 1129; *Reg. v. Orbell*, 6 Mod. 42; *Rex v. Edwards*, 8 Mod. 320; *Rex v. Eccles*, 1 Leach C. C. 274; *Rex v. De Berenger*, 3 M. & S. 68; *Poulter's Case*, 9 Coke 55; *Rex v. Kinnersley*, 1 Stra. 193; *Reg. v. Best*, 2 Ld. Raym. 1167, 1 Salk. 174.

United States. — *U. S. v. Miller*, 3 Hughes (U. S.) 553; *U. S. v. Walsh*, 5 Dill. (U. S.) 60; *U. S. v. Martin*, 4 Cliff. (U. S.) 162; *U. S. v. Donau*, 11 Blatchf. (U. S.) 168; *U. S. v. Cole*, 5 McLean (U. S.) 513; *U. S. v. Lancaster*, 44 Fed. Rep. 896; *U. S. v. Cassidy*, 67 Fed. Rep. 698.

Alabama. — *State v. Cawood*, 2 Stew. (Ala.) 360.

Connecticut. — *State v. Rowley*, 12 Conn. 112; *State v. Bradley*, 48 Conn. 549; *State v. Setter*, 57 Conn. 461, 14 Am. St. Rep. 121.

Delaware. — *State v. Adams*, 1 Houst. Cr. Cas. (Del.) 361.

Indiana. — *Landringham v. State*, 49 Ind. 186.

Iowa. — *State v. Sterling*, 34 Iowa 444.

may determine the character of the joint intent and agreement.¹

Lack of Preconcerted Design. — It has been said that the law making conspiracy a crime is designed "as a curb to the immoderate power to do mischief which is gained by a combination of the means;"² however this may be, the confederating together is so necessary, as a constituent element of the crime, that it has been held that several persons may, simultaneously, actually do, without incurring liability to punishment, that which if it were the object of a preconcerted design, though not done or attempted, would render the participants

Maine. — *State v. Ripley*, 31 Me. 386.

Maryland. — *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

Massachusetts. — *Com. v. Judd*, 2 Mass. 337, 3 Am. Dec. 54; *Com. v. Tibbetts*, 2 Mass. 536; *Com. v. Warren*, 6 Mass. 74; *Com. v. Davis*, 9 Mass. 415; *Com. v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346; *Com. v. Shedd*, 7 Cush. (Mass.) 514; *Com. v. O'Brien*, 12 Cush. (Mass.) 89; *Com. v. Wallace*, 16 Gray (Mass.) 222.

Michigan. — *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321; *People v. Saunders*, 25 Mich. 119.

Minnesota. — *State v. Pulle*, 12 Minn. 164.

Mississippi. — *Isaacs v. State*, 48 Miss. 234.

New Hampshire. — *State v. Burnham*, 15 N. H. 396; *State v. Straw*, 42 N. H. 393.

New Jersey. — *State v. Rickey*, 9 N. J. L. 203.

New York. — *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; *People v. Brickner* (Monroe Oyer & T. Ct.) 8 N. Y. Crim. Rep. 217.

North Carolina. — *State v. Christianbury*, Busb. L. (N. Car.) 48; *State v. Younger*, 1 Dev. L. (N. Car.) 357, 17 Am. Dec. 571; *State v. Trice*, 88 N. Car. 627; *State v. Brady*, 107 N. Car. 822.

Pennsylvania. — *Com. v. Ridgway*, 2 Ashm. (Pa.) 247; *Hinchman v. Richie*, Bright (Pa.) 143; *Republica v. Ross*, 2 Yeates (Pa.) 1; *Twitchell v. Com.*, 9 Pa. St. 211; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Com. v. Corlies*, 8 Phila. (Pa.) 450; *Com. v. Bliss*, 12 Phila. (Pa.) 580; *Com. v. Goldsmith*, 12 Phila. (Pa.) 632; *Collins v. Com.*, 3 S. & R. (Pa.) 220; *Duncan, J.*, in *Com. v. Gillespie*, 7 S. & R. (Pa.) 469, 10 Am. Dec. 475; *Com. v. McKisson*, 8 S. & R. (Pa.) 420, 11 Am. Dec. 630; *Heine v. Com.*, 91 Pa. St. 145.

Texas. — *Johnson v. State*, 3 Tex. App. 590.

Vermont. — *State v. Noyes*, 25 Vt. 415.

Wisconsin. — *State v. Crowley*, 41 Wis. 271.

See also *Morgan v. Bliss*, 2 Mass. 112; *Com. v. Hunt, Thach. Cr. Cas.* (Mass.) 609; *People v. Richards*, 1 Mich. 216, 51 Am. Dec. 75.

Single Offense, though Several Distinct Felonies in View. — Though a conspiracy should, in the consummation of its object, require the commission of several distinct felonies, the conspiracy would be one offense, not two offenses, as it consists in the mere act of conspiring. *State v. Sterling*, 34 Iowa 443; *People v. Everest*, 51 Hun (N. Y.) 19. And see *State v. Kennedy*, 63 Iowa 197.

Under United States Statutes. — In the case of *Pettibone v. U. S.*, 148 U. S. 197, which was a prosecution for a conspiracy formed for the purpose of obstructing the administration of justice, in a Circuit Court of the United States, under section 5399 of the Revised Statutes, and under section 5440, which provides that "if two or more persons conspire either to commit

any offense against the United States or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable," etc., it was held that although to complete the crime of conspiracy some act to effect its object is necessary, yet the confederacy to commit the crime is still the gist of its criminality. See also opinion of Benedict, J., in *U. S. v. Donau*, 11 Blatchf. (U. S.) 168.

1. See *infra*, this section, *A Criminal or Unlawful Object*.

2. See opinion of Gibson, C. J., in *Miffin v. Com.*, 5 W. & S. (Pa.) 461, 40 Am. Dec. 527.

"**Conspiracies Are Odious in Law**," said *Buchanan, J.*, in the case of *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, "and are always taken *mala parte*, and properly."

The Danger of Combinations. — *Parsons, C. J.*, delivering the opinion of the court in the case of *Com. v. Judd*, 2 Mass. 329, 3 Am. Dec. 54, said that "the gist of a conspiracy is the unlawful confederacy to do an unlawful act, or even a lawful act for unlawful purposes; that the offense is complete when the confederacy is made, and any act done in pursuance of it is no constituent part of the offense, but merely an aggravation of it. This rule of the common law," continued the learned judge, "is to prevent unlawful combinations. A solitary offender may be easily detected and punished; but combinations against law are always dangerous to the public peace and to private security. To guard against the union of numbers to effect an unlawful design is not easy, and to detect and punish them is often difficult. The unlawful confederacy is therefore punished to prevent the doing of any act in execution of it."

The act of unlawful combination is more dangerous and disturbing to the peace of society than would be the crime which is the object of the combination, when accomplished by a single individual. It has been declared that the confederacy of several persons to effect any injurious object creates such a new and additional power to cause injury as to require special criminal restraints. This is readily understandable. A conspiracy will become powerful and effective in the accomplishment of its illegal purpose in proportion to the numbers, power, and strength of the combination to effect it. It is also true that, as it involves a number in a lawless enterprise, it is proportionately demoralizing to the well being and law-abiding characters of the men engaged, and, as a consequence, to the community to which they belong. Such is the general idea of a conspiracy. *Per Speer, J.*, in *U. S. v. Lancaster*, 44 Fed. Rep. 899.

liable to indictment for conspiracy;¹ nor will evidence that each of several defendants acted illegally or maliciously with the same end in view support a charge of conspiracy, unless it appears that such acts were done pursuant to a mutual agreement.²

Knowledge of Illegal Object. — But although the combination or confederacy may be properly said to be the gist of the offense, the crime of conspiracy does not consist in the mere combination; to this must be added the illegal object as a means or an ultimate end.³

Acts Innocently Done. — In accord with this principle it has been held that acts done innocently, though tending to further the object of a conspiracy, will not render their author a co-conspirator.⁴ And where an association, innocent in its inception, is formed, and the powers of such association are subsequently perverted to purposes of oppression and injustice by those who have the control and management of it, only those will be liable who have participated in the perversion, or have assented thereto.⁵

b. AGREEMENT BETWEEN CONSPIRATORS MAY BE IMPLIED OR EXPRESS. — It is not necessary to constitute the offense that the alleged conspirators should have come together and agreed in express terms to unite for a common object.⁶ A mutual implied understanding is sufficient, so far as the combina-

1. Lack of Mutual Agreement. — In the case of *Clifford v. Brandon*, 2 Campb. 358, it was said by Sir James Mansfield that though the audience had a right to express by applause or hisses their sensations of the moment, yet if a body of men were to go to a theatre with a settled intention of hissing an actor, or even damning a piece, there could be no doubt that such a deliberate, preconcerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment.

2. In *Newall v. Jenkins*, 26 Pa. St. 159, it was held that in an action against a prosecutor, a magistrate, and a constable, for conspiring together to arrest and imprison a person without probable cause, evidence that each one acted illegally or maliciously would not support the action without proof that the defendants combined together to do such acts. See also authorities cited in note 4, p. 838.

And though it be proven that several individuals falsely induced the owner of a horse to believe that it was unsound, there can be no conviction of conspiracy unless a combination between the parties for the purpose of effecting a fraud is proved. *Rex v. Pywell*, 1 Stark. 402, 2 E. C. L. 156.

3. See *infra*, this section, *A Criminal or Unlawful Object*.

In *Clemmitt v. Watson*, 14 Ind. App. 38, it was held that one person is not liable as a conspirator with another where the latter does an act without the former's knowledge or consent, merely because he thinks the other person wishes it done.

4. Must Be Knowledge and Unlawful Intent. — There must be knowledge of the designs of the conspirators, and an intentional participation in their scheme. *Marcy, J.*, in *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; *Reg. v. Absolon*, 1 F. & F. 498.

There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose. *Dyer, J.* in *U. S. v. Goldberg*, 7 Biss. (U. S.) 175.

It must be shown by the evidence that the

defendants knowingly and designedly assented to and united in the unlawful combination charged, if any such existed, in order to make them parties thereto. *U. S. v. Goldberg*, 7 Biss. (U. S.) 175.

5. *Com. v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346. See also *People v. Collins*, 64 Cal. 293; *Bowen v. Matheson*, 14 Allen (Mass.) 503; *Carew v. Rutherford*, 106 Mass. 10, 8 Am. Rep. 287; *Snow v. Wheeler*, 113 Mass. 186.

6. Express Agreement between Conspirators Unnecessary. — *U. S. v. Sacia*, 2 Fed. Rep. 754; *U. S. v. Cassidy*, 67 Fed. Rep. 698; *U. S. v. Lancaster*, 44 Fed. Rep. 896; *U. S. v. Rindskopf*, 6 Biss. (U. S.) 259; *U. S. v. Babcock*, 3 Cent. L. J. 144; *U. S. v. Nunnemacher*, 7 Biss. (U. S.) 123; *U. S. v. Goldberg*, 7 Biss. (U. S.) 180; *U. S. v. Allen*, 7 Int. Rev. Rec. 163; *Gibson v. State*, 89 Ala. 121, 18 Am. St. Rep. 96; *Spies v. People*, 122 Ill. 170, 3 Am. St. Rep. 320; *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

It is not necessary to prove that all the defendants, or any two of them, actually came together and concerted the proceeding carried out; it will suffice if the jury are satisfied from their conduct and from all the circumstances that they were acting in concert. *Reg. v. Fellows*, 19 U. C. Q. B. 48.

In the case of *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122, it was held that the conspirators need not even be acquainted with each other. See also *U. S. v. Lancaster*, 44 Fed. Rep. 896; *U. S. v. Rindskopf*, 6 Biss. (U. S.) 259.

In the case of *U. S. v. Babcock*, 3 Dill. (U. S.) 585, it was said to be unnecessary in order to constitute the crime of conspiracy that there should have been an actual meeting of the alleged confederates, or that there should have been a formal agreement to accomplish the unlawful purpose, or that the object should have been stated in words or writing, or the details by which it was to be carried out agreed upon. It is sufficient that the parties come to a tacit understanding to accomplish the unlawful design.

tion or confederacy is concerned, to constitute the offense.¹

c. MATERIALITY OF THE MEANS TO BE EMPLOYED. — When the fact of a confederacy with an illegal object in view has been established, the means by which it was to be accomplished become a wholly immaterial consideration.²

It is not necessary to constitute a conspiracy that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly by words or in writing state what the unlawful scheme is to be and the details of the plan or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons in any manner or through any contrivance positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. Dyer, J., in *U. S. v. Goldberg*, 7 Biss. (U. S.) 175.

1. *Gibson v. State*, 89 Ala. 121, 18 Am. St. Rep. 96; *Spies v. People*, 122 Ill. 170, 3 Am. St. Rep. 320; *U. S. v. Cassidy*, 67 Fed. Rep. 698; *U. S. v. Lancaster*, 44 Fed. Rep. 896; *U. S. v. Rindskopf*, 6 Biss. (U. S.) 259.

Necessity for Concurrence. — A mere discussion between parties about entering into a conspiracy, or as to the means to be adopted for the performance of an unlawful act, does not constitute a conspiracy unless the scheme or some proposed scheme is in fact entered into and concurred in by the parties in some manner, so that their minds meet for the accomplishment of the proposed unlawful act. *U. S. v. Goldberg*, 7 Biss. (U. S.) 175.

Mere Intention. — The mere intention to form a conspiracy, or a mere solicitation to others to unite in a projected conspiracy, when as yet no combination has been effected, does not amount to a conspiracy in law. Dyer, J., in *U. S. v. Goldberg*, 7 Biss. (U. S.) 175.

2. **Means to be Employed — Where Object Illegal** — *England.* — *Rex v. Gill*, 2 B. & Ald. 204; *Rex v. Spragg*, 2 Burr. 993; *Rex v. Eccles*, 3 Doug. 337, 26 E. C. L. 131; *Rex v. Eccles*, 1 Leach C. C. 274; *Rex v. Robinson*, 1 Leach C. C. 37; *Reg. v. King*, 7 Q. B. 782, 53 E. C. L. 782; *Sydserrf v. Reg.*, 11 Q. B. 245, 63 E. C. L. 245.

Illinois. — *Per Caton, C. J.*, in *Smith v. People*, 25 Ill. 17, 76 Am. Dec. 780; *Ochs v. People*, 25 Ill. App. 379; *Thomas v. People*, 113 Ill. 531.

Iowa. — *State v. Jones*, 13 Iowa 269; *State v. Savoye*, 48 Iowa 562; *State v. Ormiston*, 66 Iowa 143; *State v. Grant*, 86 Iowa 216, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 624-626.

Maine. — *State v. Bartlett*, 30 Me. 132.

Maryland. — *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

Massachusetts. — *Com. v. Ward*, 1 Mass. 473; *Com. v. Warren*, 6 Mass. 72; *Shaw, C. J.*, in *Com. v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346.

Michigan. — *People v. Richards*, 1 Mich. 216, 51 Am. Dec. 75; *People v. Clark*, 10 Mich. 310; *People v. Arnold*, 46 Mich. 268.

New Hampshire. — *State v. Parker*, 43 N. H. 83.

North Carolina. — *State v. Brady*, 107 N. Car. 822.

Pennsylvania. — *Com. v. McKisson*, 8 S. &

R. (Pa.) 420, 11 Am. Dec. 630; *Twitchell v. Com.*, 9 Pa. St. 211; *Hazen v. Com.*, 23 Pa. St. 355; *Com. v. Hadley*, 13 Pa. Co. Ct. Rep. 188.

South Carolina. — *State v. DeWitt*, 2 Hill L. (S. Car.) 282, 27 Am. Dec. 371.

Wisconsin. — *State v. Crowley*, 41 Wis. 271.

Buchanan, J., delivering the opinion of the court in the case of *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, said: "Every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious, or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, is at common law an indictable offense, though nothing be done in execution of it, and no matter by what means the conspiracy was intended to be effected; which may be perfectly indifferent and makes no ingredient of the crime."

In the case of *Rex v. Eccles*, 1 Leach C. C. 274, several persons were indicted for conspiring to impoverish a tailor, and to prevent him, by indirect means, from carrying on his trade. They were convicted, and upon a motion in arrest of judgment it was objected that the indictment ought to have stated the acts that were committed to impoverish the tailor and prevent him from carrying on his trade, in order that the defendants might thereby have had notice of the particular charges they were called upon to answer. In this case Lord Mansfield said: "The conspiracy and the object of it are both stated in the indictment, but it is contended that the means by which the intended mischief was effected ought also to have been particularly set forth, as in the case of *Rex v. Sterling* and others; but this is certainly not necessary, for the offense does not consist in doing the acts by which the mischief is effected, for they may be perfectly indifferent, but in conspiring with a view to effect the intended mischief by any means. The illegal combination is the gist of the offense."

Under the Colorado Statute a conspiracy is punishable only where the purpose to be accomplished is in itself unlawful; therefore it is error to define the offense as "an unlawful combination or agreement between two or more persons to do an act unlawful in itself by any means whatever, or to do a lawful act by unlawful means." *Miller v. People*, (Colo. 1896) 45 Pac. Rep. 408. See also *Connor v. People*, 18 Colo. 373.

Conspiracies to Cheat and Defraud — Materiality of Means to be Employed — Doctrine in Some of the United States. — In some of the United States the doctrine seems to have been established that the means whereby a conspiracy to cheat and defraud is to be accomplished are material as an element of the offense, upon the theory that at common law to cheat and defraud a person of his property was not indictable. In *Massachusetts*, *Maine*, *Michigan*, and *New Hampshire*, for example, the doctrine of the "materiality of the means," where the charge is conspiracy to cheat and defraud,

though the contrary is the case when the object of the combination is not unlawful.¹ In the first instance it is a matter of indifference whether the means, or any means, have been agreed upon or not,² nor need any time have been set for the accomplishment of the design.³

is maintained in the following cases: *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; *Com. v. Shedd*, 7 Cush. (Mass.) 514; *Com. v. Wallace*, 16 Gray (Mass.) 223; *Com. v. Prius*, 9 Gray (Mass.) 127; *State v. Ripley*, 31 Me. 386; *State v. Hewett*, 31 Me. 396; *State v. Roberts*, 34 Me. 320; *State v. Mayberry*, 48 Me. 218; *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321; *State v. Parker*, 43 N. H. 88.

But in *People v. Arnold*, 46 Mich. 268, it is held that an information for conspiracy need not allege the means to be employed unless they constitute the only element of criminality; that an information for cheating and defrauding by false pretenses must specify the pretenses used; but an information for conspiracy thereto need not allege the means, and the offense may be complete even though the pretenses or the victims are not agreed upon.

1. Means Employed—Where Object of Conspiracy Unlawful—*England*.—*Rex v. Tanner*, 1 Esp. N. P. 304; *Rex v. Edwards*, 8 Mod. 320; *Rex v. Tarrant*, 4 Burr. 2106; *Rex v. Seward*, 1 Ad. & El. 706, 28 E. C. L. 185.

Illinois.—*Per Caton*, C. J., in *Smith v. People*, 25 Ill. 17, 76 Am. Dec. 780.

Iowa.—*State v. Potter*, 28 Iowa 554.

Maine.—*State v. Hewett*, 31 Me. 396; *State v. Roberts*, 34 Me. 320; *State v. Mayberry*, 48 Me. 218.

Massachusetts.—*Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

Michigan.—*People v. Richards*, 1 Mich. 216, 51 Am. Dec. 75; *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321; *People v. Clark*, 10 Mich. 310; *People v. Arnold*, 46 Mich. 268.

New Hampshire.—*State v. Parker*, 43 N. H. 83. And see *State v. Burnham*, 15 N. H. 396.

Vermont.—*State v. Noyes*, 25 Vt. 415.

When the Means Are Material.—Not a little confusion has resulted, in cases of indictments for conspiracy, with reference to the necessity for setting forth the means by which the criminal or unlawful purpose was designed to be accomplished, considered in connection with the requirement that the nature and character of an offense must be clearly charged in order that a defendant may know with certainty for what he is to be tried, to the end that he may intelligently prepare and concert his defense. A clear and exact apprehension of the true nature of the offense will avoid all doubt and uncertainty in this respect. It need only be borne in mind that a conspiracy is simply an agreement to commit an act criminal or unlawful. When the object of the combination is itself unlawful it is sufficient that this alone should be stated to constitute a complete offense. See opinion of Lyon, J., in *State v. Crowley*, 41 Wis. 271. When the means by which an object not unlawful is to be accomplished are unlawful, then the crime consists only in the agreement to adopt such unlawful means, in which event, from a criminal point of view, the agreement to resort to the unlaw-

ful means may be regarded as the object of the conspiracy, and constitutes the crime. See opinion of Tenney, J., in *State v. Ripley*, 31 Me. 386.

2. England.—*Rex v. Gill*, 2 B. & Ald. 204; *Reg. v. Banks*, 12 Cox C. C. 393.

Maine.—*State v. Ripley*, 31 Me. 386.

Maryland.—*Buchanan*, J., in *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

Michigan.—*People v. Clark*, 10 Mich. 310; *People v. Arnold*, 46 Mich. 268.

Pennsylvania.—*Com. v. McKisson*, 8 S. & R. (Pa.) 420, 11 Am. Dec. 630.

Wisconsin.—*State v. Crowley*, 41 Wis. 271.

See opinion of Stebbins, Sen., in *Lambert v. People*, 9 Cow. (N. Y.) 578.

The Reason of the Rule that the means to be adopted by conspirators need not have been agreed upon in order that a complete offense may be constituted is thus explained and illustrated by Tenney, J., in *State v. Ripley*, 31 Me. 386: "Suppose A and B are overheard in conversation, and it is agreed between them, in the manner alleged in the indictment, that they will inflict an injury upon the person of C, and when one is inquired of by the other what means shall be used to carry out the object, it is answered that it will be better to suspend that, to be determined at a future time, or to be according to the circumstances which may occur when they design to meet the party to be injured, and such is the agreement between them, and they separate. Immediately the case is laid before the grand jury. Could it be said with any propriety that the case upon these facts was not one which meets the statute definition of a conspiracy? The facts supposed show that the number of persons necessary to form a conspiracy had conspired, confederated, and agreed together, with the malicious intent wrongfully and wickedly to injure the person of C."

Conspiracy to Be Executed as May Be Subsequently Determined.—Thus where individuals conspire for the purpose of obtaining money by means of false pretenses and devices, leaving it to one of their number to execute the conspiracy by employing such pretenses, tokens, or devices as he may choose, the crime of conspiracy is complete and an indictment will lie against the confederates. *State v. Crowley*, 41 Wis. 271.

Different Individual Methods.—The means being immaterial it necessarily follows that the different parties to a conspiracy may decide upon, as between themselves, different individual methods for the accomplishment of the joint object, as where several combined together for the purpose of murdering a designated person, each one selecting a different mode of individual attack. See *Reg. v. Banks*, 12 Cox C. C. 393.

3. Time for Accomplishment of Object.—*Buchanan*, J., in *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

d. ACTS DONE IN EXECUTION OF THE CONSPIRACY. — At common law, whether the conspiracy be to effect a purpose in itself criminal or unlawful, or a design not unlawful, by criminal or unlawful means, nothing need have been done in execution thereof; ¹ the only significance of acts done in furtherance

1. Acts in Furtherance of Conspiracy — *England.* — *Rex v. Kinnorsley*, 1 Stra. 193; *Poulter's Case*, 9 Coke 55; *Reg. v. Best*, 2 Ld. Raym. 1167, 1 Salk. 174; *Rex v. Edwards*, 8 Mod. 320.

United States. — *U. S. v. Gardner*, 42 Fed. Rep. 829; *U. S. v. Donau*, 11 Blatchf. (U. S.) 168.

Alabama. — *State v. Cawood*, 2 Stew. (Ala.) 360.

Indiana. — *Landringham v. State*, 49 Ind. 186.

Maine. — *State v. Ripley*, 31 Me. 386.

Maryland. — *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

Massachusetts. — *Morgan v. Bliss*, 2 Mass. 112; *Com. v. Judd*, 2 Mass. 337, 3 Am. Dec. 54; *Com. v. Warren*, 6 Mass. 74; *Com. v. Hunt, Thach*, Cr. Cas. (Mass.) 609.

Michigan. — *People v. Richards*, 1 Mich. 216, 51 Am. Dec. 75; *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321; *People v. Saunders*, 25 Mich. 119.

Minnesota. — *State v. Pulle*, 12 Minn. 164.

Mississippi. — *Isaacs v. State*, 48 Miss. 234.

New Hampshire. — *State v. Straw*, 42 N. H. 393.

New Jersey. — *State v. Rickey*, 9 N. J. L. 293.

New York. — *People v. Mather*, 4 Wend. (N. Y.) 259, 21 Am. Dec. 122.

North Carolina. — *State v. Younger*, 1 Dev. L. (N. Car.) 357, 17 Am. Dec. 571; *State v. Christianbury*, Busb. L. (N. Car.) 48.

Pennsylvania. — *Hinchman v. Richie*, Bright (Pa.) 143; *Respublica v. Ross*, 2 Yeates (Pa.) 1; *Com. v. Corlies*, 8 Phila. (Pa.) 450; *Com. v. Bliss*, 12 Phila. (Pa.) 580; *Com. v. Goldsmith*, 12 Phila. (Pa.) 632; *Collins v. Com.*, 3 S. & R. (Pa.) 220; *Com. v. McKisson*, 8 S. & R. (Pa.) 420, 11 Am. Dec. 630; *Heine v. Com.*, 91 Pa. St. 145.

Texas. — *Johnson v. State*, 3 Tex. App. 590.

Vermont. — *State v. Noyes*, 25 Vt. 415.

Compare, supra, this title, *Conspiracy as Affected by State Legislation; Conspiracy as Affected by Federal Legislation.*

The Crime Complete though Nothing Done in Pursuance of the Conspiracy. — "The offense of conspiracy," said Lyon, J., in *State v. Crowley*, 41 Wis. 271, *quoting* Dewey, J., in *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596, "in one respect is doubtless peculiar. It may, unlike most offenses, be committed without any overt act. A criminal purpose to do an unlawful act, or to do a lawful act by criminal means, mutually assented to or agreed upon by two or more persons, may, by such assent and agreement, ripen into crime, although no act be done in pursuance of it."

The Antiquity of This Principle. — "It appears," said Buchanan, J., in *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, "as has been seen by a note of a case in the Book of Assizes, 27 Edw. 3, that an indictment was sustained at common law for a conspiracy, though nothing was done in exe-

cution of it. The same principle is recognized and adopted in the *Poulter's Case*, 9 Coke 56, in its fullest extent, and that is the great principle running through the cases so much objected to in argument, that conspiracies are substantive, punishable offenses, though they be not executed."

Unnecessary to Charge Execution. — From this principle it follows that it is unnecessary to charge execution of the conspiracy or performance of the plan agreed upon. *Com. v. Judd*, 2 Mass. 337, 3 Am. Dec. 54; *Com. v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346.

Withdrawal from the Conspiracy. — In *Texas* it has been held that the circumstance of the withdrawal of a party from the conspiracy after having entered into a positive agreement to commit a crime — in this case burglary — constitutes no bar to his conviction. *Dill v. State*, (Tex. Crim. App. 1895) 33 S. W. Rep. 126.

Verdict of Guilty — Execution Negatived. — In the case of *Com. v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346, it was held that a jury might properly find a verdict of guilty of conspiracy, though they expressly negatived the execution.

No Distinction Where Conspiracy is to Defraud an Indefinite Number Not Described. — In the case of *Com. v. Judd*, 2 Mass. 329, 3 Am. Dec. 54, it was contended that although a conspiracy to do a lawful act with the unlawful intent of injuring an individual was an indictable offense, though no act be done in pursuance of it, the law was different when the intent was to injure a number of people not described, in which latter instance it was insisted that some act done in pursuance of the conspiracy must be alleged and found as a necessary means to designate the persons intended to be injured. Parsons, C. J., however, delivering the opinion of the court, declined to approve the distinction. "We are not satisfied that the law makes this distinction," observed he; "it certainly does not in the cases of knowingly having in possession forged bank notes or counterfeit current coin, with the intent to pass them as genuine; for it is not necessary to allege, in these cases, an act done in pursuance of the intent. The intent is to cheat whoever can be cheated. In the case at bar there was the same general intent, to defraud all who could be defrauded. We therefore think the offense to be greatly aggravated by the undistinguishing mischief that was designed."

Same Principle Differently Expressed — "No Overt Act Necessary." — The principle stated in the text that nothing need have been done in execution of the conspiracy is frequently expressed by the authorities in the words, "No overt act is necessary to constitute the offense." See *State v. Setter*, 57 Conn. 461, 14 Am. St. Rep. 121, and cases cited *supra* in this note. See also *U. S. v. Walsh*, 5 Dill. (U. S.) 60; *U. S. v. Martin*, 4 Cliff. (U. S.) 162; *State v. Ripley*, 31 Me. 386; *Collins v. Com.*, 3 S. & R. (Pa.) 220; *Com. v. McKisson*, 8 S. & R. (Pa.) 420, 11 Am. Dec. 630.

of the object of a conspiracy being as evidence of the alleged combination, which alone constitutes the offense.¹

c. VENUE OF THE OFFENSE CONSIDERED WITH REFERENCE TO ACTS DONE PURSUANT TO THE CONSPIRACY. — This doctrine of the law of conspiracy, that nothing need be done toward the accomplishment of the object to constitute the complete offense, is exemplified in adjudications on the subject of the jurisdiction of the courts with reference to the venue of the alleged conspiracy.

Conspiracy to Forge Titles to Lands. — Thus where a conspiracy to forge titles to land lying in one state was entered into in such state, but the actual forgery was committed in another state, it was held that the courts of the first state had, nevertheless, jurisdiction of the offense.²

But a Court Having Criminal Jurisdiction of the Place where any overt act is committed would also have jurisdiction of the conspiracy itself, the overt act in such case being, in legal contemplation, a continuance or renewal of the illegal agreement.³

And It Is Continued and Renewed as to All, whenever and wherever any member of the conspiracy acts in furtherance of the common design.⁴

f. ACCOMPLISHMENT OF UNLAWFUL PURPOSE — **Success of Enterprise Not Necessary.** — It having been established that nothing need be done in execution of a conspiracy to render the crime complete, with stronger reason can it be

“No overt act,” said Tenney, J., in *State v. Ripley*, 31 Me. 386, “in carrying out the designs of those who have conspired, confederated, and agreed together for such object is necessary to make up the crime; it may be fully complete without it.”

“Overt Acts” as Aggravation of Criminal Conspiracy. — In some cases it is said that overt acts may be proved in aggravation of the offense of criminal conspiracy. See *State v. Mayberry*, 48 Me. 218; *Collins v. Com.*, 3 S. & R. (Pa.) 220; *State v. Noyes*, 25 Vt. 415; *People v. Arnold*, 46 Mich. 268. But see *infra*, this title, *Grade of Offense*.

1. Overt Acts as Evidence of Conspiracy. — See *infra*, this title, *How a Conspiracy May Be Proved* — *Overt Acts as Evidence*. See also *State v. Ripley*, 31 Me. 386; *People v. Arnold*, 46 Mich. 268.

2. Venue of Offense. — *Ex p. Rogers*, 10 Tex. App. 655, 38 Am. Rep. 654. And see, to the same effect, namely, that the courts having jurisdiction of the place where the conspiracy is actually formed, irrespective of unlawful acts done pursuant thereto, may properly take cognizance of the offense, *Thompson v. State*, 106 Ala. 67; *Bloomer v. State*, 48 Md. 521; *In re Wolf*, 27 Fed. Rep. 606.

3. Bloomer v. State, 48 Md. 521; *American Fire Ins. Co. v. State*, (Miss. 1897) 22 So. Rep. 103, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 625; *Noyes v. State*, 41 N. J. L. 418; *People v. Mather*, 4 Wend. (N. Y.) 259, 21 Am. Dec. 122; *Com. v. Corlies*, 3 Brews. (Pa.) 575; *Com. v. Gillespie*, 7 S. & R. (Pa.) 478, 10 Am. Dec. 475; *Com. v. Westervelt*, 11 Phila. (Pa.) 461. And see *Com. v. Bartilson*, 85 Pa. St. 482.

Jurisdiction — Venue — Overt Acts. — The true nature of the crime of conspiracy is well illustrated by a consideration of the rule of pleading which requires the venue in a criminal case to be laid in the county where the offense was committed in connection with what is generally regarded as an exception to this rule,

namely, that in indictments for conspiracy — an offense constituted by the mere agreement, wholly independent of overt acts done pursuant thereto — the venue may be laid in any county in which it can be proved that an overt act was done by any of the conspirators in furtherance of their common design; as, where a conspiracy was formed at sea, and an overt act done in the county of Middlesex, it was held that the venue was properly laid in that county. *Rex v. Brisac*, 4 East 164. This is, in strictness, because the law regards the agreement, not the mere act of agreeing, but the agreement itself, existing and influential, as the crime; and if the conspirators, or any of them, go into another county and there commit an overt act, such act is regarded as a renewal or continuance of the illegal combination, and proof of its existence where the overt act is committed. See opinion of Marcy, J., in *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122. And see *People v. Rathbun*, 21 Wend. (N. Y.) 538.

Jurisdiction of the Subject-matter. — In the case of *Child v. North*, 1 Keb. 203, the defendants were charged with a conspiracy to deprive the prosecutor of his fame and to extort money from him, by falsely charging him to be the father of a bastard child. A motion was made to quash the indictment on the ground that the conspiracy as laid was to charge the prosecutor with matter of which the court had no cognizance. The motion was overruled, however, the court declaring that a loss might have resulted to the prosecutor, and that it was immaterial to the question of the right of the court to punish the conspiracy, whether the court had jurisdiction of the matter of the conspiracy or not.

4. People v. Mather, 4 Wend. (N. Y.) 259, 21 Am. Dec. 122; *Com. v. Corlies*, 3 Brews. (Pa.) 575; *McKee v. State*, 111 Ind. 378. See also *infra*, this title, subdivision *Responsibility of Conspirator for Acts of Co-Conspirator*.

said to be wholly unnecessary that the object of the conspiracy should have been actually accomplished, or that the conspirators should have succeeded in their design.¹

Illustration. — Thus it has been held that a combination among several defendants to manufacture base and spurious indigo, with a fraudulent intent to sell the manufactured article as good and genuine indigo, constitutes a conspiracy for which an indictment will lie, though no sale be made in pursuance of such agreement.²

g. SUBSEQUENT PARTIES TO A PRE-FORMED CONSPIRACY. — One accused of conspiracy need not, however, be an original contriver of the mischief. There is no difference in law between those who primarily form the design and those who subsequently enter into it with a knowledge of its character.³

1. Enterprise Need Not Be Successful. — 3 Chit. Cr. Law 1141.

England. — *Rex v. Kinnorsley*, 1 Stra. 193; Reg. v. Best, 2 Ld. Raym. 1167, 1 Salk. 174; *Rex v. De Berenger*, 3 M. & S. 63; *Poulter's Case*, 9 Coke 55; *Rex v. Armstrong*, 1 Vent. 304.

United States. — *U. S. v. Donau*, 11 Blatchf. (U. S.) 168; *U. S. v. Newton*, 52 Fed. Rep. 275. *Alabama.* — *State v. Cawood*, 2 Stew. (Ala.) 360.

Illinois. — *Ochs v. People*, 25 Ill. App. 379. *Indiana.* — *Landringham v. State*, 49 Ind. 186; *Miller v. State*, 79 Ind. 198.

Kentucky. — *Com. v. Bryant*, (Ky. 1889) 12 S. W. Rep. 276.

Maryland. — *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

Michigan. — *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321.

Minnesota. — *State v. Pulle*, 12 Minn. 164. *Mississippi.* — *Isaacs v. State*, 48 Miss. 234.

New Hampshire. — *State v. Straw*, 42 N. H. 393.

New Jersey. — *State v. Norton*, 23 N. J. L. 33; *State v. Rickey*, 9 N. J. L. 293.

New York. — *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

North Carolina. — *State v. Younger*, 1 Dev. L. (N. Car.) 357, 17 Am. Dec. 571; *State v. Christianbury*, Busb. L. (N. Car.) 48; *State v. Brady*, 107 N. Car. 822.

Pennsylvania. — *Hinchman v. Richie*, Bright (Pa.) 143; *Respublica v. Ross*, 2 Yeates (Pa.) 1; *Com. v. Corlies*, 8 Phila. (Pa.) 450; *Com. v. Bliss*, 12 Phila. (Pa.) 580; *Collins v. Com.*, 3 S. & R. (Pa.) 220; *Com. v. McKisson*, 8 S. & R. (Pa.) 420, 11 Am. Dec. 630; *Heine v. Com.*, 91 Pa. St. 145.

Texas. — *Johnson v. State*, 3 Tex. App. 590. *Vermont.* — *State v. Noyes*, 25 Vt. 415.

Wisconsin. — *State v. Crowley*, 41 Wis. 271.

"There is nothing," says *Buchanan, J.*, in *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, "in the objection that to punish a conspiracy where the end is not accomplished, would be to punish a mere unexecuted intention. It is not the bare intention that the law punishes, but the act of conspiring, which is made a substantive offense."

In 3 Chit. Cr. L. 1141, it is said of the crime of conspiracy that to render the offense complete there is no occasion that any act should be done in pursuance of the unlawful agreement entered into between the parties; still less can it be necessary to show that any party was actually defrauded; for the conspiracy is the

essence of the charge, and if that be proved the defendant will be convicted.

Unsuccessful Attempt at Blackmail. — In the case of *Rex v. Armstrong*, 1 Vent. 304, the defendants were indicted for conspiring to burden an individual with the keeping of a bastard child, and thereby to bring him to disgrace. After verdict there was a motion in arrest of judgment upon the ground that it did not appear that the party was actually burdened with the keeping of the child, the only step which the defendants had taken in pursuance of their conspiracy having been an affirmation of the charge of paternity to the person conspired against, hoping to obtain money from such person if they would agree to make no further charges. The objection was overruled, however, and the defendants were punished.

2. *Com. v. Judd*, 2 Mass. 329, 3 Am. Dec. 54.

3. New Parties to Conspiracy Already Formed — *United States.* — *U. S. v. Johnson*, 26 Fed. Rep. 682; *U. S. v. Babcock*, 3 Dill. (U. S.) 581; *U. S. v. Cassidy*, 67 Fed. Rep. 698.

Delaware. — *State v. Clark*, (Del. 1891) 33 Atl. Rep. 310.

Illinois. — *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320.

Mississippi. — *Stovall v. Farmers', etc., Bank*, 8 Smed. & M. (Miss.) 305, 47 Am. Dec. 85.

New York. — *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

Oklahoma. — *Johnston Fife Hat Co. v. National Bank*, (Okla. 1896) 44 Pac. Rep. 194, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 622.

Co-Conspirators May Be Added to a Conspiracy Already Complete by joining in the common intent and agreeing to further the design already agreed upon. "If a series of acts are to be performed," said *Marcy, J.*, in *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122, "with a view to produce a particular result, he who aids in the performance of any one of these acts in order to bring about the result must have the intention to effectuate the end proposed; and if he operates with others, knowing them to have the same design, there is in fact an agreement between him and them; his criminal intent is not to be distinguished from the intent of those who first formed the plans of the conspiracy."

Concurrence in Original Design. — "Whenever a new party concurs in the plans originally formed, and comes in to aid the execution of them, he is from that moment a fellow conspirator. He commits the offense whenever

3. The Requisite Number of Persons — *a*. IN GENERAL. — The term "conspiracy," and likewise the terms "combination" and "confederacy," imply the necessity for at least as many as two persons to constitute the offense. This implication is in no sense misleading, as the authorities concur that conspiracy is a joint offense and cannot be committed by one alone.¹

***b*. ACQUITTAL OF ONE WHERE TWO ARE INDICTED AND TRIED.** — As conspiracy, therefore, is a joint offense, if two are indicted and tried both must be convicted, an acquittal of one operating as an acquittal of the other.²

***c*. NOLLE PROSEQUI AS TO ONE WHERE TWO ARE INDICTED AND TRIED.** — Where two defendants are charged with conspiracy, and both are present in court, and a plea has been filed by each, a *nolle prosequi* as to one before verdict rendered will operate to discharge the other.³

***d*. SEVERAL DEFENDANTS — ACQUITTAL OF ALL BUT ONE.** — Similarly it has been held that if all the defendants but one, charged in an indictment for conspiracy, should be acquitted, a verdict against the single defendant could not be permitted to stand, unless, indeed, the offense were alleged to have been committed "with others unknown."⁴

he agrees to become a party to the transaction, or does any act in furtherance of the original design." Marcy, J., in *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

It is not necessary that the conspiracy should originate with the persons charged; any one coming into a conspiracy at any stage of the proceedings, with knowledge of its existence, is regarded in law as a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design. Nixon, J., in *U. S. v. Sacia*, 2 Fed. Rep. 754, citing 3 Greenl. on Evidence, § 93.

Several persons, it was held in *Ochs v. People*, 25 Ill. App. 379, may be convicted of the same conspiracy, although it does not appear that all were members of the conspiracy at the same point of time.

Participation in the Execution. — One accused of a conspiracy need not be an original contriver of the mischief. It is sufficient if there be a participation in the execution of the plot. *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320. And see *Lincoln v. Clafin*, 7 Wall. (U. S.) 132.

Proof of Agreement to Concur. — As an illustration of the principle that one may be a conspirator by joining in the combination subsequently to the original conception of its design, Marcy, J., delivering the opinion of the court in *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122, inquires: "If two-thirds of the journeymen of any particular mechanic art in a city should agree to turn out for higher wages, and after the agreement was formed the other third should join them, would those who last acceded to the design be less exposed to the penalties of the law than those who originated it? Would not their concurrence, without any particular proof of an agreement to concur, be conclusive against them?"

1. Number of Persons Necessary in Law — *England*. — *Mulcahy v. Reg.*, L. R. 3 H. L. 306; *Pollard v. Evans*, 2 Show. 50; *Rex v. Hilbers*, 2 Chit. Rep. 163, 18 E. C. L. 285.

***United States*.** — *U. S. v. Miller*, 3 Hughes (U. S.) 553; *U. S. v. Doyle*, 6 Sawy. (U. S.) 612; *U. S. v. Cole*, 5 McLean (U. S.) 513; *U. S. v. Johnson*, 26 Fed. Rep. 682.

***Connecticut*.** — *State v. Glidden*, 55 Conn. 46,

3 Am. St. Rep. 23; *State v. Setter*, 57 Conn. 461, 14 Am. St. Rep. 121.

***Illinois*.** — *Evans v. People*, 90 Ill. 384.

***Michigan*.** — *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321; *People v. Petheram*, 64 Mich. 252.

***North Carolina*.** — *State v. Tom*, 2 Dev. L. (N. Car.) 569; *State v. Christianbury*, Busb. L. (N. Car.) 48.

***Pennsylvania*.** — *Com. v. Manson*, 2 Ashm. (Pa.) 31; *Com. v. Irwin*, 8 Phila. (Pa.) 380.

***South Carolina*.** — *Moses, C. J.*, in *State v. Jackson*, 7 S. Car. 283.

To justify a conviction on a count charging a conspiracy the jury must be satisfied that there was an unlawful combination between the prisoner and at least one other person. *Com. v. Irwin*, 8 Phila. (Pa.) 380.

The Individuals Composing a Corporation, Its Officers, and Agents, so far as concerns their criminal liability, are not a single person in respect of corporate acts, and may be liable for conspiracy. *People v. Duke*, 19 Misc. Rep. (N. Y. Gen. Sess.) 292.

Riotous Conspiracy — Statutory. — Section 2065 of the Rev. Stat. of *Indiana* creates and provides punishment for what is described as a "riotous conspiracy," requiring the concurrence of three or more persons, as did the common-law offense of riot. The offense of riotous conspiracy is declared to be a felony.

2. Effect of Acquittal of One of the Defendants. — *State v. Tom*, 2 Dev. L. (N. Car.) 569; *Jones v. Baker*, 7 Cow. (N. Y.) 445.

New Trial — *Canada*. — Where several defendants have been convicted a new trial, if granted, must be to all. *Reg. v. Fellowes*, 19 U. C. Q. B. 48.

3. *State v. Jackson*, 7 S. Car. 283.

4. *Com. v. Edwards*, 135 Pa. St. 474; *State v. Johnson*, 7 S. Car. 283.

Conspiracies Between a Named Person and Persons Unknown. — Upon an indictment alleging that two persons named in it conspired with each other and with divers others whose names were unknown, one of the defendants may be convicted and the other acquitted, if it appears to the satisfaction of the jury that other persons conspired with the defendant

c. TWO CONSPIRATORS — DEATH OF ONE, CONVICTION OF SURVIVOR. — Where one of two conspirators dies before conviction, the surviving conspirator may nevertheless be found guilty of conspiracy.¹

f. THREE CONSPIRATORS — DEATH OF ONE, ACQUITTAL OF ANOTHER, CONVICTION OF THE THIRD. — If three persons are engaged in a conspiracy, and one of them dies before trial, and another is acquitted, the third may be tried and found guilty.²

g. SEVERAL DEFENDANTS — SEPARATE TRIALS, CONVICTION OF ONE BEFORE TRIAL OF OTHERS. — If several defendants charged with conspiracy are tried separately, a judgment may be pronounced against one before a conviction of the others.³

h. CONSPIRACIES BETWEEN HUSBAND AND WIFE — (1) *Post-nuptial Conspiracies*. — It has been held, upon the theory of the legal unity of husband and wife, that an action will not lie against them for a post-nuptial conspiracy.⁴

(2) *Ante-nuptial Conspiracies*. — A husband and wife may, however, be indicted for an ante-nuptial conspiracy, the offense having become complete

against whom the verdict of guilty was rendered. *State v. Adams*, 1 Houst. Cr. Cas. (Del.) 361.

1. *Death of One Conspirator — Conviction of Survivor*. — *Rex v. Nicolls*, 2 Stra. 1227; *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168.

The death before conviction of one of two conspirators will not prevent the conviction of the survivor. In the case of *Rex v. Scott*, 3 Burr. 1262, the defendants were tried for committing a riot, an offense in which the concurrence of at least three individuals is necessary. Six persons had been originally indicted; two were acquitted, two died before trial, and the remaining two were found guilty — a verdict which Lord Mansfield allowed to stand upon the theory that those who had been convicted had been guilty together with one or both of the persons who had died before trial.

2. *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168.

3. *Rex v. Kinnersley*, 1 Stra. 193.

Separate Trials may be had upon an indictment or information for conspiracy. *People v. Richards*, 67 Cal. 412, 56 Am. Rep. 716; *Casper v. State*, 47 Wis. 535; *Heine v. Com.*, 91 Pa. St. 145.

Separate Trials — Admissibility in Evidence of Record of Acquittal of One Conspirator in Favor of Alleged Co-Conspirator. — In the case of *Paul v. State*, 12 Tex. App. 346, it was held that when one of several defendants is acquitted the record of his acquittal is admissible in favor of an alleged associate subsequently tried.

Conviction of One of Three Conspirators before Trial of Other Two. — Where three persons are tried separately, under an indictment charging them with conspiracy, and one is found guilty before the trial of the other two, the possibility that the others may be acquitted is not a sufficient reason for holding the judgment of conviction of the one irregular. *Reg. v. Ahearne*, 7 D. & R. 6.

Distinction Where All Have Appeared and Plead. — Commenting upon the case of *Rex v. Kinnersley*, 1 Stra. 193, in which it was held that one might be convicted of conspiracy before the trial of the other, Moses, C. J., in *State v. Jackson*, 7 S. Car. 283, said: "Here, however, it must be borne in mind that the

other had not appeared and plead. The reason given, too, in support of the judgment by Eyre, C. J., would imply that the indictment alleged the conspiracy against the two named defendants *cum multis aliis*, for he referred in support of his view to *Rex v. Sudbury*, 12 Mod. 262, where four were indicted for a riot, two found guilty, and the other two acquitted; and on an examination of the case it will be seen this was held a discharge of all, though Holt, C. J., said it would have been otherwise had it been laid *cum multis aliis*. * * * Here both Fields and Jackson [the defendants] had plead to the indictment and could have been tried together. In the former case a verdict might probably have been sustained against one, the allegation being against both, though one only was on trial; but here, before the verdict was rendered, the charge, by the *nolle pros.*, was dismissed as to Fields. The indictment, therefore, alleging a conspiracy by one alone, the effect of the *nolle pros.* destroys the averment of the 'common design' which * * * is 'the root of the charge.'"

Discontinuance of Process Against One of Two Conspirators. — It has been held that one of two conspirators cannot object, on a writ of error, to a discontinuance of process against the other. *Wright v. Reg.*, 14 Q. B. 148, 68 E. C. L. 148.

4. *Husband and Wife — Post-nuptial Conspiracies*. — *Rex v. Locker*, 5 Esp. N. P. 107; *State v. Covington*, 4 Ala. 603; *People v. Miller*, 82 Cal. 107; *State v. Clark*, (Del. 1891) 33 Atl. Rep. 310; *Kirtley v. Deck*, 2 Munf. (Va.) 15, 5 Am. Dec. 445.

Husband and Wife and a Third Person. — Although a conspiracy cannot be committed by a husband and wife alone, because they are but one legal person, yet against a husband and wife and a third person it well lieth. Tucker, J., in *Kirtley v. Deck*, 2 Munf. (Va.) 15, 5 Am. Dec. 445; *State v. Covington*, 4 Ala. 603.

Thus a husband and wife and their servants have been held guilty of a conspiracy to ruin a card-maker. *Rex v. Cope*, 1 Stra. 144, 2 Stark. Ev. (2d ed.) 232, 3 Russ. Cr. (5th ed.) 149.

Husband and Wife with "Persons Unknown". — And it has been said that a man and wife may be charged with conspiracy with persons un-

before the marriage operated to deprive the woman of the requisite independent individuality.¹

4. **A Criminal or Unlawful Object** — *a.* **GENERALLY.** — As has been before stated, it is the object of a conspiracy which lends character and color to the combination formed for the accomplishment of such object,² it being impossible to regard a mere conspiracy or union for a common purpose, considered apart from its object, as in any sense criminal or opposed to legal principles or policy.³

b. **WHERE THE OBJECT IS CRIMINAL.** — There is no conflict whatever among the authorities upon the proposition that two or more persons who

known. *People v. Mather*, 4 Wend. (N. Y.) 231, 21 Am. Dec. 122; *State v. Covington*, 4 Ala. 603; *Com. v. Wood*, 7 Law Rep. 58.

1. *Rex v. Robinson*, 1 Leach C. C. 37.

2. *Mulcahy v. Reg.*, L. R. 3 H. L. 317; *Rex v. Jones*, 4 B. & Ad. 345, 24 E. C. L. 71; *Reg. v. Vincent*, 9 C. & P. 91, 38 E. C. L. 48; *Rex v. Seward*, 1 Ad. & El. 706, 28 E. C. L. 185; *Reg. v. Peck*, 9 Ad. & El. 686, 36 E. C. L. 240; *Reg. v. Parnell*, 14 Cox C. C. 508.

The Object and Tendency of a Confederation is that from which it derives its criminality and which makes it conspiracy. *Buchanan, J.*, in *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534; *Ford, J.*, in *State v. Rickey*, 9 N. J. L. 297.

When a Combination Becomes Criminal. — In the case of *People v. Richards*, 1 Mich. 216, 51 Am. Dec. 75, *Wing, J.*, referring to the offense of conspiracy, said: "The crime does not consist in the mere combination; but where to this is added an illegal object, then it becomes criminal; and where neither the conspiracy nor the object to be attained is unlawful, but the means by which it is to be executed are criminal, then it is necessary to set out the means intended to be used, as a component part of the offense."

Union of Wills for Unlawful Purpose. — As soon as the union of wills for the unlawful purpose is perfected the offense is complete. *Spies v. People*, 122 Ill. 213, 3 Am. St. Rep. 320.

"The offense of conspiracy is committed when to the intention to conspire is added the actual agreement." *U. S. v. Donau*, 11 Blatchf. (U. S.) 168.

Failure to Comply with Statute. — The case of *People v. Powell*, 63 N. Y. 88, was an indictment against the commissioners of charities of Kings County for conspiring together to purchase supplies without advertising for them as required by statute. It appeared, however, that though the specified articles had been purchased without advertisement, the commissioners had acted in good faith, and in ignorance of the statute. Whereupon it was held that as the omission was innocent in itself, the commissioners could not be convicted unless the agreement not to advertise was entered into with criminal intent.

Verdict of Guilty of Conspiracy to Procure Money by Fraud "with Intent to Return It." — In the case of *People v. Olcott*, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168, the prisoner and another had been indicted for conspiring with a third person, who had since died, to defraud a bank of money. The jury returned a verdict that there was an agreement between the deceased

third person and the defendant to obtain money from the bank, "but with intent to return it again." The trial judge declined to receive this verdict because imperfect and unresponsive to the charge, and finally discharged the jury because they were unable to agree upon any other. Upon appeal from the decision of the lower court in overruling the motion of defendant's counsel that the prisoner be discharged, on the ground that the verdict rendered was a good verdict of acquittal, it was held by *Kent, J.*, delivering the opinion of the court, that the verdict as rendered could not be construed as a verdict of acquittal, inasmuch as the substance of the charge was the unlawful and fraudulent intent to procure money from the bank. "That finding," said the court, "leaves the truth or falsity of the accusation in equal uncertainty. The intent afterwards to return the money might consist equally with a fraudulent or an innocent intent to procure the money in the first instance. If it [such a verdict] * * * had any operation," continued the court, "it would be against the defendant; for, in answer to the indictment, the jury have found the fact that the defendant and *Roe* [the deceased third person] did agree together to obtain money from the bank, and they have not negated the fraudulent intent."

Optensible and Actual Object. — In order to charge those who became members of an association with the guilt of a criminal conspiracy, it must be proved that the actual, if not the avowed, object of the association was unlawful. An association may be formed, the declared objects of which are innocent and laudable, and yet there may be secret articles, or an agreement communicated only to the members, by which they are banded together for purposes injurious to the peace of society or the rights of its members. Such would undoubtedly be a criminal conspiracy, on proof of the fact, however meritorious and praiseworthy the declared objects might be. The law is not to be hoodwinked by colorable pretenses. It looks at truth and reality through whatever disguise they may assume. But to make such an association, ostensibly innocent, the subject of prosecution as a criminal conspiracy, the secret agreement which makes it so is to be averred and proved as the gist of the offense. *Shaw, C. J.*, in *Com. v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346.

3. See authorities in preceding note and also, *supra*, this title, *Constituent Elements of the Offense* — *The Combination or Confederacy*. See also 3 Chitty's Crim. Law 1139.

combine together for the purpose of committing a crime, that is, something for which the law prescribes a punishment, become thereby guilty of the offense of conspiracy.¹ To this extent the adjudications are harmonious, but beyond this much lack of unanimity is found.²

c. WHERE THE OBJECT IS MERELY UNLAWFUL. — Although it has been doubted in a few isolated instances,³ it is well established that a combination may amount to a conspiracy in law though its unaccomplished object be to do that which if actually done by an individual would not amount to an indictable offense.⁴

1. **At Common Law.** — A conspiracy to do anything which the law forbids is an indictable conspiracy. *Rex v. Mawbey*, 6 T. R. 619. See also *infra*, this title, *Various Instances of Adjudicated Conspiracies — Conspiracies to Commit a Crime*.

2. See *supra*, this title, *Conspiracy as a Criminal Offense — Definition and General Observations*; and *infra*, this section, *Where the Object Is Merely Unlawful*.

3. **Doctrine that an Indictment Will Not Lie for a Conspiracy to Do That Which Is Merely Unlawful.** —

In the case of *State v. Rickey*, 9 N. J. L. 293, it was insisted by Ford, J., that up to his day there was but a single case extant — that of *Rex v. Cope*, 1 Stra. 144 — which held that an indictment for a conspiracy would lie for a combination of two or more to commit a private injury which was not a public wrong, and he further insisted that the case referred to was erroneously decided; but the court in that case, as is evident from the grounds upon which it based its decision, did not concur in that view. "And," said Beasley, C. J., in *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649, "the course of reasoning adopted by Mr. Justice Ford is now very generally admitted to be fallacious." In another New Jersey case, that of *State v. Norton*, 23 N. J. L. 44, this view of the law taken by Ford, J., is disapproved by Green, C. J., who, in stating his conclusion after an examination of the subject, said: "The great weight of authority, the adjudged cases no less than the most approved elementary writers, sustain the position that a conspiracy to defraud individuals or a corporation of their property may in itself constitute an indictable offense, though the act done or proposed to be done in pursuance of the conspiracy be not in itself indictable."

4. **Where Acts Not Indictable if Done by Individual** — *England*. — *Timberley v. Childe*, 1 Sid. 68; *Child v. North*, 1 Keb. 203; *Rex v. Armstrong*, 1 Vent. 304; *Reg. v. Best*, 2 Ld. Raym. 1167; *Rex v. Kinnersley*, 1 Stra. 193; *Rex v. Journeymen-Tailors*, 8 Mod. 11; *Breerton v. Townsend*, Noy 103.

Connecticut. — *State v. Rowley*, 12 Conn. 101. *Illinois*. — *Smith v. People*, 25 Ill. 17, 76 Am. Dec. 780.

Maryland. — *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

Massachusetts. — *Com. v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346; *Com. v. Waterman*, 122 Mass. 57.

New Jersey. — *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649.

New York. — *Savage, C. J., in People v. Fisher*, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501.

Pennsylvania. — *Miffin v. Com.*, 5 W. & S. (Pa.) 461, 40 Am. Dec. 527; *Twitchell v. Com.*, 9 Pa. St. 212; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 187.

See also 3 Chitty's Crim. Law 1139.

A confederation formed for the purpose of doing an act which if done by an individual would not be punishable may, nevertheless, amount to a conspiracy in law for which an indictment will lie; the reason for the distinction being that the ordinary care and prudence which would be sufficient to guard against the evil designs of a single individual might afford insufficient protection to the co-operating machinations of several. *Buchanan, J., in State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

Taylor, C. J., in State v. Younger, 1 Dev. L. (N. Car.) 357, 17 Am. Dec. 571, observes, with reference to what may constitute a conspiracy, that the offense may be committed though, if an individual only were concerned, the contemplated act must have been performed before an indictment would lie. As has been heretofore shown, the authorities go further than this, and a conspiracy in law may exist though the act to be done by the conspirators or pursuant to the conspiracy would not, though actually done or performed by an individual, constitute any punishable offense.

Examples — Conspiracy to Seduce Minor Female.

— In the case of *Smith v. People*, 25 Ill. 17, 76 Am. Dec. 780, it was held that a combination formed for the purpose of accomplishing the seduction of a minor female constituted an indictable conspiracy, although it was objected that seduction was not a criminal offense at common law, nor indictable under the statutes of *Illinois*. "We may safely assume," said the court in this case, "that it is indictable to conspire to do an unlawful act by any means, and also that it is indictable to conspire to do any act by unlawful means. * * * If the term 'unlawful' means criminal, or an offense against the criminal law, and as such punishable, then the exception taken to this indictment is good, for seduction by our law is not indictable and punishable as a crime. But by the common law governing conspiracies the term is not so limited, and numerous cases are to be found where convictions have been sustained for conspiracy to do unlawful acts, although those acts are not punishable as crimes."

Conspiracy to Induce Elopement and Marriage.

— Though a clandestine or runaway marriage is not indictable at common law where it has been procured by the unassisted artifice of the husband, the cases abundantly show it otherwise where it has been procured by confed-

Design Opposed to Right and Justice Merely. — In this sense a conspiracy may consist of a combination to do what is merely unlawful, or, in other words, opposed to principles of right and justice, as contradistinguished from that which is criminal, or for the doing of which the law prescribes punishment.¹

eracy. Gibson, C. J., in *Miffin v. Com.*, 5 W. & S. (Pa.) 461, 40 Am. Dec. 527.

Conspiracy to Cheat. — A cheat effected by a conspiracy is an indictable offense, whereas the same deception practiced by a single individual would not be. *Rex v. Wheatly*, 2 Burr. 1127.

Commenting upon the fact that a conspiracy for the purpose of cheating is indictable, whereas a mere private cheat may not be, Buchanan, J., delivering the opinion of the court in the case of *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, calls attention to the distinction between libel and slander as offenses under the common law, the former being indictable on account of its supposed tendency to a breach of the peace, while the latter was not indictable. In this connection reference is made to an observation of Lord Mansfield in *Rex v. Rispal*, 1 W. Bl. 368, where it was said that conspiracies tended to a breach of the peace as much as libels.

Conspiracy to Injure and Oppress. — Where a substituted trustee, in a deed of trust which had been procured by assignment by a creditor of the grantor, by collusion with such creditor refuses to receive payment of the debt secured, sells the property, and produces a balance which the creditor garnishes, the creditor and the person acting as trustee are liable to indictment for conspiracy. *Ellzey v. State*, 57 Miss. 827.

Conspiracies to Raise or Lower the Price of Public Funds. — In the case of *Rex v. De Berenger*, 3 M. & S. 68, it was held that though to lower or raise the price of public funds was not in itself a crime, yet it was an offense for a number of persons to conspire to raise them; the crime being not in raising the funds, but in the combination and conspiracy to do so, which would be complete though not pursued to its consequences.

Misappropriation of Funds. — Where several persons were indicted for a conspiracy to misappropriate the funds of a bank, it was contended by the defense that as an improper use or embezzlement of the funds of the bank would in law be only a breach of trust, a combination to effect the same purpose could not amount to an indictable offense. Buchanan, J., however, delivering the opinion of the court in this case, said: "But however ingeniously urged, there does not appear to be anything in the argument when stripped of the dazzling attire in which it was clothed, seeing, as has been shown, that to constitute an indictable conspiracy, it is not necessary that the act conspired to be done should, if effected by an individual, be such as would *per se* amount to an indictable offense." *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

Review of English Cases. — Buchanan, J., delivering the opinion of the court in the case of *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, thus reviews some old English cases tending to establish the principle that an indictment for conspiracy may be found against

several for a combined undertaking to accomplish something which, if done by one alone, would not be punishable by law. "In *Tremaine's P. C.* 82, 83," he says, "there is an information against Turner and others for a conspiracy to destroy the reputation of one George Green, and falsely to charge him with adultery with the wife of one of the conspirators, for the purpose of extorting money from him. In 86, against Record and others, for a cheat practiced on Lady Dorothea Seymour in prevailing on her, by means of a falsehood, to advance large sums of money to them. In 91, against Wilcox and others, for cheating by conspiracy one John Dutton of a quantity of cloth, under pretense of buying it. In 94, against Taydler and others, for a cheat by conspiracy in drawing an absolute conveyance to themselves of the estates of two women, and persuading them to execute it, pretending it was only in trust for the women, etc. And in 97, against Allibone and others, for cheating by conspiracy one Hilliard in obtaining divers bonds from him for the payment of money to themselves and others as a consideration for procuring a marriage between him and an indigent woman, whom they represented as being rich. In neither of those cases," continues the learned judge, "could an indictment have been sustained for the same injury practiced by an individual, without the aid of conspiracy or combination; and as Tremaine gives the terms, the reigns, and the names of the respective parties, there can be little doubt that they are precedents of informations in adjudicated cases, and that they were held to be good, and that they go far to show how the common law was understood in England in the reigns of Charles and James II."

1. That a confederacy may be unlawful, and so amount to the crime of conspiracy, either the object sought to be attained by the combination must be criminal in itself, or the proposed act must be one which, though attempted by a single individual, would not be punishable, yet it would be dangerous to the public to permit it to be attained by the combination of individual means. *Com. v. McKisson*, 8 S. & R. (Pa.) 420, 11 Am. Dec. 630. Thus though it may not be an indictable offense for one alone verbally to defame another, or to extort money from him, not under color of office, if the object of a conspiracy be to extort money from an individual by threatened defamation the confederates may be convicted and punished. *Timberle v. Childe*, 1 Sid. 68; *Child v. North*, 1 Keb. 203; *Rex v. Armstrong*, 1 Vent. 304; *Reg. v. Best*, 2 Ld. Raym. 1167; *Rex v. Kinnersley*, 1 Stra. 193.

Conspiracies to "Prejudice" a Third Person. — All conspiracies whatsoever wrongfully to prejudice a third person are, according to Hawk. P. C., b. 1, c. 72, § 2, highly criminal at the common law; for example, where divers persons confederate together by indirect means to impoverish a third person, or falsely and

The Precise Limits of This Rule have never been clearly defined,¹ notwithstanding the fact that various tests, for the purpose of determining its extent, have been proposed.²

Various Statements of Rule. — In this connection it has been stated, as a general rule, that if the end proposed or the means to be employed are, by reason of the power of combination, particularly dangerous to the public interests, or injurious to some individual, those uniting for the accomplishment of such end or the adoption of such means are guilty of a criminal conspiracy.³ Again it has been said that if the object or means to be employed are of a merely

maliciously to charge a man with being the father of a bastard child, or to maintain one another in any matter, whether it be true or false. By way of summing up the result of a consideration of the cases on the subject of "conspiracy," Mr. Chitty, in 3 Chitty's Crim. Pl. 616, said: "In a word, all confederacies wrongfully to prejudice another are misdemeanors at common law, whether the intention is to injure his person, his property, or his character." See also the preceding note.

1. Precise Limits of Rule Not Defined. — In 3 Chitty's Crim. Law, 1139, it is said: "There are, perhaps, few things left so doubtful in the criminal law as the point at which a combination of several persons in a common object becomes illegal. Certain it is that there are many cases in which the act itself would not be cognizable by law if done by a single person, which become the subject of indictment when effected by several with joint design."

"But the great uncertainty, if we may be allowed the expression," said Caton, C. J., in *Smith v. People*, 25 Ill. 14, 76 Am. Dec. 780, "is as to what constitutes an unlawful end, to conspire to accomplish which is indictable without regard to the means to be used in its accomplishment. And again, what means are unlawful to accomplish a purpose not in itself unlawful."

"The great difficulty," said Johnson, J., delivering the opinion of the court in *State v. De Witt*, 2 Hill L. (S. Car.) 282, 27 Am. Dec. 371, "lies in determining the precise boundary between the class of injuries against individuals, for which a prosecution for a conspiracy will or will not lie; and I confess that I find great difficulty in reconciling the authorities on this question to any definite principle."

2. Various Tests Attempted. — "Cases may occur," said Beasley, C. J., in *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649, "in which the purpose designed to be accomplished becomes punitive as a public offense solely from the fact of the existence of a confederacy to effect such purpose. It is certainly not to be denied, however, that great practical difficulty is experienced whenever any attempt is made to lay down any general rules by which to discriminate that class of combinations which becomes thus punishable, from those which are to be regarded in their results as mere civil injuries, remediable by private suit. It may be safely said, nevertheless, that a combination will be an indictable conspiracy whenever the end proposed or the means to be employed are of a highly criminal character; or where they are such as indicate great malice in the confederates; or where deceit is to be

used, the object in view being unlawful; or where the confederacy, having no lawful aim, tends simply to the oppression of individuals. A careful analysis of the cases which have been heretofore adjudged will reveal the presence of one or more of the qualities here enumerated; to this extent, therefore, they may be relied on as safe criteria whereby to test new emergencies as they may be presented for adjudication."

Where the Law Affords a Civil Remedy. — Johnson, J., delivering the opinion of the court in *State v. De Witt*, 2 Hill L. (S. Car.) 282, 27 Am. Dec. 371, restricts the law of conspiracy in the following language: "When the principle comes to be fully developed, which has been contended for, I think it will be found that an indictment for a conspiracy will not in general lie in those cases of fraud or trespass not affecting the person, for which an action or suit at law would afford adequate relief if the intention of the conspirators was consummated, when the means intended to be resorted to are private." Compare *Wilson v. Com.*, 96 Pa. St. 56.

Where Punitive Damages Would Be Recoverable. — "Conspiracies to accomplish purposes which are not by law punishable as crimes," said Caton, C. J., in *Smith v. People*, 25 Ill. 14, 76 Am. Dec. 780, "but which are unlawful as violative of the rights of individuals, and for which the civil law will afford a remedy to the injured party, and will at the same time and by the same process punish the offender for the wrong and outrage done to society by giving exemplary damages beyond the damages actually proved, have in numerous instances been sustained as common-law offenses."

3. Where Power of Combination Dangerous to the Public or to an Individual. — It is sufficient if the end proposed or the means to be employed are, by reason of the power of combination, particularly dangerous to the public interests or injurious to some individual, although not criminal. Colt, J., in *Com. v. Waterman*, 122 Mass. 57.

The position cited by Chitty (3 Chit. Crim. Law, 1139) from Hawkins, as by way of summing up the result of the cases, is this: "In a word, all confederacies wrongfully to prejudice another are misdemeanors at common law, whether the intention is to injure his property, his person, or his character." To which Chitty adds that "the object of conspiracy is not confined to an immediate wrong to particular individuals; it may be to injure public trade, to affect public health, to violate public policy, to insult public justice, or to do any act in itself illegal."

immoral nature, the participants in the design may be charged as conspirators.¹ Still again it is declared that in order to determine what sort of combinations may be entered into at common law without committing a punishable offense, regard must be had to the influence which the intended act would have upon society if done.²

No Satisfactory Test. — It will be observed that none of these statements afford a standard by which all cases of conspiracy involving mere alleged unlawfulness can be satisfactorily tested.³

5. Criminal or Unlawful Means Where the Object Is neither Criminal nor Unlawful — *a. WHERE THE MEANS TO BE ADOPTED ARE CRIMINAL.* — Where the means agreed upon by a combination of persons for the accomplishment of a specific purpose involve the doing of that which is a crime, the parties to the agreement and sharers in the common intent are guilty of a conspiracy.⁴ Where the means agreed upon and adopted are criminal the object of the conspiracy becomes as unimportant as are the means when the object is criminal.⁵

b. WHERE THE MEANS TO BE ADOPTED ARE MERELY UNLAWFUL. — Where the means to be employed in the accomplishment of the object of a conspiracy are merely unlawful, in contradistinction to criminal, and the object of the conspiracy is neither unlawful nor criminal, the same observations with reference to what the term "unlawful" embraces, when used with relation to the object of a conspiracy, may be made in the application of the word as descriptive of the means to be employed.⁶ All examination, however, into the uncertain meaning of "unlawful" in this connection may at once be avoided if the ultimate effect of the conspiracy is criminal, when, as has been heretofore stated, the means to be employed become an immaterial consideration.⁷

III. VARIOUS INSTANCES OF ADJUDICATED CONSPIRACIES. — So insusceptible is the law of conspiracy of reduction to fixed rules or guiding principles that it has been characterized by an eminent text-writer as "resting upon the particular cases decided."⁸ That this is true in some degree at least cannot be denied, and it is believed to be true to a sufficient extent to render profitable a separate consideration of the most prominent instances in which certain sets

1. Where Object or Means of Immoral Nature. — *Rex v. Delaval*, 3 Burr. 1434. See *infra*, this title, *Various Instances of Adjudicated Conspiracies — Conspiracies to Commit Offenses Against Morality and Decency.*

2. Influence of Act upon Society. — "The law does not punish criminally every unlawful act" said Caton, C. J., in *Smith v. People*, 25 Ill. 17, 76 Am. Dec. 780, "although it may be a grievous offense to society. And in determining what sort of conspiracies may or may not be entered into without committing an offense punishable by the common law, regard must be had to the influence which the act, if done, would actually have upon society, without confining the inquiry to the question whether the act might itself subject the offender to criminal punishment."

3. In this connection it is observed by an eminent text-writer that whether or not a conspiracy has been committed depends much upon the particular circumstances of each case. 3 Chit. Cr. Law, 1139.

4. See *supra*, this title, *Conspiracy as a Criminal Offense — Definition and General Observations.*

Where the Object is Lawful, the means must be unlawful to constitute the crime. *Marcy, J., in People v. Mather*, 4 Wend. (N. Y.) 229, 21

Am. Dec. 122; *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

Example — Combination to Procure Marriage.

"In the case of *R. v. Fowler*, 1 East P. C. 461, 11, Mr. Justice Buller expressed the opinion that as the act of marriage is lawful in itself, a combination to procure it can only become criminal by the use of undue means."

5. See *supra*, this section, *Materiality of the Means to be Employed.*

6. See *supra*, this section, *Where the Object is Merely Unlawful.*

7. See *supra*, this section, *Materiality of the Means to be Employed.*

8. No Fixed Rules — Circumstances of Each Case Control. — As Mr. Chitty, in his work on Criminal Pleading (3 Chit. Crim. Pl. 616), remarks: "There are perhaps few things left so doubtful in the criminal law as the point at which a combination of several persons in a common object becomes illegal." "It might," he continues, "be inferred from the decisions that to constitute a conspiracy it is not necessary that the act intended should in itself be illegal, or even immoral; that it should affect the public at large, or that it should be accomplished by false pretenses; and though it is agreed that the gist of the offense is the union of persons, it is impossible to conceive a com-

of circumstances and states of facts have been held by the courts to constitute conspiracies.

1. Conspiracies to Commit a Violation of Law — *a.* CONSPIRACIES TO COMMIT A CRIME — (1) *In General.* — As has been heretofore seen, it has always been held to be an indictable conspiracy for two or more persons to confederate together for the purpose of doing that which is a crime in law.¹

(2) *Conspiracies to Commit Assault and Battery.* — A conspiracy to commit an assault and battery is an indictable offense under the law,² such combinations having the double effect of disturbing the public peace and violating the personal rights of an individual.³

(3) *Conspiracies to Rob or Steal.* — A further illustration of the rule that it is a criminal conspiracy for several to combine together for the purpose of committing a violation of law is found in the adjudications holding it to be indictable for two or more individuals to conspire to perpetrate robbery or theft;⁴ and the rule that where the object of the conspiracy is criminal in

bination, as such, to be illegal." "We can rest, therefore," he says, "only on the individual cases decided, which depend in general upon particular circumstances, and which are not to be extended."

Commenting upon the statement made by Mr. Chitty in his work on Criminal Law, vol. 3, p. 1139, to the effect that the law of conspiracy rests upon the particular cases decided and is not to be extended, Wing, J., delivering the opinion of the court in *People v. Richards*, 1 Mich. 216, 51 Am. Dec. 75, observed that the supposed authority for this position was derived from the remarks of Lord Ellenborough in *Rex v. Turner*, 13 East 228, in which case the indictment was for a conspiracy to commit a civil trespass by going upon another person's land to kill hares, and it was held that an indictment for this would not lie. See criticism and disapproval of *Rex v. Turner*, 13 East 228, by Gibson, C. J., in *Mifflin v. Com.*, 5 W. & S. (Pa.) 461, 40 Am. Dec. 527. "Lord Ellenborough's remark," said Wing, J., "was made in reference to such a case. The judge cannot be supposed to have intended to say that an indictment for a conspiracy to cheat an individual would only lie in cases where the facts were the same as those in which indictments had been sustained. He only objects to the extension of the doctrine to cases where the principles laid down in former cases were not involved."

1. General Rule as to Conspiracy to Commit Crime. — *England.* — Reg. v. Banks, 12 Cox C. C. 393; Reg. v. Bunn, 12 Cox C. C. 316; Reg. v. Vincent, 9 C. & P. 91, 38 E. C. L. 48; *Rex v. Pollman*, 2 Campb. 229.

Arkansas. — State v. Chapin, 17 Ark. 561, 65 Am. Dec. 452.

Colorado. — Solander v. People, 2 Colo. 48.

Connecticut. — State v. Shields, 45 Conn. 256.

Georgia. — Horton v. State, 66 Ga. 690.

Indiana. — Card v. State, 109 Ind. 415.

Kentucky. — Com. v. Blackburn, 1 Duv. (Ky.) 4.

Maryland. — State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

Massachusetts. — Com. v. Kingsbury, 5 Mass. 106.

New York. — People v. Mather, 4 Wend. (N. Y.) 265, 21 Am. Dec. 122.

North Carolina. — State v. Tom, 2 Dev. L. (N. Car.) 569; State v. Price, 88 N. Car. 627.

Pennsylvania. — Com. v. Demain, Bright (Pa.) 441; Com. v. Goldsmith, 12 Phila. (Pa.) 632.

See also *supra*, this title, *Constituent Elements of the Offense — Where the Object Is Criminal.*

Where Concert Is an Integral Part of an Offense.

— A distinction has, however, been said to exist where concert constitutes an integral part of a crime, and the indictment is for the mere agreement, as in the case of an indictment of a man and woman for a conspiracy to commit adultery or fornication. In such cases, it has been said, there can be no conviction for conspiracy where the alleged conspiracy consists in the mere agreement between the parties to the prospective offense to commit it. *Miles v. State*, 58 Ala. 390; *Shannon v. Com.*, 14 Pa. St. 226.

2. Conspiracy to Commit Assault and Battery. — *Com. v. Putnam*, 29 Pa. St. 296; *State v. Ripley*, 31 Me. 386.

Upon an Officer to Prevent the Discharge of His Duty. — Conspiracy to commit assault and battery upon a deputy sheriff in order to prevent him from performing his official duties is indictable. *State v. McNally*, 34 Me. 210, 56 Am. Dec. 651.

Conspiracy to Engage in a Prize Fight is a conspiracy to commit a crime, and as such indictable. *Seville v. State*, 49 Ohio St. 117.

3. Per Lewis, C. J., in Com. v. Putnam, 29 Pa. St. 296.

4. Conspiracy to Rob and Steal — *Alabama.* — Browder v. State, 102 Ala. 164.

Arkansas. — Clinton v. Estes, 20 Ark. 216; *Lawson v. State*, 32 Ark. 220.

California — People v. Richards, 67 Cal. 412, 56 Am. Rep. 716.

Connecticut. — State v. Grady, 34 Conn. 118.

Georgia. — Reid v. State, 20 Ga. 681; *Horton v. State*, 66 Ga. 690.

Indiana. — Nevill v. State, 60 Ind. 308.

Iowa. — State v. Sterling, 34 Iowa 443.

Kentucky. — Miller v. Com., 78 Ky. 15, 39 Am. Rep. 194.

North Carolina. — State v. Dean, 13 Ired. L. (N. Car.) 63.

To Compel Signing of Bank Check. — A conspiracy having for its object the compelling of

character no act need be done pursuant thereto should be kept in mind in this connection, as well as in all cases where the object of the conspiracy is of such a nature.¹

b. CONSPIRACIES TO COMMIT A CIVIL TRESPASS. — Where the defendants had conspired and confederated together for the purpose of entering upon the premises of another, and to hold and keep possession of the same, it was held to be an indictable conspiracy.²

2. Conspiracies to Induce Others to Violate the Law — Accomplishment of Object. — A conspiracy entered into to induce and procure other persons to do an act prohibited by law is an indictable offense, whether the object is accomplished or not.³

Inducing Sales of Liquor on Sunday — Intent. — And where several persons, by artifice and persuasion, induced a tavern keeper to sell liquor on Sunday, they were held guilty of a conspiracy, though the intent of the conspirators was to inform the proper authorities of the violation of law.⁴

Violation of Law Induced for Purpose of Extortion to Prevent Prosecution. — It has also been held that several individuals who confederated together for the purpose of inducing violations of the law, with a view of subsequently extorting money from the offenders by threats of prosecution, were guilty of an indictable offense.⁵

Feigning Compliance to Induce Others to Enter into the Plan. — The position has been maintained that where one person feigns compliance in an unlawful design for the purpose of inducing or persuading another to enter into the plan, the latter cannot be convicted for conspiring with the former to commit the offense agreed upon.⁶

3. Conspiracies to Commit Offenses Against Morality and Decency. — A combination to commit an offense against morality and decency is an offense at common law.⁷

the contemplated victim to sign a bank check, and then the procuring of it by force, has been held a conspiracy to rob. *People v. Richards*, 67 Cal. 412, 56 Am. Rep. 716.

To Commit Burglary. — See *Reinhold v. State*, 130 Ind. 467; *Brown v. State*, 2 Tex. App. 115; *Mason v. State*, 32 Ark. 238; *State v. Ridley*, 48 Iowa 370; *Scudder v. State*, 62 Ind. 13.

1. See *supra*, this title, *Constituent Elements of the Offense* — *Acts Done in Execution of the Conspiracy*.

2. Conspiracy to Commit Civil Trespass. — *Wilson v. Com.*, 96 Pa. St. 56. See also *Rex v. Mawbey*, 6 T. R. 628; *Reg. v. Rowlands*, 17 Q. B. 686, 79 E. C. L. 686; *State v. Straw*, 42 N. H. 393.

Conspiracy to Violate Statute Repealed Before Trial. — Defendants on trial for a conspiracy to violate the provisions of a statute which has been repealed before the trial upon the indictment for conspiracy cannot be convicted. *Powell v. People*, 5 Hun (N. Y.) 169.

3. Conspiracy to Induce Others to Violate the Law. — *Hazen v. Com.*, 23 Pa. St. 355. In this case it was held that a conspiracy was indictable which was entered into to solicit, induce, and procure certain persons who were officers of a bank, together with others, to violate and disobey certain enactments of the Pennsylvania legislature, prohibiting the circulation in such state of foreign bank notes of a less denomination than five dollars. See also *U. S. v. Lancaster*, 44 Fed. Rep. 896. Compare *Com. v. Barnes*, 132 Mass. 242.

4. *Com. v. Lees*, 9 Phila. (Pa.) 569. And see also the case of *Com. v. Kostenbauder*, (Pa. 1886) 20 Atl. Rep. 995, where the object of the conspirators was to get the penalty allowed to informers.

5. *People v. Saunders*, 25 Mich. 119. And see *Com. v. Doughty*, 139 Pa. St. 383.

6. *Woodworth v. State*, 20 Tex. App. 375.

7. Conspiracy to Commit Offenses Against Morality and Decency — *England*. — *Rex v. Delaval*, 3 Burr. 1434; *Rex v. Grey*, 3 Harg. St. Tr. 519; *Rex v. Lynn*, 2 T. R. 733; *Reg. v. Mears*, 2 Den. C. C. 79; *Reg. v. Howell*, 4 F. & F. 160. *Alabama*. — *State v. Murphy*, 6 Ala. 765, 41 Am. Dec. 79.

Illinois. — *Smith v. People*, 25 Ill. 17, 76 Am. Dec. 780.

Utah. — *People v. Hampton*, 4 Utah 258.

Virginia. — *Anderson v. Com.*, 5 Rand. (Va.) 627, 16 Am. Dec. 776.

A combination to induce and persuade a young female, by false representations, to leave the protection of her parents' house, with a view of facilitating her prostitution, is an indictable conspiracy. *Rex v. Grey*, 3 Harg. St. Tr. 519.

So, also, a conspiracy to procure, by false pretenses, an infant female to have illicit carnal connection with a man. *Reg. v. Mears*, 2 Den. C. C. 79.

And likewise a conspiracy to induce an unmarried girl seventeen years old to become a common prostitute. *Reg. v. Howell*, 4 F. & F. 160.

Conspiracy to Keep House of Ill Fame. — Such a

Seduction. — Thus it has been held to be indictable to conspire to accomplish the seduction of a female, and this whether the means to be adopted are or are not criminal or unlawful.¹

Prostitution. — So also it has been held indictable to conspire for the purpose of placing a girl in the hands of an individual for purposes of prostitution, although the girl consent to the proposed arrangement.²

Disinterment of Dead Bodies for Scientific Purposes. — Again, a confederacy whose object was the disinterment of dead bodies for scientific purposes has been held to constitute an indictable conspiracy.³

4. Conspiracies Affecting Public Interests — Rule Stated. — All combinations which have for their object the injurious affection of public interests are indictable.⁴

Illustrations. — A conspiracy, therefore, to impose upon the public by manufacturing and offering for sale a base and spurious article, representing it to be genuine, has been held to constitute a criminal offense.⁵ It has also been

conspiracy is an indictable offense. *People v. Hampton*, 4 Utah 258.

1. *Smith v. People*, 25 Ill. 17, 76 Am. Dec. 780.

2. *Rex v. Delaval*, 3 Burr. 1434.

3. *Rex v. Lynn*, 2 T. R. 733.

4. **Conspiracy Affecting Public Interests** — *England*. — *Rex v. De Berenger*, 3 M. & S. 67; *Rex v. Roberts*, 1 Campb. 399; *Rex v. Turner*, 13 East 228; *Reg. v. Warburton*, 11 Cox C. C. 584.

Connecticut. — *State v. Rowley*, 12 Conn. 101.

Illinois. — *Ochs v. People*, 25 Ill. App. 379.

Indiana. — *McKee v. State*, 111 Ind. 378.

Massachusetts. — *Com. v. Manley*, 12 Pick. (Mass.) 173.

New Hampshire. — *State v. Straw*, 42 N. H. 393; *State v. Burnham*, 15 N. H. 396.

New York. — And see *People v. Tweed*, 5 Hun (N. Y.) 353.

North Carolina. — *State v. Trammell*, 2 Ired. L. (N. Car.) 379.

Pennsylvania. — *Hazen v. Com.*, 23 Pa. St. 366.

"It would seem, indeed," said Johnson, J., delivering the opinion of the court in *State v. De Witt*, 2 Hill L. (S. Car.) 282, 27 Am. Dec. 371, "that the rule was universal that all conspiracies to impose on or injure the public are indictable."

To Cheat and Defraud the Public. — Where the directors of a joint stock bank, knowing it to be in a state of insolvency, published a balance sheet showing a profit and declaring a dividend of six per cent., advertising for subscribers to the capital stock of the bank upon the faith of the published statement of its condition, they were held guilty of a conspiracy to cheat and defraud the public. *Reg. v. Brown*, 7 Cox C. C. 442; *Reg. v. Esdaile*, 1 F. & F. 213. *Compare Reg. v. Gurney*, 11 Cox C. C. 414.

An Agreement to Fabricate Shares in a Joint Stock Company in excess of the number of shares of which, according to its rules, it might consist, is indictable. *Rex v. Mott*, 2 C. & P. 521, 12 E. C. L. 244.

To Utter Counterfeit Money. — Whenever the act intended to be done has a tendency to prejudice the public by injuring and cheating the unwary it is indictable, said the court in *Clary v. Com.*, 4 Pa. St. 210. In this case the defendants were found guilty of a conspiracy

to utter forged bank notes of a foreign corporation.

To Cheat and Defraud a Municipal Corporation. — A municipal corporation being *quasi* public, on this ground alone, it has been held, a conspiracy to cheat and defraud it would be held indictable. *State v. Young*, 37 N. J. L. 184. *Compare Com. v. Ward*, 92 Ky. 158.

And it is a criminal conspiracy for members of a municipal board to combine to cheat the municipality of its moneys by corruptly purchasing supplies at excessive prices and paying salaries to persons who are not entitled to them. *Madden v. State*, 57 N. J. L. 324.

Thus a joint undertaking to prevent bids for the contract of furnishing labor and materials to a city, for the purpose of making it necessary that higher prices should be paid in consequence, is an offense. *Com. v. Haines*, 11 Rep. 413; *People v. Olson*, (Buffalo Super. Ct.) 15 N. Y. Supp. 778.

To Do Public Mischief. — A combination which has for its object such a purpose is indictable. *Johnson, J.*, in *State v. De Witt*, 2 Hill L. (S. Car.) 282, 27 Am. Dec. 371.

To Defraud the Government. — A conspiracy to issue a certificate on the state treasury to a fictitious person, for fraudulent purposes, is indictable. *State v. Cardoza*, 11 S. Car. 195. And see the case of *Wood v. State*, 47 N. J. L. 461, where certain freeholders were alleged to have conspired to vote a sum of money to be paid out of the county funds. And also *Ochs v. People*, 25 Ill. App. 379, which was an indictment for a conspiracy to defraud a county.

Fraudulently to Procure the Acceptance of a Bill of Exchange. — An indictment for conspiracy will lie for fraudulently combining to procure the acceptance of a bill of exchange. *Reg. v. Gompertz*, 9 Q. B. 824, 58 E. C. L. 824.

Such a conspiracy has been held indictable, "obviously," said Johnson, J., delivering the opinion of the court in *State v. De Witt*, 2 Hill L. (S. Car.) 282, 27 Am. Dec. 371, "upon the ground that a bill of exchange when accepted is a *quasi* currency, and calculated to impose on the community, and therefore a fraud affecting the public."

5. *Johnson, J.*, in *State v. De Witt*, 2 Hill L. (S. Car.) 282, 27 Am. Dec. 371. And see *Com. v. Tack*, 1 Brews. (Pa.) 511.

Unwholesome Provisions. — A combination to

held indictable for several to conspire to stimulate dishonestly the price of commodities upon the market,¹ or to raise the price of public funds by false rumors or other unlawful means.²

5. Conspiracies to Pervert or Obstruct Public Justice. — All conspiracies which have for their object the perversion or obstruction of public justice have been, from the earliest times, regarded as indictable.³

vend unwholesome provisions, whereby the public health is endangered, is an indictable conspiracy. *Johnson, J., in State v. De Witt, 2 Hill L. (S. Car.) 282, 27 Am. Dec. 371; Reg. v. Mackarty, 2 Ld. Raym. 1179. See State v. Rowley, 12 Conn. 101.*

1. Dishonestly to Stimulate Prices of Commodities. — *Rex v. De Berenger, 3 M. & S. 67; Reg. v. Aspinall, 1 Q. B. Div. 730; Rex v. Norris, 2 Kenyon 300; Rex v. Hilbers, 2 Chit. Rep. 163, 18 E. C. L. 285.*

To Raise the Price of Oil. — In *Rex v. Hilbers, 2 Chit. Rep. 163, 18 E. C. L. 285*, it was held that while it was no offense for individuals, by disunited endeavor, to seek to raise the price of oil, nevertheless, if there was a confederacy between them for such a purpose they would be guilty of conspiracy.

To Raise the Price of Salt. — A combination among merchants not to sell salt under a certain price, made for the purpose of "dishonestly stimulating" its price upon the market, has been held indictable. *Rex v. Norris, 2 Kenyon 300.*

2. Public Funds. — *Johnson, J., in State v. De Witt, 2 Hill L. (S. Car.) 282, 27 Am. Dec. 371.*

In the case of *Rex v. De Berenger, 3 M. & S. 67*, it was declared indictable to conspire by false rumors to raise the price of the public government funds upon a particular day, with intent to injure those who should purchase on that day.

3. Conspiracy to Prevent or Obstruct Public Justice. — *Co. Litt. 161, 166, note 13.*

England. — *Reg. v. Shellard, 9 C. & P. 277, 38 E. C. L. 119; Reg. v. Vincent, 9 C. & P. 91, 38 E. C. L. 48; Rex v. Mawbey, 6 T. R. 619; Claridge v. Hoare, 14 Ves. Jr. 59; Rex v. Jolliffe, 4 T. R. 285; Reg. v. Thompson, 16 Q. B. 832, 71 E. C. L. 832; 20 L. J. M. C. 183; Rex v. Macdaniel, 1 Leach C. C. 45; Claridge v. Hoare, 14 Ves. Jr. 65; Bushel v. Barrett, R. & M. 434, 21 E. C. L. 483, Fost. 130; Reg. v. Taylor, 15 Cox C. C. 265.*

Illinois. — *Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786; Cole v. People, 84 Ill. 216.*

Indiana. — *State v. McKinstry, 50 Ind. 465.*

Maine. — *State v. Ripley, 31 Me. 386; State v. McNally, 34 Me. 210, 56 Am. Dec. 651.*

Massachusetts. — *Com. v. Douglass, 5 Met. (Mass.) 241.*

New Hampshire. — *State v. Burnham, 15 N. H. 396.*

New Jersey. — *State v. Norton, 23 N. J. L. 33.*

New York. — *People v. Chase, 16 Barb. (N. Y.) 495; People v. Washburn, 10 Johns. (N. Y.) 160.*

South Carolina. — *State v. De Witt, 2 Hill L. (S. Car.) 282, 27 Am. Dec. 371.*

Vermont. — *State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450; State v. Carpenter, 20 Vt. 9; State v. Noyes, 25 Vt. 415.*

Whether in Civil or Criminal Proceeding. — All conspiracies to injure others by perverting, ob-

structing, or defeating the course of public justice, whether in a course of civil or criminal proceeding, are indictable. *Co. Litt. 161, 166, note 13; Johnson, J., in State v. De Witt, 2 Hill L. (S. Car.) 282, 27 Am. Dec. 371.*

To Procure Criminal Process for Improper Purposes. — An indictment lies for a conspiracy to procure criminal process for improper purposes, the officer, prosecutor, and all other persons participating therein being liable. *Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786.*

Officer a Party to Conspiracy — Writ Affords No Protection. — As a general rule, a writ issued by a court having jurisdiction of the subject matter, and regular on its face, protects the officer who executes it from liability therefor; but if it appears that the officer who executed the process was engaged in a conspiracy to use the process for improper purposes, the writ can afford him no protection. *Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786.*

To Prevent the Execution of a Warrant. — It is an indictable conspiracy for parties to combine together for the purpose of preventing by force the execution of a warrant. *State v. McNally, 34 Me. 210, 56 Am. Dec. 651.*

Assault and Battery upon Judicial Officer. — Where the charge is of an unlawful combination to do a certain illegal act injurious to the administration of public justice by committing an assault and battery upon a judicial officer, in order to prevent him from the performance of his appropriate official duties, it is immaterial in what particular manner it was supposed public justice would fail to be administered if the act alleged to be agreed upon was done. Whether the result was expected to be attained by the infliction of such an injury as physically to prevent the officer from the discharge of his duty, or to intimidate him with a view of influencing his decision, need not be considered. *State v. Ripley, 31 Me. 386.*

Conspiracy to Obstruct Election Laws. — Individuals who confederate together for the purpose of perverting or obstructing the administration of the election laws are guilty of a criminal conspiracy under *Supp. Revision N. J., p. 199, § 43*, which provides that if any two or more persons shall conspire to commit any act for the perversion or obstruction of justice, or the due administration of the laws, they shall, on conviction, be deemed guilty of a conspiracy. *Moschell v. State, 53 N. J. L. 498. See also People v. McKane, 143 N. Y. 455; U. S. v. Crosby, 1 Hughes (U. S.) 448.*

Pledges of Candidate for Office. — In the case of *People v. Squire, 20 Abb. N. Cas. (N. Y. Oyer & T. Ct.) 368*, it was held to constitute a criminal conspiracy, as having for its object the perversion of justice, that a candidate for office agreed with another that if the latter would procure his appointment, he would administer the duties of the post at the will of the person procuring his appointment.

Suppressing or Fabricating Evidence. — Accordingly it has been held to be an indictable conspiracy when the design of the confederates was to be accomplished by the suppression or fabrication of evidence.¹

Inducing Witness to Abscond. — Likewise the offense of conspiracy was held to have been committed where there was a combination to induce a witness to abscond or conceal himself, so that upon the trial of an indictment for felony his testimony would not be procurable.²

Preventing a Prosecution. — And, with stronger reason, it has been held indictable where the common design was to defeat outright the operation of the law by preventing altogether a prosecution for a crime which had been committed.³

6. Conspiracies to Cheat and Defraud — *a.* IN GENERAL. — Conspiracies to Cheat and Defraud an Individual of his property, real or personal, have always been regarded as indictable,⁴ although at common law a cheat or fraud effected by

Corruptly to Procure a Public Office. — See *Rex v. Pollman*, 2 Campb. 229; *Com. v. Callaghan*, 2 Va. Cas. 460; *U. S. v. Watson*, 17 Fed. Rep. 145.

To Raise Money by Selling a Public Office. — See *Rex v. Vaughan*, 4 Burr. 2494; *Rex v. Pollman*, 2 Campb. 229.

A Conspiracy to Bribe Members of Parliament is a misdemeanor at common law, and as such is indictable. *Reg. v. Bunting*, 7 Ont. Rep. 524.

To "Pack" a Jury. — A conspiracy formed for such purpose is indictable. *O'Donnell v. People*, 41 Ill. App. 23.

Illegal Arrest and Imprisonment. — A magistrate and a police sergeant may be indicted for conspiracy for illegal arrest and imprisonment. *Com. v. Collins*, 12 Rep. 284.

Malicious Prosecution. — An indictment for conspiracy for malicious prosecution will lie at common law. *Sydenham v. Keilaway*, Cro. Jac. 8.

Fraudulently to Procure Divorce. — Where the defendants were charged with having unlawfully, feloniously, wilfully, and fraudulently conspired together with the fraudulent intent wrongfully and wickedly to injure the administration of public justice by unlawfully, wilfully, and fraudulently attempting to obtain and procure a decree of divorce, it was held that they were guilty of a criminal conspiracy under section 46 of the Criminal Code of *Illinois* (Rev. Stat. 1874). *Cole v. People*, 84 Ill. 216.

Under United States Statutes — Knowledge and Intent. — Under § 5399 of the Rev. Stat. of the United States, which provides that "every person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness or officer in any court of the United States in the discharge of his duty, or corruptly or by threats or force obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, shall be punished," etc., it was held in the case of *Pettibone v. U. S.*, 148 U. S. 197, that a person could not be held guilty of a conspiracy to obstruct the due administration of justice in a Circuit Court of the United States unless he knew or had notice that justice was being administered in such court.

Crime Against State. — In the case of *Pettibone v. U. S.*, 148 U. S. 197, it was held that the mere criminal intent, on the part of the defendants, to commit a crime against the state would not support a conviction for a conspiracy

to obstruct the administration of justice in a federal court, under United States Rev. Stat., § 5399.

1. Conspiracy to Suppress or Fabricate Evidence. — *State v. De Witt*, 2 Hill L. (S. Car.) 282, 27 Am. Dec. 371; *Rex v. Mawbey*, 6 T. R. 619; *Rex v. Stevenon*, 2 East 362; *Rex v. Johnson*, 2 Show. 1.

Fabrication of Evidence — Need Not Involve Perjury. — A combination to fabricate evidence may amount to an indictable conspiracy though not involving perjury. *Johnson, J.*, in *State v. De Witt*, 2 Hill L. (S. Car.) 282, 27 Am. Dec. 371.

Destruction, Secretion, or Suppression of a Will. — The case of *State v. De Witt*, 2 Hill L. (S. Car.) 282, 27 Am. Dec. 371, was upon an indictment for a conspiracy to defraud the devisees of a certain decedent by destroying or secreting a will. It was held that the indictment charged an offense punishable under the law.

Subornation of Perjury. — A combination which has for its object an attempt to suborn a witness to commit perjury is an indictable conspiracy. *Johnson, J.*, in *State v. De Witt*, 2 Hill L. (S. Car.) 282, 27 Am. Dec. 371.

2. Inducing Witness to Abscond. — *People v. Chase*, 16 Barb. (N. Y.) 495.

3. Preventing Prosecutions. — *Claridge v. Hoare*, 14 Ves. Jr. 59.

4. Conspiracy to Cheat an Individual. — *Arch. Cr. Pl.* 507; 3 *Chitty's Crim. Law* 1139; 1 *Hawk P. C.*, b. 1, c. 72, § 2.

England. — *Rex v. Gill*, 2 B. & Ald. 204.

United States. — *U. S. v. Cruikshank*, 92 U. S. 542.

Alabama. — *State v. Murphy*, 6 Ala. 765, 41 Am. Dec. 79.

Connecticut. — *State v. Bradley*, 48 Conn. 535.

Illinois. — *Johnson v. People*, 22 Ill. 314.

Maine. — *State v. Clary*, 64 Me. 369.

Massachusetts. — *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; *Com. v. Davis*, 9 Mass. 415; *Com. v. Boynton*, 2 Allen (Mass.) 160; *Com. v. Walker*, 108 Mass. 309; *Com. v. Fuller*, 132 Mass. 563.

Michigan. — *People v. Richards*, 1 Mich. 216. 51 Am. Dec. 75.

New Jersey. — *State v. Norton*, 23 N. J. L. 33; *State v. Cole*, 39 N. J. L. 324.

New York. — *People v. Underwood*, 16 Wend. (N. Y.) 546.

Pennsylvania. — *Com. v. Tack*, 1 Brews. (Pa.) 511; *Clary v. Com.*, 4 Pa. St. 210; *Rhoads v. Com.*, 15 Pa. St. 272.

a single individual, without collusion or co-operation with others, if not done in a manner calculated to affect the public at large, was not an offense.¹

South Carolina. — *State v. Simons*, 4 Strobb. L. (S. Car.) 266.

Conspiracy Unsuccessful — Canada. — A conspiracy to defraud is indictable, even though the conspirators are unsuccessful in carrying out the fraud. *Reg. v. Frawley*, 25 Ont. Rep. 431.

Means Need Not Have Been Agreed Upon. — *Rex v. Gill*, 2 B. & Ald. 204, a leading English authority upon the points adjudicated, was a trial upon an indictment which charged the defendants with having conspired, by divers false pretenses and subtle devices, to obtain and procure for themselves divers large sums of money of persons named, and to cheat and defraud them thereof. Abbott, C. J., in his opinion sustaining the indictment, and in answer to the objection that the particular devices were not stated, says: "It is possible, however, to conceive that persons might meet together, and might determine and resolve that they would, by some trick and device, cheat and defraud another, without having at that time fixed and settled what the particular means and devices should be." See *supra*, this title, *Constituent Elements of the Offense — Materiality of the Means to be Employed*.

Either Real or Personal Property. — Upon the authority of *Rex v. Turner*, 13 East 228, in which it was held (erroneously, according to Gibson, C. J., in *Miffin v. Com.*, 5 W. & S. (Pa.) 461, 40 Am. Dec. 527) that an indictment for a conspiracy to commit a civil trespass by going upon another's land to kill hares would not lie, it was contended on the part of the defendants, in the case of *People v. Richards*, 1 Mich. 216, 51 Am. Dec. 75, that an indictment to defraud a person of lands was not maintainable. The soundness of this proposition was denied, however, by the court, through Wing, J., who delivered the opinion. "By reference to the cases," it was declared, "I am unable to perceive that they depend upon the kind of property to obtain which was the object of the conspiracy. In this, as in many of the cases, the intended fraud or cheat gives character to the transaction, and not the nature of the property. It is true that fraud in relation to real estate resolves itself into some other distinct offense when consummated; but the same may be said of all kinds of property."

Fraudulent Claim to Real Estate. — Where a woman living in the service of her master confederated with another person, who agreed to impersonate her master, and in such simulated character to solemnize a marriage with her for the purpose of aiding the woman to secure the property of the master after his death by setting up a spurious claim to such property upon the faith of the pretended marriage, it was held that such design entered into constituted conspiracy for which an indictment would lie. *Rex v. Robinson*, 2 East P. C. 1000.

Conspiracy to Extort a Deed. — Where the object of a conspiracy is to extort a deed by means of a peace warrant, the offense of conspiracy may be complete, though the statements contained in the peace warrant are true. *State v. Shooter*, 8 Rich. L. (S. Car.) 72. And

see *People v. Richards*, 1 Mich. 216, 51 Am. Dec. 75.

Fraudulent Purchase of Goods. — Those entering into a combination by which one person was to buy the goods of another and then abscond are guilty of a conspiracy. *Com. v. Ward*, 1 Mass. 473.

Conspiracy to Defraud Creditors. — A combination to secrete or dispose of the property of a debtor for the purpose of defrauding his creditors is indictable. *Com. v. Goldsmith*, 12 Phila. (Pa.) 632.

And a combination for the purpose of avoiding an expected adjudication in bankruptcy is indictable, whether or not the adjudication was, in fact, subsequently made. *Heymann v. Reg.*, L. R. 8 Q. B. 102, 12 Cox C. C. 383.

Purchase of Goods by an Insolvent Partnership. — In a trial upon an indictment against partners in trade for a conspiracy to cheat and defraud by obtaining goods when in an insolvent condition, with the intention of not paying for them, the trial court charged the jury that the purchase of goods on credit by an insolvent person, after knowledge of his insolvency, and without disclosing that fact to the seller, such buyer having no "reasonable expectation" of being able to pay for the goods in the regular and ordinary course of his business, was an unlawful act, which if participated in by two or more members of a partnership would be evidence of the existence of an indictable conspiracy. Upon appeal, Dewey, J., delivering the opinion of the court, said: "The test here assumed is that of 'reasonable expectation' of being able to pay for the goods purchased. This is too severe a test. * * * The more proper rule would seem to be that the purchase of goods by an insolvent person, knowing himself to be such, without any expectation of paying for the goods, would be an unlawful act which might be the subject of conspiracy." And unless this was the case, continued the court, there must be something to show a deceptive contrivance or false pretense. *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

Conspiracy to Execute Firm Notes in Payment of Individual Debts. — A conspiracy between a member of a copartnership and a third person whereby firm notes are to be executed and put in circulation for the purpose of paying the individual debts of such partner is an indictable offense. *State v. Cole*, 39 N. J. L. 324.

False Representations as to Solvency of Another. — It is an indictable conspiracy where the object is to cheat and defraud by a false representation as to the solvency of another. *Reg. v. Timothy*, 1 F. & F. 39; *Com. v. Warren*, 6 Mass. 74.

1. Shaw, C. J., in *Com. v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346, citing *Com. v. Boynton*, decided in *Massachusetts* before reports of cases were regularly published. See also opinion of Buchanan, J., in *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, in which the common-law authorities are exhaustively reviewed.

Conspiracy to Cheat a Corporation. — It will also be an indictable conspiracy if two or more combine together for the purpose of cheating or defrauding a private corporation, as where an employee of a bank conspired with a third person for the purpose of embezzling the funds of such institution.¹

b. CONSPIRACY BETWEEN VENDORS TO ENHANCE THE PRICE OF PROPERTY — False Representations as to Quality. — Where the vendors of personal property sold at auction induced a purchaser to pay more than it was worth by false representations as to its quality, it was held that such conduct did not render such vendors guilty of conspiracy.²

Mock Auction. — Where, however, for the purpose of selling goods at prices greatly in excess of their value, a mock auction was arranged, with sham bidders in attendance, it was held that those participating in the scheme were guilty of a conspiracy to cheat and defraud.³

c. CONSPIRACY BETWEEN VENDEE AND OTHERS TO REDUCE THE PRICE OF PROPERTY. — Where several persons confederated together for the purpose of inducing the owner of a horse to sell the animal for less than its value, by falsely representing that one of their number was a former owner and knew the animal to be unsound, they were held to be guilty of a conspiracy.⁴

d. CONSPIRACY TO CHEAT AND DEFRAUD AN ASSOCIATE IN AN ILLEGAL ENTERPRISE. — It seems upon principle that it should make no difference, in a criminal prosecution for a conspiracy, that the alleged victim was an associate in an illegal enterprise.⁵

Making One Drunk to Cheat Him at Cards. — Thus a combination between two to

1. *Com. v. Foering*, 6 Pa. L. J. 281; *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

To Cheat and Defraud an Insurance Company. — See *Com. v. Kellogg*, 7 Cush. (Mass.) 473.

Ontario Statute — Conspiring to Cheat Railroad. — It is criminal under § 394 of the Code to conspire by any fraudulent means to defraud any person, and a conspiracy to permit persons to travel free on a railroad would be a conspiracy against the company. *Reg. v. Defries*, 25 Ont. Rep. 645.

2. False Representations as to Quality of Goods. — In the case of *Reg. v. Levine*, 10 Cox C. C. 374, where a buyer of certain plated ware at auction had been induced to purchase by false representations as to its quality, made by several individuals in order to enhance the price, it was held that an agreement between persons to dispose of goods in that way did not amount to a conspiracy. Explaining the grounds for its decision, the court said: "It is most important not to bring within the criminal law the ordinary enhancing of value and quality by the seller of the goods. There is always a conflict of knowledge and skill between a buyer and a seller, the one wishing to buy as advantageously and the other to sell as advantageously as he possibly can, and it would be very dangerous to extend the criminal law to such cases."

3. *Reg. v. Lewis*, 11 Cox C. C. 484.

4. *Reg. v. Carlisle, Dears. C. C.* 337.

5. Conspiracy to Cheat Associate in Illegal Enterprise. — The case of *Reg. v. Hudson*, Bell C. C. 263, 8 Cox C. C. 305, was an indictment of three persons for a conspiracy under the following circumstances: The three alleged conspirators were, with several others, at a public house. One of the three placed a pen-case on the table and left the room. In his absence another of the conspirators advanced

to the table, opened the pen-case, and ostensibly removed a pen therefrom, substituting a pin in its place. Upon the return of the person who had left the pen-case upon the table, the individual who it was supposed had removed the pen and substituted the pin, with the co-operation of a third alleged conspirator, induced a bet between a bystander and the person who had placed the pen-case on the table prior to his departure and return, and whom the bystander supposed to be ignorant of the apparent substitution of the pin for the pen, the bystander wagering a sum of money that the pen-case contained no pen. Upon opening the case a pen appeared, and the bystander lost the amount wagered. Upon the trial it appeared that the entire performance was a scheme of the three, and they were found guilty. It was no defense, the court held, that the victim of the conspiracy was induced to believe that he was cheating the conspirators at the time he fell into the trap.

"Where two persons conspire together to make an unlawful act the means of doing an injury to or impoverishing another, it is stronger than many of the cases which have been held indictable." *Taylor, C. J.*, in *State v. Younger*, 1 Dev. L. (N. Car.) 357, 17 Am. Dec. 571.

Proper Distinction Between Civil and Criminal Proceedings. — *Peckham, J.*, delivering a dissenting opinion in *McCord v. People*, 46 N. Y. 470, said: "Where both parties to a civil suit are equally guilty of a felony, out of which the action arises, the law refuses its aid to either. It leaves them where it finds them. This rule has no application to criminal proceedings; the complainant is no party to that proceeding. The people are the party prosecuting, not the complainant. There is no ground for that rule in a criminal case, and there is no such rule."

cheat another by making him drunk and defrauding him at cards has been held an indictable conspiracy.¹

Wager on Race — Competitor Losing Purposely. — Likewise it has been held an indictable offense for a contestant in a foot race to conspire with a third party to induce a spectator to make a wager upon the result of the race, pursuant to which the contestant intentionally allows an inferior competitor to win.²

Depriving One of Office in Illegal Enterprise. — On the other hand, however, it has been held that a combination to deprive a person of office in an illegal trading company is not an indictable offense.³

Obtaining Goods Under False Pretenses. — And where the indictment was for a conspiracy to obtain goods by false pretenses, in a manner made unlawful by statute, the intended victim being a participant in the illegal scheme, it was held that the defendants could not be found guilty, upon the theory that the statute was not intended for the protection of wrongdoers.⁴

7. Conspiracies to Injure the Reputation. — Although a mere verbal calumny or slander is not indictable, a combination among several to destroy the reputation of an individual by such means constitutes a criminal offense.⁵ And it has been held immaterial whether the conspiracy be to charge a person with a crime, or only to affect injuriously his standing in society.⁶

1. *State v. Younger*, 1 Dev. L. (N. Car.) 357, 17 Am. Dec. 571.

2. *Reg. v. Orbell*, 6 Mod. 42.

3. **Depriving One of Office in Illegal Company.** — *Rex v. Stratton*, 1 Campb. 549, note. Lord Ellenborough said, upon the trial of this case: "This society was certainly illegal. Therefore, to deprive an individual of an office in it cannot be treated as an injury. When the prosecutor was secretary to the society, instead of having an interest which the law would protect he was guilty of a crime."

4. **Obtaining Goods Under False Pretenses.** — *State v. Crowley*, 41 Wis. 271. This was a case where the conspiracy was to defraud another by falsely representing that parcels sold to him contained counterfeit money, when in fact they contained sawdust.

The same view has been taken by the courts of *New York*. In the case of *McCord v. People*, 46 N. Y. 470, it was observed that "the prosecutor parted with his property as an inducement to a supposed officer to violate the law and his duties; and if in attempting to do this he has been defrauded, the law will not punish his confederate, although such confederate may have been instrumental in inducing the commission of the offense. Neither the law nor public policy designs the protection of rogues in their dealings with each other, or to insure fair dealing and truthfulness as between each other in their dishonest practices. The design of the law is to protect those who for some honest purpose are induced, upon false and fraudulent representations, to give credit or part with their property to another, and not to protect those who for unworthy or illegal purposes part with their goods." See also *People v. Stetson*, 4 Barb. (N. Y.) 151.

The author of Jacob's Law Dictionary, under the title "Conspiracy," in an enumeration of the "incidents" which "this confederacy, punishable by law before it is executed," should have, states: "It ought to be false, against an innocent."

5. **Conspiracy to Defame** — *England*. — *Rex v. Parsons*, 1 W. Bl. 392.

Maine. — *State v. Walker*, 32 Me. 195.

Massachusetts. — *Com. v. Tibbetts*, 2 Mass. 536; *Shaw, C. J.*, in *Com. v. Hunt*, 4 Met. (Mass.) 111, 38 Am. Dec. 346; *Com. v. O'Brien*, 12 Cush. (Mass.) 84.

New Jersey. — *Johnson v. State*, 26 N. J. L. 313; *State v. Hickling*, 41 N. J. L. 208, 32 Am. Rep. 198.

New York. — *Elkin v. People*, 28 N. Y. 177.

To Charge with Crime. — An indictment lies for conspiring by means of false and malicious charges to injure and defraud an individual, and to cause him to be regarded as dishonest and a thief. *State v. Hickling*, 41 N. J. L. 208, 32 Am. Rep. 198. "Indeed," said Beasley, C. J., in this case, "it may be said that a combination, formed with a view to cause a person to be suspected of having committed an indictable offense, is much nearer to the original ground upon which, in the old books, criminal prosecutions for conspiracy are based. * * * There are strong indications that originally the definition of conspiracy did not include anything more than confederacies to charge falsely a person with criminality. Thus Lord Coke describes the offense as 'a consultation and agreement between two or more to appeal or indict an innocent person falsely and maliciously, whom accordingly they cause to be indicted or appealed; and afterwards the party is lawfully acquitted by the verdict of twelve men.' Blackstone also seems to regard the offense to be confined to a malicious accusation. 4 Bl. Com. 136. There are several cases in the Year Books that favor the same limitation. And, in fact, this species of indictment was the remedy for the same wrong, considered in its criminal aspect, for which an action for a malicious prosecution was the remedy, considered in its civil aspect."

6. **To Accuse of Arson or Larceny.** — *People v. Dyer*, 79 Mich. 480.

To Charge with Capital Offense. — *Rex v. Spragg*, 2 Burr. 993.

Persons buying a pretended right to an estate, and then entering into a combination with others to charge the owner with a capital

8. Conspiracies to Extort Blackmail. — Where several individuals combine together for the purpose of extorting blackmail, they are guilty of a criminal conspiracy.¹ Thus where a confederacy was entered into for the purpose of procuring money from a person, by exhibiting to him a paper falsely represented to be an indictment charging him with a crime, which indictment the conspirators offered to suppress upon the payment to them of a certain sum, it was held that the parties to the plot were guilty of conspiracy and liable to punishment.²

9. Conspiracies to Injure a Person in His Trade or Occupation. — A combination formed for the purpose of injuring a person in his trade or occupation has been held to constitute an indictable offense;³ likewise a confederacy between two or more persons to coerce, restrain, or unduly influence another in the way he shall employ his industry, talents, or capital.⁴

offense in order that his estate might be forfeited, are guilty of the crime of conspiracy. *Ashley's Case*, 12 Coke 90.

The case of *Rex v. Macdaniel*, 1 Leach C. C. 44, was an indictment against certain individuals for conspiracy, upon the trial of which it was made to appear that the defendants had confederated together for the purpose of accusing an innocent man of highway robbery, and had actually procured his conviction and execution, in order to obtain the reward allowed for the conviction of a highway robber.

To Charge with Theft. — *Poulter's Case*, 9 Coke 55.

To Charge with Infanticide. — *State v. Jackson*, 82 N. Car. 565.

Where No Indictment Procured. — Upon the principle that no overt act is necessary to constitute the offense, it was held to be no defense to the prosecution that no indictment against the contemplated victim had been procured nor even a complaint made before a magistrate. *Rex v. Parsons*, 1 W. Bl. 302.

To Defame without Charging a Crime. — In the case of *Rex v. Rispal*, 1 W. Bl. 368, which was a prosecution for a conspiracy to extort money from an individual by charging him generally with having taken a quantity of human hair out of a bag, objection was made against the indictment on the ground that it did not charge that the defendants had conspired to fix any crime on the party, but only generally with taking the hair, which might have been lawful. But, said Lord Mansfield, the other judges concurring, the crime laid is an unlawful conspiracy, whether it be to charge a man with criminal acts, or such only as may affect his reputation.

To Charge a Spiritual Offense. — Conspiracy may be to charge one with fornication, a spiritual offense. *Reg. v. Best*, 2 Ld. Raym. 1167.

To Charge Paternity of Bastard. — It is an indictable offense to conspire to bring one into disrepute by falsely charging him with being the father of a bastard. *Reg. v. Best*, 6 Mod. 137; *Leviston v. Lentall*, 1 Sid. 68; *Rex v. Armstrong*, 1 Vent. 304; *Rex v. Kimberty*, 1 Lev. 62; *Timberle v. Childe*, 1 Sid. 68.

New Jersey Rule. — In the case of *State v. Hickling*, 41 N. J. L. 208, 32 Am. Rep. 198, it was held to be the true doctrine, that in order for an indictment for a conspiracy to slander to be maintainable, the contemplated slander must be to impute an offense punishable by

the courts. See also *Johnson v. State*, 26 N. J. L. 313.

1. Blackmail — England. — *Rex v. Hollingberry*, 6 D. & R. 345, 16 E. C. L. 262, 4 B. & C. 329, 10 E. C. L. 346; *Rex v. Rispal*, 1 W. Bl. 368; *Timberle v. Childe*, 1 Sid. 68; *Child v. North*, 1 Keb. 203; *Rex v. Armstrong*, 1 Vent. 304; *Reg. v. Best*, 2 Ld. Raym. 1167; *Rex v. Kinnersley*, 1 Stra. 193.

Alabama. — *State v. Cawood*, 2 Stew. (Ala.) 360.

Massachusetts. — *Com. v. Andrews*, 132 Mass. 263; *Com. v. Nichols*, 134 Mass. 531.

Act with Which Victim Is to Be Charged May or May Not Be a Crime. — Where, with the object of extorting money, it is agreed between several to falsely charge another with a certain act, it is immaterial whether the act of which the contemplated victim of the conspiracy is to be charged is or is not of a criminal nature. *Rex v. Rispal*, 1 W. Bl. 368.

To Charge the Paternity of a Bastard Child. — In the case of *Timberle v. Childe*, 1 Sid. 68, the defendants were convicted of a conspiracy to charge one with being the father of a bastard child with intent to extort money from him.

2. Rex v. Hollingberry, 6 D. & R. 345, 16 E. C. L. 262, 4 B. & C. 329, 10 E. C. L. 346.

3. To Injure One in His Trade. — *Rex v. Cope*, 1 Stra. 144; *Rex v. Eccles*, 1 Leach C. C. 274; *Crump v. Com.*, 84 Va. 927, 10 Am. St. Rep. 895.

In the case of *Rex v. Eccles*, 1 Leach C. C. 274, several persons were indicted and convicted for conspiring to impoverish a tailor, and to prevent him, by indirect means, from carrying on his trade.

In the case of *Rex v. Cope*, 1 Stra. 144, it appeared that the defendants had combined together for the purpose of injuring the trade of the prosecutor, who was card-maker to the king; and in furtherance of their designs they had bribed the apprentices of the prosecutor to put grease into the paste used in the process of manufacture, thereby spoiling the cards. Such facts were held to constitute the crime of conspiracy, though if the act proved had been done by a single individual, it would have constituted but a private injury, for which the party injured would have been confined to his civil action.

4. In the case of Reg. v. Druiitt, 10 Cox C. C. 593, Baron Bramwell said: "The liberty of a man's mind and will to say how he should

10. Conspiracies to Procure Marriage. — A marriage between adults free from disability being not unlawful, in order to render a combination to procure such a marriage indictable it is necessary that the intention of the conspirators be to accomplish it by "some violence, fraud, or falsehood, or some artful or sinister contrivance."¹ When, however, any such unlawful means have been agreed upon or adopted, the combination becomes at once criminal, and the associates liable to indictment.²

IV. GRADE OF OFFENSE — 1. In General. — In the nomenclature of the com-

bestow himself and his means, his talents and his industry, was as much a subject of the law's protection as was that of his body;" and "if any set of men agree among themselves to coerce that liberty of mind and thought by combination and restraint, they would be guilty of a criminal offense, namely, that of conspiring against the liberty of mind and freedom of will of those toward whom they conducted themselves." The public, it was held in this case, has an interest in the unrestrained exercise of honest industry, and the free use and employment of capital within legitimate bounds.

See also *Crump v. Com.*, 84 Va. 927, 10 Am. St. Rep. 895; *Jackson v. Stanfield*, 137 Ind. 609, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 608. See also the titles LABOR COMBINATIONS; STRIKES.

1. Conspiracy to Procure Marriage. — *Buller, J.*, in *R. v. Fowler*, 1 East P. C. 461; *Rex v. Thorp*, 5 Mod. 221. And see *Com. v. Waterman*, 122 Mass. 43.

Criminal or Unlawful Means. — Such combinations come directly within the rule requiring criminal or unlawful means, where the object is neither criminal nor unlawful. See *supra*, this title, *Constituent Elements of the Offense — Criminal or Unlawful Means — Where the Object Is Neither Criminal Nor Unlawful*.

Conspiracies Between Overseers of the Poor to Procure the Marriage of Paupers. — Pursuant to the principle stated in the text, it has been held that whether or not it is an indictable conspiracy for overseers of the poor to confederate together to relieve their own parish to the consequent burdening of another, by procuring the marriage of a female pauper, for whose support their own parish is chargeable by reason of her settlement therein, to a pauper of another parish, whereby she acquires a settlement in the latter, seems to depend upon the means by which the object is to be accomplished. *Rex v. Edwards*, 8 Mod. 321; *Rex v. Herbert*, 2 Kenyon 466; *Rex v. Watson*, 1 Wils. 41; *Rex v. Tarrant*, 4 Burr. 2106.

It has been declared, therefore, that a concerted undertaking to procure a marriage between poor persons of different parishes, for the mere purpose of exonerating one parish and charging another, is not an indictable offense unless the parties were unwilling to marry, or some forcible or fraudulent means of procuring the marriage were resorted to. *Rex v. Watson*, 1 Wils. 41; *Rex v. Tarrant*, 4 Burr. 2106.

Conspiracy to Effect Elopement and Marriage of Infant. — In the report of the case of *Miffin v. Com.*, 5 W. & S. (Pa.) 461, 40 Am. Dec. 527, which was an indictment for conspiracy to

effect the escape and marriage of a female infant, it does not clearly appear whether the means resorted to were in themselves violent, fraudulent, artful, or sinister. Upon principle, it seems not improbable that a conspiracy to procure the marriage of an infant female, certainly if under the age of consent, would constitute an indictable offense, whether the means be resorted to were or were not criminal or unlawful.

2. Where Unlawful Means Adopted — England. — *Rex v. Twistleton*, 1 Sid. 387; *Rex v. Locker*, 5 Esp. N. P. 107; *Rex v. Thorp*, 5 Mod. 221; *Reg. v. Blacket*, 7 Mod. 39.

Alabama. — *State v. Murphy*, 6 Ala. 765, 41 Am. Dec. 79.

Pennsylvania. — *Miffin v. Com.*, 5 W. & S. (Pa.) 461, 40 Am. Dec. 527; *Respublica v. Hevice*, 2 Yeates (Pa.) 114.

Where several persons combined together for the purpose of securing the marriage of a young woman to one of their number, by exhibiting a forged license, falsely represented to be genuine, to the woman, her father and mother, and by further representing falsely that one of their number was an officer authorized by law to perform the ceremony, it was adjudged that the confederates were guilty of a conspiracy. *State v. Murphy*, 6 Ala. 765, 41 Am. Dec. 79.

The case of *Miffin v. Com.*, 5 W. & S. (Pa.) 461, 40 Am. Dec. 527, was a trial upon an indictment for conspiring to effect the escape of a female infant for the purpose of effecting her marriage against her father's will. After a verdict of guilty, in the lower court, the defendants moved in arrest of judgment upon the ground that no crime was charged in the indictment. Upon the overruling of this motion an appeal was taken, when it was held, after a careful review of the authorities, that the indictment did charge a substantive offense for which an indictment for conspiracy would lie. Commenting upon Mr. Russell's classification of conspiracy, in his treatise on Crimes, vol. 2, p. 553, the court said that the case under consideration was embraced in two heads, viz., confederacies to do a private wrong, and confederacies to do a public mischief; "for nothing can be more grievous to the party," continues the court, "or of worse example to the public, than to steal away a man's daughter from his nurture and admonition."

In the case of *Rex v. Thorp*, 5 Mod. 221, several persons who united in a design to inveigle a young man, under the age of eighteen, and heir to a considerable estate, out of the custody and government of his father, and seduce him to a disgraceful marriage, were held guilty of a conspiracy.

mon law of crimes, the offense of conspiracy is a "misdemeanor."¹ According to one authority, there were several degrees of the offense under the ancient English common law,² which, however, perhaps means no more than that some conspiracies were subject to special punishments.³

2. Merger of the Conspiracy into a Felony Committed Pursuant Thereto.—A conspiracy to commit a crime of a higher grade than the offense of conspiracy merges into the crime upon its execution.⁴ When, therefore, a felony is committed pursuant to a conspiracy, the offense of the lesser grade merges into the one of higher grade, and there can be no prosecution for the former.⁵

Conspiracy to Commit Misdemeanor.—It is otherwise, however, where the two offenses are of equal grade, as a conspiracy to commit a misdemeanor, because in such case there can be no legal merger of the one into the other.⁶

1. Grade of Offense—At Common Law.—4 Steph. Com. 238; Steph. Cr. Dig. 29, 87; Rap. & Lawr. Law Dict., Conspiracy.

England.—Reg. v. Aspinall, 1 Q. B. Div. 730.

Alabama.—State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79.

Connecticut.—State v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23.

Massachusetts.—Scott v. Eldridge, 154 Mass. 25.

Michigan.—Wing, J., in People v. Richards, 1 Mich. 216, 51 Am. Dec. 75.

New York.—Marcy, J., in People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

North Carolina.—State v. Jackson, 82 N. Car. 565.

Pennsylvania.—Com. v. Goldsmith, 12 Phila. (Pa.) 632.

2. Buchanan, J., in State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

3. See Rap. & Lawr. Law Dict., Conspiracy.

4. Where Crime to Be Committed of Higher Grade than the Conspiracy—Merger—United States.—U. S. v. Gardner, 42 Fed. Rep. 829; U. S. v. McDonald, 3 Dill. (U. S.) 545; U. S. v. Martin, 4 Cliff. (U. S.) 166.

Alabama.—State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79.

Arkansas.—Elsev v. State, 47 Ark. 572.

Indiana.—Wright v. State, 5 Ind. 528.

Iowa.—State v. Lewis, 48 Iowa 579, 30 Am. Rep. 407.

Maine.—State v. Mayberry, 48 Me. 238.

Massachusetts.—Com. v. Kingsbury, 5 Mass. 105.

Michigan.—People v. Richards, 1 Mich. 222, 51 Am. Dec. 75.

New York.—People v. McKane, 31 Abb. N. Cas. (N. Y. Oyer & T. Ct.) 176, 7 Misc. Rep. (N. Y.) 478; People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

"The Reason," said Wallace, J., in U. S. v. Gardner, 42 Fed. Rep. 831, "why a conviction cannot be had for the conspiracy to commit a felony or for an attempt to commit a felony when it appears that the felony was actually committed is that an acquittal for the minor offense would not bar a subsequent indictment for the major, and consequently the accused might be put twice in jeopardy for acts which were all constituent parts of one offense."

5. No Prosecution for Lesser Offense.—Com. v. Kingsbury, 5 Mass. 106; Shannon v. Com., 14 Pa. St. 226; People v. McKane, 31 Abb.

N. Cas. (N. Y. Oyer & T. Ct.) 176, 7 Misc. Rep. (N. Y.) 478. And see U. S. v. Gardner, 42 Fed. Rep. 829.

In the case of Com. v. Kingsbury, 5 Mass. 106, the defendants were charged with the fraudulent removal of goods upon a conspiracy previously formed, under such circumstances as made them guilty of a felony. The question was raised whether the defendants could be prosecuted for the conspiracy, and the court was of opinion that if the conspiracy had not been effected it might have been punished as a distinct offense; "but a contrivance to commit a felony, and executing the contrivance, cannot be punished as an offense distinct from the felony, because the contrivance is a part of the felony, when committed pursuant to it."

As a deduction from the principle stated in the text, it was held in Elsev v. State, 47 Ark. 572, that an indictment for a conspiracy to commit a felony should allege that the felony was not committed.

6. Conspiracy to Commit Misdemeanor—United States.—U. S. v. Martin, 4 Cliff. (U. S.) 156; U. S. v. Gardner, 42 Fed. Rep. 829.

Alabama.—State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79.

Connecticut.—State v. Setter, 57 Conn. 461, 14 Am. St. Rep. 121.

Maine.—State v. Murray, 15 Me. 100; State v. Mayberry, 48 Me. 218.

Michigan.—People v. Richards, 1 Mich. 216, 51 Am. Dec. 75.

New York.—People v. Mather, 4 Wend. (N. Y.) 265, 21 Am. Dec. 122.

Pennsylvania.—Com. v. Delany, 1 Grant's Cas. (Pa.) 224.

Vermont.—State v. Noyes, 25 Vt. 415.

Commenting upon a case in which it was alleged to have been stated that where either a felony or a misdemeanor was committed pursuant to a conspiracy, the conspiracy at once merged, it was held by the court in People v. Richards, 1 Mich. 216, 51 Am. Dec. 75, that such a rule had no application in a case where a misdemeanor only was committed. "To apply such a rule to misdemeanors," said Wing, J., delivering the opinion of the court in this case, "is scarcely in accordance with legal analogy, and it is supported by no other authority. That it never obtained in England to such an extent as to involve the absorption of a conspiracy to commit a misdemeanor in the misdemeanor itself, is evident from the elementary treatises in which no

V. HOW A CONSPIRACY MAY BE PROVED — 1. In General — Circumstantial Evidence. — It is not necessary, in order that the fact of a conspiracy may be established, that it should be proved by evidence of an express agreement or compact between the alleged conspirators,¹ or by direct evidence of any agreement or compact. A conspiracy may be proved inferentially, or by circumstantial evidence.² Conspiracies from their very nature, it has been said, are

such doctrine is even broached, and the books of precedents in which forms constantly occur for conspiracies to commit misdemeanors to which the overt act is attached."

The Offense of Obstructing an Officer of the Law in the discharge of his duty, not constituting a felony, does not, upon commission, merge the offense of a conspiracy to commit the offense. *State v. Noyes*, 25 Vt. 415.

1. See *supra*, this title, *Constituent Elements of the Offense — Agreement Between Conspirators May Be Implied or Express*.

2. Circumstantial Evidence — England. — *Rex v. Parsons*, 1 W. Bl. 392; *Rex v. Robinson*, 1 Leach C. C. 37.

United States. — *U. S. v. Babcock*, 3 Dill. (U. S.) 588; *U. S. v. Rindskopf*, 6 Biss. (U. S.) 259; *U. S. v. Goldberg*, 7 Biss. (U. S.) 175; *Drake v. Stewart*, 22 C. C. A. 104; *Glaspie v. Keator*, 12 U. S. App. 281.

Alabama. — *Martin v. State*, 89 Ala. 115, 18 Am. St. Rep. 91; *Gibson v. State*, 89 Ala. 121, 18 Am. St. Rep. 96.

Connecticut. — *Gardner v. Preston*, 2 Day (Conn.) 205, 2 Am. Dec. 91.

Delaware. — *State v. Clark*, (Del. 1891) 33 Atl. Rep. 310.

Illinois. — *Spies v. People*, 122 Ill. 213, 3 Am. St. Rep. 320; *Ochs v. People*, 124 Ill. 399.

Indiana. — *Archer v. State*, 106 Ind. 426; *McKee v. State*, 111 Ind. 378.

Iowa. — *State v. Sterling*, 34 Iowa 443; *Taylor County v. Standley*, 79 Iowa 666, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 629-632.

Maryland. — *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534; *Bloomer v. State*, 48 Md. 521.

Minnesota. — *Redding v. Wright*, 49 Minn. 322.

New York. — *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342; *Marcy, J.*, in *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

Pennsylvania. — *Benford v. Sanner*, 40 Pa. St. 9, 80 Am. Dec. 545; *Com. v. Ridgway*, 2 Ashm. (Pa.) 247.

The acts of the parties in particular cases, the nature of those acts, and their declarations and statements, whether verbal or in writing, and the character of the transactions or series of transactions, with the accompanying circumstances as the evidence may disclose them, may be investigated and considered as sources from which evidence may be derived of the existence or nonexistence of an agreement which may be express or implied to do the alleged unlawful act. *U. S. v. Goldberg*, 7 Biss. (U. S.) 175.

Not Only May, but Ordinarily Must, Be Proved by Circumstantial Evidence. — To this effect see *Benford v. Sanner*, 40 Pa. St. 9, 80 Am. Dec. 545.

To establish a conspiracy it is not necessary that there should be an explicit or formal agreement for an unlawful scheme between

the parties, nor is it essential that direct proof be made of an express agreement to do the act forbidden by law. It is as competent to prove an alleged conspiracy by circumstances as by direct evidence. In transactions for criminal conspiracies the proof of the combination charged must almost always be extracted from the circumstances connected with the transaction which forms the subject of the accusation. *U. S. v. Goldberg*, 7 Biss. (U. S.) 175.

As a conspiracy can rarely be proved by direct evidence, the courts are compelled to consider such acts and circumstances as may tend to point out the guilty parties. *State v. Sterling*, 34 Iowa 443.

Concurrent Knowledge and Approval of Each Other's Acts — Similarity of Means Employed. — "A combination or conspiracy," said the court in the case of *Gardner v. Preston*, 2 Day (Conn.) 205, 2 Am. Dec. 91, "may be proved by evincing a concurrent knowledge and approval, in the persons conspiring, of each other's acts; and it is most usually done by proof of the separate acts of several persons concentrating in the same purpose or particular object. The greater the secrecy that is observed relative to the object of such concurrence, and the more apparent the similarity of the means employed to effect it, the stronger is the evidence of conspiracy."

May Be Established Inferentially from Collateral Circumstances. — The joint assent may be established as an inference from other facts. *Spies v. People*, 122 Ill. 213, 3 Am. St. Rep. 320.

In the case of *Rex v. Parsons*, 1 W. Bl. 392, which was an information for a conspiracy, it was adjudged that "there was no occasion to prove the actual fact of conspiring, but that it might be collected from collateral circumstances." See also, to same effect, *Marcy, J.*, in *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

West Virginia Statute — Aiding and Abetting. — Under § 10, c. 148, West Virginia Code of 1891, the jury may find the fact of combination and conspiracy from the circumstance that the parties were present, aiding and abetting in the commission of the crime charged, if satisfied of such conspiracy beyond a reasonable doubt. But this presumption is rebuttable. *State v. Bingham*, 42 W. Va. 234.

Illustrations. — Evidence of other purchases than those charged in the indictment for conspiracy to cheat and defraud by obtaining goods without paying for them is admissible to show the intent with which the acts charged were done, but not to prove the commission of other offenses than those charged. *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596. In this case it may be noted that the evidence of the "other acts" was admitted in order to prove the intent with which an act, itself only evidentiary, was done.

Where the defendants were indicted for a

usually entered into in secret, and are consequently difficult to be reached by positive testimony, which renders it peculiarly necessary and proper to permit them to be inferred from circumstances.¹

Question for Jury. — And the existence of a conspiracy is a question of fact to be determined by the jury, who should decide from all the evidence whether there is such a combined intent and confederation as constitutes the offense.²

2. Overt Acts as Evidence — *a.* IN GENERAL. — Acts done pursuant to a

conspiracy to cheat and defraud by the one impersonating the other and negotiating certain drafts payable to the latter, whereupon the bank upon which the drafts were drawn was instructed not to pay such drafts, new drafts of like tenor and date being procured, it was held to be admissible to show, in order to raise a presumption of guilt as to the owner of the drafts, that he had proposed a similar scheme to another person not named in the information, several days prior to the carrying out of the plan by the confederate named. *People v. Arnold*, 46 Mich. 268. See also *Tarbox v. State*, 38 Ohio St. 581.

In an action against three associates for a conspiracy to defraud such merchants and traders as they might be able to deceive by two of the three representing the third, who was insolvent, as a man of large property and safely to be trusted, evidence that the two defendants made such representations to other persons than the plaintiff, in consequence of which such other persons, without the request of the defendants, recommended the third conspirator to the plaintiff, whereby the plaintiff was induced to give him credit, was held to be admissible after proof of the combination had been made. *Gardner v. Preston*, 2 Day (Conn.) 205, 2 Am. Dec. 91. And see *Lucky v. Roberts*, 25 Conn. 486.

In the case of *Rex v. Stone*, 6 T. R. 527, it was said by Lawrence, J., that in *Tooke's Case*, 25 How. St. Tr., he had alluded to the cases of Lord Stafford and Lord Lovatt to show that in order to prove a conspiracy the acts of the different conspirators were admissible, though acts to which the prisoners were no party. In *Beal v. Thatcher*, 3 Esp. N. P. 194, the principle just mentioned is recognized and applied. The plaintiff brought an action on the case against the defendant for his having given a false character of one Johnston, as to his solvency, by reason of which the plaintiff had trusted him with goods which had not been paid for. The plaintiff's counsel called a witness to prove that the defendant had recommended Johnston to him, the witness, and represented him as a man entitled to credit, and in good circumstances. This evidence was objected to as being *res inter alios acta*. It was said that the issue was not whether he had defrauded the witness, but the plaintiff. Lord Kenyon, however, declared it to be admissible because it proved a subsisting fraudulent connection between the defendant and Johnston, and might therefore go to the jury.

In the case of *Rex v. Hammond*, 2 Esp. N. P. 719, Lord Kenyon said: "If a general conspiracy exists, you may go into general evidence of its nature and the conduct of its members, so as to implicate men who stand charged with acting upon the terms of it,

years after those terms have been established, and who may reside at a great distance from the place where the general plan is carried on."

Evidence Tending to Prove Independent Offenses. — Evidence should not, necessarily, be excluded because it may tend to prove offenses for which independent indictments would lie. *M'Donald v. People*, 25 Ill. App. 350.

Where one of several conspirators was tried for committing a murder in an attempt to rob, it was held that evidence of a conspiracy to rob several parties was admissible, though the deceased was the only victim. *Ford v. State*, 34 Ark. 649. And see *State v. Greenwade*, 72 Mo. 298; *Reinhold v. State*, 130 Ind. 467.

Where a conspiracy to defraud a county by rendering false bills was charged, it was held admissible to introduce other false bills, rendered pursuant to other conspiracies, where they tended to prove the conspiracy charged. *McDonald v. People*, 126 Ill. 150, 9 Am. St. Rep. 547.

Correspondence Between Alleged Conspirators. — In an action against several for a conspiracy to cheat and defraud, correspondence and proof of conversations between two of the defendants are admissible to prove the conspiracy. *St. Paul Distilling Co. v. Pratt*, 45 Minn. 215. To the same effect see *Zellerbach v. Allenberg*, 99 Cal. 57; *Com. v. Waterman*, 122 Mass. 43; *Speer, J.*, in *U. S. v. Lancaster*, 44 Fed. Rep. 896; *U. S. v. Graff*, 14 Blatchf. (U. S.) 382; *People v. Hampton*, 4 Utah 258.

Letters from Conspirator to Witness. — Letters written by one on trial for conspiracy to a witness in the case, seeking, by threats, to prevent him from testifying, are admissible in evidence. *Adams v. People*, 9 Hun (N. Y.) 89.

1. *Buchanan, J.*, in *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534; *Speer, J.*, in *U. S. v. Lancaster*, 44 Fed. Rep. 896. See also *Benford v. Sanner*, 40 Pa. St. 9, 80 Am. Dec. 545.

2. Question for Jury — *England.* — *Rex v. Robinson*, 1 Leach C. C. 37.

United States. — *Russell v. Post*, 138 U. S. 425. *California.* — *People v. Fehrenbach*, 102 Cal. 394.

Illinois. — *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320.

Maine. — *State v. Ripley*, 31 Me. 386.

Maryland. — *Buchanan, J.*, in *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

Massachusetts. — *Com. v. Smith*, 163 Mass. 411.

Pennsylvania. — *Percival v. Harres*, 142 Pa. St. 369.

Texas. — *Porter v. Martyn*, (Tex. 1895) 32 S. W. Rep. 731; *Blain v. State*, 33 Tex. Crim. Rep. 236.

And see *People v. Flack*, 125 N. Y. 324.

conspiracy, though circumstantial evidence merely, are peculiarly satisfactory and convincing proof of the existence of the combined intent and agreement.¹

Proof of Previous Concurrence in Design. — In this connection it has been held to be unnecessary to prove a previous concurrence in the design of a conspiracy, in order to convict one who actively participates in accomplishing its object.² And where several come together, though for a lawful purpose, if they subsequently join in the doing of an injury to the property of another it will be held to be a conspiracy, without proof of any previous design against the person injured.³

b. ACTS AND DECLARATIONS OF ONE AS EVIDENCE AGAINST ASSOCIATE — Rule Stated. — When the fact of a conspiracy has been proved or established by reasonable inference, the acts and declarations of one conspirator in furtherance of, or made with reference to, the common design, are admissible in evidence against his associates.⁴

1. General Rule as to Overt Acts as Evidence. — 2 Russ. Crim. Law 568.

England. — *Rex v. Eccles*, 3 Doug. 337, 26 E. C. L. 131; *Rex v. Spragg*, 2 Burr. 993; *Rex v. Rispal*, 3 Burr. 1321.

Alabama. — *Martin v. State*, 89 Ala. 115, 18 Am. St. Rep. 91.

Illinois. — *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320.

Maine. — *State v. Ripley*, 31 Me. 386.

Massachusetts. — *Com. v. Eastman*, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; *Com. v. Tibbetts*, 2 Mass. 537.

New York. — *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342.

Pennsylvania. — *Com. v. Corlies*, 8 Phila. (Pa.) 450.

Overt Acts — Most Convincing Evidence Adducible. — "It is often that the intentions of a wrongdoer," said Tenney, J., delivering the opinion of the court in *State v. Ripley*, 31 Me. 386, "are ascertained entirely by acts done which are the natural effects of unlawful designs; the acts and circumstances which accompany them, showing the connection between the acts and the motives which produced them, are generally the most convincing evidence which can be adduced."

Disconnected Overt Acts Contributing to Same Result. — Persons performing disconnected overt acts, all contributing to the same result and the consummation of the same offense, may, by the circumstances, and their general connection or otherwise, be satisfactorily shown to be conspirators with the same general end and object in view. *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342; *U. S. v. Cole*, 5 McLean (U. S.) 513.

If two persons pursue by their acts the same object, one performing one act or a part of an act, and the other another act or another part of the same act, so as to complete it with a view to the attainment of the object they are pursuing, the jury are at liberty to draw the conclusion that they have been engaged in a conspiracy to effect the object. *Dyer, J.*, in *U. S. v. Goldberg*, 7 Biss. (U. S.) 175.

When Overt Acts Are of Less Significance as Evidence. — When the criminality of a conspiracy to do an act depends upon the motives of the alleged conspirators and the intent with which the act is to be done, the mere doing of the act is not of itself evidence of a

criminal conspiracy. Thus the confining a person in an insane asylum by her relatives is not, of itself, evidence of a criminal conspiracy. To render such a conspiracy criminal, it has been held, the motives of the persons concerned must be criminal or corrupt. *Com. v. Sheriff*, 1 Leg. Gaz. (Pa.) 340.

Acts Tending to Prove Conspiracy Directly or Indirectly. — It would seem that proof of an overt act may be offered in evidence upon a trial for conspiracy, though the alleged preconcerted plan did not necessarily include the commission of the act done, provided, however, the act be one which would tend, directly or indirectly, to the accomplishment of the common purpose. *Martin v. State*, 89 Ala. 115, 18 Am. St. Rep. 91.

2. Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320; *Com. v. Warren*, 6 Mass. 74.

If parties in any manner work together to advance the unlawful scheme, having its promotion in view and actuated by the common purpose of accomplishing the unlawful end, they are conspirators. *U. S. v. Goldberg*, 7 Biss. (U. S.) 175.

3. So where the defendants and others started out on a fox chase, but subsequently went to chasing and killing cattle. *Lowery v. State*, 30 Tex. 402.

4. Acts and Declarations of One as Evidence Against Associate — *England.* — *Rex v. Stone*, 6 T. R. 527.

United States. — *American Fur Co. v. U. S.*, 2 Pet. (U. S.) 359; *Nudd v. Burrows*, 91 U. S. 426; *Logan v. U. S.*, 144 U. S. 263; *U. S. v. Lancaster*, 44 Fed. Rep. 896; *U. S. v. Cassidy*, 67 Fed. Rep. 698; *U. S. v. Gunnell*, 5 Mackey (D. C.) 196; *Lincoln v. Claffin*, 7 Wall. (U. S.) 132; *Drake v. Stewart*, 22 C. C. A. 104; *Clune v. U. S.*, 195 U. S. 590.

Alabama. — *Johnson v. State*, 29 Ala. 62, 65 Am. Dec. 383; *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 56 Am. Rep. 31.

California. — *People v. Trim*, 39 Cal. 75; *People v. Geiger*, 49 Cal. 643; *People v. Collins*, 64 Cal. 293; *People v. Dixon*, 94 Cal. 255; *People v. Fehrenbach*, 102 Cal. 394; *People v. Brady*, (Cal. 1894) 36 Pac. Rep. 949.

Delaware. — *State v. Clark*, (Del. 1891) 33 Atl. Rep. 310.

Florida. — *Williams v. Dickenson*, 28 Fla. 90.

Georgia. — *Horton v. State*, 66 Ga. 690.

The Requirement that the Conspiracy Shall First Be Established before proof of the acts and declarations of a conspirator can be received against an alleged co-conspirator, includes, of course, the necessity of showing directly, or by the same rea-

Idaho. — *Shields v. Ruddy*, 2 Idaho 884.
Illinois. — *Spies v. People*, 122 Ill. 237, 3 Am. St. Rep. 320.

Indiana. — *Jones v. State*, 64 Ind. 473; *Card v. State*, 109 Ind. 415; *Reinhold v. State*, 130 Ind. 467; *Archer v. State*, 106 Ind. 426.

Iowa. — *Allen v. Kirk*, 81 Iowa 658.

Kansas. — *State v. Winner*, 17 Kan. 298.

Kentucky. — *McGraw v. Com.*, (Ky. 1892) 20 S. W. Rep. 279; *Metcalfe v. Conner*, Litt. Sel. Cas. (Ky.) 497, 12 Am. Dec. 340.

Louisiana. — *State v. Buchanan*, 35 La. Ann. 89.

Maine. — *State v. Soper*, 16 Me. 293, 33 Am. Dec. 665.

Massachusetts. — *Com. v. Tivnon*, 8 Gray (Mass.) 375, 69 Am. Dec. 248; *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81.

Michigan. — *People v. Saunders*, 25 Mich. 119.

Minnesota. — *Nicolay v. Mallery*, 62 Minn. 119, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 633.

Mississippi. — *Stovall v. Farmers', etc.*, Bank, 8 Smed. & M. (Miss.) 305, 47 Am. Dec. 85; *Trimble v. Turner*, 13 Smed. & M. (Miss.) 348, 53 Am. Dec. 90.

Missouri. — *Weinstein v. Reid*, 25 Mo. App. 41; *State v. Minton*, 116 Mo. 605; *State v. Duffy*, 124 Mo. 1.

New Hampshire. — *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172.

New York. — *People v. Kerr*, (New York County Oyer & T. Ct.) 6 N. Y. Crim. Rep. 406; *Crary v. Sprague*, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110; *People v. Gorham*, 16 Hun (N. Y.) 93.

Ohio. — *Goins v. State*, 46 Ohio St. 457; *Seville v. State*, 49 Ohio St. 117.

Pennsylvania. — *McCaskey v. Graff*, 23 Pa. St. 321, 62 Am. Dec. 336; *Benford v. Sanner*, 40 Pa. St. 9, 80 Am. Dec. 545; *McCabe v. Burns*, 66 Pa. St. 356; *Lowe v. Dalrymple*, 117 Pa. St. 564; *Com. v. O'Brien*, 140 Pa. St. 555.

South Carolina. — *Bell v. Coiel*, 2 Hill Eq. (S. Car.) 108, 27 Am. Dec. 448; *Costelo v. Cave*, 2 Hill L. (S. Car.) 528, 27 Am. Dec. 404; *State v. Simons*, 4 Strobb. L. (S. Car.) 266.

Tennessee. — *Owens v. State*, 16 Lea (Tenn.) 1.

Texas. — *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746; *Loggins v. State*, 8 Tex. App. 434; *O'Neal v. State*, 14 Tex. App. 583; *Smith v. State*, 21 Tex. App. 96; *Harris v. State*, 31 Tex. Crim. Rep. 411; *Luttrell v. State*, 31 Tex. Crim. Rep. 493; *McKenzie v. State*, 32 Tex. Crim. Rep. 568; *Smith v. State*, (Tex. Crim. App. 1892) 20 S. W. Rep. 576; *Rix v. State*, 33 Tex. Crim. Rep. 353.

Virginia. — *Williamson v. Com.*, 4 Gratt. (Va.) 547; *Sands v. Com.*, 21 Gratt. (Va.) 871; *Danville Bank v. Waddill*, 31 Gratt. (Va.) 469.

Wisconsin. — *Tucker v. Finch*, 66 Wis. 17; *Baker v. State*, 80 Wis. 416.

See also the title CONFESSIONS, *ante*.

And see *Wiggins v. Leonard*, 9 Iowa 194; *Holliday v. Jackson*, 30 Mo. App. 263.

Prerequisites to Admissibility — **Privity and Community of Design**. — "No man," said Rice,

C. J., delivering the opinion of the court in *Johnson v. State*, 29 Ala. 62, 65 Am. Dec. 383, "can be criminally affected by the acts or declarations of a stranger; but where a privity and community of design has been established, the acts, declarations, and conduct of all of the associates in furtherance of their common unlawful purpose are evidence against each of them."

Existence of Conspiracy Shown Inferentially.

— The rule that the conspiracy must first be established *prima facie* before the acts of one confederate can be received in evidence against another cannot well be enforced where the proof depends upon a vast number of isolated circumstances. In any case, where the whole evidence shows that a conspiracy actually existed, it will be considered immaterial whether the conspiracy was established before or after the acts and declarations of the members. *Spies v. People*, 122 Ill. 237, 3 Am. St. Rep. 320; *State v. Winner*, 17 Kan. 298; *Loggins v. State*, 12 Tex. App. 65.

Declarations Admissible as Part of Res Gestæ.

— Where several persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence against the others. *American Fur Co. v. U. S.*, 2 Pet. (U. S.) 359; *Taylor County v. Standley*, 79 Iowa 666; *State v. Soper*, 16 Me. 293, 33 Am. Dec. 665; *Crary v. Sprague*, 12 Wend. (N. Y.) 41, 27 Am. Dec. 110; *Costelo v. Cave*, 2 Hill L. (S. Car.) 528, 27 Am. Dec. 404; *Bell v. Coiel*, 2 Hill Eq. (S. Car.) 108, 27 Am. Dec. 448; *Wright v. State*, 10 Tex. App. 476.

What Are and What Are Not Res Gestæ. — Any declarations made by a conspirator at the time of committing the unlawful act are not only evidence against himself, but as part of the *res gestæ*, and tending to determine the quality of the act, are also evidence against the rest of the party, who are equally as responsible as if they had themselves done the act. But what one of the party may have been heard to say at any other time, as to the share which others had in the transaction, or as to the object of the conspiracy, cannot be admitted as evidence to affect them, as a confession is evidence only against the person himself who makes the confession, and not against others. *Boyle, C. J.*, in *Metcalfe v. Conner*; Litt. Sel. Cas. (Ky.) 497, 12 Am. Dec. 340. See the title RES GESTÆ.

Letters of Conspirator as Admissible Against an Associate. — The letters of one of the principals

in a prospective prize-fight, written while in training for the fight, stating when and where the fight would occur, as well as other details and particulars, and requesting the presence of his friends and others on the occasion, have been held to be in furtherance of the unlawful enterprise, and admissible in evidence upon the trial for a conspiracy to engage in such fight, not only against their author, but also as against his alleged associates. *Seville v. State*, 49 Ohio St. 117.

sonable inference, the guilty connection with the confederacy of the person the proof of whose acts or declarations is offered in evidence, as well as the one against whom the acts or declarations of his alleged associate are sought to be introduced.¹

And until the Conspiracy Is Shown Aliunde, the acts and declarations of an alleged conspirator are inadmissible to establish the connection with the conspiracy of one charged as a co-conspirator.²

Admissibility and Effect of Declarations Which Are Merely Narrative. — Declarations which are merely narrative as to what has been or what will be done are admissible against the individual who made them, or those in whose presence they were made. *Spies v. People*, 122 Ill. 237, 3 Am. St. Rep. 320. See also *Samples v. People*, 121 Ill. 547.

Act of One Not a Co-Conspirator. — A telegram from the wife of one of the defendants in an action for conspiracy, not written or sent by any of the parties to the alleged conspiracy, is not admissible in evidence against the husband or any of his alleged confederates. *Benford v. Sanner*, 40 Pa. St. 9, 80 Am. Dec. 545.

Acts and Declarations of One Person as Admissible Against Another, in the Absence of Any Combination or Conspiracy. — The general rule of evidence is that such acts and declarations, if admissible at all, can only be received in evidence against their author. *Hart v. Hicks*, 129 Mo. 99; *Beeler v. Webb*, 113 Ill. 436; *Rutherford v. Schattman*, 119 N. Y. 604. And see *Harris v. State*, 31 Tex. Crim. Rep. 411.

Declarations of Individual Purpose. — An alleged conspirator's declaration of his individual intention to commit a crime, unconnected with any concerted plan or design, is not admissible in evidence against one charged with subsequent connection with a conspiracy to commit the offense. *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746.

Acts and Declarations Before Formation of Conspiracy. — It is only acts and declarations done and made after the formation of a conspiracy which are admissible in evidence against an alleged co-conspirator. *Wilson v. People*, 94 Ill. 299; *State v. Moberly*, 121 Mo. 604; *People v. Irwin*, 77 Cal. 494; *Train v. Taylor*, 51 Hun (N. Y.) 215; *McGraw v. Com.*, (Ky. 1892) 20 S. W. Rep. 279; *Williams v. Dickenson*, 28 Fla. 90.

Proof of Conspiracy Required. — As stated in the text, it is only necessary, in order to render the acts and declarations of an alleged co-conspirator admissible against his associate, that the fact of the conspiracy be established by reasonable inference. The rule on this subject is generally expressed by the statement that:

Prima Facie Proof Is Sufficient. — To this effect, see *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 56 Am. Rep. 31. And see *Johnson v. State*, 87 Ala. 39; *Brown v. Herr*, 21 Neb. 113; *Rutherford v. Schattman*, 119 N. Y. 604; *Goins v. State*, 46 Ohio St. 457; *Lowe v. Dalrymple*, 117 Pa. St. 564; *Avery v. State*, 10 Tex. App. 199; *Baker v. State*, 80 Wis. 416.

"Absolute Proof" of the Conspiracy is not required before the declarations of alleged conspirators may be admitted in evidence. *Miller v. Dayton*, 57 Iowa 423.

Proof of the Combination by One Witness. — In the case of *Com. v. Crowninshield*, 10 Pick.

(Mass.) 497, it was held that the conspiracy was sufficiently established to render the acts and declarations of an alleged conspirator admissible in evidence against a co-conspirator when proof of it had been made by one witness who was competent, and that the court, in deciding the question of the admissibility of such evidence, would not consider the credibility of the witness whose testimony was to furnish a foundation for the evidence sought to be introduced.

By Testimony of an Accomplice. — In the case of *State v. Cardoza*, 11 S. Car. 195, it was held that proof of declarations of alleged co-conspirators, though not made in the defendant's presence, might be admitted in evidence before any proof of the conspiracy besides the testimony of an accomplice had been adduced.

1. Guilty Connection of Party to Be Established. — *U. S. v. Cole*, 5 McLean (U. S.) 513; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320; *Allen v. Kirk*, 81 Iowa 658; *Benford v. Sanner*, 40 Pa. St. 9, 80 Am. Dec. 545; *Sands v. Com.*, 21 Gratt. (Va.) 871. See also authorities cited in the preceding note. And see the title *CONFESSIONS, ante*.

In the case of *Williamson v. Com.*, 4 Gratt. (Va.) 547, it was held that unless the facts proved were sufficient to establish the connection between the prisoner and a third person as associates in the unlawful design, the declarations of such third person, made in the absence of the defendant, were not admissible in evidence against him.

Acts and Declarations of Conspirator Before the Acquisition of Co-Conspirator. — Although, in the case of *State v. Grant*, 86 Iowa 216, it seems to have been held that evidence of the acts or declarations of one conspirator before the connection of another with the conspiracy is not admissible against the latter, the weight of authority is believed to be in favor of its admissibility. See *State v. Crab*, 121 Mo. 554; *Smith v. State*, 21 Tex. App. 96; *Sands v. Com.*, 21 Gratt. (Va.) 871; *Baker v. State*, 80 Wis. 416; *Holtz v. State*, 76 Wis. 99.

2. Conspiracy to Be Shown Aliunde. — *Solomon v. Kirkwood*, 55 Mich. 256; *Brackett v. Griswold*, 59 Hun (N. Y.) 617, 13 N. Y. Supp. 192; *Benford v. Sanner*, 40 Pa. St. 9, 80 Am. Dec. 545. See also the title *CONFESSIONS, ante*.

If a Conspiracy Be Shown to Exist, the Next Question Is whether or not the defendants on trial, or either of them, were connected with that conspiracy as parties thereto. To establish this connection it must be shown by facts or circumstances independent of the declarations of others, or by his own acts, conduct, or declarations, and until this fact is thus established he is not bound by the declarations or statements of others. The principle of law and rule of evidence is, that when once the conspiracy or combination is established,

Suspicion or Possibility of Guilty Connection. — Nor is it sufficient, in order that the declarations of an alleged co-conspirator may be admitted in evidence, that a mere suspicion or possibility of guilty connection on the part of the person sought to be affected is established.¹

c. HOW SUCH PROOF, THOUGH INCOMPETENT WHEN OFFERED, MAY NEVERTHELESS BE CONSIDERED. — Although proof of the acts and declarations of an alleged co-conspirator may not be properly admissible at the time when introduced in evidence, for the reason that community of intent and design has not been established, yet if such evidence is received, the error may be cured by the subsequent introduction of proof of the existence of the conspiracy at the time the alleged declarations were made.² This is in accordance with the rule of evidence which provides that testimony which is incompetent when offered and admitted may nevertheless be rendered competent, and the irregularity of its admission cured, by the subsequent introduction of proof which, had it preceded the evidence incompetent *pro tempore*, would have rendered such evidence properly admissible when offered.³

d. ACTS AND DECLARATIONS OF CONSPIRATORS AFTER ACCOMPLISHMENT OF COMMON DESIGN — Inadmissible. — It has been held that proof of the acts and declarations of a conspirator are not admissible against an associate where such acts are committed or declarations made after the accomplishment of the object of the conspiracy.⁴

and a defendant's connection therewith is shown by independent evidence, then he is bound by the acts, declarations, and statements of his co-conspirators, because in that case each is deemed to assent to or command what is done by any other in furtherance of the common object. *Dyer, J., in U. S. v. Goldberg, 7 Biss. (U. S.) 175, citing 2 Whart. Crim. L., § 1406.*

1. Suspicion or Possibility of Guilty Connection. — *People v. Stevens, 68 Cal. 113; Benford v. Sanner, 40 Pa. St. 9, 80 Am. Dec. 545.* And see *Brackett v. Griswold, 59 Hun (N. Y.) 617, 13 N. Y. Supp. 192.*

Mere Passive Cognizance. — Something more than mere passive cognizance of the unlawful combination must be proved in order to charge one as a conspirator. *Evans v. People, 90 Ill. 384; U. S. v. Lancaster, 44 Fed. Rep. 896.*

2. Lawson v. State, 20 Ala. 65, 56 Am. Dec. 182; Johnson v. State, 29 Ala. 62, 65 Am. Dec. 383; Hall v. State, 31 Fla. 176; State v. Grant, 86 Iowa 216; Work v. McCoy, 87 Iowa 221, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 635-636; Avery v. State, 10 Tex. App. 199.

And in the Civil Action, where proof of the conspiracy is not material, the error of admitting acts and declarations of an alleged co-conspirator before proof of the conspiracy may be cured by an instruction directing the jury to disregard that part of the plaintiff's complaint charging the conspiracy. *Moore v. Shields, 121 Ind. 267, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 631.*

3. Crenshaw v. Davenport, 6 Ala. 390, 41 Am. Dec. 56; Lawson v. State, 20 Ala. 65, 56 Am. Dec. 182; Johnson v. State, 29 Ala. 62, 65 Am. Dec. 383; Hamilton v. Summers, 12 B. Mon. (Ky.) 11, 54 Am. Dec. 509.

4. Acts and Declarations After Accomplishment of Common Design — United States. — *Logan v. U. S., 144 U. S. 263; Brown v. U. S., 150 U. S. 93. California.* — *People v. Irwin, 77 Cal. 494; People v. Dilwood, 94 Cal. 89.*

Indiana. — *Roberts v. Kendall, 3 Ind. App. 339.*

Iowa. — *State v. Arnold, 48 Iowa 566; Taylor County v. Standley, 79 Iowa 666.*

Kansas. — *State v. Bogue, 52 Kan. 79.*

Kentucky. — *Miller v. Com., 78 Ky. 15, 39 Am. Rep. 194.*

Missouri. — *State v. Fredericks, 85 Mo. 145; State v. Minton, 116 Mo. 605.*

Montana. — *State v. English, 14 Mont. 399.*

Nebraska. — *Stratton v. Oldfield, 41 Neb. 702.*

North Carolina. — *State v. Dean, 13 Ired. L. (N. Car.) 63.*

Pennsylvania. — *Benford v. Sanner, 40 Pa. St. 9, 80 Am. Dec. 545; Heine v. Com., 91 Pa. St. 145.*

Tennessee. — *Snowden v. State, 7 Baxt. (Tenn.) 482.*

Texas. — *Ricks v. State, 19 Tex. App. 308; Armstead v. State, 22 Tex. App. 51; Willey v. State, 22 Tex. App. 408; Cortez v. State, 24 Tex. App. 511; Menges v. State, 25 Tex. App. 710; Luttrell v. State, 31 Tex. Crim. Rep. 493. Vermont.* — *State v. Dyer, 67 Vt. 690.*

Virginia. — *Danville Bank v. Waddill, 31 Gratt. (Va.) 469.*

And see *Cohea v. State, 11 Tex. App. 153; Long v. State, 13 Tex. App. 211.*

Compare Pace v. State, (Tex. Crim. App. 1892) 20 S. W. Rep. 762.

See further the title *CONFESSIONS, ante.*

Receivable in Evidence Against the Party Making. — In the case of *People v. Arnold, 46 Mich. 268*, it was held that the admissions of an alleged confederate after the offense had been committed might be received in evidence to prove his own participation, the jury being instructed not to permit such confessions to prejudice others. And in the case of *State v. Grant, 86 Iowa 216*, it was held that evidence of acts and declarations of an associate in an illegal enterprise, after the consummation of the purpose, are admissible against the person doing or making such acts or declarations.

Exceptions to Rule. — To this rule, however, an exception has been recognized where the declarations were made with reference to a subsisting interest in property fraudulently acquired pursuant to a conspiracy.¹ And again, the declarations of one conspirator, present upon the occasion of the killing of the victim of the conspiracy by a co-conspirator, made with reference to the homicide, and immediately thereafter, have been held to be admissible in evidence as a part of the *res gesta*, and as being part of one continuous transaction.²

Proof of Possession of Fruits of the Crime. — Nor does the rule excluding proof of the acts and declarations of a conspirator against an alleged co-conspirator, after the consummation of the conspiracy, render inadmissible proof of the finding of the fruits of the crime in the possession of such guilty associate.³

VI. RESPONSIBILITY OF CONSPIRATOR FOR ACTS OF CO-CONSPIRATOR —

1. In General — Coequal Responsibility. — When individuals associate themselves in an unlawful enterprise, any act done in pursuance of the conspiracy by one of the conspirators is, in legal contemplation, the act of all.⁴

Effect of Presence and Acquiescence of Co-Conspirator. — But where, after the commission of the common design, declarations of a conspirator were made in the presence of an alleged co-conspirator, who acquiesced in them, they were held to be admissible in evidence against such person. *Holden v. State*, 18 Tex. App. 91.

1. *McCaskey v. Graff*, 23 Pa. St. 321, 62 Am. Dec. 336.

Declarations Before a Division of the Spoils. — And where the conspiracy was to obtain money on land by first forging a deed to the property, the proceeds of the conspiracy to be divided among the conspirators, it was held that the transactions of one conspirator between the forgery of the deed and the division of the spoils were admissible against a co-conspirator on a prosecution for forgery. *State v. Pratt*, 121 Mo. 566.

A conspiracy to commit larceny has not been consummated, for the purpose of excluding the acts and declarations of a conspirator as evidence against an associate, so long as the stolen property has not been divided or disposed of according to the plan of the conspirators. *Baker v. State*, 80 Wis. 416; *State v. Thaden*, 43 Minn. 253.

And likewise, where a conspiracy to burn a house to obtain insurance in property contained in it was proved, it was held that evidence of acts and declarations of some of the alleged conspirators, made after the fire, with reference to the disposition to be made of the property, is admissible. *Com. v. Smith*, 151 Mass. 491.

2. *Martin v. State*, 89 Ala. 115, 18 Am. St. Rep. 91. See also *Smith v. State*, 88 Ala. 73; *Ryan v. State*, 83 Wis. 486.

3. *Clark v. State*, 28 Tex. App. 189; *Gregg v. State*, (Tex. App. 1889) 12 S. W. Rep. 732.

4. Responsibility of One Confederate for Acts of Associate — *England*. — *Rex v. Hammond*, 2 Esp. N. P. 719.

United States. — *U. S. v. Smith*, 1 Dill. (U. S.) 212; *U. S. v. Sacia*, 2 Fed. Rep. 754; *U. S. v. Lancaster*, 44 Fed. Rep. 896; *U. S. v. Babcock*, 3 Dill. (U. S.) 585; *U. S. v. Cassidy*, 67 Fed. Rep. 698; *Rev. Stat. U. S.*, § 1980; also § 5440; *U. S. v. Mitchell*, 1 Hughes (U. S.) 439; *U. S. v. Doyle*, 6 Sawy. (U. S.) 612; *U. S. v. Butler*, 1 Hughes (U. S.) 457; *U. S. v. Callicot*, 7 Int. Rev. Rec. 177.

Alabama. — *Williams v. State*, 81 Ala. 1, 60 Am. Rep. 133; *Martin v. State*, 89 Ala. 115, 18 Am. St. Rep. 91; *Gibson v. State*, 89 Ala. 121, 18 Am. St. Rep. 96; *Evans v. State*, 109 Ala. 11.

Connecticut. — *Gardner v. Preston*, 2 Day (Conn.) 205, 2 Am. Dec. 91.

Georgia. — *Horton v. State*, 66 Ga. 690.

Illinois. — *Spies v. People*, 122 Ill. 179, 3 Am. St. Rep. 320.

Iowa. — *State v. Munchrath*, 78 Iowa 270; *Allen v. Kirk*, 81 Iowa 658.

Kentucky. — *Metcalf v. Conner*, Litt. Sel. Cas. (Ky.) 497, 12 Am. Dec. 340.

Maine. — *Strout v. Packard*, 76 Me. 148, 49 Am. Rep. 601.

Massachusetts. — *Com. v. Campbell*, 7 Allen (Mass.) 541, 83 Am. Dec. 705; *Com. v. Crowninshield*, 10 Pick. (Mass.) 497.

Mississippi. — *Hairston v. State*, 54 Miss. 689, 28 Am. Rep. 392; *Story v. State*, 68 Miss. 626, citing 4 AM. & ENG. ENCYC. OF LAW (1st ed.) 621.

Missouri. — *State v. Walker*, 98 Mo. 95.

North Carolina. — *State v. Anderson*, 92 N. Car. 732.

Pennsylvania. — *Collins v. Com.*, 3 S. & R. (Pa.) 220; *Com. v. Westervelt*, 11 Phila. (Pa.) 461.

Texas. — *Hardin v. State*, 4 Tex. App. 355; *Bowers v. State*, 24 Tex. App. 542, 5 Am. St. Rep. 907; *Phillips v. State*, 26 Tex. App. 228, 8 Am. St. Rep. 471; *Harris v. State*, 31 Tex. Crim. Rep. 411.

Theory that Each Is the Agent of the Others. — The mind of each being intent upon a common object, and the energy of each being enlisted in a common purpose, "each," as it has been expressed, "is the agent of all the others, and the acts done are therefore the acts of each and all." *Per* Bigelow, C. J., in *Com. v. Campbell*, 7 Allen (Mass.) 541, 83 Am. Dec. 705.

Presence of All at Consummation of Design. — It is immaterial as affecting the question of coequal responsibility on the part of conspirators for the acts of each other, that one or more were not actually present at the consummation of the preconceived design. *Brennan v. People*, 15 Ill. 517; *Williams v. People*, 54 Ill. 422; *Spies v. People*, 122 Ill. 177, 3 Am. St. Rep. 320. Compare *U. S. v. Johnson*, 26 Fed. Rep. 682.

Thus where one member of a conspiracy allures the victim to the spot where the pre-

Results Not Specifically Intended.—And this mutual coequal responsibility of each conspirator for the acts of his associates, done pursuant to and in furtherance of the common design, extends, as well, to such results as are the natural or probable consequences of such acts, even though such consequences were not specifically intended as part of the original plan.¹

2. Limit of the Rule.—This doctrine, however, holding each conspirator liable for the acts of his associates, as well as for the consequences of such acts, is subject to the restriction indicated in the statement of the rule; namely, that it is only for such acts as are naturally or necessarily done pursuant to and in furtherance of the conspiracy, and for the natural or necessary consequences of such acts, that a co-conspirator is responsible.²

concerted robbery is committed, leaving it to his associates to consummate the design, all will be held equally guilty as confederates. *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342.

Responsibility of Party Who Joins Pre-Formed Conspiracy.—A person who enters into a conspiracy already formed becomes, in legal contemplation, a party to all acts done by any of the other parties in furtherance of the common design, whether such acts were performed before or after the connection of such person with the enterprise. *Spies v. People*, 122 Ill. 179, 3 Am. St. Rep. 320.

When a person joins a conspiracy after it is formed, he becomes a conspirator and the antecedent acts of his associates become his by adoption. *U. S. v. Johnson*, 26 Fed. Rep. 682.

Rule Applicable in Civil as Well as Criminal Cases.—Where several had entered into a conspiracy to defraud the plaintiff, it was held that an act done by any of the defendants in furtherance of the common design, and in accordance with the plan of the conspiracy, became the act of all, with coequal responsibility for its consequences. *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172.

1. Extent of Rule of Coequal Responsibility—Results Not Specifically Intended.—*United States.*—*Boyd v. U. S.*, 142 U. S. 450; *U. S. v. Kane*, 23 Fed. Rep. 748.

Alabama.—*Turner v. State*, 97 Ala. 57; *Williams v. State*, 81 Ala. 1, 60 Am. Rep. 133; *Gibson v. State*, 89 Ala. 121, 18 Am. St. Rep. 96; *Martin v. State*, 89 Ala. 115, 18 Am. St. Rep. 91.

Georgia.—*Roney v. State*, 76 Ga. 731.

Massachusetts.—*Com. v. Campbell*, 7 Allen (Mass.) 541, 83 Am. Dec. 705.

Texas.—*Bowers v. State*, 24 Tex. App. 542, 5 Am. St. Rep. 901.

Crime Committed Pursuant to Conspiracy.—If one conspirator, proceeding according to the common intent, commits a crime, his associates may be held responsible, though the crime committed be not the particular result intended, if it be a natural result or probable consequence of the course of action agreed upon. *Spies v. People*, 122 Ill. 225, 3 Am. St. Rep. 320.

Homicide as a Probable Result.—Thus he who conspires with others to do such an unlawful act as will probably result in the taking of human life is presumed to have understood the consequences which might reasonably be expected from carrying it into execution, and to have assented thereto.

Spies v. People, 122 Ill. 226, 3 Am. St. Rep. 320.

This doctrine, as applied to cases of homicide, is stated in 1 Hale P. C. 441, in a quotation from Dalton, in these words: "If divers persons come in one company to do any unlawful thing, as to kill, rob, or beat a man, or to commit a riot, or to do any other trespass, and one of them in doing thereof kill a man, this shall be adjudged murder in them all that are present of that party abetting him and consenting to the act, or ready to aid him, although they did but look on." And in 1 East P. C. 257, it is laid down that "where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it with violence, or in such a manner as naturally tends to raise tumults and affrays, as by committing a violent disseisin with great numbers, or going to beat a man, or rob a park, or standing in opposition to the sheriff's posse, * * * they must at their peril abet the event of their actions."

Attendants in a Lawful Enterprise—When Liable.—Persons who attend one on a lawful expedition, during which the latter alone commits a crime, are liable therefor only on proof of a conspiracy to commit such crime, or their intention to aid him in any unlawful expedition to which he might resort. *Hairston v. State*, 54 Miss. 689, 28 Am. Rep. 392.

2. Martin v. State. 89 Ala. 115, 18 Am. St. Rep. 91; *Evans v. State*, 109 Ala. 11; *State v. Furney*, 41 Kan. 115, 13 Am. St. Rep. 262; *Com. v. Campbell*, 7 Allen (Mass.) 541, 83 Am. Dec. 705; *Bowers v. State*, 24 Tex. App. 542, 5 Am. St. Rep. 901.

Acts Resulting from the Malice of Individual Conspirators.—While the parties to a conspiracy are responsible for the consequent acts growing out of the general design, they are not so responsible for independent, unnecessary, and unexpected acts growing out of the particular malice of individuals. *Martin v. State*, 89 Ala. 115, 18 Am. St. Rep. 91.

Homicide from Collateral Causes.—Where a homicide results from causes having no connection with the common object, the actual perpetrator of the crime is alone responsible, even though his associates are present at the time of the killing. *Evans v. State*, 109 Ala. 11.

Homicide During Riot.—The case of *Com. v. Campbell*, 7 Allen (Mass.) 541, 83 Am. Dec. 705, was a trial upon an indictment for a homicide which occurred during a riot. During the trial the prosecution requested an instruc-

And It Is for the Jury to Determine whether an act done by a member of a conspiracy is done in furtherance of the common design, as well as what are the natural and necessary consequences of such acts.¹

VII. CONSPIRACY IN ITS CIVIL ASPECT — 1. Distinguished from the Criminal Offense — *a. GENERALLY.* — Conspiracy in its civil aspect, considered as the ground of an action on the case for damages, partakes of none of the distinguishing characteristics of the criminal offense.²

The Confederacy a Nonessential. — Thus the combination or confederacy, which in criminal conspiracy is said to be the "gist of the offense," wholly lacks the quality of an essential requisite in the civil injury.³

Action against Single Individual. — And a civil action for damages, it has been held, suffered by reason of a conspiracy, might be instituted against a single defendant, or if brought against several, a verdict against one and in favor of the others would not necessarily be improper.⁴

tion to the effect that if the defendant was a participant in the riotous assembly, and during an attack which the mob had made upon a certain armory a homicide took place, the defendant was in law guilty of manslaughter, although the evidence might fail to show whether the shot which killed the deceased was fired by the rioters with whom the prisoner was acting in concert or by the soldiers who were within the armory, legally resisting the attack of the mob. These circumstances evoked the enunciation of the limitation as stated in the text, the court declaring: "Without such limitation a person might be held responsible for acts which were not the natural or necessary consequences of the enterprise or undertaking in which he was engaged, and which he could not, either in fact or in law, be deemed to have contemplated or intended. No person can be held guilty of homicide unless the act is either actually or constructively his; and it cannot be his act, in either sense, unless committed by his own hand, or by some one acting in concert with him or in furtherance of a common object or purpose. Certainly that cannot be said to be an act of a party in any just sense, or on any sound legal principle, which is not only not done by him, or by any one with whom he is associated or connected in a common enterprise, or in attempting to accomplish the same end, but is committed by a person who is his direct and immediate adversary, and who is, at the moment when the alleged criminal act is done, actually engaged in opposing and resisting him and his confederates and abettors in the accomplishment of the unlawful object for which they are united. Suppose, for example, a burglar attempts to break into a dwelling-house, and the owner or occupant, while striving to resist and prevent the unlawful entrance, by misadventure kills his own servant. Can the burglar, in such case, be deemed guilty of criminal homicide? Certainly not. The act was not done by him, or with his knowledge or consent, nor was it a necessary or natural consequence of the commission of the offense in which he was engaged. He could not, therefore, have contemplated or intended it. Another illustration will perhaps be more apposite to the case before us. Suppose, during the progress of the riot in which it is alleged the prisoner was engaged, and

while the soldiers and others in possession of the armory were in the act of repelling the attack of the mob in the street by firing upon it with the cannon which was used on the occasion, that it had burst by reason of some secret defect and killed several of those who were in its immediate vicinity, or that a soldier, while handling his musket, had by accident inflicted a mortal wound upon himself; it would hardly be contended that in either of these cases the whole body of rioters could be held legally responsible for criminal homicide, by reason of the lives that were thus destroyed."

1. *Bowers v. State*, 24 Tex. App. 542, 5 Am. St. Rep. 901.

2. See the subdivisions following.

3. **Combination Immaterial.** — *Savill v. Roberts*, 1 *Ld. Raym.* 374; *Castrique v. Behrens*, 30 *L. J. Q. B.* 163; *Kimball v. Harman*, 34 *Md.* 407, 6 *Am. Rep.* 340; *Hutchins v. Hutchins*, 7 *Hill (N. Y.)* 107.

4. **Action Against Single Individual** — *Maryland*. — *Kimball v. Harman*, 34 *Md.* 407, 6 *Am. Rep.* 340.

Nebraska. — *Booker v. Puyear*, 27 *Neb.* 346. *New Jersey*. — *Van Horn v. Van Horn*, 56 *N. J. L.* 318.

New York. — *Hutchins v. Hutchins*, 7 *Hill (N. Y.)* 104; *Griffing v. Diller*, 66 *Hun (N. Y.)* 633, 50 *N. Y. St. Rep.* 455; *Keit v. Wyman*, 67 *Hun (N. Y.)* 337.

North Carolina. — *Eason v. Westbrook*, 2 *Murph. (N. Car.)* 329.

Pennsylvania. — *Laverty v. Vanarsdale*, 65 *Pa. St.* 507.

Texas. — *Johnson v. Davis*, 7 *Tex.* 173.

Where Recovery Against All is Sought. — But, it has been held, where such an action is brought against several, as having combined to do the unlawful act which produced the injury, it is necessary, in order to recover against all, to prove that all were engaged in the conspiracy; which would seem but the enunciation of a plain principle of justice in no sense confined in its application to cases of this character. *Alvey, J.*, in *Kimball v. Harman*, 34 *Md.* 407, 6 *Am. Rep.* 340. See also *Laverty v. Vanarsdale*, 65 *Pa. St.* 507.

A Further Illustration of the principle stated in the text is apparent in the holding that where the object of an action was simply to recover real estate which the plaintiff claimed to have been induced to convey to one of

Where the Injury Could Only Have Been Done by Joint Action. — It would seem, however, even in the case of the civil action, that where the defendants are charged with having done the plaintiff an injury which could only have been inflicted by the joint action and mutual co-operation of the defendants, the proof must implicate all, or enough to have done the injury charged.¹

Injuries Not Actionable if Done by Individual. — And although, as has been heretofore seen, a conspiracy to do that which if done by an individual would not be an offense may be indictable, yet, in an action on the case for damages, an injury which if done by one alone would afford no ground of action does not become actionable by reason of its having been done pursuant to a conspiracy.²

b. GIST OF THE CIVIL ACTION—The Injury Done. — The gist of the civil action for damages is simply the injury done to the plaintiff.³ Therefore, a

several conspirators by fraud and deceit, the mere participation in the fraud was not sufficient to render all the conspirators proper parties to the action. It is only the one who has obtained title to the property who should be made a party defendant. *Johnson v. Davis*, 7 Tex. 173, and see *Northern Pac. R. Co. v. Kindred*, 14 Fed. Rep. 77.

Verdict Against One Defendant. — If damage, but not the combination, be shown, the plaintiff is entitled to a verdict against any defendant shown to have caused the injury from which the damage results. *Buffalo Lubricating Oil Co. v. Everest*, 30 Hun (N. Y.) 588.

1. Where the Injury Could Only Have Resulted from Mutual Co-Operation. — Thus in an action for a conspiracy to enter a false, fraudulent, and unlawful judgment and for issuing execution thereon, brought against the plaintiff in the judgment, the justice, and the constable, by the defendant therein, no evidence being adduced against the constable, and none that the judgment entered by the justice was false in amount, or that its entry was unauthorized, it was held that the action could not be sustained, and that the trial court acted properly in entering judgment of nonsuit against the plaintiff. *Gaunce v. Backhouse*, 37 Pa. St. 350. And see *Newall v. Jenkins*, 26 Pa. St. 159.

The case of *Talbot v. Cains*, 5 Met. (Mass.) 520, was decided upon a principle somewhat analogous to that stated in the text. In this case it was alleged in the declaration that the plaintiff and R. were partners, and that the defendant covenanted with them to furnish them with money to be used as capital in their partnership business; that the defendant did so furnish money during a certain time and afterwards, "maliciously intending and contriving to injure and ruin the plaintiff, and confederating and conspiring with said R. to injure and ruin the plaintiff in his business and to break up said partnership, etc., refused any longer to furnish capital according to his covenant, and brought a suit against said partners to recover the money furnished to them by him and recovered judgment against them; took out execution and caused their stock in trade to be sold for said execution, at a great sacrifice, to pay the same," and that said R., in pursuance of said confederacy, had refused to join with the plaintiff in a suit against the defendant for a breach of said covenant. Here it was held that the plaintiff, in order to maintain his action, must prove

not only that the defendant had broken his covenant, but that he did so with the intent alleged, and pursuant to the confederacy as set forth in the declaration.

Where Action for the Tort Barred by Statute of Limitation. — And also, it was held, where the action is against several defendants for the commission of numerous torts pursuant to a conspiracy, the suit having been brought at a time when actions for the torts themselves would have been barred by the statute of limitations, the conspiracy becomes the gist of the action, and must be proved in order that the plaintiff may maintain his action. *Breitenberger v. Schmidt*, 38 Ill. App. 168.

2. Rule in Case of Injuries Which if Done by Individual Would Not Be Actionable. — *Savill v. Roberts*, 1 Ld. Raym. 374; *Cotterell v. Jones*, 11 C. B. 713, 73 E. C. L. 713; *Salaman v. Warner*, 65 L. T. 132; *Adler v. Fenton*, 24 How. (U. S.) 407; *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340; *Wellington v. Small*, 3 Cush. (Mass.) 145, 50 Am. Dec. 719; *Hutchins v. Hutchins*, 7 Hill (N. Y.) 104.

With reference to a civil action for damages for injuries sustained by the plaintiff, by reason of a conspiracy, it was held in the case of *Wellington v. Small*, 3 Cush. (Mass.) 145, 50 Am. Dec. 719, that nothing becomes actionable by reason of its accomplishment in pursuance of a conspiracy when it would not have been actionable if done by one alone; as in an action on the case in the nature of a conspiracy, the gist of the action is not the conspiracy (as it is in an indictment, and was in the old writ of conspiracy), but the damage done to the plaintiff.

Matter of Aggravation. — *Alvey, J.*, delivering the opinion of the court in *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340, declared that in a civil action the fact of the conspiracy or combination might be proved in aggravation of the injury.

3. The Gist of the Civil Action for Damages is the actual damage sustained by the plaintiff, and not the conspiracy or the confederating together.

England. — *Savill v. Roberts*, 1 Ld. Raym. 374.

Canada. — *Municipality of East Missouri v. Horseman*, 16 U. C. Q. B. 506.

Connecticut. — *Bulkley v. Storer*, 2 Day (Conn.) 531.

Illinois. — *Doremus v. Hennessy*, 62 Ill. App. 391.

Maryland. — *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340.

conspiracy alone is never sufficient to support an action for damages.¹ Something pursuant to the conspiracy must be done from which legal damage and injury has proximately resulted to the plaintiff.²

Nebraska. — *Booker v. Puyear*, 27 Neb. 346.

New Jersey. — *Van Horn v. Van Horn*, 52 N. J. L. 284.

New York. — *Hutchins v. Hutchins*, 7 Hill (N. Y.) 107; *Lee v. Kendall*, 56 Hun (N. Y.) 610; *Tappan v. Powers*, 2 Hall (N. Y.) 277.

Ohio. — *Toledo Electric St. R. Co. v. Toledo Consol. R. Co.*, 5 Ohio Dec. 11.

Pennsylvania. — *Griffith v. Ogle*, 1 Binn. (Pa.) 172; *Haldeman v. Mart...*, 10 Pa. St. 370; *Lavery v. Vanarsdale*, 65 Pa. St. 507.

Wisconsin. — *Smith v. Nippert*, 76 Wis. 86, 20 Am. St. Rep. 26.

1. Conspiracy Alone Not Sufficient to Support Action — *England*. — *Savill v. Roberts*, 1 Ld. Raym. 374; *Castrique v. Behrens*, 30 L. J. Q. B. 163.

United States. — *Adler v. Fenton*, 24 How. (U. S.) 407.

Indiana. — *Severinghaus v. Beckman*, 9 Ind. App. 388.

Maryland. — *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340; *Robertson v. Parks*, 76 Md. 118.

New York. — *Hutchins v. Hutchins*, 7 Hill (N. Y.) 107; *Buffalo Lubricating Oil Co. v. Everest*, 30 Hun (N. Y.) 588.

Pennsylvania. — *Griffith v. Ogle*, 1 Binn. (Pa.) 174; *Lavery v. Vanarsdale*, 65 Pa. St. 507.

In the case of *Savill v. Roberts*, 1 Ld. Raym. 374, Lord Holt, in answer to the suggestion at the bar that the fact of the conspiracy was sufficient to maintain the action, said that "conspiracy is not the ground of these actions, but the damage done to the party, for an action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but if the party be damaged the action will lie." "From whence it follows," continued his lordship, "that the damage is the ground of the action, which is as great in the present case as if there had been a conspiracy."

"A simple conspiracy," said Nelson, C. J., in *Hutchins v. Hutchins*, 7 Hill (N. Y.) 107, "however atrocious, unless it resulted in actual damage to the party, never was the subject of a civil action, not even when the old form of a writ of conspiracy, in its limited and most technical character, was in use. Then, indeed, the allegation of a conspiracy was material and substantive, because, unless established by the proof, the plaintiff failed; as it was essential that the verdict should be against two at least in order to be upheld."

A civil action for damages cannot be sustained merely because there has been a conspiracy or combination to do injurious acts. *Adler v. Fenton*, 24 How. (U. S.) 407.

And see also the case of *McHenry v. Sneer*, 56 Iowa 649, in which it was held that where the defendants did nothing unlawful, it was immaterial whether they conspired or not.

2. Actual Legal Damage — *England*. — *Castrique v. Behrens*, 30 L. J. Q. B. 163; *Temper-ton v. Russell*, (1893) 1 Q. B. 715.

Iowa. — *Kelly v. Chicago, etc., R. Co.*, 93 Iowa 436.

Maine. — *Garing v. Fraser*, 76 Me. 37.

Maryland. — *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340.

New Jersey. — *Van Horn v. Van Horn*, 56 N. J. L. 318.

New York. — *Buffalo Lubricating Oil Co. v. Everest*, 30 Hun (N. Y.) 588; *Bayles v. Vanderveer*, 11 Misc. Rep. (N. Y. Supreme Ct.) 207; *Douglass v. Winslow*, 52 N. Y. Super. Ct. 439.

North Carolina. — *Eason v. Petway*, 1 Dev. & B. L. (N. Car.) 44.

Pennsylvania. — *Griffith v. Ogle*, 1 Binn. (Pa.) 174; *Kirkpatrick v. Lex*, 49 Pa. St. 122; *Hinchman v. Richie, Bright*, (Pa.) 143; *Lavery v. Vanarsdale*, 65 Pa. St. 507.

"Actual Legal Damage." — "There is no doubt," said Alvey, J., in *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340, "of the right of a plaintiff to maintain an action on the case against several for conspiring to do, and actually doing, some unlawful act to his damage. But it is equally well established that no such action can be maintained unless the plaintiff can show that he has, in fact, been aggrieved, or has sustained actual legal damage by some overt act, done in pursuance and execution of the conspiracy."

Damnum Absque Injuria. — In the case of *Orr v. Home Mut. Ins. Co.*, 12 La. Ann. 225, 68 Am. Dec. 770, three insurance companies were sued for damages resulting to the plaintiff by reason of an alleged malicious conspiracy on the part of the insurance companies not to insure any article upon any boat upon which the plaintiff might be employed, whereby said plaintiff had lost his position as master. The court held, however, that the wrong which the plaintiff had suffered was but *damnum absque injuria*. "It is sufficient for the purposes of the case," said the court, "to decide that the facts alleged in this case are not sufficient to sustain the action." The court also remarked in this case that they did not deem "it necessary to advert to the distinctions of the common law on the subject of the indictment for a conspiracy, and the action on the case in the nature of a conspiracy, nor to consider whether cases may not arise in which combinations to do acts otherwise lawful may not occasion injuries which will sustain a civil action."

For Inducing One to Do That Which Subjects Him to a Fine. — In the case of *Cummins v. Scott*, 6 Watts (Pa.) 519, 31 Am. Dec. 493, it was alleged by the plaintiff, a justice of the peace, that the defendants, George Scott, a minor, and Patrick Baily, had conspired and confederated together to procure the marriage of the said George without the consent of his parents, and that by such conspiracy, and by representing to the plaintiff as such justice that the said George was over twenty-one years of age, they had induced him to marry said George to one Nancy Cull, whereupon the parents of the minor had sued him and compelled him to pay fifty pounds, the statutory penalty for marrying a minor without the con-

Levy of Execution. — Hence, though through a conspiracy between a sheriff and a third person, holding an execution against a principal and a surety for a debt due, the execution is levied upon the goods of the surety exclusively, no action will lie in behalf of the surety for the alleged injury.¹

Testator Altering Will — Fraudulent Representations. — Nor will an action lie for depriving one of a possibility or expectation of benefit, as where a testator was induced, by fraudulent representations, to alter a will which had formerly contained a provision in favor of the plaintiff.²

2. The General Rule Applicable to Actions on the Case for Damages — a. GENERALLY. — It is a general rule, in connection with actions on the case for damages in the nature of a writ of conspiracy, that such an action lies wherever a person is aggrieved and damnified by the unlawful acts of others, done pursuant to a conspiracy for that purpose.³ This, it will be observed, omitting

sent of his parents or guardian. It was held, however, with much force of reason, by Gibson, C. J., who delivered the opinion of the court, that the plaintiff could not recover.

For Inducing the Violation of an Injunction. — In the case of *Knowles v. Peck*, 42 Conn. 386, 19 Am. Rep. 542, the patentees of a preparation known as vulcanized rubber had obtained an injunction to restrain its manufacture and sale by a certain dentist, and for the purpose of ascertaining whether the party enjoined was violating the injunction, a person was employed to apply to the dentist for a set of teeth made upon a plate of vulcanized rubber, whereupon the dentist made and delivered to the person applying a set of teeth made upon such a plate and received pay therefor. The facts were then reported to the patentees, who then instituted proceedings for contempt against the dentist. The latter thereupon instituted a suit against the agents of the patentees for a conspiracy to induce him to violate the injunction, whereby he was subjected to costs and damage. It was held, however, that the patentees had a right to resort to such method of ascertaining whether the defendant in the injunction proceedings was disregarding the injunction, and that no action lay in his behalf against those who had procured its violation.

Damages Prior to Institution of Suit. — In an action on the case for damages in the nature of a conspiracy, only such damages as have accrued prior to the institution of the action are recoverable. *Haskell County Bank v. Santa Fe Bank*, 51 Kan. 39.

Subsequent Action for Additional Damages. — Where an action has been brought against several defendants who, by conspiring together, had defrauded the plaintiff of certain real estate, to recover such property and also to recover the rents and profits received by the defendants, the plaintiff may, nevertheless, bring a subsequent action against a portion of the defendants to recover for injuries sustained, in addition to those for which recovery had been had in the first action. *Bruce v. Kelly*, 5 Hun (N. Y.) 229.

1. *Eason v. Petway*, 1 Dev. & B. L. (N. Car.) 44.

Nor is an action in the nature of a conspiracy maintainable by one partner against a copartner and a third person, a surety upon certain partnership obligations, the latter of whom had induced the copartner, when the

partnership was in an insolvent condition, to use the partnership assets in the discharge of the debt for which the surety was liable. *Kirkpatrick v. Lex*, 49 Pa. St. 122.

2. Remote and Contingent Damage. — In the case of *Hutchins v. Hutchins*, 7 Hill (N. Y.) 104, the defendants had successfully conspired to induce a testator, by fraudulent representations, to alter a will he had made in favor of the plaintiff. The court said: "For injuries to his health, liberty, and reputation, or to his rights of property, personal or real, the law has furnished the appropriate remedies. The former are violations of the absolute rights of the person, from which damage results as a legal consequence. As to the latter, the party aggrieved must not only establish that the alleged tort or trespass has been committed, but must aver and prove his right or interest in the property or thing affected, before he can be deemed to have sustained damages for which an action will lie." And because the plaintiff had a mere possibility of benefit, and was deprived only of hopes and expectations, it was decided that the action in that case would not lie.

It has also been held that the efforts of the inhabitants of one township to rid themselves of a person whom they regard as a prospective charge as a pauper will not render them liable, in an action for conspiracy, to the township to which the person goes in consequence of such efforts and becomes chargeable. *Overseers of Poor v. Aurand*, 10 Watts (Pa.) 134. And see *Rex v. Seward*, 3 N. & M. 557, 1 Ad. & El. 706, 28 E. C. L. 185.

3. General Rule in Regard to Action for Damages. — *Bulkley v. Storer*, 2 Day (Conn.) 531; *Patten v. Gurney*, 17 Mass. 186, 9 Am. Dec. 141; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Booker v. Puyear*, 27 Neb. 346; *Mott v. Danforth*, 6 Watts (Pa.) 304, 31 Am. Dec. 468; *Morley v. Elsbree*, (Pa. 1889) 17 Atl. Rep. 212.

A Tort in Private Law. — In private law conspiracy is a tort in the nature of trespass, for which the injured person has an action for the damage caused to him, as where several persons conspire to indict a man falsely of a crime. *Rapalje & Lawrence Law Dict.*, Conspiracy.

Writ of Conspiracy Superseded by Civil Action. — "The action on the case for a conspiracy," said Sergeant, J., in *Mott v. Danforth*, 6 Watts (Pa.) 304, 31 Am. Dec. 468, "has in modern

the reference to a conspiracy, is but a statement of the general principle regulating all actions on the case for damages, which is discussed elsewhere under appropriate titles. It must suffice, therefore, for the purposes of this treatise,

times taken the place of the writ of conspiracy, which seems to be considered as antiquated." See also Black's Law Dict., Writ of Conspiracy.

The writ of conspiracy, however, lay only for a conspiracy to indict for treason, or a capital felony, where the intended victim had been indicted and acquitted. *Jones v. Baker*, 7 Cow. (N. Y.) 445.

Conspiracy Whereby a Person Is Enticed into Another State and Arrested on Civil Process. — Where several individuals confederated together for the purpose of enticing a citizen of one state into another state, that the latter might there be arrested on civil process, it was held, upon the accomplishment of such design, that the conspirators were liable in damages to the person so arrested, and this though the debt for which the arrest was made was justly due. *Phelps v. Goddard*, 1 Tyler (Vt.) 60, 4 Am. Dec. 720.

Conspiracy to Vex and Harass. — A conspiracy to vex and harass a person by having him subjected to repeated inquisitions for lunacy, without probable cause, has been held actionable. *Davenport v. Lynch*, 6 Jones L. (N. Car.) 545. See also *Hinchman v. Richie*, Bright (Pa.) 143.

Malicious Prosecution. — Where several persons combine together, whereby one is subjected to a malicious prosecution, an action lies against the conspirators. *Dreux v. Domec*, 18 Cal. 83; *Raleigh v. Cook*, 60 Tex. 438. But on a bill in equity filed by the maker of certain promissory notes, given in settlement of a prosecution for bastardy, against the woman in the case, her mother, stepfather, attorney, and a justice of the peace, the latter parties are not guilty in instituting the suit in her behalf if they were induced thereto by an honest belief that the prosecution was just. *Heaps v. Dunham*, 95 Ill. 583.

In the case of *Stewart v. Cooley*, 23 Minn. 347, 23 Am. Rep. 690, it was held that while no private action can be maintained against a judge for any acts or omissions in the performance of his judicial functions, yet if a judge, prior to the institution of criminal proceedings in the court over which he presided, conspired with others maliciously and without probable cause to prosecute an individual for perjury, whereby the individual was arrested and imprisoned, all of the confederates, including the judge, incur liability to the party injured.

For Withholding Property. — In the case of *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340, the plaintiff charged the defendants with conspiring to withhold from his possession a certain lot of bedsteads. It was held in this instance that the plaintiff was not entitled to recover unless it could be established that actual damage had been suffered by him. And in such an action, it was declared, a recovery might be had against one defendant, if the nature of his acts justified it, although the fact of a conspiracy was negated by a verdict in favor of the other defendants.

For Obtaining Goods upon False Pretenses. — Where one person conspires with another who has no property that the latter shall obtain goods from a third person and deliver them to him (the first person), and the goods are so fraudulently obtained and delivered, the fraudulent act is deemed the act of the instigator of the fraud, the latter person being liable therefor to the person defrauded. *Moore v. Tracy*, 7 Wend. (N. Y.) 229. And see *Whitman v. Spencer*, 2 R. I. 124; *Place v. Minster*, 65 N. Y. 89.

For Fraudulently Obtaining Money. — In the case of *Sheple v. Page*, 12 Vt. 519, it appeared that a copartnership had been dissolved, one of the partners continuing the business and assuming the liabilities of the firm. Subsequent to the dissolution the retiring partner, conspiring and confederating with another, executed a note in the firm name, dating it anterior to the dissolution, which was duly presented and payment required of the partner so continuing in business. It was held that an action lay, in behalf of the party paying the note, against the former partner and his confederate.

Passive Participants in Fraud. — In the case of *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172, which was an action for damages against several for an alleged conspiracy to cheat and defraud, whereby the plaintiff had been injured, it was held that a party might be liable in such an action, though he took no active part in the accomplishment of the common design, where it had been agreed that one or two were to be the active agents in accomplishing the joint object, while the others remained in the background and took no open nor visible part in the transactions. In such a case all would be alike responsible for the acts of any. Compare *Brannock v. Bouldin*, 4 Ired. L. (N. Car.) 61.

For Preventing the Trial of Pending Suits. — *Schwab v. Mabley*, 47 Mich. 572.

For Fraudulently Forming a Corporation. — *Bush v. Sprague*, 51 Mich. 41.

For Misappropriation of Corporate Funds by Directors. — The assignee in bankruptcy of an insolvent corporation may maintain a bill against the directors for confederating together and diverting the corporate funds to unlawful and improper purposes. *Gindrat v. Dane*, 4 Cliff. (U. S.) 260.

Action Against Copartner — Confession of Judgment. — An action against a partner and a third person for having formed a conspiracy together, pursuant to which the partner confessed judgment in favor of the third person and thus terminated the partnership business, cannot be maintained if it appears that the partner so charged with conspiring owed to his alleged co-conspirator a *bona fide* debt for the full amount of the judgment confessed, though the debt was not due at the time of the judgment. *Neudecker v. Kohlberg*, 14 Am. L. Rev. 812.

Actions Between Conspirators for a Division of the Spoils. — Justice will not undertake to de-

to call attention to the prominent instances in which this general principle has been applied in cases involving injuries alleged to have been effected by reason of conspiracies.

b. INSTANCES OF CIVIL ACTIONS FOR DAMAGES—(1) Actions for Injury to Reputation and Business.—An action for damages may be maintained against individuals who conspire to injure a person in his reputation and business and to bring him into public disgrace, where acts are done in pursuance of such conspiracy which actually have the designed effect.¹

(2) Actions for Deception Practiced upon Vendees of Property—Representations Must Be Calculated to Deceive Ordinary Prudence.—It has been held that a vendee who has been induced, by the fraudulent acts and representations of others, to purchase property at a price much in excess of its real value, even though such acts and representations were done and made pursuant to a preconcerted agreement for the purpose, cannot recover against the alleged participants in the fraud in an action on the case in the nature of conspiracy, unless the acts and representations were of a nature calculated to deceive and impose upon a

termine to whom the reward of successful fraud is due, therefore it has been held that one of the parties to a conspiracy to defraud the government cannot maintain an action to recover from his associates his proportion of the money realized as the fruits of the conspiracy. *Boyd v. Barclay*, 1 Ala. 34, 34 Am. Dec. 762.

Liability of Party to Pre-Formed Conspiracy.—It makes no difference, it has been held, with respect to the liability of a party for damages, at what time he entered into the conspiracy. Such party becomes liable for the acts of his associates, even though done previous to his connection with the combination. *Hinchman v. Richie*, Bright (Pa.) 143.

Under United States Statutes.—Section 1980 of the Revised Statutes of the United States provides that if two or more persons conspire to prevent any person from holding office under the United States, or to induce any officer of the United States to leave his post of duty, or to interrupt or impede such officer in the discharge of his duties; or if two or more persons conspire to impede, hinder, or obstruct in any manner the due course of justice in any state or territory; or if two or more conspire to go in disguise upon the highways or premises of another for the purpose of interfering with or of depriving any person of the equal protection of and the free exercise of all privileges and immunities under the laws— and if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of any conspiracy set forth, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation against any one or more of the conspirators.

1. Injury to Reputation and Business—Maryland.—*Kimball v. Harman*, 34 Md. 408, 6 Am. Rep. 340.

Massachusetts.—*Parker v. Huntington*, 2 Gray (Mass.) 124.

New Jersey.—*Van Horn v. Van Horn*, 52 N. J. L. 284.

New York.—*Jones v. Baker*, 7 Cow. (N. Y.) 445; *Ryan v. Burger*, etc., *Brewing Co.*,

59 Hun (N. Y.) 625, 37 N. Y. St. Rep. 287; *Hutchins v. Hutchins*, 7 Hill (N. Y.) 107.

Pennsylvania.—*Griffith v. Ogle*, 1 Binn. (Pa.) 172; *Haldeman v. Martin*, 10 Pa. St. 370.

Texas.—*Delz v. Winfree*, 80 Tex. 400.

Wisconsin.—*Smith v. Nippert*, 76 Wis. 86, 20 Am. St. Rep. 26.

And see *Wright v. Bourdon*, 50 Vt. 494.

Railroad companies combining with a view to prevent the employment by each other of discharged employees are liable to the latter for preventing them from obtaining employment. *Mattison v. Lake Shore*, etc., R. Co., 3 Ohio Dec. 526.

Where defendants conspired to ruin the plaintiff, a teacher, by certain false and malicious slander, imputing to him a want of integrity and a want of capacity, mental and moral, they were held liable in damages. *Wildie v. McKee*, 111 Pa. St. 335, 56 Am. Rep. 271.

In the case of *Smith v. Nippert*, 76 Wis. 86, 20 Am. St. Rep. 26, it was held that a complaint contained a good cause of action which alleged that the defendants maliciously conspired together and wilfully, maliciously, and falsely sued out an inquisition of lunacy against the plaintiff, with intent to destroy her character, deprive her of her means of support, and force her to leave the community, and also to destroy her testimony in a criminal prosecution against one of the defendants, whereby the plaintiff had been brought into public scandal and disgrace, and greatly injured in her reputation and business as a dressmaker.

In *Davis v. Minor*, 2 U. C. Q. B. 464, it was held that an action on the case in the nature of a conspiracy does not lie against a person for supplanting another in the purchase of goods which had first been contracted for by the latter, and that in every action on the case in the nature of a conspiracy the declaration must expressly aver malice on the part of the defendant.

Hissing an Actor.—Any person has a right to express in a reasonable manner approbation or disapprobation of an actor at a theatre. But if several persons combine together to ruin an actor, and hire persons to attend, and with hissing, groans, and yells compel him to desist, and prevent the manager from employ-

man who, as a prospective purchaser, has exercised ordinary prudence in relying upon them.¹

Deception as to Title and Quality. — Where, however, a person was induced to purchase a tract of land lying in another state, by the fraudulent representations of confederates, not only as to its nature and quality but also as to the title, it was held that an action against the participants in the fraud would lie.²

(3) *Conspiracies to Hinder, Delay, or Defraud Creditors.* — There has been some diversity of opinion as to whether a general creditor has such a present and vested interest in the goods of his debtor as will render liable to such creditor, in an action on the case for damages, those who enter into a conspiracy to remove or conceal such property so that it cannot be reached by legal process. Some adjudications approve the rule of allowing the maintenance of an action under such circumstances,³ holding the measure of damages

ing him, such conduct is actionable. *Gregory v. Brunswick*, 6 M. & G. 205, 46 E. C. L. 205.

1. Deception Practiced upon Vendees of Property. — *Harvey v. Young*, *Yelv.* 20; *Bayly v. Merrel*, *Cro. Jac.* 386; *Fenton v. Browne*, 14 *Ves. Jr.* 145; *Page v. Parker*, 43 N. H. 363, 80 *Am. Dec.* 172; *Davis v. Meeker*, 5 *Johns. (N. Y.)* 354; *Van Epps v. Harrison*, 5 *Hill (N. Y.)* 63, 40 *Am. Dec.* 314. And see *Lysney v. Selby*, 2 *Ld. Raym.* 1118; *Nurse v. Frampton*, 1 *Salk.* 214, *Dobell v. Stevens*, 3 B. & C. 623, 10 E. C. L. 201; *Bowring v. Stevens*, 2 C. & P. 337, 12 E. C. L. 157.

Thus it was declared by Sargent, J., delivering the opinion of the court in *Page v. Parker*, 43 N. H. 363, 80 *Am. Dec.* 172, that "it is not every false affirmation of the vendor of property that will give the vendee an action, even though he may be deceived by it. If the buyer trusts to representations which were not calculated to impose upon a man of ordinary prudence, or if he neglects the means of information easily within his reach, it is better that he should suffer the consequences of his own folly than to give him an action against the seller."

In *Miller v. People*, (Colo. 1896) 45 *Pac. Rep.* 408, it was held that it was immaterial that the falsity of the representations could have been discovered by the purchaser by an examination of the abstract of title given him, and that he was in no way prevented from making the examination. This was the trial of an indictment for conspiracy to defraud by false representations as to the title to land.

2. Deception as to Title and Quality. — In the case of *Bostwick v. Lewis*, 1 *Day (Conn.)* 250, 2 *Am. Dec.* 73, the plaintiff had, by the representations of several confederates, been induced to purchase from one of their number a tract of land in Virginia, the title to which was claimed to be in the vendor, who sold with general warranty, and the quality of which was alleged to be well adapted to agricultural operations. Upon subsequent developments to the effect that the vendor had no title to a considerable portion of the tract, and that deception had been practiced upon the vendee, in which the confederates had participated, as to the quality of the land actually conveyed, it was held that an action on the case for this fraud would lie against the perpetrators thereof. It was earnestly contended by counsel for defendants in this action, that as there had

been a conveyance with general warranty, the plaintiff, having a remedy upon the warranty in the deed, should not be allowed to maintain an action for the fraud and deceit. Commenting upon this case *Bronson, J.*, in his dissenting opinion delivered in *Whitney v. Allaire*, 1 *N. Y.* 314, said that though there had been a combination to defraud the purchaser in relation to the quality of the land as well as in relation to the title, it might fairly be inferred from the report that the recovery was on the ground of fraud in relation to the quality alone. "Although evidence was given," continues the opinion, "that the title to a part of the property was out of the vendor, it was admitted for the sole purpose of showing that the residue of the tract was of no value."

3. Conspiracies to Hinder, Delay, or Defraud Creditors. — *Mott v. Danforth*, 6 *Watts (Pa.)* 304, 31 *Am. Dec.* 468; *Penrod v. Morrison*, 2 *P. & W. (Pa.)* 126; *Meredith v. Johns*, 1 *Hen. & M. (Va.)* 585. And see *Collins v. Cronin*, 117 *Pa. St.* 35.

In the case of *Smith v. Tonstall*, *Carth.* 3, it appeared that the plaintiff had obtained judgment against one J. S. for one hundred pounds, and that one hundred pounds were still due said plaintiff for the rent of certain property used or occupied by the said J. S.; that the plaintiff, intending to take out execution upon the judgment already obtained, and also to bring an action of debt for rent in arrear, and the said J. S., being possessed of sufficient goods and chattels to discharge plaintiff's debt, conspired with the defendant D., who, by covin conspiring with the said J. S., procured the said J. S. to confess a judgment to one J. N., which latter individual sued out execution on such feigned judgment, by virtue of which all the goods and chattels of the said J. S. had been seized and elogned to places unknown, by reason of which the plaintiff had lost his debt. It was held that upon such state of facts an action might well be maintained.

Action by Surety upon Official Bond. — The case of *Meredith v. Johns*, 1 *Hen. & M. (Va.)* 585, was an action instituted by a surety upon a sheriff's bond who had sustained liability upon the bond, against one who had counseled and assisted the surety's principal against whom the surety was about to institute suit, to flee the country and to remove or conceal his effects, with the result of preventing the plaintiff from obtaining the indemnification

to be the value of the property so removed or concealed;¹ while others, it would seem with better reason, deny it upon the ground that such a loss and injury is too uncertain and remote for legal consideration.²

which to him was justly due. It was held that the plaintiff was entitled to a verdict.

Debt Not Due at Time of Removal. — The fact that the debt was not due at the time of the alleged removal of the debtor's goods from the reach of a creditor in pursuance of a conspiracy to defraud such creditor does not defeat an action against the conspirators where the debt was lost by reason of such removal. *Mott v. Danforth*, 6 Watts (Pa.) 304, 31 Am. Dec. 468.

Action by Single Creditor — Injury to All. — It is no objection to an action brought by a single creditor against the participants in a plot to remove from without the reach of such creditor the goods and effects of a debtor, that the objects of the conspiracy were not prejudicial to him in particular, but were to defeat the claims of all creditors generally. Such a circumstance is rather an aggravation than an alleviation of the offense. *Mott v. Danforth*, 6 Watts (Pa.) 304, 31 Am. Dec. 468.

1. Measure of Damages. — *Mott v. Danforth*, 6 Watts (Pa.) 304, 31 Am. Dec. 468.

When the Property Exceeds in Value the Amount of the Debt. — In an action on the case for fraudulently withdrawing and concealing the defendant's goods so that they could not be reached by the plaintiff's execution, the damages are the value of the goods and not the amount of the execution, unless the value of the goods exceeds that amount. When this is the case the measure of damages is the amount of the execution. *Penrod v. Mitchell*, 8 S. & R. (Pa.) 522.

2. Contrary View. — *Adler v. Fenton*, 24 How. (U. S.) 407; *Smith v. Blake*, 1 Day (Conn.) 258; *Green v. Kimble*, 6 Blackf. (Ind.) 552; *Wellington v. Small*, 3 Cush. (Mass.) 145, 50 Am. Dec. 719; *Lamb v. Stone*, 11 Pick. (Mass.) 527; *Bradley v. Fuller*, 118 Mass. 239; *Hall v. Eaton*, 25 Vt. 458.

The Rationale of this Proposition, as stated in the text, was thus explained by Shepley, J., in *Moody v. Burton*, 27 Me. 427, 46 Am. Dec. 612: "A debt due from one person cannot be satisfied by the recovery of damages from another person, unconnected with and a stranger to it, without some statute provision. The creditor would recover damages in satisfaction for an injury suffered, not on account of a debt due and in satisfaction of it. How are the damages which a creditor may thus recover to be proved and estimated? The plaintiff had obtained no lien on the property conveyed by attachment, judgment, or in any other manner; had no special property in or claim to it. The only proof of loss or injury which he could make would be that his debtor had fraudulently conveyed his property without having received any value for it, and with the intent to avoid payment of the debt, and that he had no other means of obtaining payment. All other creditors could make the same proof. Upon such proof he could not be entitled to recover the amount of his debt, for that is still subsisting, and it may yet be collected. Nor could he be entitled to recover the value of the property conveyed, for

to that he had no better claim than other creditors. He has not, therefore, lost it. If it had not been fraudulently conveyed, it was as probable that it might have been applied to the payment of other debts as to his own. The debtor might have disposed of it fairly and for a valuable consideration, or have lost it by accident or misfortune. The only loss or injury shown by the proof would be that he had been deprived of a chance or possibility of obtaining payment from that property. This would be stating his loss or injury too strongly, for he would still have the chance of attaching or securing it, or its proceeds, in the hands of the fraudulent holder. A jury would be authorized then to estimate the value only of his chance to secure it and have it applied to the payment of his debt while in the hands of his debtor, for this only has he lost. There would be no data, tables, or other means afforded by which such a chance could be estimated. The loss or injury would be too uncertain and remote for legal estimation."

Illustrations. — The case of *Adler v. Fenton*, 24 How. (U. S.) 407, was an action on the case for damages instituted by a creditor against his debtor and a co-defendant for conspiring to dispose of the property of the debtor, concealing it from the pursuit of those to whom the latter was indebted. It was held, however, in this case, that a general creditor had no such interest in or lien upon the goods and effects of his debtor as would support an action for damages under such circumstances. *Wellington v. Small*, 3 Cush. (Mass.) 145, 50 Am. Dec. 719, was an action on the case in the nature of a conspiracy against an insolvent debtor and another for fraudulently removing and concealing the goods of the debtor, and for canceling and discharging a valid and enforceable debt due the insolvent debtor from his co-defendant, with intent to delay and defeat the creditors of the former. It was held that no such action was maintainable against the person who had so aided the debtor in his fraudulent design, the proper remedy being, it was held, the attaching of the property in the transferee's hands, or by summoning him by trustee process. Nor was the case varied by the fraudulent intent of the defendant, it was held, because such intent could not make the plaintiff's damage any greater, or any less remote or contingent, than it would have been if no such intent had existed.

Payment to One Creditor of Fund Promised to Another. — That a creditor and his debtor agree that the latter shall pay to the former a sum of money which the debtor had promised to pay, when received, to another creditor, is not a corrupt and fraudulent conspiracy, and the receipt of the money by such creditor, in pursuance of the agreement, will not make him liable to respond in damages to the other creditor, even though the recipient of the money knew of the promise which the debtor had made. *Benford v. Sanner*, 40 Pa. St. 9, 80 Am. Dec. 545. This was a case where one James H. Benford entered into a contract, for

Defeating Lien of Attachment. — When, however, a conspiracy was entered into by which the rights of a creditor who had secured a valid attachment lien upon certain property were defeated, it was held that an action on the case would lie against the participants in the unlawful combination.¹

(4) *Conspiracies to Deter Bidders at Execution Sales.* — Where property is purchased at an execution sale, by a member of a conspiracy formed to deter bidders from attending such sale and to prevent free competition thereat, no title passes to the vendee, on account of the fraud to which he was a party.²

3. How the Execution of a Conspiracy May Be Prevented. — An Injunction May Be Granted to prevent the doing by conspirators of irreparable injury to the property rights of another.³ And it is no ground for refusing an application for such an injunction, that the acts sought to be enjoined would, if performed, subject the perpetrators thereof to a criminal prosecution.⁴

CONSTABLE. — See the title **SHERIFFS AND CONSTABLES.**

CONSTANT. — See note 5.

valuable consideration, to pay the obligee therein, to whom he was indebted, the proceeds of certain post-office warrants which he, the said Benford, expected to receive for carrying the United States mails. When the warrants were received, however, James H. Benford turned them over to his brother, Cyrus Benford, to whom he was also indebted; the latter receiving the warrants, it was alleged, with full knowledge of the contract by which James H. Benford had obligated himself to pay them to the obligee in the contract, Sanner by name, who brought his action on the case in the nature of a writ of conspiracy against the Benfords. The court in this case, as indicated in the text, maintained the position that the defendants could not be held liable.

1. *Adams v. Paige*, 7 Pick. (Mass.) 542.

Judgment Creditors. — In the case of *Findlay v. McAllister*, 113 U. S. 104, it was held that a judgment creditor of a county which had, in obedience to a mandamus, levied a special tax to pay the judgment, and for the payment of which property had been seized, had such an interest in the special tax and in the goods seized to be sold as would support an action against those who conspired to prevent, and by threats and menaces deterred, persons from bidding for the property, and influenced and persuaded taxpayers not to submit to the special tax. In this case the case of *Adler v. Fenton*, 24 How. (U. S.) 407, is *considered and distinguished*. See also the case of *Smith v. Tonstall*, Carth. 3.

2. Conspiracy to Deter Bidders at Execution Sales. — Where property was purchased at an execution sale pursuant to a combination by which outside parties were deterred from bidding, and the property bought in by one of the confederates for the benefit of the execution debtor, at a price much below its value, such sale was held to be fraudulent and void as to the other creditors of the execution debtor, and the purchasing confederate was not allowed to retain the property even to the extent of the price paid for it, the fraudulent intent vitiating the purchase and no lien being acquired by the contract. *Stovall v. Farmers', etc., Bank*, 8 Smed. & M. (Miss.) 305, 47 Am. Dec. 85.

See also *Trimble v. Turner*, 13 Smed. & M. (Miss.) 348, 53 Am. Dec. 90.

Where the vendee at a sheriff's sale procured the property at a grossly inadequate price by, in conjunction with his brother, falsely circulating the report that he was purchasing in the interest of the family of the defendant in the execution, and by fraudulently pretending that a purchaser would take the property offered charged with certain liens, which he knew the sale would divest, it was held that the title so acquired was void for the fraudulent conspiracy to which the vendee was a party. *McCaskey v. Graff*, 23 Pa. St. 321, 62 Am. Dec. 336. See also the titles **AUCTIONS AND AUCTIONEERS**, vol. 3, p. 506; **FRAUD; JUDICIAL SALES; SHERIFF'S SALES; TAX SALES.**

3. Injunction. — *Arthur v. Oakes*, 63 Fed. Rep. 310; *Elder v. Whitesides*, 72 Fed. Rep. 724. And see *Blindell v. Hagan*, 54 Fed. Rep. 40.

4. Arthur v. Oakes, 63 Fed. Rep. 310; *Elder v. Whitesides*, 72 Fed. Rep. 724.

5. Constant Use. — Of the term "*constant use*," as applied to the establishment of a right of way by adverse possession, *Ames, J.*, in *Bodfish v. Bodfish*, 105 Mass. 319, says: "It is certain that continuous use does not necessarily mean *constant use*." See generally the title **ADVERSE POSSESSION**, vol. 1, p. 834.

Constantly in Use. — The court instructed that it was the duty of the defendant to keep *constantly* in use in its boat the most improved machinery for prevention of spread of fire from its engine. The appellate court said: "The only objection made to this instruction is that the court said such improved machinery 'should be kept *constantly* in use.' The use of the words '*constantly* in use,' if understood as relating to all times and places, was clearly wrong; but, as explained by the court to the jury, they must have understood that such '*constant use*' related only to such times and places as rendered it unsafe not to use such machinery. We think the defendant could not have been prejudiced by the general use of the word *constantly*, under the circumstances." *Atkinson v. Goodrich Transp. Co.*, 69 Wis. 8. See also the title **FIRES**.

Constantly—Fire Insurance. (See also the

CONSTITUTE. — See note 1.

title FIRE INSURANCE.)— It has been held that a representation that the premises insured are *constantly* worked is a representation that the premises were to be *constantly* worked during the usual working days and hours for the prosecution of the business for which they were employed. *Prieger v. Exchange Mut. Ins. Co.*, 6 Wis. 89.

1. **Constitute.** — In *Galveston, etc., R. Co. v. State*, 77 Tex. 367, Stayton, J., in a dissenting opinion said: "The declaration that the specified funds together 'shall *constitute* a perpetual school fund,' of itself leaves no doubt upon this question; for the word *constitute*, as here used, is the equivalent of the words 'compose, make up, be;' the unit composed of the several constituents, which it is declared shall be perpetual, continuing indefinitely, without cessation or interruption by any department of the government, and subject to diversion only by the will of the people, which may be expressed in some future organic law." See also the title SCHOOLS.

A **Company** formed by Act of Parliament for the purpose of making a dock was afterwards authorized by an Act of Parliament obtained by a railway company to make a short piece of railway over its own land connected with the line of the railway company, and to work it

for through traffic. It was held that the dock company was a company *constituted* by Act of Parliament for the purpose of making a railway. *In re East & West India Dock Co.*, 38 Ch. Div. 576. In that case Chitty, J., said: "The term *constituted* is not equivalent to 'incorporated;' it is of wider import. It seems to be equivalent to 'established.' The act or acts need not be the act or acts by which the company is incorporated; any act, whether original or subsequent, by which the company is *constituted* for the purpose of constructing, maintaining, or working a railway, is within the meaning of the section. To put an illustration: if a company were originally incorporated by Act of Parliament for the purpose of constructing and maintaining a canal, and by a subsequent act the company was authorized to turn the canal into a railway, and to construct and maintain the railway, it would be a company *constituted* for this latter purpose within the meaning of the enactment."

Ordain, Constitute, Establish. — In *Kepner v. Com.*, 40 Pa. St. 129, the court said: "The Act says that the council may 'make, ordain, *constitute*, establish, and pass' ordinances, etc.; but all these verbs mean the same thing and any one of them would have been sufficient."

CONSTITUTIONAL LAW.

BY CHARLES SUMNER LOBINGIER, M.A., LL.M.

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I. INTRODUCTORY — 1. History of Term "Constitution." — The term "constitutions" was used at an early period of English history with reference to laws promulgated by the Crown, having the force and character of modern statutes.¹ Its first use in anything like the modern sense appears to have been in the third Virginia colonial charter.² The instruments framed by the different American colonies upon their separation from Great Britain were generally denominated constitutions,³ and to such as these the term has ever since been applied.

2. Definition and Nature — a. OF CONSTITUTIONS — (1) Viewed as to Substance and Contents. — Definitions of constitutions vary according to the standpoint of the definer. In the older American definitions, these instruments are considered chiefly as to substance and contents, and the authors lay stress upon that part of a constitution which prescribes the frame or form of government,⁴ that being the most familiar. But it is now being recognized

1. *E. g.*, the "Constitutions of Clarendon," the Latin text of which is reprinted in Stubbs' *Select Charters Illustrative of English Constitutional History* (Oxford, 1888), pp. 137-140. This was a document of sixteen clauses pertaining to the relation between the crown and the church, as well as to civil matters promulgated in 1164 by Henry II. in the course of his controversy with Thomas à Becket. See Stubbs' *Const. Hist. of Eng.* (3d ed.), section 140.

2. Preston's *Documents Illustrative of American History* (1886), p. 33. The full title of this instrument was "An Ordinance and Constitution of the Treasurer, Council and

Company in England for a Council of State and General Assembly," dated July 21, 1621.

3. In several instances the phrase "or form [or system or plan] of government" was added. In Virginia the first revolutionary instrument consisted of a bill of rights only. See 2 Poore's *Constitutions and Charters of the United States*, 1908.

4. **Frame of Government Emphasized.** — "A constitution is that by which the powers of government are limited." Nelson, J., in *Kamper v. Hawkins*, 1 Va. Cas. 24.

"What is a constitution? The constitution of an American state is the supreme, organized, and written will of the people acting in con-

that the scope of the modern constitution is much broader than this,¹ including administration² as well as organization. Indeed, the most striking feature of contemporary constitution-making is the tendency to enlarge the scope of these instruments, to invade new fields, and to incorporate subjects not hitherto included.³ This tendency has been much criticised of late,⁴ but it must be reckoned with in order to frame a faithful and accurate definition of modern constitutions. Any attempt to do this without recognizing the ever widening scope of these instruments must result in definitions largely theoretic-

vention and assigning to the different departments of the government their respective powers. It may limit and control the action of these departments, or it may confer upon them any extent of power not incompatible with the federal compact. By an inspection and examination of all the constitutions of our own country they will be found to be nothing more than so many restrictions and limitations upon the departments of the government and people." *Taylor v. Governor*, 1 Ark. 27.

"What is a constitution? It is the form of government delineated by the mighty hand of the people, in which certain first principles of fundamental law are established. The constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the power that made it." *Vanhorne v. Dorrance*, 2 Dall. (U. S.) 304.

A constitution "is a form of government established by the people, designed for their general welfare as a society and as individuals." *Sharkey, C. J., in Brien v. Williamson*, 7 How. (Miss.) 17.

"A constitution is an instrument of government, made and adopted by the people for practical purposes connected with the common business and wants of human life." *People v. New York Cent. R. Co.*, 24 N. Y. 485. See also *Cohen v. Hoff*, 3 Brev. (S. Car.) 501; *State v. Parkhurst*, 9 N. J. L. 443; *French v. State*, 52 Miss. 762.

1. Scope of Modern Constitution.—Mr. Bryce, in his "*American Commonwealth*" (2d ed. 1891), vol. I, p. 422, presents the following analysis:

"A normal constitution consists of five parts:

"I. Definition of the boundaries of the state. (This does not occur in the case of older states.)

"II. The so-called bill of rights—an enumeration of the citizens' primordial rights to liberty of person and security of property. This usually stands at the beginning of the constitution, but occasionally at the end.

"III. The frame of government—*i. e.*, the names, functions, and powers of executive officers, the legislative bodies, and the courts of justice. This occupies several articles.

"IV. Miscellaneous provisions relating to administration and law, including articles treating of schools, of the militia, of taxation and revenue, of the public debts, of local government, of state prisons and hospitals, of agriculture, of labor, of impeachment, and of the method of amending the constitution, besides other matters, to be mentioned presently, still less political in their character. The order in which these occur differ in different instruments, and there are some in which some of the above topics are not mentioned at all. The

more recent constitutions and those of the newer states are much fuller on these points.

"V. The schedule, which contains provisions relating to the method of submitting the constitution to the vote of the people, and arrangements for the transition from the previous constitution to the new one which is to be enacted by that vote. Being of a temporary nature, the schedule is not strictly a part of the constitution."

The following is Prof. Burgess's characterization: "A complete constitution may be said to consist of three fundamental parts. The first is the organization of the state for the accomplishment of future changes in the constitution. This is usually called the amending clause, and the power which it describes and regulates is called the amending power. * * * The second fundamental part of a complete constitution, I denominate the constitution of liberty; and the third, the constitution of government." *Burgess's Political Science and Comparative Constitutional Law*, vol. I, p. 137. See also *Jameson, Const. Conv.* (4th ed.), § 63. And for a more general discussion, see *Holland on Jurisprudence*, 249; *1 Austin on Jurisprudence* (Campbell's ed.), § 248 *et seq.*

2. Administrative Law in the Constitutions.—

"Most significant in the constitutions themselves is the recognition, expressed or implied, of the fourth department of representative government, the department of administration. This recognition is in keeping with the entire political tendency of American constitution making during the present century. Our fathers settled, or tried to settle, on what principles government should be founded; we are settling, or trying to settle, on what principles government shall be administered." *Thorpe, Recent Constitution Making in the United States*, 2 *Annals of American Academy*, p. 201.

3. Eaton, Recent State Constitutions, 6 *Harvard Law Rev.*, pp. 53, 109 *Thorpe, Recent Constitution Making in the United States*, 2 *Annals of American Academy*, p. 145, where the author, in speaking of the constitutions of the four states admitted in 1889, says: "The perusal of these new constitutions suggests that the people have lost confidence in their state legislatures, and that the conventions, responsive to this feeling, have sought to anticipate great evils by limiting the powers of the legislature, or by substantially limiting them in declaring by what procedure the legislature shall act, on what it shall not act, and to what extent it may act. The chief limitations on the legislature are in respect to special or private legislation, corporations, political corruption among members, taxation, and the power to use the credit of the state."

4. See Mr. Eaton's Recent State Constitutions, 6 *Harvard Law Review*, 53, 109.

cal; stating what in the author's opinions ought to be, rather than what is.

(2) *Viewed as to Legal Character.* — A more satisfactory standpoint from which to view these instruments for the purposes of definition is that of their intrinsic legal character. Thus regarded the American constitution is found to be the fundamental or basic law to which all other must conform.¹ In other words, the ultimate distinction between other forms of law and the constitution is not the character of the latter's provisions, nor yet their binding force, but the formal mode by which they may be changed. Statutes may be amended or repealed by the legislature, case law may be modified or overruled by the courts, but the constitution can, as a rule,² be changed only by the people, in the exercise of their sovereign powers. This is the only basis upon which an American constitution can be defined and differentiated, according to tests that will hold, from other law.

b. OF DERIVATIVE TERMS. — The Term "Constitutional" denotes that which is consonant to and agrees with the constitution.³

A "Constitutional Law" is therefore one that does not contravene the express or implied restrictions on legislative action contained in the constitution.

The Phrase "Unconstitutional Law," though a contradiction in terms,⁴ is used to designate a rule of action that is sought to be established in opposition to the provisions or principles of the fundamental law, and which is therefore in excess of the authority of the body or official promulgating it, and consequently void.⁵

c. OF CONSTITUTIONAL LAW. — This term is used in several senses. Most commonly it is employed to designate provisions of the character usually found in constitutions.⁶ It is also used to denote the law pertaining to the

1. *Constitution as Fundamental Law.* — State *v.* McCann, 4 Lea (Tenn.) 9.

"A constitution is defined by Judge Story to be 'a fundamental law or basis of government.' It is established by the people in their original sovereign capacity, to promote their own happiness, and permanently to secure their rights, property, independence, and common welfare." *McKoan v. Devries*, 3 Barb. (N. Y.) 198.

"By the constitution of a state I mean the body of those written or unwritten fundamental laws which regulate the most important rights of the higher magistrates and the most essential privileges of the subjects." Mackintosh on the Study of the Law of Nature and Nations.

Judge Sharswood, in his *Law Lectures* (Lecture 1, p. 23), well says: "There are and have been constitutions, written and unwritten, organic or fundamental laws. But in all of them, so far as I know, the fundamental laws thus established have no sanction beyond the oath of those intrusted with the administration of them, the force of public opinion, and the responsibility of the representative to his constituent. With us the fundamental laws are in the strictest sense of the words, *leges legum*." See also Dicey's *Law of the Constitution*, Lecture 3, p. 125; Lecture 4, p. 145.

In England, under the theory of the constitution, Parliament is supreme. "It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the Act of Union and the several statutes for triennial and septennial election. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure

rather too bold, the omnipotence of parliament." 1 Black. Com. 161.

Belgium and France have written constitutions, but they likewise are without practical legal sanction, and are "mere glittering declarations of abstract principles of political morality or action." *Dillon's Laws and Jurisprudence of England and America*, p. 201. See also Dicey's *Laws of the Const.* (2d ed.), Lecture 4, p. 144.

2. The only exception to this in the United States appears to be the Delaware Constitution, which provides for amendment by the legislature. See Const. of Del. (1897), art. 16, § 1.

3. See *Bouvier's Law Dict.*

4. *Cooley's Const. Lim.* (6th ed.), p. 5.

5. The Term "Unconstitutional Law." — See 1 Austin on Jur. (Campbell's ed.), § 248; *Cooley's Const. Lim.* (6th ed.), p. 5; *Cooley's Const. Law*, p. 24.

6. *Constitutional Law.* — See its use in this sense in Borgeaud, *Adoption and Amendment of Constitutions* (Hazen's translation, 1895), p. 41. In *Ordonaux's Constitutional Legislation in the United States* (1891), pp. 207-8, it is observed: "The application of these principles of constitutional liberty under the interpretation given to them by courts has built up in the United States a special branch of jurisprudence known as constitutional law. This new branch has grown out of the occasional conflicts of power and jurisdiction between different departments of a tripartite government. The boundaries of these departments not being capable of exact ascertainment, there will, in the complexity of public interests, necessarily arise occasions when, the supposed limits of their authority being reached, an act is nevertheless required to be performed by

organization of government, in contradistinction to administrative law which relates to "government in action."¹ Constitutional may also be defined in a third sense as that branch of jurisprudence which treats of constitutions — their nature, formation and amendment, operation and interpretation.

3. Scope of This Title. — It is mainly in the last mentioned sense that the phrase "Constitutional Law" has been adopted as the subject of this article. The contents of a modern constitution are too varied and voluminous to be treated in one article. Moreover they include many well-settled titles which form distinct branches of the law and are best considered in different articles.² The following pages will, therefore, be devoted to the external law pertaining to the constitution, together with such of its contents as are most familiar and most common to instruments of its kind.

II. CLASSES OF CONSTITUTIONS — 1. In General. — Constitutions may be separated into two grand divisions, viz., (1) cumulative³ or evolved and (2) conventional⁴ or enacted.⁵ The basis of this division is an historical one; it is an attempt to classify constitutions with reference to their origin. But it nearly, if not quite, coincides with another classification, based ostensibly upon form, by which constitutions have been distinguished as *unwritten* and *written*. For all conventional or enacted constitutions are necessarily written — at least as regards their formal provisions — and all others are for the most part unwritten.⁶

2. Cumulative or Evolved Constitutions may be defined as those which, both in form and substance, are entirely the product of political evolution; not inaugurated at any specific time, and changing by accretions rather than by any systematic method.⁷ They may include scattered written provisions, but are unwritten in the sense of having no compact written form.⁸ The three

them, for whose justification neither precedent nor adjudication can be supplied. In such emergencies the wheels of government would be blocked were not some implied powers attached to those specifically granted, as necessary adjuncts to their complete execution. Should error occur either in assuming an unwarranted jurisdiction, or in discharging duties belonging to a different department, it becomes a proper subject for judicial inquiry to define these boundaries in that particular instance. In such cases the function of the court is to seek the law within the constitution from which a rule of conduct may in the future be deduced."

1. Constitutional Law and Administrative Law Contrasted. — See Wilson, *The Study of Administration*, 2 Pol. Sc. Quar. 198.

"While constitutional law gives the general plan of governmental organization, administrative law carries out this plan in its minutest details. But administrative law not only supplements constitutional law, in so far as it regulates the administrative organization of the government; it also complements constitutional law, in so far as it determines the rules of law relative to the activity of the administrative authorities. For while constitutional law treats the relations of the government with the individual from the standpoint of the rights of the individual, administrative law treats them from the standpoint of the powers of the government. Constitutional law, it has been said, lays stress upon rights; administrative law emphasizes duties." Goodenow, *Comparative Administrative Law* (1893), p. 8, *citing* Boeuf, *Droit Administratif* IV. At p. 15 of the work last quoted from, the

author says: "The distinction between the two [constitutional law and administrative law] is thus more one of degree than of kind. Both treat to a large extent of the same subjects, the latter more in detail than the former, while the latter devotes itself almost entirely to the consideration of the executive organs of the government, since they are the only ones which actually act and administer."

2. See the list of cross-references at the beginning of this title for an enumeration of titles in this work, where these topics are considered.

3. Jameson, *Constitutional Conventions* (4th ed.), § 72; Lieber's *Civil Liberty*, p. 166, note 1; Ordranax, *Constitutional Legislation in the United States* (1891), p. 207.

4. See Ordranax, *Constitutional Legislation in the United States*, p. 207.

5. Jameson, *Constitutional Conventions* (4th ed.), § 73.

6. But all constitutions consist of both written and unwritten matter. See Burgess, *Political Science and Comparative Constitutional Law* (1893), vol. I, p. 91.

7. "The code of our unwritten constitution has, like all other English things, grown up bit by bit, and for the most part silently and without any acknowledged author." Freeman, *Growth of the English Constitution* (1884), p. 122. See Jameson, *Constitutional Conventions* (4th ed.), § 72; Ordranax, *Constitutional Legislation in the United States* (1891).

8. Unwritten Constitutions. — "When we talk of the constitution of a state or a nation, we mean those of its rules or laws which determine the form of its government, and the

most conspicuous historical instances of such constitutions are those of Athens,¹ Rome,² and England.³ The latter is almost the sole example of a progressive modern state retaining such a constitution.⁴

3. Conventional or Enacted Constitutions — *a. NATURE AND ORIGIN.* — These are constitutions which have been given definite written form at a particular time by a specially constituted authority, usually, in the United States, a convention.⁵ They represent a comparatively recent stage of constitutional development. Though foreshadowed by certain historic political documents in England⁶ they developed independently in the American colonies,⁷ and first reached full fruition there. Thence the idea spread to France,⁸ and after-

respective rights and duties of the government towards the citizens and of the citizens towards the government. These rules, or the most important among them, may be contained in one document, such as the Swiss or Belgian Constitution, or may be scattered through a multitude of statutes and reports of judicial decisions, as is the case with regard to what men call the English Constitution. This is a distinction of practical consequence." Bryce, *The American Commonwealth* (2d ed. 1891), p. 350.

1. See Aristotle's *Constitution of Athens* (Poste's Translation, 1891); Botsford, *The Development of the Athenian Constitution*.

2. See Tighe, *The Development of the Roman Constitution* (1886). Mr. Bryce, in *The American Commonwealth* (2d ed. 1891), p. 352, note, observes: "The constitutions of the ancient world were all, or nearly all, flexible, because the ancient republics were governed by primary assemblies, all of whose laws were of equal validity. By far the most interesting and instructive example is the constitution of Rome. It presents some striking resemblances to the constitution of England. Both left many points undetermined, both relied largely upon non-legal usages and understandings; and any English constitutional lawyer who should compare the practical workings of the two in an exact and philosophical way would render a service to history and political science."

3. English Constitution. — "The Constitution of England consists of law and precedent. She has great documents like *Magna Charta* at the foundation of her institutions; but *Magna Charta* was only a royal ordinance. She has great laws like the Bill of Rights at the centre of her political system; but the Bill of Rights was only an Act of Parliament. She has no written constitution, and Parliament may, in theory, change the whole structure and principle of her institutions by mere bill. But in fact Parliament dare not go faster than public opinion; and public opinion in England is steadily and powerfully conservative. That is a very impressive tribute which Sir Erskine May feels able soberly to pay to the conservatism of a people living under such a form of government when he says: 'Not a measure has been forced upon Parliament which the calm judgment of a later time has not since approved; not an agitation has failed which posterity has not condemned.'" Woodrow Wilson, *The State* (1889), § 730.

"Our English Constitution was never made, in the sense in which the constitutions of many other countries have been made. There never

was any moment when Englishmen drew out their political system in the shape of a formal document, whether as the carrying out of any abstract political theories or as the imitation of the past or present system of any other nation. There are indeed great political documents, each of which forms a landmark in our political history. There is the Great Charter, the Petition of Right, the Bill of Rights. But none of these gave itself out as the enactment of anything new. All claimed to set forth with new strength, it might be, and with new clearness, those rights of Englishmen which were already old." Freeman, *Growth of the English Constitution* (1884), pp. 56, 57.

"There are four principal sources of English constitutional law: (1) treaties or quasi-treaties; (2) precedents and customs, generally known as common law; (3) compacts; and (4) statutes. The first and the two last of these divisions are the written part of the constitution, the second is the unwritten part. They do not always differ much in form. The difference is chiefly to be found in their essential characteristics, in the matters which they regulate and the spirit which has dictated them." Boutmy, *The English Constitution* (1891), p. 8.

On the other hand, De Tocqueville, *Democracy in America*, c. 6, denied that England had a real constitution. And see, as asserting a similar opinion, *Grimball v. Ross*, T. U. P. Charlt. (Ga.) 175.

4. See Borgeaud, *Adoption and Amendment of Constitutions* (Hazen's Translation, 1895), pp. 30, 34.

5. In the United States all constitutions, federal and state, have been written, with the exception of the constitution of Connecticut prior to 1818, and that of Rhode Island prior to 1842.

6. English Prototypes of the Written Constitution. — Among these may be mentioned:

(a) *Magna Charta* (1215). See Stubbs' *Select Charters Illustrative of English Constitutional History* (1888), p. 289.

(b) *The Petition of Right* (1628).

(c) *The Agreement of the People* (1647).

(d) *The Instrument of Government* (1653).

The three last may be found reprinted in Gardiner's *Constitutional Documents of the Puritan Revolution* (1889).

(e) *The Bill of Rights* (1689). See Stubbs' *Select Charters Illustrative of English Constitutional History* (1888), p. 523.

7. The germs of the constitution are found in the early colonial charters.

8. See Borgeaud, *Origin of Written Constitutions*, 7 *Political Science Quarterly*, 613.

wards slowly through the present century to most of the states of continental Europe,¹ throughout the western hemisphere,² and it has even found a foothold in Asia,³ Africa,⁴ and the scattered isles of Oceanica.⁵ Thus almost the entire civilized world has in this particular followed the lead of the United States; the written constitution is America's most widely copied contribution to political science.

b. KINDS. — Written or enacted constitutions have been still further subdivided into (1) *monarchical* and (2) *democratic*.⁶ The former derive their authority primarily from some power outside the popular will.⁷ Those of the second class proceed from the people⁸ though there may be other parties to them.⁹

III. FORMATION AND AMENDMENT OF CONSTITUTIONS — 1. Adoption —

a. INTRODUCTORY. — "Constitutions," observed Sir James Mackintosh, "grow; they are not made."¹⁰ But while it is in the highest sense true that the political ideas of which the constitution is the formal expression are the result of long continued growth, the product of accumulated experience, it is also true that in most countries these ideas, in order to attain the rank of constitutional law, must receive definite form and sanction at a particular time and according to a prescribed method. To present the law applicable to this method, is the purpose of this branch of the present treatise.

b. THE OCCASION — (1) *Periodical Resubmission*. — Some of the constitutions provide for periodically submitting to the voters the question whether a convention shall be called to form a new constitution.¹¹ Otherwise the con-

1. See Borgeaud, Adoption and Amendment of Constitutions (Hazen's translation, 1895), pp. 30-31.

2. Borgeaud, Adoption and Amendment of Constitutions (Hazen's translation, 1895), p. 34.

3. See a translation of the Japanese Constitution (announced 1881; in force 1890), 24 Am. Law Rev. 963; and compare "Local Self Government in Japan," 7 Political Science Quarterly, 294.

4. Borgeaud, Adoption and Amendment of Constitutions (Hazen's translation, 1895), p. 34; Bryce, Two South African Constitutions, 21 Forum, p. 145 (1896).

5. Borgeaud, Adoption and Amendment of Constitutions (1895), p. 34; Braddon, The Federation Movement in Australia, 40 Nineteenth Century, 156.

6. *Classes of Written Constitutions*. — "According to their origin and legal character contemporary written constitutions may be divided into two main categories; on the one hand, compacts and royal charters; on the other, constitutions resting exclusively upon the principle of popular sovereignty." Borgeaud, Adoption and Amendment of Constitutions (Hazen's translation, 1895), p. 43. Compare Boutmy, The English Constitution (1891), p. 154. In *Grimball v. Ross*, T. U. P. Charl. (Ga.) 175, the court draws a similar distinction as follows: "In England they have no constitution; hence their Parliament possesses omnipotent powers. Englishmen call Magna Charta, their Bill of Rights, and the Act of Settlement component parts of the British Constitution. But we all know that the people had no agency in any of these measures; consequently, they were acts of an omnipotent legislature or of an oligarchy assuming and exercising the sovereign authority. A constitution stands upon a different basis. It

emanates directly from the will of the people, in whom, from the very nature of things, the sovereign power necessarily resides. As soon as the people have given existence to this constitution, it becomes the supreme law of the nation or state; it is paramount to all other authority; and that mighty fiat, and that fiat only, which gave it life, can announce its destruction."

7. *Of This Monarchical Class* were the charters granted by the royal authority of the British colonies which afterwards became the United States.

The British North American Act or present Constitution of Canada is also of the class referred to in the text.

8. Of this class are the constitutions of the United States, France, and Switzerland.

9. "The Constitution of the United States is, in its more essential and fundamental character, a *tripartite* agreement. The parties to it are the states, the people, and the United States." Matter of Booth, 3 Wis. 96.

10. See this remark quoted by Borgeaud, Adoption and Amendment of Constitutions (Hazen's translation, 1895), p. 37.

11. *Massachusetts Const.* (1780) provided for resubmission after fifteen years.

New Hampshire Const. (1784) provided for resubmission after seven years. The third constitution of this state (1792) provided for submission every seven years.

New York Const. (1846) provided for resubmission every twenty years. See Constitution of 1894, art. 14, section 2.

Michigan Const. (1850) provided for resubmission every sixteen years, beginning with 1850.

Iowa Const. (1846) provided for resubmission every tenth year, commencing with 1870, and this provision was carried into the constitution of 1857.

vention may be called at such times as the legislature and the voters may require.¹

(2) *Admission of New States.* — In the United States new states may be formed by the adoption of constitutions on the part of the people of the several territories, whenever enabling acts for that purpose are passed by Congress, but only in the manner allowed by such acts.²

Ratification of Irregularly Formed Constitution by Subsequent Admission of State. — Where, in the absence of such enabling act, the people of a territory proceed irregularly to form a constitution, either by their own spontaneous action or under the direction of the legislative or executive authority of the territory, the subsequent admission of the state into the Union must be deemed to have cured all irregularities.³

Congress Determines Whether Proposed State Entitled to Admission. — But the right of such proposed state to admission is dependent upon the favorable determination by Congress of various questions of policy as well as of constitutional law.⁴

Status of Seceding States After Civil War. — The states in rebellion never ceased to be states within the Union,⁵ and the approval by Congress of a state constitution adopted in consequence of the provisions of the reconstruction acts

Kansas Const. (1858) provided for resubmission every ten years, commencing with 1863.

1. Thus, it is provided in *Illinois* that whenever two-thirds of the members of each house of the general assembly shall concur that a convention is necessary to revise the constitution, the question shall be submitted to the electors. If a majority of the electors shall vote for a convention as proposed by the general assembly, the convention shall meet in accordance with the provision of the constitution, and the revision or amendments prepared by it shall become effective if approved by the electors at an election held not more than six months after the adjournment of the convention. Ill. Const. 1870, art. 14, section 1.

The constitution of *Alabama* provides simply that "no convention shall hereafter be held for the purpose of altering or amending the constitution of this state, unless the question of convention or no convention shall be first submitted to a vote of all the electors of the state and approved by a majority of those voting at said election." Ala. Const. 1875, art. 17, section 2.

2. Cooley's Const. Lim. (6th ed.), p. 41.

Michigan — Stipulations of United States on Acquiring Northwest Territory. — At the time of the admission of Michigan into the Union it was strenuously insisted that the necessity for an enabling act by Congress, and indeed the necessity for any federal sanction, was dispensed with by the stipulations previously entered into by the National Government in acquiring the Northwest Territory. See Benton's Abridgment of Congressional Debates, vol. 12, pp. 69, 72; such was in fact the holding in *Scott v. Detroit Young Men's Soc.*, 1 Dougl. (Mich.) 119. But by the Supreme Court of the United States, in a decision on the same case, 5 How. (U. S.) 343, the holding of the lower court was overthrown. See also *Myers v. Manhattan Bank*, 20 Ohio 283.

Deeds of Territorial Cession. — In theory it would seem that under the provisions of most deeds of territorial cession to the Union the

people of a territory, seeking admission as a state under a constitution and under conditions to which no proper objections can be made, are entitled as of right to such admission. Thus the ordinance of 1787 with reference to the Northwest Territory provided that such territory should be divided into either three or five states, and that "whenever any of the said states shall have sixty thousand free inhabitants therein, such state * * * shall be at liberty to form a permanent constitution and state government. *Provided*, the constitution and government so to be formed shall be republican, and in conformity to the principles contained in these articles." See also deed of cession from North Carolina of Tennessee, U. S. Stat. at Large, vol. 1, pp. 106, 109; Treaty of Cession of 1803 with France, U. S. Stat. at Large, vol. 8, p. 200; Treaty with Spain for cession of Floridas, U. S. Stat. at Large, vol. 8, p. 252; Treaty with Mexico for cession of California and territory in the Southwest, U. S. Stat. at Large, vol. 9, p. 922. The title of the United States to the original territory of Oregon rests on the right of discovery and settlement, and is accompanied by no conditions. See Jefferson's Wks., ed. of 1854, vol. 7, p. 51. Practically, however, the decision of the question as to the conformity of a proposed state constitution with the requirements above referred to is vested ultimately with Congress, and the theoretical right is without legal sanction.

3. *Secombe v. Kittelson*, 29 Minn. 555.

4. **Matters to be Passed Upon by Congress to Determine Right to Admission.** — As whether the constitution so formed is republican in its character, whether satisfactory provisions are incorporated governing the elective franchise, whether the proposed state boundaries are proper ones, and whether any evil exists in the territory which renders it unfit for participation in the obligations and privileges of the Union, see Cooley's Const. Lim. (6th ed.), p. 42.

5. *Gunn v. Barry*, 15 Wall. (U. S.) 623, *per* Swayne, J.

was only a condition precedent to the representation of the state in the federal legislature.¹

c. THE FRAMING: THE CONSTITUTIONAL CONVENTION — (1) *In General*. — In most of the United States, constitutions are framed by delegate conventions chosen by popular vote. In *Rhode Island* this method is not now available,² and there have been other exceptions to the rule.³ In some other countries, the convention is employed as a method of constitution-making.⁴

(2) *Character*. — A constitutional convention has been defined as "a body of delegates, chosen by the electors of a state to perform certain legislative duties connected with the enactment of the fundamental law."⁵ It has been called a "sovereign body,"⁶ but is not an independent branch of the government.⁷

1. *Peak v. Swindle*, 68 Tex. 242.

A provision in a constitution framed under the reconstruction acts the effect of which is to impair the obligation of contracts is void, even though the constitution containing such provision is ratified by Congress without objection. *Gunn v. Barry*, 15 Wall. (U. S.) 610.

Reconstruction. — After the overthrow of the governments of the Southern Confederacy through the success of the military forces of the United States, their restoration to their former position in the Union was only accomplished through taking certain steps, and their submission to certain conditions imposed by Congress, which body also exercised the right of determining for itself when such steps had been taken and such conditions complied with. See *Texas v. White*, 7 Wall. (U. S.) 700; *Gunn v. Barry*, 15 Wall. (U. S.) 610.

2. **Amendments to Constitution of Rhode Island.** — *In re Constitutional Convention*, 14 R. I. 649, where the judges of the Supreme Court, in answer to a question proposed to them by the legislature, delivered an opinion to the effect that the Rhode Island constitution could only be lawfully amended or changed in the mode which itself prescribed, *i. e.*, by means of specific amendments proposed in and passed by the general assembly and submitted to the electors; and that the legislature had no power to provide for a constitutional convention to frame a new constitution for the state.

The court cited and relied upon the Opinion of Justices, 6 Cush. (Mass.) 573, where it was held that under a substantially similar provision of the constitution of Massachusetts, no power existed to amend except as provided in the constitution itself. But "as a matter of history, however, a convention was called by the legislature [of Massachusetts] in 1853, twenty years after this opinion was given, to propose a constitution; and while the question was raised as to the legality of such convention, it was ably vindicated by the best lawyers in the state, among them Choate, Parker, and Morton, the latter one of the judges of the court at the time the opinion was given; and a constitution prepared and submitted to the people." Stowe, J., in the Court of Common Pleas, in *Woods's Appeal*, 75 Pa. St. 59. The learned judge continued: "Turning now to the history of the government of the various states, for the purpose of discovering what the usage in such cases has been, we find the practice has been so frequent and uniform as clearly to indicate what the common under-

standing of the people, lawyers and laymen, has been in regard to this question. * * * Mr. Webster stated in 1848, in his argument before the Supreme Court of the United States, in the case of *Luther v. Borden*, 7 How. (U. S.) 1, 'that of the old thirteen states, their constitution, with but one exception, contained no provision for their own amendment, yet there is hardly one that has not altered its constitution, and it has been done by conventions called by the legislature, as an ordinary exercise of power.' If this is true, and my own examination, so far as, with the limited time and opportunity since the argument of this case, I have been able to make it, has verified it, as well as shown the continuation of the same practice to the present day, it would seem as though the question as to whether the calling of a constitutional convention was a legal exercise of power by the legislature should now be considered by all judicial tribunals as settled so firmly as a part of the common law of our governments that any attempt to disturb it at this day would savor more of revolution than legitimacy. He would be bold indeed who would now assert that all these conventions were usurpations, and that all the constitutions proposed by them and adopted by the people were revolutionary."

3. Many of the earlier state constitutions were framed by the legislature. The first constitution of *Nebraska* was framed in this way.

4. **The Convention in Other Countries.** — It is in vogue in some of the Swiss cantons, and is provided for in the constitutions of *Switzerland*, *Argentina*, *Guatemala*, *Honduras*, *Nicaragua*, *Paraguay*, and *San Salvador*. See Borgeaud, *Adoption and Amendment of Constitutions* (Hazen's translation, 1895), pp. 287-288, 193-194.

In *Australia* constitutional conventions have been held as follows: (1891) Sydney (Framed Const. of Commonwealth of Australia. See *Nineteenth Century*, vol. 40, p. 156). (1897) Adelaide. See *The Nation*, May 13, 1897.

5. Jameson, *Const. Conventions*, § 306.

6. *Sproule v. Fredericks*, 69 Miss. 898; *Loomis v. Jackson*, 6 W. Va. 708.

7. **Constitutional Convention Not Co-ordinate Branch of Government.** — "The convention is not a co-ordinate branch of the government. It exercises no governmental power, but is a body raised by law in aid of the popular desire to discuss and propose amendments which have no governing force so long as they

(3) *Authorization*. — It requires no provision in the existing constitution to authorize the calling of a convention for the purpose of revising the fundamental law.¹ The legislative department of the government is alone empowered to take the initiative in calling a constitutional convention,² unless a different mode of procedure is laid down in the constitution.³ And such action may be taken in the form of a joint resolution; a formal statute is not required in order to provide for a lawful convention.⁴

Authority Limited to a Particular Purpose. — And when by the terms of the act the convention is to be assembled for the modification of particular portions of the constitution only, such terms constitute a limitation on the legitimate power of the delegates.⁵

(4) *Powers*. — Opinions relative to the powers of constitutional conventions vary according to whether the courts regard them as having the right to enact constitutions outright or merely to frame and recommend them to the electors.⁶

Powers of Convention Held to Be Sovereign. — On the one hand we are told that the powers of a convention are sovereign,⁷ and even that "it would be in the

remain propositions. While it acts within the scope of its delegated powers it is not amenable for its acts, but when it assumes to legislate, to repeal and displace existing institutions before they are displaced by the adoption of its propositions, it acts without authority, and the citizens injured thereby are entitled, under the declaration of rights, to an open court and to redress at our hands." *Wells v. Bain*, 75 Pa. St. 57, 15 Am. Rep. 563.

1. *Cooley's Const. Lim.* (6th ed.), p. 39; *Jameson, Const. Conv.*, § 219.

2. *Legislature Alone Authorized to Call Convention*. — *Cooley's Const. Lim.*, pp. 39, 42; *Jameson, Const. Conv.*, § 378.

A convention assembled at the instance of a majority of the people of a state, but without constitutional authorization of the people to that end, is simply a revolutionary body and its proceedings are entirely without lawful sanction. *Luther v. Borden*, 7 How. (U. S.) 1.

3. See *supra*, this section, *Periodical Re-submission*.

4. *Joint Resolution Sufficient Authorization*. — *State v. Dahl*, (N. Dak. 1896) 68 N. W. Rep. 418, the court saying: "Under many state constitutions containing provisions with regard to the enactment of statutes similar to those found in the organic law of this state, it has been and is customary to express by joint resolution the will of the legislature on matters not falling within the category of ordinary legislation. Such course has not, so far as we have been able to discover, ever been successfully challenged as being repugnant to the supreme law. Our Constitution plainly recognizes the legality of the expression of sovereign will by joint resolution. See section 66. This section declares that the presiding officer of each house shall sign all bills and joint resolutions. We do not think that it was the purpose of the people to interfere with this settled and convenient usage of expressing sovereign pleasure by joint resolution in all cases not falling within the domain of ordinary legislation. We cannot bring ourselves to believe that they intended to require all the forms and procedure essential to a valid law, in cases where the legislature really desires to express its wish that the people would at the polls

inform their servants of their sentiment touching some question of public interest."

5. *Convention Assembled for Specific Amendments*. — *Woods's Appeal*, 75 Pa. St. 59; *Jameson, Const. Conv.*, §§ 381a to 382, inclusive.

In *Opinion of Justices*, 6 Cush. (Mass.) 573, it was held that when the legislature submitted to the people the expediency of calling a convention of delegates for the purpose of revising or altering the constitution in certain specified parts, the delegates to the convention would derive their whole authority and commission from such vote, and would have no right to act upon any proposed amendments in other parts of the constitution not so specified.

6. See *infra*, this section, *Ratification*.

7. *Convention Held a Sovereign Body*. — "I have had no difficulty in reaching the following conclusions upon the constitutional questions presented in this specification, viz.: first, that a constitutional convention lawfully convened does not derive its powers from the legislature, but from the people; second, that the powers of a constitutional convention are in the nature of sovereign powers; third, that the legislature can neither limit or restrict them in the exercise of these powers." *Woods, J.*, in *Loomis v. Jackson*, 6 W. Va. 708.

"We have spoken of the constitutional convention as a sovereign body, and that characterization perfectly defines the correct view, in our opinion, of the real nature of that august assembly. It is the highest legislative body known to freemen in a representative government. It is supreme in its sphere. It wields the powers of sovereignty, specially delegated to it for the purpose and the occasion by the whole electoral body, for the good of the whole commonwealth. The sole limitation on its powers is that no change in the form of government shall be done or attempted. The spirit of republicanism must breathe through every part of the framework, but the particular fashioning of the parts of this framework is confided to the wisdom, the faithfulness, and the patriotism of this great convocation representing the people in their sovereignty." *Sproule v. Fredericks*, 69 Miss. 898, *per Woods, J.*

power of such convention to take away or destroy individual rights." ¹

Powers Declared to Be Delegated Only. — On the other hand it is said that "a convention has no inherent rights; it exercises powers only," and that these are delegated and strictly construed. ²

Powers as Regards Procedure. — In matters of personnel and procedure it is subject to the limitations imposed by the legislature. ³ But it has been held that errors of procedure, such as the refusal to submit an article separately, cannot be inquired into by the judiciary. ⁴

Retroactive Provisions. — A state constitutional convention may be authorized by Congress to transfer causes from existing courts to those created by the new constitution, ⁵ but it may be doubted whether it can enact *ex post facto* provisions. ⁶

d. RATIFICATION — (1) *Convention Practice.* — The reference of newly framed constitutions to the electors is a practice whose development has been gradual and has proceeded *pari passu* with the extension of the suffrage and

1. *McMullen v. Hodge*, 5 Tex. 73, where, however, it is added: "But such an intention would never be presumed; and to give effect to a design so unjust and unreasonable would require the support of the most direct, explicit, affirmative declaration of such intent."

2. **Convention Exercises Delegated Powers.** — *Woods's Appeal*, 75 Pa. St. 59, where it is also said: "The legislature may not confer powers by law inconsistent with the rights, safety, and liberties of the people, because no consent to do this can be implied, but they may pass limitations in favor of the essential rights of the people." See also *Penn v. Tollison*, 26 Ark. 545; *Opinion of Justices*, 6 Cush. (Mass.) 573; *Wells v. Bain*, 75 Pa. St. 39, 15 Am. Rep. 563; *State v. Hunt*, 2 Hill L. (S. Car.) 223.

Powers of Independent Legislation. — A convention assembled and empowered to frame a constitution is, it seems, limited in its authority by the purpose for which it is called together; and it is doubtful whether any act of mere legislation in the form of a convention ordinance can be passed by a convention called for such constitutional purpose. See *State v. Keith*, 63 N. Car. 140; *Gibbes v. Greenville*, etc., R. Co., 13 S. Car. 242; *Quinlan v. Houston*, etc., R. Co., (Tex. 1896) 34 S. W. Rep. 738. See also *State v. Neal*, 42 Mo. 119, perhaps in conflict with this view.

3. **Legislature Regulates Personnel and Procedure.** — The legislature is entitled to control the membership of the convention as to its character and numbers; to designate the time and place of assembling; to regulate the manner of its organization; to prescribe the oath to be taken; and to determine the mode in which the work of the convention shall be submitted to the people for ratification. *Jameison, Const. Conv.* (4th ed.), § 380.

4. *Wells v. Bain*, 75 Pa. St. 39, 15 Am. Rep. 563. Compare *Secombe v. Kittelson*, 29 Minn. 555.

5. *McCormick v. Western Union Tel. Co.*, 79 Fed. Rep. 449.

6. **Ex Post Facto Ordinance of Convention.** — In *State v. Keith*, 63 N. Car. 140, the defendant, tried in 1868 upon an indictment for murder, pleaded that the homicide was committed while he was acting as an officer in the military service of the late Confederate States, and that

his case was within the provisions of the Amnesty Act of 1866-67. The state admitted this, but claimed that that act had been repealed by an ordinance of the Constitutional Convention of 1868. The court, by Rodman, J., said: "If the effect contended for — to revive the previous offenses of the prisoner — can be attributed to the Ordinance of 1868, it can only be because the Convention of 1868 was subject neither to the Constitution of the United States, nor to the previous Constitution of North Carolina, nor to the fundamental rules of public law and morals which bind every political community, whatever may be its form of government, but was absolutely lawless and unrestrained. We do not think the Convention of 1868 ever claimed such powers, and we can by no means admit them. It was assembled under the Reconstruction Acts of Congress to form a new constitution for the state, and, as representing the people of North Carolina, it had general legislative powers. It could change the old state Constitution as it pleased, but the power to make a new one was at least limited by the proviso that it should be 'republican in form.' The ordinance in question is not found in the Constitution, but is a part of the legislative action of the Convention. The legislative power of the Convention was limited, at least, by those sacred principles which are contained in the Constitution of the United States and of every American state; that no *ex post facto* law shall be passed, and that no man shall be deprived of vested rights, or of life and liberty, except according to law. Amendments to Constitution of the United States, art. v.; art. 1, § 9, c. 3, Bill of Rights of North Carolina, §§ 12, 24; New Constitution, Bill of Rights, §§ 32, 35. These great principles are inseparable from American government and follow the American flag. No political assemblage under American law, however it may be summoned, or by whatever name it may be called, can rightfully violate them, nor can any court sitting on American soil sanction their violation. Congress could not give to the Convention greater powers than itself possessed. The ordinance in question was substantially an *ex post facto* law; it made criminal what before the ratification of the ordinance was not so; and it took away from the prisoner his vested right to immunity."

the growth of democratic ideas. In the early history of the United States such a reference was the exception; now it is universal, and in the past sixty years there appear to have been only three instances of constitutions put in force without popular ratification.¹

(2) *Necessity*. — A constitutional convention untrammelled by conditions imposed by the authority calling the convention has power to enact a new constitution to go into effect without being submitted to the people for ratification.²

Convention with Limited Powers. — But where the act from which a convention derives its powers provides for the submission of the convention's work to the people in a specific manner, the convention has no power to provide for its submission in a different manner.³ And of course where such an act, or the constitution itself, requires submission to the people, it must be so submitted, and only becomes operative upon the approval of the electors.⁴

In the Absence of Such a Limitation on the Power of a Convention there appears to be no judicial or authoritative utterance that a submission to the electors is necessary to give validity to the constitution or amendments framed by the convention,⁵ however desirable it may be that the work of the convention

1. Since the *Arkansas* Constitution of 1836, only the Constitutions of *Mississippi* (1890), *South Carolina* (1895), and *Delaware* (1897) have been so adopted. See upon this subject Jameson's *Constitutional Conventions*; Borgeaud's *Adoption and Amendment of Constitutions*; Oberholtzer's *The Referendum in America*; Poore's *Charters and Constitutions of America*.

The *Florida* Constitution of 1838, placed by Jameson among the unsubmitted, appears by art. 17, § 5 of the instrument itself to have been submitted for popular ratification.

2. **Necessity of Submission.** — *Sproule v. Fredericks*, 69 Miss. 898. This was an election contest which involved the validity of certain clauses in the *Mississippi* Constitution of 1890, relative to the qualifications of voters. The invalidity of these provisions was urged on the ground that the instrument of which they formed a part had never been ratified by the people. The court, in rejecting this contention, said: "It will be remembered that the case at bar is free from the difficulties which are supposed by some writers to arise out of a failure or refusal of a constitutional convention to yield to the direction of the legislature which summoned it that the constitution framed shall be submitted to the people for ratification. The act of the legislature which provided for the assembling of the Constitutional Convention of 1890 declared that the end sought to be attained, the work to be done, was the revision and amendment of the Constitution of 1869, or the enactment of a new constitution; and it did not attempt to limit the powers of the Convention by imposing or seeking to impose upon that sovereign tribunal the mere legislative will that the constitution enacted should be submitted to the people for ratification. We have simply the case of a constitutional convention enacting a new constitution, and putting it into effect without an appeal to the people, in strict conformity to the legislative call which assembled it. * * * Whatever may be the safer and wiser course as to putting into operation the completed work of the constitutional convention, the opinions of the

political theorists which we are considering will be found to rest upon grounds largely imaginary and fanciful. The constitutional convention itself, according to this theory, is looked upon with suspicion and distrust, as being the introduction into our governmental system of a revolutionary device; the chosen representatives of the sovereign people are dreaded, as likely to prove unfaithful to their mighty trust, and the liberties of the people are in danger of subversion. This succinct statement of the grounds of these political theorists will demonstrate the unreal foundation upon which their teachings rest. The general judgment of the people of our own state has practically and strikingly repudiated the theory from the foundation of the government. The usage in Mississippi, with a solitary exception in an extraordinary conjuncture of public affairs, gives it no support. That the government has lived from its birth to this hour with no valid fundamental law on which to rest, except for a brief interval, cannot be true." A dictum to the same effect is found in *State v. Neal*, 42 Mo. 119. See also *Quinlan v. Houston*, etc., R. Co., (Tex. 1896) 34 S. W. Rep. 738.

3. *Wells v. Bain*, 75 Pa. St. 39, 15 Am. Rep. 563; *Woods's Appeal*, 75 Pa. St. 59.

4. **Constitution Requiring Ratification Becomes Operative Thereon.** — See *In re Deckert*, 2 Hughes (U. S.) 183; *Schall v. Bowman*, 62 Ill. 321; *State v. Morgan City*, 32 La. Ann. 81; *Scott v. Detroit Young Men's Soc.*, 1 Dougl. (Mich.) 119; *Secombe v. Kittelson*, 29 Minn. 559; *Territory v. Smith*, 3 Minn. 240; *State v. Williams*, 49 Miss. 640; *Campbell v. Fields*, 35 Tex. 751; *Peak v. Swindle*, 68 Tex. 242.

5. **The View that Such Submission Is Necessary** is expressed in Oberholtzer's *Referendum in America*, 36, and there is a passage in Cooley's *Constitutional Limitations* (6th ed.), pp. 43, 44, which, taken apart from its context, appears susceptible of being understood in the same way. But Judge Cooley apparently only means to say (what no one can question) that in order to put constitutional amendments in effect without ratification, the powers of the body framing the amendment must be ade-

should be so submitted.¹

(3) *Procedure of Submission.* — The question whether an existing and recognized constitution was regularly adopted has been declared a political rather than a judicial one.²

Whether Majority Has Accepted Constitution Is a Political Question. — So the question whether or not a majority of those persons entitled to suffrage voted to adopt a constitution, cannot be settled in a judicial proceeding.³

To Whom Submission to Be Made. — The submission must be made to those designated in the enabling act,⁴ but when submission to "the people" is required, this means to the electors only.⁵

What Constitutes "Majority of Legal Votes Cast." — Where the enabling act requires for adoption a "majority of the legal votes cast" it is sufficient if the constitution or articles therewith submitted receive a majority of the votes cast on the question of adoption, though that number may be less than a majority of the votes cast for candidates voted for at the same election.⁶

quate for such action, that is, must not be so limited as to require submission.

In *Kamper v. Hawkins*, 1 Va. Cas. 28, Nelson, J., said: "It is confessedly the assent of the people which gives validity to a constitution." The question in connection with which this remark was made was whether a revolutionary constitution could be deemed ratified by a prolonged acquiescence on the part of the people in its provisions. It needs no explanation to show that this statement has no bearing on the present question:

In *Manly v. State*, 7 Md. 135, Tuck, J., says that the constitution of Maryland, "unlike the acts of our legislature, owes its whole force and authority to its ratification by the people." This is said, however, of an instrument which had, according to law, required and received such a ratification, and the remark was made only to enforce the conclusion that a certain provision must receive a construction according to its ordinary rather than its technical sense.

In *Sproule v. Fredericks*, 69 Miss. 904, the view that ratification is necessary is characterized as "the theorizing of the political essayist and the legal doctrinaire."

1. See *Woods's Appeal*, 75 Pa. St. 59; *Jameison on Political Conventions* (4th ed.), p. 490.

2. *Brittle v. People*, 2 Neb. 198.

3. *Luther v. Borden*, 7 How. (U. S.) 1. See *Brittle v. People*, 2 Neb. 198.

Congress Decides What Government Is the Established One. — It rests with Congress, and not the judiciary, to decide what government is the established one in a state. *Luther v. Borden*, 7 How. (U. S.) 1, where Taney, C. J., said: "The Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a state, has treated the subject as political in its nature, and placed the power in the hands of that department. The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence. Under this article

of the Constitution it rests with Congress to decide what government is the established one in a state. For, as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal." See also *Keith v. Clark*, 97 U. S. 474; *Texas v. White*, 7 Wall. (U. S.) 700; *Calhoun v. Calhoun*, 2 S. Car. 294; 2 *Story on Const.* (4th ed.), 567, note 1; *Webster's Works*, vol. 6, p. 617.

4. **Electors.** — The sovereignty in a state is vested in such persons as have been designated by description in the Enabling Act of Congress. *Marsh v. Burroughs*, 1 Woods (U. S.) 463.

5. "The People, for political purposes, must be considered synonymous with qualified voters." *Blair v. Ridgely*, 41 Mo. 177, 97 Am. Dec. 248.

6. **Meaning of "Majority of Legal Votes Cast."** — *State v. Barnes*, 3 N. Dak. 319, the court saying: "It thus appears that a majority of all the votes for or against said article were in the affirmative, and also that the affirmative vote for said article exceeded one-half of all the votes cast for or against the adoption of the constitution. But at said election there were 38,098 votes cast for governor, and the affirmative vote upon the adoption of said article 20 was less than one-half of the total vote cast for governor. Upon these facts it is urged upon us with great earnestness and force that a 'majority of the votes cast' within the meaning of said section 8 of the Enabling Act were not in favor of the adoption of said article 20, and hence the same was never adopted. This proposition cannot receive our assent, and we will briefly state some of the reasons which irresistibly lead our minds to the opposite conclusion. Said section 8 of the Enabling Act requires (and the requirement is mandatory) that the proposed constitution, and any specific

Mandamus to Compel Reception or Rejection of Votes. — Where the counting of the votes on a proposed constitutional amendment is left to the governor he cannot be compelled by mandamus to include certain votes and reject others.¹

Irregularities Cured by Adoption and Recognition. — Irregularities in the process of adoption are cured by subsequent acceptance and recognition of the instrument by the state.²

c. TAKING EFFECT. — As a rule, a constitution takes effect from the time of its ratification by the voters³ rather than from the date of the governor's proclamation,⁴ or the admission of the state,⁵ or the approval of Congress.⁶ But in *Georgia* the court, in construing a reconstruction constitution, held that it took effect from the time when that state complied with the terms imposed by the federal government.⁷ And other theories are recognized.⁸

article that the constitutional convention may direct, be submitted to a vote of the people, and that any such specific article shall be voted upon separately, and that, if a majority of the votes cast be in favor of the constitution, that fact shall be certified to the President of the United States, with a statement of the votes for and against the constitution and each specific proposition so separately submitted, together with a copy of the constitution and of any articles separately submitted; and from the data thus certified the President was required to determine whether or not the constitution was republican in form, and whether or not all the requirements of the Enabling Act had been complied with, and if so, he was required to issue his proclamation admitting North Dakota as a state. Where, in this section, Congress spoke of the votes cast, it had reference to votes cast upon the particular objects which it directed should be submitted to a vote of the qualified electors. Congress had no knowledge that any candidates for offices would be voted for at that same election, and the matter of electing officers was left under the exclusive control of the constitutional convention; and, further, it was the vote upon the constitution and the articles, if any, separately submitted, that was to be certified to the President, and if by the use of the words 'majority of legal votes cast' Congress meant votes cast upon any subject other than those directed to be certified to the President, it would be obviously impossible for that official ever to determine whether or not the constitution had been legally adopted, and yet under the act the duty devolved upon him to determine that question at once. These considerations seem to us to conclusively establish that when Congress used the words 'majority of legal votes cast' it meant votes cast for or against the adoption of the constitution or of the articles separately submitted."

1. *Miles v. Bradford*, 22 Md. 170, 85 Am. Dec. 643.

2. **Irregularities Cured.** — *Secombe v. Kittelson*, 29 Minn. 555; *Wells v. Bain*, 75 Pa. St. 39, 15 Am. Rep. 563. Compare *Brittle v. People*, 2 Neb. 198. See also *Kamper v. Hawkins*, 1 Va. Cas. 28.

3. **Effective from Ratification by Voters — United States.** — *In re Deckert*, 2 Hughes (U. S.) 183.

Illinois. — *Schall v. Bowman*, 62 Ill. 321.
Louisiana. — *State v. Morgan City*, 32 La. Ann. 81.

Michigan. — *Scott v. Detroit Young Men's Soc.*, 1 Dougl. (Mich.) 119.

Minnesota. — *Territory v. Smith*, 3 Minn. 240; *Secombe v. Kittelson*, 29 Minn. 559.

Mississippi. — *State v. Williams*, 49 Miss. 640.

Texas. — *Peak v. Swindle*, 68 Tex. 242; *Campbell v. Fields*, 35 Tex. 751.

Constitution of Proposed State Accepted by Congress on Condition of Modification. — Where a constitution adopted by the people of a territory is accepted by Congress subject to certain prescribed changes and additions which are to be adopted by the state legislature as a part of the constitution, as a condition precedent to the admission of the state, such changes and additions, when adopted by the legislature, become a part of the constitution, the same as if incorporated therein, although not submitted to the people for approval. *Brittle v. People*, 2 Neb. 198; *Secombe v. Kittelson*, 29 Minn. 555.

4. *Schall v. Bowman*, 62 Ill. 324; *In re Deckert*, 2 Hughes (U. S.) 183.

5. *Peak v. Swindle*, 68 Tex. 250; *State v. Williams*, 49 Miss. 640. Compare *Scott v. Detroit Young Men's Soc.*, 1 Dougl. (Mich.) 119.

6. *Campbell v. Fields*, 35 Tex. 752.

7. *Foster v. Daniels*, 39 Ga. 39.

8. **When Operative — Various Theories.** — *In Secombe v. Kittelson*, 29 Minn. 559, *Mitchell, J.*, uses the following language: "The question as to when a territory ceases to be such and becomes a state, and as to when the constitution and governmental machinery of a new state goes into operation, is one upon which not even courts and constitutional lawyers are agreed. One theory is that a territory continues in all respects a territory until admitted into the Union by act of Congress, and that until such act of admission the proposed state constitution cannot take effect nor any part of the machinery of a state government go into operation. Another theory is that where under an enabling act of Congress the people adopt a state constitution and form a state government, such constitution goes into effect upon its adoption by the people, and that the former territory thereby becomes a state, although not in the Union, for the purposes of representation in Congress, until formally admitted by Congress. A third theory, which is really only an extension of the one last named, is that an enabling act operates as a constitutional act of admission, and that when a state complies with the conditions of that act, she

Of course, also, it may be otherwise provided in the constitution,¹ or by the constitutional convention acting under legislative authority.²

2. Development — *a. IN GENERAL.* — Mr. Bryce has distinguished three modes in which the Federal Constitution has developed since its adoption; viz., amendment, interpretation, and usage.³ And what he says with reference to that one instrument applies equally well to all American constitutions, for they are all subject to the same law of change and the same play of political forces. Of these several modes the most familiar, and the only one provided for in the constitutions themselves, is amendment and revision, which is now to be considered.

b. AMENDMENT AND REVISION — (1) *Nature and Extent of Revisory Power* — *In Whom Revisory Power Resides.* — In constitutional governments authority to modify or alter the organic law is inherent in those who under the existing institutions are clothed with the ultimate exercise of sovereignty.⁴ In the states of the Union, this right, unless otherwise provided by the existing constitution, inheres in those who, by the terms of that instrument, are

is a state in the Union for all purposes, without any further action on the part of Congress."

1. *Williams v. Douglass*, 21 La. Ann. 468; *People v. Norton*, 59 Barb. (N. Y.) 169; *People v. Gardner*, 59 Barb. (N. Y.) 198; *Real v. People*, 42 N. Y. 270; *Richter v. Poppenhausen*, 42 N. Y. 373.

2. Jameson, *Constitutional Conventions* (4th ed.), p. 545, note 1.

Adoption of Federal Constitution. — The Federal Constitution did not become operative until it had been adopted by nine states, and a day "for commencing proceedings under the constitution" had been appointed by Congress in conformity with the resolution of the convention, which day was the first Wednesday in March, 1789. Consequently, an act passed by a state legislature prior to that date cannot infringe the constitutional prohibition against acts impairing the obligation of contracts. *Owings v. Speed*, 5 Wheat. (U. S.) 420.

3. Development of Federal Constitution. — Bryce, *The American Commonwealth* (2d ed. 1891), pp. 353, 354, where the author says: "The Constitution of the United States, rigid though it be, has changed, has developed. It has developed in three ways. * * * It has been changed by amendment. Certain provisions have been struck out of the original document of 1787-88; certain other, and more numerous, provisions have been added. This method needs little explanation, because it is open and direct. It resembles the method in which laws are changed in England, the difference being that whereas in England statutes are changed by the legislature, here in the United States the fundamental law is changed in a more roundabout fashion by the joint action of Congress and the states.

"It has been developed by interpretation; that is, by the unfolding of the meaning implicitly contained in its necessarily brief terms, or by the extension of its provisions to cases which they do not directly contemplate, but which their general spirit must be deemed to cover.

"It has been developed by usage; that is, by the establishment of rules not inconsistent with its express provisions, but giving them a

character, effect, and direction which they would not have if they stood alone, and by which their working is materially modified. These rules are sometimes embodied in statutes passed by Congress and repealable by Congress. Sometimes they remain in the stage of a mere convention or understanding which has no legal authority, but which everybody knows and accepts. Whatever their form they must not conflict with the letter of the constitution, for if they do conflict with it they will be deemed invalid whenever a question involving them comes before a court of law.

"It may be observed that of these three modes of change the first is the most obvious, direct, and effective, but also the most difficult to apply, because it needs an agreement of many independent bodies which is rarely attainable. The second mode is less potent in its working, because an interpretation put on a provision may be recalled or modified by the same authority, viz., the courts of law (and especially the Supreme Federal Court), which has delivered it. But while a particular interpretation stands, it is as strong as the constitution itself, being indeed incorporated therewith, and therefore stronger than anything which does not issue from the same ultimate source of power, the will of the people. The weakest, though the easiest and most frequent, method is the third. For legislation and custom are altogether subordinate to the constitution, and can take effect only where the letter of the constitution is silent, and where no authorized interpretation has extended the letter to an unspecified case. But they work readily, quickly, freely; and the developments to be ascribed to them are therefore as much larger in quantity than those due to the two other methods as they are inferior in weight and permanence."

4. *Koehler v. Hill*, 60 Iowa 543; *Cooley's Const. Lim.* (6th ed.) p. 42; Jameson's *Const. Conv.* (4th ed.) pp. 233, 552, 555. See Webster's argument in *Luther v. Borden*, 7 How. (U. S.) 1, Webster's *Works*, vol. 6, p. 217; opinions of Chancellor Kent, Spencer, C. J., and Gov. Clinton, in Report of Council of Revision on New York Convention Act of 1820.

invested with ultimate political authority through the exercise of the elective franchise.¹

Conditions of Exercise of Power. — Being itself a constituent part of existing political institutions, the power of revision or amendment cannot be exercised arbitrarily or in disregard of the established government,² but must conform in time, manner, and extent of its operation to limitations imposed by the provisions of the constitution sought to be modified, or, in the absence of such constitutional provisions, by an act of the legislative department,³ which under such circumstances is the only authority competent to make provision for the exercise of this power.⁴

How Amendments Inaugurated. — Modifications of the constitution may be thus inaugurated either (1) through the agency of the legislative department alone, or (2) through that of constitutional conventions,⁵ both regularly followed by a ratification by the people.⁶

(2) *Submission* — (a) **Inherent Legislative Power.** — The proposal of amendments to the constitution is not a power inherent in the legislative department, but must be conferred by a special grant of the constitution, and in the absence of such a provision the legislature has no capacity thus to initiate amendments.⁷ On the other hand, long-established usage has settled the principle that a general grant of legislative power carries with it the authority to call conventions for the amendment or revision of the constitution;⁸ and even where the only method provided in the constitution for its own modification is by legislative submission of amendments, the better doctrine seems to be that such provision, unless in terms restrictive,⁹ is permissive only, and does not preclude the calling of a constitutional convention under the implied powers of the legislative department.¹⁰

1. *Wells v. Bain*, 75 Pa. St. 39, 15 Am. Rep. 563; *Luther v. Borden*, 7 How. (U. S.) 1.

2. *Luther v. Borden*, 7 How. (U. S.) 38; *Kochler v. Hill*, 60 Iowa 615.

3. *Wells v. Bain*, 75 Pa. St. 39, 15 Am. Rep. 563; *Luther v. Borden*, 7 How. (U. S.) 1. See also *Kochler v. Hill*, 60 Iowa 615.

An existing lawful government of the people cannot be altered or abolished unless by their consent lawfully obtained. *Wells v. Bain*, 75 Pa. St. 39, 15 Am. Rep. 563.

4. Jameson's Const. Conventions (4th ed.), pp. 211, 549, 621.

5. Jameson's Const. Conventions (4th ed.), p. 550.

The mode of amending by conventions called for that purpose was first adopted by Pennsylvania in 1776. Under their method of amendment the initiative rests with the legislative department. It either recommends specific amendments to be passed on by the people, or it proposes to the people the calling of a convention, and, if they vote in favor of it, provides for its call. There appear to have been no exceptions to this rule except the Pennsylvania constitution of 1776 and the earlier constitutions of Vermont which contemplated the calling of constitutional conventions by a body designated as a "council of censors" established for that purpose. Under the American constitutions modifications by the legislative method are confined to the proposing of amendments, while the only proper method of proposing revisions is through the employment of conventions.

6. Cooley's Const. Lim. (6th ed.) 44; Jameson's Const. Conventions, § 530.

No legislative act can take from the people

their sovereign right to ratify or reject a constitution or an ordinance framed by a convention. Nothing can infuse present life and vigor into the work of a convention before its adoption by the people. *Woods's Appeal*, 75 Pa. St. 59. See on this subject, *supra*, this section, *Adoption*, subdivision *Ratification — Necessity*.

7. Jameson's Const. Conv. (4th ed.), §§ 528, 570. But see *State v. Dahl*, (N. Dak. 1896) 68 N. W. Rep. 418.

8. "All our state constitutions make to the general assemblies a general grant of legislative power, which is admitted to extend to all subjects of ordinary legislation which are not prohibited by their own or by the Federal Constitution. By a long-established usage in most of the states, and in some of them in repeated instances these bodies have called conventions, under the circumstances stated, as a branch of their general legislative power; and * * * were there doubt as to the constitutionality of such action it is too late now to question it. Frequent exercise of the power, and uniform and long acquiescence of the people in it, constitute a fundamental law as binding as though it had been formulated expressly in the constitution." Jameson's Const. Conv. (4th ed.), § 574*h*. See also opinion of Stowe, J., in *Court of Com. Pleas*, *Woods's Appeal*, 75 Pa. St. 59.

9. Jameson's Const. Conv. (4th ed.), § 569.

10. *Wells v. Bain*, 75 Pa. St. 39, 15 Am. Rep. 563. See opinion of Goldthwaite, J., in *Collier v. Frierson*, 24 Ala. 100; *Argument of Hon. Joel Parker*, in *Deb. Mass. Conv.* 1853, vol. 1, p. 153; Jameson's Const. Conv. (4th ed.), § 570 *et seq.* For *obiter* expressions of a con-

(b) **Under Constitutional Authorization** — *aa. IN GENERAL.* — Where the legislative department of a state is authorized to submit amendments to the constitution, its authority in that regard is restricted only by the limitations contained in that instrument¹ or by the prohibitions of the Federal Constitution,² and so

trary opinion, see *In re Constitutional Convention*, 14 R. I. 649. See also Opinion of Justices, 6 Cush. (Mass.) 573; and *supra*, this title, *Adoption—The Framing; The Constitutional Convention—In General.*

1. Jameson's Const. Conv., § 551.

Cannot Propose Entire Revision as Amendment. — The legislature is not authorized to assume the functions of a constitutional convention, and propose for adoption by the people a revision of the entire constitution under the form of an amendment. *Livermore v. Waite*, 102 Cal. 118.

2. *Penn. v. Tollison*, 26 Ark. 545; *Livermore v. Waite*, 102 Cal. 113, *per* Harrison, J.

Amendments Must Not Infringe Federal Constitution—Instances. — *A Republican Form of Government* is guaranteed by the Federal Constitution to each state, and the latter cannot substitute any other form of government. Const. of U. S., art. iv., § 4; *State v. Keith*, 63 N. Car. 140, *per* Rodman, J.

An attempt on the part of a state to accomplish such a purpose would be revolutionary, and would necessitate intervention on the part of the federal government. *Penn. v. Tollison*, 26 Ark. 545; *Cooley's Const. Lim.*, vi., ed. 44; *Federalist* No. 43.

The Impairment of the Obligation of Contracts cannot be effected through a revision or an amendment of a state constitution. *Pacific R. Co. v. Maguire*, 20 Wall. (U. S.) 36; *Ohio, etc., R. Co. v. McClure*, 10 Wall. (U. S.) 511. See also *Jacoway v. Denton*, 25 Ark. 625.

In relation to this inhibition of the Federal Constitution a provision of a state constitution occupies the same position as a state law. *White v. Hart*, 13 Wall. (U. S.) 646; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650.

Where a state in chartering a bank stipulated that a certain amount of tax should be accepted in lieu of all taxes to which said bank or the stockholders thereof would otherwise be subject, it was held that the obligation of this contract could not be impaired by the subsequent adoption, by the people of the state, of a new constitution wherein it was declared that taxes should be imposed upon banks in a different fashion; and that a legislative act passed in conformity with the new constitution, levying taxes upon the bank to a greater amount and on a different principle than that provided for in the charter, was void. *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Jefferson Branch Bank v. Skelly*, 1 Black (U. S.) 436; *Union Bank v. State*, 9 Verg. (Tenn.) 490.

A legislative grant of an exclusive right to supply gas or water to a municipality and its inhabitants, through pipes and mains laid in the public streets and upon condition of the performance of the service by the grantee is a grant of a franchise vested in the state, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the Constitution of the United States against adverse

state legislation, and cannot be impaired by a provision of a state constitution subsequently adopted that "The monopoly features of the charter of any corporation now existing in the state * * * are hereby abolished." *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674.

The clause of the Constitution of Georgia of 1868 which provides that "No court or officer shall have, nor shall the general assembly give, jurisdiction to try or give judgment on or enforce any debt, the consideration of which was a slave, or the hire thereof," was held to have no effect upon a contract made previous to the time of its adoption, though the consideration of the contract was a slave. *White v. Hart*, 13 Wall. (U. S.) 646.

Statute of Limitations. — The right of a defense complete under a statute of limitations, cannot be taken away by an ordinance of a constitutional convention, or by an amendment of the constitution. *Girdner v. Stephens*, 1 Heisk. (Tenn.) 280, 2 Am. Rep. 700; *Henderson v. Felker*, 1 Heisk. (Tenn.) 271.

Redemption. — Nor can a constitutional amendment revive the right of redemption of real property after such right has once lapsed. *Reynolds v. Baker*, 6 Coldw. (Tenn.) 221.

New Trial. — Nor can a constitutional convention, by ordinance, grant a new trial in a case where otherwise such right did not exist. *Lawson v. Jeffries*, 47 Miss. 686, 12 Am. Rep. 342.

Judgment Lien. — The lien of a judgment creditor on lands belonging to the debtor cannot be divested by a provision contained in a constitution subsequently adopted whereby the amount of property exempted to the debtor was increased so as to include the realty in question. *Gunn v. Barry*, 15 Wall. (U. S.) 610.

When a law attaches a fixed compensation to a public office during the whole term of service of a person legally filling the office and performing the duties thereof, a perfect implied obligation arises to pay for the services at the fixed rate to be enforced by the remedies which the laws then give; and a change in the state constitution which takes away the existing power so as to deprive the officer of the means of collecting his compensation is within the prohibitory clause of the Constitution forbidding the passage of state laws impairing the obligation of contracts. *Fisk v. Jefferson Police Jury*, 116 U. S. 131.

Ex Post Facto Provisions for the punishment of acts which were treated by the law as innocent at the time of their commission cannot be incorporated in a state constitution. *Cummings v. Missouri*, 4 Wall. (U. S.) 277; *Cooley's Const. Lim.* (6th ed.), p. 44.

Pardons. — The indemnity resulting from a general amnesty law whereby full and unequivocal pardon was granted to any officer and soldier for homicides and felonies done in the discharge of any duty imposed in conse-

long as those restrictions are not infringed, the wisdom and expediency of a proposed amendment is a matter resting solely within the discretion of the legislative body.¹

bb. SUCH PROVISIONS MANDATORY. — Provisions of a constitution regulating its own amendment, otherwise than by a convention, are generally to be considered mandatory rather than directory;² and a strict observance of every substantial requirement is essential to the validity of the proposed amendment.³ These provisions are as binding on the people as on the legislature, and the former are powerless by their vote of acceptance to give legal sanction to an amendment the submission of which was made in disregard of the limitations contained in the constitution.⁴

(c) *Formalities of Passage* — *aa. GENERALLY.* — As preliminary to the submission to the people for ratification of a proposed constitutional amendment, it is therefore imperative that there be due compliance on the part of the general assembly with all constitutional requirements, including such formal steps as the reading of the proposed amendment before each chamber,⁵ the entry of such amendments on the journal,⁶ the approval by the required number of

quence of his acting in such capacity, etc., was held to be a vested right of immunity which could not be taken away by an ordinance of a convention assembled under the reconstruction Acts of Congress to a new constitution for the state. *State v. Keith*, 63 N. Car. 140.

Other Inhibitions preclude the states from inserting in their constitutions provisions for the creation of titles of nobility, or the attainer of persons for crime, or in general for the exercise of any power expressly or impliedly prohibited to the state by the terms of the Federal Constitution. See Const. of U. S., art. I, § 10; Cooley's Const. Lim. (6th ed.) 44.

Reconstruction. — A confederate state after rebellion, and before its representation was restored, had no more power to grant a title of nobility, or pass a bill of attainder, an *ex post facto* law, or law impairing the obligation of contracts, or to do anything else prohibited to it by the Constitution of the United States, than it had before its rebellion began, or after its restoration to its normal position in the Union. *White v. Hart*, 13 Wall. (U. S.) 646, *per* Swayne, J.

1. Wisdom and Policy of Amendments Not Judicial Question. — *State v. Swift*, 69 Ind. 524.

"The character, that is, the substance and extent, of the amendments, is left entirely and exclusively to the discretion of the general assembly. The right to propose is as unlimited as is the right to adopt by vote of the people themselves. * * * The courts have nothing to do with the wisdom or policy of such proposal." Macfarlane, J., in *Edwards v. Lesueur*, 132 Mo. 433; *Brewer, J.*, in *Prohibitory Amendment Cases*, 24 Kan. 700.

2. State v. Tooker, 15 Mont. 8; *Nesbit v. People*, 19 Colo. 441.

3. Constitutional Provisions as to Amendments to Be Strictly Observed. — *Nesbit v. People*, 19 Colo. 441, *per* Elliott, J.; *Edwards v. Lesueur*, 132 Mo. 410, *per* Macfarlane, J.; *Livermore v. Waite*, 102 Cal. 113; *State v. Mason*, 43 La. Ann. 651; *Wells v. Bain*, 75 Pa. St. 39, 15 Am. Rep. 563; *State v. Dovey*, 19 Nev. 396; *Green v. Weller*, 32 Miss. 650; *State v. Swift*, 69 Ind. 505.

The mode of submitting amendments con-

tained in the constitution is necessarily exclusive and precludes an amendment in any other fashion. *Wells v. Bain*, 75 Pa. St. 39, 15 Am. Rep. 563; *State University v. McIver*, 72 N. Car. 76; *Opinion of Justices*, 6 Cush. (Mass.) 573. See also *Goldthwaite, J.*, in *Collier v. Frierson*, 24 Ala. 100.

4. Prescribed Mode Binding on Electors. — "It matters not if not only every elector, but every adult person in the state, should desire and vote for an amendment to the constitution, it cannot be recognized as valid unless such vote was had in pursuance of and in substantial accordance with the requirements of the constitution." *Seever, J.*, in *Koehler v. Hill*, 60 Iowa 543. To the same effect are the remarks of *Thornton, J.*, in *Oakland Paving Co. v. Hilton*, 69 Cal. 489.

5. The Failure to Read in the Houses of the General Assembly a proposed amendment that had been submitted to the people by the last preceding assembly is a fatal omission when the constitution requires such succeeding assembly to ratify the proposed amendment. *Goldthwaite, J.*, in *Collier v. Frierson*, 24 Ala. 100.

6. The Entry on the Journal of each house of the general assembly, of a proposed amendment, is an almost invariable constitutional requirement, and a failure to observe such requirement is fatal to the proposed amendment, notwithstanding the fact that the amendment had been ratified by the people. *State v. Tufty*, 19 Nev. 391. And see *State v. Mason*, 43 La. Ann. 641.

Sufficiency of Entry on Journal. — Following the doctrine laid down by *Brewer, J.*, in *Prohibitory Amendment Cases*, 24 Kan. 700, the weight of authority upholds the proposition that this requirement is sufficiently complied with by the entry on the journals of an "identifying reference" to the amendment. In the case cited the journal entry was "Senate joint resolution No. 3, proposing an amendment to article 15 of the Constitution of the state of Kansas, relating to the manufacture and sale of intoxicating liquors, by adding section 10 to the same article;" and in the opinion declaring this to be a sufficient com-

votes, usually more than a mere majority,¹ and ratification by a succeeding legislature.² And, of course, an omission of one of these steps cannot be overlooked on account of any inconvenience that may result through failure to adopt the proposed amendment.³

pliance the court says: "Omissions and errors which work no wrong to substantial rights are to be disregarded."

See also *Oakland Paving Co. v. Tompkins*, 72 Cal. 5, 1 Am. St. Rep. 17; *Thomason v. Ashworth*, 73 Cal. 73; *People v. Strother*, 67 Cal. 624. But see opinion by Thornton, J., in *Oakland Paving Co. v. Hilton*, 69 Cal. 479, where the theory of the "identifying reference" is ably controverted.

In *Worman v. Hagan*, 78 Md. 152, the constitutional provision referred to is held to be sufficiently complied with when the amendment is "fully and clearly identified by its title."

The Supreme Court of Colorado refused to annul certain amendments so adopted where they had been accepted and acted upon by the different departments of the government for nine years and where "nearly a thousand legislative acts, and more judicial decisions and executive acts than could be enumerated, depended upon said amendments," so that in the view of the court "The approval of these amendments by the people, and their acceptance by the representatives of the people, have in this instance practically removed the question of their validity from the sphere of mere judicial authority to the sphere of the political power of the state; the conditions are such that the judiciary ought not to attempt to declare them void." *Nesbit v. People*, 19 Colo. 456.

An amendment having been proposed in the senate and entered on its journals, which was subsequently modified by the house and so entered on its journal, and subsequently returned to the senate where the modification was concurred in and extended on the journal, was held a sufficient compliance with the requirement that a proposed amendment be entered on the journal of each house. In its opinion, the court, *per* Maxwell, J., announces its approval of the doctrine of Prohibitory Amendment Cases, 24 Kan. 700. *In re Senate File 31*, 25 Neb. 864.

The Supreme Court of Iowa, in the case of *Koehler v. Hill*, 60 Iowa 555, while holding that the decision of the question was not essential to a determination of the case, urges with much force the necessity of a strict compliance with the constitutional requirement in this regard.

1. **The Sanction of Two-thirds of Each House of the general assembly** to a proposed amendment being required, and it appearing by the senate journal that a proposed amendment, in one of its readings in the senate failed to receive the two-thirds vote of all the members of that branch of the legislature, the omission was held fatal, notwithstanding the subsequent ratification of the proposed amendment by the votes of the people. *Green v. Weller*, 32 Miss. 650. But such requirement of a two-thirds vote of each house is held to necessitate the sanction merely of two-thirds of a quorum present and voting. *Green v. Weller*, 32 Miss.

650; *State v. McBride*, 4 Mo. 303, 29 Am. Dec. 636.

2. **Ratification by Succeeding Legislature.**—When the constitution required two successive general assemblies to agree to a proposed amendment, and it appeared that the amendment agreed to by the first general assembly was different in language and substance from that agreed to by the second, it was held that the amendment so submitted to the electors did not become a part of the constitution, notwithstanding it was approved by a large majority of the electors. *Kochler v. Hill*, 60 Iowa 543.

Where one session of the general assembly had proposed several amendments to the constitution to be voted on by the people; and in the next succeeding general assembly, joint resolutions were adopted, reciting in the preamble, that "Whereas the General Assembly of this state, at the last session of the same, duly submitted to the people of said state proposed amendments to the constitution; and whereas the people of this state, in manner and form as provided by the constitution, have accepted the said amendments, which are in words and figures following," etc., setting them out, all except one, which was entirely omitted; and providing further "that the aforesaid amendments to the constitution proposed as aforesaid and accepted by the people as aforesaid, be ratified, and that the same from and after the passage of this resolution be and form a part of the constitution of the state of Alabama," it was held that the proposed amendment which was omitted from the ratifying resolution was not constitutionally ratified, and therefore failed. *Collier v. Frierson*, 24 Ala. 100.

So under a provision that "no part of the constitution shall be altered, unless a bill to alter the same shall be * * * agreed to by three-fifths of each house, etc., and the bill so agreed to "published in manner provided" and "the alteration proposed" be ratified by the next succeeding general assembly, a bill which contained seventeen amendments was duly agreed to and published, but on reaching the succeeding general assembly, was modified by the rejection of nine of such proposed amendments and the adoption of the remaining eight amendments which were incorporated into eight separate bills and thus submitted to the people for ratification. It was held that the adoption of the eight amendments was in conformity with the provisions of the constitution. *State University v. McIver*, 72 N. Car. 76.

Where a state constitution requires a proposed amendment thereto to be agreed to by two succeeding legislatures before its submission to the people, a declaration of the succeeding legislature as to the contents of the proposition voted on by the preceding legislature is without effect. *Koehler v. Hill*, 60 Iowa 543.

3. *Collier v. Frierson*, 24 Ala. 100.

Publication of a proposed amendment is a usual requirement and must be made in the time and manner prescribed.¹ But a constitutional clause requiring amendments proposed by one legislature to be published for three months next preceding the election of its successor is complied with by publication in the printed edition of the statutes issued eighteen months prior thereto.²

b.b. NOT SUBJECT TO RULES OF ORDINARY LEGISLATION. — The proposal by the legislature of amendments to the constitution is not the exercise of ordinary legislative functions,³ and it is not subject to the constitutional provisions regulating the introduction and passage of ordinary legislative enactments.⁴ Thus it is not required that a proposed constitutional amendment be limited to a single subject as is required of statutes,⁵ nor that the subject be expressed in its title.⁶ Indeed, no title is necessary to a proposed amendment, and if one is inserted it may be disregarded.⁷ Nor is it necessary that a proposed amendment be read like a bill on three different days in each house of the general assembly.⁸

The Sanction of the Executive is not essential to the validity of a proposed amendment. Thus a proposed amendment to the Federal Constitution need not be presented to the President for his approval,⁹ nor need the governor of a state concur in a proposed amendment to its constitution.¹⁰ So the veto of the governor would not affect the validity of the proposed amendment.¹¹

Law Providing for Submission of Amendment Requires Executive Approval. — But where the constitution provides that such proposed amendment shall be submitted "in such manner and at such times as may be deemed expedient" this provision was held to require the enactment of a law to that effect, which law, like any other, required the signature of the governor.¹²

Legislative Amendment Before Ratification Ineffectual. — An act of the legislature proposing an amendment to the constitution has, before it has been ratified by a vote of the qualified voters of the state, no effect whatever.¹³

(d) Form of Submission — Amendment Containing Alternative Propositions. — A proposed amendment may be dual in form, containing two contradictory propositions.

1. Publication. — *State v. Tooker*, 15 Mont. 8; *State v. Davis*, 20 Nev. 220.

Under the constitutional provision that the legislature should submit proposed amendments to the people "in such manner and at such time as the legislature may prescribe," the legislature by statute provided for the publication of the proposed amendments in one daily newspaper of general circulation, for ninety days next preceding the election to be held thereon, and that for each registered voter of each county, a copy of such paper should be sent to the clerk and by him mailed to such voters. It was held that this act was a reasonable requirement sanctioned by the constitution, and that amendments voted on without compliance with such requirement were inoperative. *State v. Davis*, 20 Nev. 220.

2. *State v. Grey*, 21 Nev. 378.

3. Proposal of Amendments Not Ordinary Legislative Function. — Jameson's Constitutional Conventions (4th ed.), §§ 549, 574^c, 574^h. See *Deb. Mass. Conv.* 1820, p. 407; *Deb. Va. Conv.* 1829, p. 887; *Oakland Paving Co. v. Hilton*, 69 Cal. 514; *Hatch v. Stoneman*, 66 Cal. 632; *In re Senate File* 31, 25 Neb. 864; *Green v. Weller*, 32 Miss. 650.

4. Form of Amendments Proposed in Legislature. — The fact that a proposed amendment is incorporated in a bill which also provides statutory regulations for the election to be held on the adoption of such amendment, violates

neither the amendment nor the statutory enactments, where all the statutory requirements both for amendments and for legislative enactments are observed. *Nesbit v. People*, 19 Colo. 441.

The fact that an amendment is in form a bill does not require that it be passed as an ordinary legislative act, or in any other way affect its validity. *In re Senate File* 31, 25 Neb. 864.

5. Need Not Be Limited to Single Subject. — *Nesbit v. People*, 19 Colo. 441.

6. Title. — *Nesbit v. People*, 19 Colo. 441; *Hays v. Hays*, (Idaho 1897) 47 Pac. Rep. 732; *Julius v. Callahan*, 63 Minn. 154.

7. *In re Senate File* 31, 25 Neb. 864. See *Nesbit v. People*, 19 Colo. 441.

8. Reading on Different Days. — *Edwards v. Lesueur*, 132 Mo. 410.

9. Approval of Executive Unnecessary. — *Hollingsworth v. Virginia*, 3 Dall. (U. S.) 381.

10. *Hatch v. Stoneman*, 66 Cal. 632; *In re Senate File* 31, 25 Neb. 864; *Koehler v. Hill*, 60 Iowa 543; *State v. Mason*, 43 La. Ann. 590; Jameson's Const. Conv., §§ 556-562.

11. Veto of Governor Ineffectual. — *State v. Mason*, 43 La. Ann. 649.

12. Statute Providing for Submitting Amendment. — *Hatch v. Stoneman*, 66 Cal. 632.

13. Legislative Amendment Requires Ratification. — *State v. New Orleans*, 29 La. Ann. 863.

only one of which an elector need vote for.¹

Whether an Amendment May Be Conditional in Form subject to taking effect upon other contingencies than that of popular ratification, is a disputed point. In construing a proposed amendment providing for the removal of the state capital to another city upon the donation of property by it, the Supreme Court of *California* has recently held the negative of this proposition, while that of *Missouri* has adopted the affirmative.²

Several Amendments. — A clause whereby the submission of more than one amendment is required to be made in such manner as to enable the electors to vote on each amendment separately, is held to necessitate the separate submission of such amendments only as have "different objects and purposes."³ It is not essential that the proposed amendment be submitted by a formal act; a joint resolution is sufficient.⁴

(3) **Ratification** — (a) **Necessity.** — In the earliest period of our constitutional history, amendments, like the instruments of which they formed a part, were not usually submitted to the voters.⁵ But the almost universal practice at the present time with regard to amendments, as with regard to new constitutions, is to require their submission to the electors as a condition precedent to becoming effective.⁶ The *Delaware* constitution⁷ of 1897 seems to be the last

1. **Proposed Alternative Amendment.** — *In re* Senate File 31, 25 Neb. 864, where propositions were submitted by the same bill for licensing and also for prohibiting the liquor traffic.

2. **Amendment to Change Seat of Government Conditionally Invalid** — *California*. — *Livermore v. Waite*, 102 Cal. 113, where the court said: "The proposed amendment is however ineffective in accomplishing the object expressed in the title of the proposition. Article 18, section 1, of the Constitution provides that, if a proposed amendment is ratified and approved by the people, it 'shall become a part of this Constitution.' By the terms of the proposed amendment, however, its operative effect is limited upon the donation to the state of not less than ten acres in land and \$1,000,000 in money, and the approval by the governor, the secretary of state, and the attorney-general of the site so donated. The section of the Constitution which is to be superseded by the proposed amendment fixes the seat of government at Sacramento, and so long as that section remains a part of the Constitution the seat of government will remain at Sacramento until changed by law. But if the proposed amendment should be adopted by the people, it would obliterate this section from the Constitution without leaving any constitutional declaration by which the seat of government would be located in any part of the state. * * * Until the donation of money and land shall have been made, and the site donated approved by the designated officers, the removal of the seat of government cannot take place; and the declaration, in the first sentence, that 'the city of San José is hereby declared to be the seat of government of this state,' would be ineffectual for the reason that the amendment would fail to become an operative part of the Constitution. * * * The legislature was not authorized by the framers of the Constitution, nor do the terms of that instrument permit it, to propose any amendment that will not, upon its adoption by the people, become an effective part of the Constitution; nor is it

authorized to propose an amendment which, if ratified, will take effect only at the will of other persons, or upon the approval by such persons of some specific act or condition. The amendment proposed is neither a declaration by the people of a principle or of a fact, nor is it a limitation or a rule prescribed for the guidance of either of the departments to which the sovereignty of the people has been intrusted.

Missouri. — In Missouri a similar proposed amendment has been sustained. To the objection that such an amendment, though adopted by the people, would be invalid on account of the conditions annexed thereto, and the powers delegated to certain officials, the court said: "The objection is directed against the wisdom of the measure and its expediency. As has been said, these are questions upon which the people are to pass, and over which the courts have no power. The amendment derives its force from the people and not from the legislature. * * * Every condition and every delegation of power contained in the amendment will come direct from the people as a part of the organic law. The people have placed no limitation on their own power in this respect." *Edwards v. Lesueur*, 132 Mo. 410.

3. **Separate Submission of Several Amendments.** — *State v. Timme*, 54 Wis. 318; *State v. Mason*, 43 La. Ann. 660.

4. *Hays v. Hays*, (Idaho 1897) 47 Pac. Rep. 732; *Julius v. Callahan*, 63 Minn. 154. *Compare State v. Dahl*, (N. Dak. 1896) 68 N. W. Rep. 418.

5. See *supra*, this title, *Adoption — Ratification — Convention Practice*.

6. See *Oberholtzer, The Referendum in America* (1893), pp. 41, 42.

"Amendments derive their force from the action of the people, and not from the action of the assembly which proposes them." *Edwards v. Lesueur*, 132 Mo. 434. *Compare State v. New Orleans*, 29 La. Ann. 863; *Livermore v. Waite*, 102 Cal. 113.

7. *Del. Const.* 1897, article 16, § 1.

to exclude the voters from participating in the adoption of amendments.¹

(b) **Procedure** — *aa. IN GENERAL.* — Long-established usage may be followed in the ratification of amendments,² and the ordinary forms of elections employed without special authority.³ The courts have full power to declare that an amendment to the constitution has not been properly adopted, even though it has been so declared by the political department of the state.⁴

bb. VOTE NECESSARY TO ADOPT. — The question as to the number of votes required to ratify a constitutional amendment is one which necessarily depends largely upon the phraseology of the constitution itself or of the act submitting the amendment.

Provisions of Several State Constitutions Construed. — In *Kansas*, where the requirement is "a majority of the electors voting on said amendments," it is held that a simple majority as to each proposition is sufficient without reference to the number of votes cast on other propositions or for other purposes at the same election.⁵ In *Idaho*, where the constitution merely requires ratification by "a majority of the electors," a major part of those voting on the amendment is held to be sufficient.⁶ In *Nebraska*⁷ and *Ohio*⁸ the requirement of "a majority of the electors voting at such election" is held to mean a major part of the highest vote cast for any purpose at the election wherein the proposed amendment is submitted. A similar rule has been applied in other states where various questions were submitted to the popular vote.⁹ On the other hand, in *North Dakota*, where the enabling act merely requires the adoption of the constitution and ordinances submitted therewith by "a majority of the legal votes cast," it was held that only the ballots relating to such

1. See Oberholtzer, *The Referendum in America* (1893), pp. 41, 42.

2. **Usage Authenticating Method of Submission.** — A particular method of submitting amendments which has been resorted to in the past without question has been held to be a legislative and popular interpretation of the scope and import of the language used with reference to such submission, and the repeated acquiescence in and recognition of the propriety of such method carry with them "an affirmation on the part of the legislatures which so submitted, of the people who acted upon such submission, and of all the departments of the government which have recognized the validity of these amendments, that this form of submission is sufficient under the constitution." *Prohibitory Amendment Cases*, 24 Kan. 700. And see *Nesbit v. People*, 19 Colo. 441.

3. **Submission at General Election without Special Directions.** — The submission to the electors of a proposed amendment at a general election, without a provision in terms that the machinery of the general election law shall control, or that any particular officers or boards shall receive, count, or canvass the votes cast, is held to be a valid submission, especially where other amendments have been submitted and adopted in like manner and without objection in the past. *Prohibitory Amendment Cases*, 24 Kan. 700.

4. **Whether Amendment Properly Adopted Is a Question for the Court.** — *Collier v. Frierson*, 24 Ala. 100; *State v. Swift*, 69 Ind. 505; *Koehler v. Hill*, 60 Iowa 543; *State v. Young*, 29 Minn. 474; *Secombe v. Kittelson*, 29 Minn. 555; *State v. McBride*, 4 Mo. 305, 29 Am. Dec. 636; *State v. Timme*, 54 Wis. 318; *Jameson Const. Conv.* (4th ed.), p. 617.

5. *Kansas.* — *Prohibitory Amendment Cases*, 24 Kan. 700.

6. *Idaho* — *Indiana.* — *Green v. State Board*, (*Idaho* 1896) 47 Pac. Rep. 259. In this case the court held that an amendment granting suffrage to women had been legally adopted, although the vote in its favor was less than a majority of those cast at the election for state officers. But see *State v. Swift*, 69 Ind. 505, where a provision somewhat similar was held to require the approval of a majority of all the electors, whether voting or not.

7. *Nebraska.* — *Tecumseh Nat. Bank v. Saunders*, (Neb. 1897) 71 N. W. Rep. 779, *explaining State v. Babcock*, 17 Neb. 188; *In re Senate File 31*, 25 Neb. 864.

The same rule has been applied in that state in the submission of other measures than constitutional amendments. See *State v. Lancaster County*, 6 Neb. 483; *State v. Anderson*, 26 Neb. 517; *State v. Bechel*, 22 Neb. 158; *Bryan v. Lincoln*, (Neb. 1897) 70 N. W. Rep. 252; *Stenberg v. State*, (Neb. 1897) 69 N. W. Rep. 849.

8. *Ohio.* — *State v. Foraker*, 46 Ohio St. 677. *Compare Enyart v. Hanover Tp.*, 25 Ohio St. 618.

9. *California.* — *People v. Berkeley*, 102 Cal. 298.

Illinois. — *People v. Wiant*, 48 Ill. 263.

Michigan. — *Stebbins v. Superior Ct.*, (Mich. 1896) 66 N. W. Rep. 594.

Missouri. — *State v. St. Louis*, 73 Mo. 435, where certain amendments to a city charter had been submitted and had received three-fifths of the votes cast on the question of their adoption, but less than three-fifths of those cast on the same day for city officers, and they were held not to be adopted.

constitution and ordinances need be considered in determining the necessary majority.¹

Decisions on Analogous Questions, Illustrating Constitutional Requirements. — Other constitutional requirements as to the number of votes required in certain cases may receive some interpretation from decisions relating to the submission of other questions than the adoption of constitutional amendments, though the *Indiana* court insists upon a distinction between the two kinds of cases.² In *Minnesota* a constitutional clause providing for the removal of county seats upon a vote of a majority of the electors of the county has been construed to mean a majority only of those voting,³ and a similar rule has been adopted in other jurisdictions,⁴ but there are contrary decisions.⁵ In *Indiana*, where an amendment to the constitution was required to be ratified by a majority of the electors of the state, it was held that while the legislature might provide that such ratification could be effected by a majority of those voting on the proposition, yet the failure so to provide would leave the proposed amendment unratified unless it were shown to have been approved by a majority of all the electors of the state.⁶ In *Wisconsin*, where the constitution provided that the franchise might be extended by an act "approved by a majority of all the votes cast at such election," but also provided that the adoption of amendments should only require "a majority of the voters voting thereon," it was held that the latter clause qualified the former, and that the franchise might be extended upon the approval of a majority of those voting upon the question.⁷

(4) *Taking Effect.* — The Time When an Amendment Becomes Operative as such is to be determined largely by the language of the constitution itself. An amendment submitted to the voters does not, of course, take effect until ratified by them,⁸ but is usually in force from such ratification.⁹

1. *North Dakota.* — *State v. Barnes*, 3 N. Dak. 319.

2. *Indiana* — *Analogy of Certain Cases Denied.* — *State v. Swift*, 69 Ind. 520, where the court says: "We have thus seen that there is no analogy between electing an officer and ratifying a constitutional amendment; nor is there any analogy between the cases cited on behalf of the appellee, wherein taxes are assessed, or franchises granted, by the vote of the majority of the electors, and the ratification of a constitutional amendment. In such cases the taxes assessed and the franchises granted affect the rights of but few persons, relative to the whole number of the people, and are temporary in their nature; while the ratification of a constitutional amendment permanently affects the entire body politic. And the comparison of a vote of the members of a private corporation, which can affect only the corporation and its property, with the vote of the electors of a state upon an amendment to the constitution, which affects the rights of all the people of the state, does not come to us with any force as an argument, nor throw any light that we can see upon the question before us."

3. *Minnesota* — *Vote on Question of Removing County Seat.* — *Everett v. Smith*, 22 Minn. 53; *Bayard v. Klinge*, 16 Minn. 249; *Taylor v. Taylor*, 10 Minn. 107.

4. *Removal of County Seat* — *United States.* — *Cass County v. Johnston*, 95 U. S. 360; *Saint Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 664.

Illinois. — *People v. Garner*, 47 Ill. 253; *People v. Warfield*, 20 Ill. 160. But see *People v. Brown*, 11 Ill. 479.

Mississippi. — *Hawkins v. Carroll County*, 50 Miss. 735.

5. *Missouri.* — *State v. Francis*, 95 Mo. 44; *State v. Winkelmeier*, 35 Mo. 103. But see *State v. Renick*, 37 Mo. 270.

New York. — *People v. Fort Edward*, 70 N. Y. 28.

Tennessee. — *Cocke v. Gooch*, 5 Heisk. (Tenn.) 294.

6. *State v. Swift*, 69 Ind. 505. Compare with this case *Green v. State Board*, (Idaho 1896) 47 Pac. Rep. 259, where a majority of those voting on the proposition was held sufficient.

7. *Wisconsin* — *Vote on Extending Franchise.* — *Gillespie v. Palmer*, 20 Wis. 544.

8. *State v. New Orleans*, 29 La. Ann. 863.

9. *Amendments Held Operative upon Ratification.* — Under the provision, "If a majority of the electors voting upon the amendments at such election shall adopt the amendments, the same shall become a part of the Constitution," it was held that such amendment became operative and of full force and effect as part of the constitution *eo instanti* upon its approval and adoption by a majority vote of the electors of the state. *In re Advisory Opinion*, 34 Fla. 500; *Nesbit v. People*, 19 Colo. 448.

In *Seneca Min. Co. v. Osmun*, 82 Mich. 573, under a provision of the state constitution in reference to amendments providing that if ratified by the requisite majority the amendment should become part of the constitution, it was held that amendments took effect from the time of their ratification notwithstanding the provision of another section, relating to constitutional revision, that all "amendments shall take effect at the commencement of the

Operative from Counting Votes or Proclamation of Result. — On the other hand, the phraseology may be such as to make the amendment operative only from the counting and canvassing of the votes thereon¹ or the proclamation of the result.² Nevertheless, where an amendment contains certain regulations which, "commencing in" a certain year, were to apply to officers therein designated, it was held that such regulations took effect, as to the officers elected, in the year named, even though the proclamation of the governor declaring the amendment carried was not issued until the following month.³

Provision Intended to Operate from Future Date. — Where from all of several proposed amendments it clearly appears that it was the intention of the legislature, and was so understood by the voters, that such amendments should not take effect until a future date, and all but one of such amendments were defeated, the one receiving the sanction of the voters will not take effect until such future date, though in itself it contained no such provision.⁴

Interpretation of Clause as to Persons in Office at "Adoption" of Amendment. — A provision that judges "in office at the adoption of this article shall hold their offices until the expiration of their respective terms" means an "adoption consummated and completed, and not inchoate and imperfect," and refers to the time when the amendment is by its terms to go into effect, and not to the date of the election or the canvassing of the vote.⁵

(5) *Peculiarities of Amendment of Federal Constitution* — (a) *In General.* — The principles just announced in relation to the amendment of state constitutions are in the main equally applicable to the Federal Constitution. Under the provision for amendment contained in that instrument⁶ nothing less than

year after their adoption." This holding was based on the fact that by a previous amendment the constitution was so changed that amendments might be submitted to the people at an election held earlier in the year than formerly, and that, consequently, the legislative purpose must have been to secure the earlier taking effect of such amendments.

1. Amendments Operative upon Counting and Canvassing Votes. — Where a return of the vote is to be made to the secretary of state, and if it appears from said returns that a majority of the votes cast were in favor of the amendment it is to become operative, the counting of the votes by the secretary of state is a prerequisite to the going into effect of the amendment. *Ellis v. Cleburne*, (Tex. Civ. App. 1896) 35 S. W. Rep. 495.

Under a constitutional provision that "if it shall appear from said returns [on a vote on a proposed amendment] that a majority of the votes cast have been cast in favor of any amendment, the said amendment so receiving a majority of the votes cast shall become a part of the constitution, and proclamation shall be made by the governor thereof," it was held that an amendment does not become operative at the time of the election and not until the votes are counted; the court expressly declining to decide whether such amendment had still to await the proclamation of the governor to become operative. *Sewell v. State*, 15 Tex. App. 56. And to the same effect, see *Duluth v. Duluth St. R. Co.*, 60 Minn. 178. But in the later Texas case of *Wilson v. State*, 15 Tex. App. 150, the court holds that it is the ascertained majority vote of the people, and not the proclamation of the governor, which gives operation and force to an amendment receiving such majority vote.

2. Operative from Proclamation of Result. — An amendment becomes operative from the time of the canvassing and promulgation of the result of the vote, unless otherwise provided. *Real v. People*, 42 N. Y. 270.

And when by a constitutional provision it is made the duty of the governor to make proclamation of the result of the election, on the fortieth day after the election, the amendment cannot become operative prior to that date, even though at an earlier day the vote should be canvassed and the governor should issue his proclamation declaring the amendment adopted. *Texas Water, etc., Co. v. Cleburne*, 1 Tex. Civ. App. 588.

Under the Maryland Constitution, the votes cast for and against a proposed amendment are returned to the governor, and in case it shall appear to him that a majority have voted in favor of an amendment he is directed to declare it by his proclamation adopted by the people, and it thenceforth becomes a part of the constitution. It was held that the governor's proclamation of the adoption of a constitutional amendment was conclusive of that fact, and that the amendment thereby became *ec instanti* a part of the constitution, and that no other officer, nor any other department of the government, could review his action. *Worman v. Hagan*, 78 Md. 152.

3. *Worman v. Hagan*, 78 Md. 152.

4. *Real v. People*, 42 N. Y. 270.

5. *People v. Norton*, 59 Barb. (N. Y.) 169.

6. Provision of U. S. Constitution as to Amendment. — "The Congress, when ever two thirds of both houses shall deem it necessary, shall propose amendments to this constitution; or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in

a two-thirds vote of each house would avail to authorize a submission of amendments to the various states; nor could a convention for that purpose be called by Congress upon its own motion merely, by however large a majority of the two houses, or on the application of the legislatures of any number of the states less than two-thirds.¹ No power is conferred on Congress to recall an amendment submitted.²

(b) **Ratification.** — Ratification of a proposed amendment, when once acceded to by a state legislature, would seem to exhaust its authority to act and preclude a reconsideration;³ but, on the other hand, a vote of rejection on the part of a state is no bar to a subsequent reconsideration and adoption of the amendment.⁴

(c) **Taking Effect.** — Congressional legislation has placed with the secretary of state the duty of investigating the official returns of the action of the various states on proposed amendments and of promulgating such as are thus found to have been duly adopted as a part of the constitution.⁵

c. **OTHER MODES OF DEVELOPMENT.** — The other methods of constitutional development enumerated by Mr. Bryce,⁶ viz., interpretation and usage, while not provided for in the constitutions, are none the less real and effective. Judicial interpretation has rendered the Federal Constitution a far different instrument from that which left the hands of its framers at Philadelphia,⁷ and, though perhaps to a slightly less extent, the state constitu-

either case, shall be valid to all intents and purposes as part of this constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate." U. S. Const., art. v.

1. Jameson's Const. Conv. (4th ed.), § 575.

As to whether Congress could refuse to proceed to call a convention in accordance with the application of the legislatures of two thirds of the states, see discussion on Treaty with England, Benton's Deb., vol. 1, pp. 653, 659.

2. Jameson's Const. Conventions, § 585.

3. **Acceptance by State of Federal Amendment Is Final.** — Jameson's Const. Conv. (4th ed.), §§ 582-584.

The states of New Jersey and Ohio first adopted and then rejected the Fourteenth Amendment. In each case the latter action was disregarded, and Congress, by a concurrent resolution, pronounced the ratification valid and sufficient. 15 U. S. Stat. at Large 706.

Not counting these, however, the amendment was ratified by more than three fourths of the states, though it had not been when Secretary Seward issued his proclamation. See an interesting discussion of this point, containing table by Prof. J. B. Moore, showing dates of ratifications, in 30 Amer. L. Rev. 894.

So the legislature of New York, after having voted to ratify the Fifteenth Amendment, afterwards sought by resolution to withdraw its ratification. 16 U. S. at Large 1131.

4. **Rejection by State of Federal Amendment Not**

Final. — Jameson's Const. Conv. (4th ed.), §§ 576, 581.

The legislature of the state of New Jersey first rejected the Thirteenth Amendment in 1865 and then adopted it the following year. And so the Fourteenth Amendment was rejected by the legislatures of North Carolina, South Carolina, and Georgia, when first presented, but subsequently it was ratified by the reorganized governments of those states, and in each instance the ratification was treated as authoritative. U. S. Stat. at Large, vol. 14, p. 428, vol. 15, pp. 2, 706, 708.

Within What Time Final Action must be taken by a state on a proposed constitutional amendment is a question of much uncertainty. It may be noted, not as a correct interpretation of the rule, but as an illustration of its uncertainty, that in 1873 the Senate of Ohio adopted a joint resolution ratifying an amendment relating to the compensation of members of Congress which was submitted by Congress in 1789 to the thirteen states then in existence and rejected at that time.

5. **Secretary of State Certifies Adoption of Federal Amendments.** — "That whenever official notice shall have been received at the department of state, that any amendment which heretofore has been or hereafter may be proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, it shall be the duty of the said secretary of state forthwith to cause the said amendment to be published in the said newspapers authorized to promulgate the laws, with his certificate, specifying the states by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States." Act April 20, 1818, § 2, 3 U. S. Stat. at Large, 439.

6. See *supra*, *Development — In General*.

7. **Effect of Judicial Interpretation.** — To illustrate this it is hardly necessary more than to

tions have undergone a similar process. In the same way the constitutions have all grown and expanded by usage, and in their practical workings rules have been formed which are hardly less respected than the words of the instruments themselves.¹

IV. OPERATION AND EFFECT OF CONSTITUTIONS — 1. What Provisions Are Self-executing — *a.* IN GENERAL. — Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given or the enforcement of a duty imposed.² Thus a clause making bank officers individually liable for receiving deposits after knowledge of the bank's insolvency is self-operative.³

Interpretation of Ambiguous Provisions. — In case a constitutional provision is

refer to some of the leading constitutional decisions of the Supreme Court during the first half century of our national history. Such were: *Chisholm v. Georgia*, 2 Dall. (U. S.) 419, holding that a state might be sued by a citizen of another state; *Marbury v. Madison*, 1 Cranch (U. S.) 137, declaring that the judiciary might annul statutes and *mandamus* the secretary of state; *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316, holding that the federal government possessed implied or incidental powers, and among them the power to charter a bank; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, holding that a college charter was a contract, and could not be altered by state legislation; and *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, holding that one state could not exclude vessels plying between states from navigating its waters. In nearly all these the constitution was not merely interpreted, it was supplemented. Ideas were incorporated into it which not only had not been found there before, but which in some cases were directly opposed to the commonly received opinion.

1. Usage and Practice. — A good illustration of this is *Solomon v. Cartersville*, 41 Ga. 157, where the power of the governor to veto a bill after adjournment was upheld solely upon the ground that such was the established executive usage, and although the court stated that had the question not thus been settled, a different rule would be adopted. Here was a clear addition to the state constitution resting upon usage alone. Compare *Castro v. De Uriarte*, 16 Fed. Rep. 93. Another good example is found in the powers of the speaker of the House of Representatives, who, from a simple moderator of a legislative body at the beginning of our history, has now become probably the second most powerful officer of the government; more influential in shaping legislation than even the chief executive. Yet nearly all this development has taken place through usage. Even the far-reaching power to appoint the standing committees is derived from the House rules, which are not recognized by statute. Thus, the powers of government have been radically changed and redistributed without the aid of either amendment or interpretation, but wholly by usage. See Follett, *The Speaker of the House of Representatives* (1896).

2. Test of Operative Character. — *California*, — *People v. Hoge*, 55 Cal. 612; *Ewing v. Oroville Min. Co.*, 56 Cal. 649.

Illinois. — *Hills v. Chicago*, 60 Ill. 86; *Cook*

County v. Chicago Industrial School, 125 Ill. 540, 8 Am. St. Rep. 386.

Missouri. — *State v. Holladay*, 64 Mo. 526.

Nebraska. — *State v. Weston*, 4 Neb. 216.

Tennessee. — *Friedman v. Mathes*, 8 Heisk. (Tenn.) 488.

Washington. — *State v. Holmes*, 12 Wash. 169.

"The question in every case is whether the language of a constitutional provision is addressed to the courts or the legislature. Does it indicate that it was intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts." *Willis v. Mabon*, 48 Minn. 150, 31 Am. St. Rep. 626, *per* Mitchell, J.

"Where it is apparent that a particular provision of the organic law shall go into immediate effect without ancillary legislation, and this can be determined by giving full force and effect to all its clauses relating to the same subject, and the language is free from ambiguity, then it becomes the imperative duty of judicial tribunals to declare it self-executing; and where the provision is unambiguous and the purpose of the provision would be frustrated unless it be given immediate effect, it will be held self-executing." *Tuttle v. National Bank of Republic*, 161 Ill. 502, *per* Phillips, J.

"While it is true in reference to some provisions of a constitution that they are dormant and quiescent until some statute brings them into life and operation, yet there are others which need no legislation to give them effect. They are to be distinguished by such as confer mere discretionary powers upon the legislature and such as are positive limitations upon the legislative discretion — such as are mandates for legislative action and such as are inhibitions *per se*." *Sneed, J.*, in *Friedman v. Mathes*, 8 Heisk. (Tenn.) 498.

3. Mallon v. Hyde, 76 Fed. Rep. 388, construing the Constitution of Washington. Compare *Fusz v. Spaunhorst*, 67 Mo. 256.

ambiguous and the words employed do not plainly evince an intention that the provision is to be self-executing, the court in construing it will resort to other aids than the mere language employed.¹

A Constitutional Provision Designed to Remove an Existing Mischief should never be construed as dependent for its efficacy and operation upon legislative will.²

b. PROHIBITIONS — (1) *Generally*. — It is the prevailing doctrine, though there is contrary authority,³ that prohibitory constitutional provisions are self-executing without regard to legislative sanction,⁴ and that their scope and purpose cannot be restricted by adverse legislation.⁵ But all statutes then existing or which might thereafter be passed inconsistent with its provisions are nullified by such constitutional prohibition,⁶ though legislation may nevertheless be desirable and valuable for the purpose of defining the right and aiding in its enforcement.⁷

Absence of Provision for Penalty. — Nor does the absence of any provision for a penalty postpone the operation of a constitutional provision,⁸ though some authorities give much weight to the absence of a penalty in determining the intention of the framers of the provision.⁹

(2) *Property Guaranties* — (a) **In Eminent Domain**. — A constitutional prohibition against taking private property for public use without just compensation therefor is self-executing, even though the method of ascertaining such compensation is left for legislative determination.¹⁰ For when the Constitution forbids damage to private property, and points out no remedy and no statute affords one for the invasion of the right of property thus secured, the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance.¹¹

Property Not to Be Taken Until Legislature Provides Method. — But it has also been held that property could not be taken under such a clause until the legislature had provided a mode of assessing compensation.¹²

(b) **Homestead Exemption**. — So a constitutional clause providing for a definite

1. *Fusz v. Spaunhorst*, 67 Mo. 256.

2. *People v. Rumsey*, 64 Ill. 44; *Morley v. Thayer*, 3 Fed. Rep. 740.

3. *Groves v. Slaughter*, 15 Pet. (U. S.) 449.

4. **General Rule as to Prohibitory Clauses** — *Illinois*. — *East St. Louis v. People*, 124 Ill. 655; *Law v. People*, 87 Ill. 385; *People v. Palmer*, 64 Ill. 41; *Hills v. Chicago*, 60 Ill. 86.

Mississippi. — *Brien v. Williamson*, 7 How. (Miss.) 14; *Green v. Robinson*, 5 How. (Miss.) 80; *Cowen v. Boyce*, 5 How. (Miss.) 769.

Nevada. — *Dunker v. Chedic*, 4 Nev. 378.

Tennessee. — *Yerger v. Rains*, 4 Humph. (Tenn.) 259.

5. *Buchanan v. Litchfield*, 102 U. S. 278; *Doon Tp. v. Cummins*, 142 U. S. 366.

6. *Oakland Paving Co. v. Hilton*, 69 Cal. 479.

7. *Reeves v. Anderson*, 13 Wash. 17; *Cooley's Const. Lim.* (6th ed.), p. 100.

8. *State v. Holmes*, 12 Wash. 169. *Compare Law v. People*, 87 Ill. 385.

9. *St. Louis, etc., R. Co. v. Fire Assoc.*, 60 Ark. 325; *Groves v. Slaughter*, 15 Pet. (U. S.) 449; *Bowie v. Lott*, 24 La. Ann. 214.

10. **Guaranty Against Taking Private Property for Public Use** — *Illinois*. — *People v. McRoberts*, 62 Ill. 41; *Elgin v. Eaton*, 83 Ill. 535, 25 Am. Rep. 412.

Missouri. — *Hickman v. Kansas City*, 120 Mo. 110, 41 Am. St. Rep. 684; *Householder v. Kansas City*, 83 Mo. 488.

West Virginia. — *Johnson v. Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779.

The court, in *People v. McRoberts*, 62 Ill. 41, *per* Thornton, J., says: "Is the section of the Bill of Rights prospective in its effect, and inoperative without legislative action? The right of property thus intended to be secured cannot depend upon the mere will of the legislature. The prime object of a Bill of Rights is to place the life, liberty, and property of the citizen beyond the control of legislation, and to prevent either legislatures or courts from any interference with or deprivation of the rights therein declared and guaranteed, except upon certain conditions. It would be the merest delusion to declare a subsisting right as essential to the acquisition and protection of property, and make its employment depend upon legislative will or judicial interpretation."

"It is also well-settled law that this article [relating to the taking of private property for public use] of the Constitution gives an absolute right and is self-enforcing; and although the legislature may have enacted no law providing a mode for the ascertainment and payment of the compensation provided for, resort may be had by the party entitled to the right to any common-law action which will afford him adequate and appropriate means of redress." *Hickman v. Kansas City*, 120 Mo. 110, 41 Am. St. Rep. 684, *per* Brace, J.

11. *Johnson v. Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779.

12. *Lamb v. Lane*, 4 Ohio St. 167.

homestead exemption has been held self-operative,¹ but it is otherwise with one which merely directs the legislature so to provide,² or which fails to fix the amount of the exemption.³

(3) *Limitations on Municipal Indebtedness and Rate of Taxation.* — A limitation on the indebtedness of a municipal or political corporation is self-executing.⁴

A Constitutional Provision Limiting the Rate of Taxation does not require legislative action to enforce it, and goes into effect at once, notwithstanding a proviso allowing the rate to be increased by legislative action and a specified popular vote.⁵

(4) *Prohibiting Sale of Lottery Tickets.* — A provision that the legislature "shall pass laws to prohibit the sale of lottery tickets" is itself a prohibition of lotteries, and self-executing.⁶

c. MISCELLANEOUS PROVISIONS — (1) *Salary Clauses.* — The Constitution, by fixing the salary of an officer and providing that "the auditor shall draw the warrants of the state quarterly" therefor, and that they "shall be paid out of any funds not otherwise appropriated," appropriates by law the amount necessary to pay such salary, and no legislative act is necessary.⁷ But it is otherwise where no sum is fixed by the Constitution.⁸ So a provision that justices of the peace in towns of a certain population shall receive such salaries as may be provided by law, but no fees for their own use, is held self-executing, the ascertainment of the population being a matter for judicial determination.⁹

(2) *Civil Service Provision.* — The clause of the New York Constitution of 1894 placing all officers of the state under the civil service law was held self-

1. *Homesteads.* — A constitutional provision exempting a homestead of "not exceeding eighty acres" was held self-executing in *Alabama*, the court saying: "The clause, as far as it extends, has the form and properties of a law declarative of the will and purpose of the sovereignty, and it is self-executing. Hence, it is not, in form or substance, a command or direction to the legislature. It intended to exempt the homestead, as an accomplished fact, not to instruct the legislature how it should be done." *Miller v. Marx*, 55 Ala. 332, *per* Stone, J. To the same effect see *Beecher v. Baldy*, 7 Mich. 488; *Martin v. Hughes*, 67 N. Car. 296.

In declaring the constitutional provision for a homestead self-executing, the Supreme Court of *Michigan*, in *Beecher v. Baldy*, 7 Mich. 500, *per* Christiancy, J., says: "We fully admit that the constitutional provision is an express prohibition against a forced sale on execution of the homestead which it describes, and, as such prohibition, that it needs no legislation to give it effect, * * * Though further legislation might be necessary in order to enable the debtor to make a valid selection, it would be the duty of the court to protect the right till such necessary legislation could be had."

2. *Noble v. Hook*, 24 Cal. 638.

3. *Minn. Const.*, art. 1, § 12, *construed* in *Tuttle v. Strout*, 7 Minn. 465, 82 Am. Dec. 108.

4. *Limiting Municipal Indebtedness* — *United States*. — *Doon Tp. v. Cummins*, 142 U. S. 370; *Buchanan v. Litchfield*, 102 U. S. 278; *Litchfield v. Ballou*, 114 U. S. 190; *Lake County v. Rollins*, 130 U. S. 662; *Dixon County v. Field*, 111 U. S. 83.

Illinois. — *Law v. People*, 87 Ill. 385.

And if a state constitution declares what indebtedness cities of a certain class may not contract, such prohibitions cannot be suspended or rendered nugatory by the failure of the legislation to make the classification of cities provided for by such constitution, and a forbidden indebtedness, though contracted in advance of such classification, is void. *Beard v. Hopkinsville*, 95 Ky. 239, 44 Am. St. Rep. 222.

So a constitutional provision that no municipal corporation shall incur any indebtedness without providing for the collection of an annual tax, sufficient to pay the interest as it matures and to discharge the debt within twenty years, is self-executing, as of itself it supplies a sufficient rule by means of which the duty imposed may be enforced, and no supplemental legislation is necessary in order to make it effectual. *East St. Louis v. People*, 124 Ill. 655. *Compare* *People v. Bradley*, 60 Ill. 390; *Kine v. Defenbaugh*, 64 Ill. 291; *Mitchell v. Illinois, etc., R., etc., Co.*, 68 Ill. 286; *Law v. People*, 87 Ill. 385.

5. *Limiting Rate of Taxation.* — *St. Joseph's Public Schools v. Patten*, 62 Mo. 444.

6. *Prohibiting Sale of Lottery Tickets.* — *Bass v. Nashville, Meigs (Tenn.)* 421, 33 Am. Dec. 151.

7. *Provisions for Official Salaries.* — *State v. Weston*, 4 Neb. 216. And see, in *Thomas v. Owens*, 4 Md. 189, where it was held that when the constitution declared the amount to be paid an officer, such declaration constituted an appropriation made by law, and that no legislative act was necessary.

8. *Myers v. English*, 9 Cal. 342.

9. *Anderson v. Whatcom County*, 15 Wash. 47.

executing, notwithstanding a provision therein that "laws shall be made to provide for the enforcement of this section."¹

(3) *Municipal Home Rule*.—A provision authorizing cities of a certain population to frame charters for their own government is self-operative.²

2. **What Provisions Are Not Self-executing**—*a. IN GENERAL*.—Where a constitutional provision furnishes no rule for its own enforcement, or where it expressly or impliedly requires legislative action to give effect to the purposes contemplated, it is not self-executing.³

1. **New York—Civil Service Clause**.—"In adopting the new constitution the people, in their original capacity, decreed that thereafter all the departments of the government should be brought within the operation of existing laws on the subject of appointments. The mandate to the legislature to enact laws to provide for the enforcement of the section does not in any degree conflict with this view." *People v. Roberts*, 148 N. Y. 360. *Compare Chittenden v. Wurster*, 152 N. Y. 345.

2. *People v. Hoge*, 55 Cal. 612.

3. **When Clauses Not Self-executing—General Test**.—*United States*.—Missouri, etc., R. Co. v. Texas, etc., R. Co. 10 Fed. Rep. 497.

Alabama.—*Brown v. Seay*, 86 Ala. 122; *Ex p. State*, 52 Ala. 231.

Arkansas.—*St. Louis, etc., R. Co. v. Fire Assoc.*, 60 Ark. 325.

California.—*Ex p. Wall*, 48 Cal. 279, 17 Am. Rep. 425; *Ewing v. Oroville Min. Co.*, 56 Cal. 653; *Spinney v. Griffith*, 98 Cal. 149.

Indiana.—*Green v. Aker*, 11 Ind. 223.

Kansas.—*McCullom v. Pipe*, 7 Kan. 189.

Louisiana.—*Bowie v. Lott*, 24 La. Ann. 214.

Missouri.—*St. Joseph's Public Schools v. Patten*, 62 Mo. 444; *Jerman v. Benton*, 79 Mo. 148; *Fusz v. Spaunhorst*, 67 Mo. 256.

Virginia.—*Price v. Smith*, 93 Va. 14.

West Virginia.—*Dodridge County v. Stout*, 9 W. Va. 703.

Wyoming.—*Fremont County v. Perkins*, (Wyoming 1895) 38 Pac. Rep. 915.

"When the provision points to something more to be done, and looks to some future time for the accomplishment of what is required, the general rule is that it contemplates legislation to carry it into effect." Clifford, C. J., in *Morley v. Thayer*, 3 Fed. Rep. 740.

"The cases are exceptional where constitutional provisions enforce themselves; ordinarily the labors of the convention have to be supplemented by legislation before becoming operative. Of course if it be evident from the terms employed in any particular provision of the organic law that it shall go into force forthwith, without awaiting ancillary legislation, it will become an imperative judicial duty to thus declare. Such duty, however, will only become manifest when the language employed is free from ambiguity, or when it is apparent, either from the language used, or from reasonable inference therefrom, or from other sources equally legitimate and accessible where statutory and constitutional construction is involved, that the purpose of the given section will be frustrated unless immediate effect be accorded to its provisions." Sherwood, C. J., in *Fusz v. Spaunhorst*, 67 Mo. 265.

Illustrations.—A provision that clerks of courts shall be paid a salary to be fixed by law

requires legislation to carry it into effect. *Norman v. Cain*, (Ky. 1895) 31 S. W. Rep. 860.

A provision that "all lands sold in pursuance of decrees of courts shall be divided into tracts of from ten to fifty acres" is not self-executing, as it furnishes no *modus operandi* by which the sales are made but rather contains a general direction addressed to the legislative department, announcing a new policy in regard to the division of land and leaving to the legislature the task of carrying the idea into practical execution. *Bowie v. Lott*, 24 La. Ann. 214.

So a requirement that "all taxes shall be uniform on the same class of subjects," and levied and collected "under general laws," is not immediately operative, but is held to have been intended by the convention to be mandatory on the legislature to enact laws framed upon its special intent and to repeal all laws inconsistent therewith, leaving the legislature, in the exercise of a wise and sound discretion, to time the repeal after proper general laws have been passed. *Williams v. Detroit*, 2 Mich. 560; *Lehigh Iron Co. v. Lower Macungie Tp.*, 81 Pa. St. 482; *Coatesville Gas Co. v. Chester County*, 97 Pa. St. 476. *Compare McHenry v. Downer*, 116 Cal. 20.

A provision authorizing the taking of private land for "a private way of necessity" is not self-executing, but before a right to such private ways of necessity may be enforced the legislature must define what they are, authorize persons to apply for them, and prescribe the method by which the necessary land is to be taken. *Long v. Billings*, 7 Wash. 267. See also *Tacoma v. State*, 4 Wash. 64.

A statute authorizing the legislature to tax real estate held by a municipality which is not used for municipal purposes is not self-executory, but requires legislation to make it effective. *New Castle v. Lawrence County*, 2 Pa. Dist. Rep. 95.

So a clause requiring the legislature to establish a system of town and county governments does not operate *proprio vigore*. *Ex p. Wall*, 48 Cal. 318, 17 Am. Rep. 425; *People v. Lake County*, 33 Cal. 487.

And where municipalities are required, when contracting an indebtedness, to provide at the same time for the collection of an annuity tax sufficient to pay the interest, the provision becomes operative only on the adoption by the legislature of general laws imposing such limitations and restrictions. *Holzhauser v. Newport*, 94 Ky. 396.

The clause in a former constitution of *California*, providing for the increase of the capital stock of corporations, was held not self-operative. *Ewing v. Oroville Min. Co.*, 56 Cal. 649, where the court says: "It does not of

Failure of Legislature to Effectuate Provision Not Self-executing. — The failure of the legislature to make suitable provision for rendering a clause effective is no argument against such construction.¹

b. STOCKHOLDERS' LIABILITY CLAUSES — Not Generally Self-executing. — Whether or not constitutional provisions declaring stockholders individually liable for corporate indebtedness are self-executing depends largely upon the language of the particular provision, and hence the authorities are not entirely uniform;² but as a rule such provisions are not self-executing.³

Qualifications. — But it is not necessary under such provisions that a remedy should be expressly given whereby the creditor of the corporation could directly enforce the liability of the stockholder.⁴ The constitutional provision

itself furnish a complete mode of accomplishing the object which the Constitution allows to be carried out in terms by a general law to be enacted by the legislature. This law, however, must provide for a meeting, and the meeting must be called for the purpose * * * of increasing the stock, and sixty days' public notice must be given as may be provided by law. * * * It is sufficient in this case to determine that this clause is not self-executing — that is, legislation is required to enforce it. To attempt to define the limits of the legislative power in the case before us, it is manifest, is uncalled for."

The Fifteenth Amendment to the Federal Constitution has been held not self-executing. *U. S. v. Reese*, 92 U. S. 214.

A constitutional amendment creating new offices, but leaving it to the legislature to provide for election, duties, or term, is, of course, not self-operative. *Hays v. Hays*, (Idaho 1897) 47 Pac. Rep. 732; *Blake v. Ada County*, (Idaho 1897) 47 Pac. Rep. 734.

1. *McCullom v. Pipe*, 7 Kan. 189.

2. *Fowler v. Lamson*, 146 Ill. 478, 37 Am. St. Rep. 163.

3. Stockholders' Liability Clause — Kansas. — The provision of the Constitution of Kansas that "debts from corporations shall be secured by individual liability of stockholders" is not self-executing, but is a mandate to the legislature. *Lamson v. Fowler*, 44 Ill. App. 186; *Fowler v. Lamson*, 146 Ill. 478, 37 Am. St. Rep. 163; *Schertz v. Chester First Nat. Bank*, 47 Ill. App. 124; *Marshall v. Sherman*, 148 N. Y. 9.

In *Tuttle v. National Bank of Republic*, 161 Ill. 502, reversing 48 Ill. App. 481, the court, per Phillips, J., says: "If this provision is to be treated and construed as self-operating, then the clause 'and such other means as may be provided by law' must be rejected as meaningless, and held without force or effect. The creditor must be confined to the security of the individual liability of stockholders to an amount equal to the stock owned by such stockholders. * * * What stockholders are liable for dues to corporations? When are they liable? Is it the holder of the stock at the time the indebtedness is created, or at the time the indebtedness became due, or at the time suit is instituted to recover the dues owing by the corporation? All these questions arise in each case, and will not down without an answer. The instrument itself gives no light to determine these questions." Compare *National Bank v. Zinser*, 55 Ill. App. 510.

California. — A former constitution of California provided that "dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law;" and that "each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liabilities." The latter section was held not self-executing. The judgment was placed on two grounds: first, that the two sections should be construed together; and, second, that without legislation there was no other means of ascertaining the "proportion" of a given stockholder, it being held that "the legislature has the power to say, not that the stockholder shall not be liable for any of the debts of the corporation, but that he shall be liable for his portion, and to say what that portion shall be." *French v. Teschemaker*, 24 Cal. 518.

Missouri. — So a provision of the Constitution of Missouri that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and by such other means as shall be provided by law," was held not self-executing. *Morley v. Thayer*, 3 Fed. Rep. 740.

Michigan. — The provision of the Michigan Constitution that "the stockholders of all corporations and joint stock associations shall be individually liable for all labor performed for such corporation or association," if self-executing at all, can be enforced only in equity. *Peck v. Miller*, 39 Mich. 597, where the court, while not passing directly upon the question, says: "This action is brought under the statute and not under the Constitution. If the constitutional provision is sufficient to execute itself without legislation, it can only be by some proceeding in equity. There is no remedy at law to do complete justice in such a case without some aid of statutes."

4. *Willis v. Mabon*, 48 Minn. 154, 31 Am. St. Rep. 626; *Peck v. Miller*, 39 Mich. 597.

In construing the provision of the *Arkansas* Constitution that "in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock," the Supreme Court of that state, in *Jones v. Jarman*, 34 Ark. 323, held that it entered into and formed part of the charters of private corporations, and that parties becoming stockholders in a corporation under that Act, during the operation of that

of *Minnesota* that "each stockholder in any corporation shall be liable to the amount of the stock held or owned by him" is self-executing.¹

c. **OPERATIVE LEGISLATION** — (1) *In General*. — Clauses in a constitution directing legislation to carry them into effect have at most no more than moral force,² even when mandatory in terms.³ And a provision that "suits may be brought against the state in such * * * courts as may be by law provided" imposes no duty upon the legislature to enact such a law.⁴ The legislature may enlarge the scope of a directory constitutional clause, but may not lessen it.⁵

(2) *Provisions as to Stockholders* — **Supplemental Legislation Fixing Extent of Liability**. — Where a constitutional provision creates a liability for corporate debts on the part of stockholders, but fails to fix the extent of the liability or provide a method of enforcing it, the legislature may supply such omission.⁶

Same Rate of Liability for All. — It is incumbent upon the legislature to impose the same rate of liability upon all stockholders, and to cause the law to operate alike upon all corporations.⁷

Liability for Future Corporate Debts. — An enactment whereby stockholders are held liable for future corporate debts is within legislative authority.⁸

Legislature Cannot Relieve from or Reduce Liability. — But an attempt on the part of the legislature entirely to relieve stockholders from any liability under the constitutional provisions would clearly be invalid,⁹ as would also be an attempt to reduce such liability below the minimum as designated by the constitution.¹⁰

3. **Retrospective Effect** — a. **IN GENERAL**. — Constitutions are construed to operate prospectively only, unless on the face of the instrument a contrary intention is manifest beyond reasonable question.¹¹

Constitution, assumed the liability imposed by the foregoing provision of it, and that, in the absence of any statutory remedy at law, the corporation creditor might enforce such liability in equity.

In passing upon the provision of the *Kansas* Constitution that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law," it is said in *Schertz v. Chester First Nat. Bank*, 47 Ill. App. 133: "But if the legislature should fail to provide a remedy, then the right would still remain and the common law would supply one. The creditors could not be deprived of their assured security by any omission of the legislature to enact a remedy."

1. *Willis v. Mabon*, 48 Minn. 140, 31 Am. St. Rep. 626.

2. Cooley, *Const. Lim.* (5th ed.), p. 99.

3. *St. Joseph's Public Schools v. Patten*, 62 Mo. 444.

4. *Exp. State*, 52 Ala. 231.

5. *Tuttle v. Strout*, 7 Minn. 465, 82 Am. Dec. 108; *Coleman v. Ballandi*, 22 Minn. 144; *Citizen's Bank v. Wright*, 6 Ohio St. 319.

6. **Legislature May Fix Extent of Liability of Stockholders**. — "While the Constitution requires the debts of corporations to be secured by the personal liability of the corporators, and makes each stockholder liable for his proportion of such debts, it leaves to the legislature the power to regulate such liability and to prescribe the rule by which each stockholder's proportion of such debts shall be ascertained." And an act by the legislature making each stockholder of the corporation

liable for his share of all its debts contracted while he is a stockholder is sufficient to answer the requirements of the constitution. *Larrabee v. Baldwin*, 35 Cal. 155.

Where the constitution provides that debts from corporations shall be secured by such individual liabilities of the corporators or other means as may be prescribed by law, the general assembly may provide such means for that purpose as seem to meet the requirement, and should it "determine to secure such dues by individual liabilities of the corporators, there is no restriction or limitation as to the manner in which it shall be done. It is therefore impossible to say that it may not be by making the corporators liable, individually, to penalties, because it is manifest this might be a reasonable mode and a very effective one, too, of securing such dues." *Diversey v. Smith*, 103 Ill. 385, 42 Am. Rep. 14.

7. *French v. Teschemaker*, 24 Cal. 519.

8. *Weidenger v. Spruance*, 101 Ill. 278, the court saying that every stockholder in a corporation organized under that constitution, "takes his stock subject to this supervision of the general assembly and to be affected by whatever legislation in that regard the general assembly may deem necessary."

9. *Central Agricultural, etc., Assoc. v. Alabama Gold L. Ins. Co.*, 70 Ala. 120; *French v. Teschemaker*, 24 Cal. 518; *Milroy v. Spurr Mountain Iron Min. Co.*, 43 Mich. 231.

10. *Citizens' Bank v. Wright*, 6 Ohio St. 332.

11. **Construed to Operate Prospectively** — *United States*. — *Shreveport v. Cole*, 129 U. S. 36; *Starr v. Hamilton*, *Deady* (U. S.) 268.

California. — *Funded Debt Sinking Fund*

Prohibition on Special Legislation. — Thus a provision that "the legislature shall not pass local or special laws" applies to future and not past legislation, and therefore does not operate as a repeal of laws passed before the constitution went into effect.¹

Provisions Limiting Tax Rate. — So the limitation of the *Missouri* Constitution as to the rate of levy for taxes applies only to years subsequent to its adoption.²

Provision as to Actions for Death by Wrongful Act. — The clause of the *New York* Constitution providing that "the right of action now existing to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation," does not operate retrospectively, and hence cannot affect causes of action which had accrued before it went into operation.³

Eligibility of Officers. — A constitutional provision that "sheriffs shall hold no other office, and be ineligible for two years next succeeding the termination of their offices," was held prospective only, and not to apply to territorial officers at the time of the adoption of the state constitution.⁴ So a constitutional amendment making judges ineligible after seventy was held to apply only to those elected in pursuance of such amendment.⁵

But an Expressed Intention that a Constitution Shall Operate Retrospectively will be enforced.⁶ Thus a provision forbidding certain devises for charitable or relig-

v. Sacramento, 71 Cal. 310; *Ex p. Burke*, 59 Cal. 6, 43 Am. Rep. 231.

Colorado. — *Strickler v. Colorado Springs*, 16 Colo. 73, 25 Am. St. Rep. 245.

Illinois. — *Covington v. East St. Louis*, 78 Ill. 548.

Indiana. — *State v. Barbee*, 3 Ind. 258.

Kansas. — *State v. Thompson*, 2 Kan. 432.

Kentucky. — *Slack v. Maysville, etc.*, R. Co., 13 B. Mon. (Ky.) 1.

Louisiana. — *State v. New Orleans*, 29 La. Ann. 863.

Maine. — *Farnsworth v. Lime Rock R. Co.*, 83 Me. 440.

Maryland. — *Capron v. Devries*, 83 Md. 220; *New Central Coal Co. v. Georgia Creek Coal, etc.*, Co., 37 Md. 557.

Missouri. — *State v. Macon County Ct.*, 41 Mo. 453; *State v. Hannibal, etc.*, R. Co., 101 Mo. 120.

Nebraska. — *State v. Lancaster County*, 6 Neb. 214.

New York. — *O'Reilly v. Utah, etc.*, Stage Co., 87 Hun (N. Y.) 406; *Matter of Griffiths*, 16 N. Y. Misc. Rep. (Oneida County Ct.) 128; *People v. Carson*, 10 Misc. Rep. (N. Y. Supreme Ct.) 246; *Isola v. Weber*, 13 Misc. Rep. (N. Y. C. Pl.) 101. *Compare* opinion of Denio, J., in *Matter of Lee's Bank*, 21 N. Y. 11; *People v. Gardner*, 59 Barb. (N. Y.) 198.

Ohio. — *Allbyer v. State*, 10 Ohio St. 588.

Pennsylvania. — *Evans v. Phillippi*, 117 Pa. St. 226, 2 Am. St. Rep. 655; *Folkenson v. Easton*, 116 Pa. St. 523.

South Dakota. — *Kirby v. Western Union Tel. Co.*, 4 S. Dak. 108.

Texas. — *Halbert v. Martin*, (Tex. Civ. App. 1895) 30 S. W. Rep. 388.

Wisconsin. — *State v. Giles*, 2 Pin. (Wis.) 166, 52 Am. Dec. 149.

"Whoever asserts that a constitution or a statute has a retroactive effect must bear the burden of proving it." *O'Reilly v. Utah, etc.*, Stage Co., 87 Hun (N. Y.) 413.

Same Rule as to Statutes. — So, statutes will not be so construed as to allow a retrospective operation.

England. — *Moon v. Durden*, 2 Exch. 22.

Illinois. — *Bruce v. Schuyler*, 9 Ill. 221, 46 Am. Dec. 447; *Thompson v. Alexander*, 11 Ill. 54; *Matter of Tuller*, 79 Ill. 107, 22 Am. Rep. 164.

Mississippi. — *Brown v. Wilcox*, 14 Smed. & M. (Miss.) 127.

New York. — *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291; *Isola v. Weber*, 13 Misc. Rep. (N. Y. C. Pl.) 101.

Pennsylvania. — *Price v. Mott*, 52 Pa. St. 315. See generally the title STATUTES.

1. *Ex p. Burke*, 59 Cal. 6, 43 Am. Rep. 231.

2. *State v. Hannibal, etc.*, R. Co., 101 Mo. 120.

3. *Isola v. Weber*, 147 N. Y. 329, reversing 13 Misc. Rep. (N. Y. C. Pl.) 97; *O'Reilly v. Utah, etc.*, Stage Co., 87 Hun (N. Y.) 406.

4. *State v. Giles*, 2 Pin. (Wis.) 166, 52 Am. Dec. 149. But compare *Sigur v. Crenshaw*, 8 La. Ann. 401.

5. *People v. Gardner*, 59 Barb. (N. Y.) 198.

6. **Intention to Give Retrospective Effect Expressed.** — In *Matter of Lee's Bank*, 21 N. Y. 9, a provision declaring generally that the stockholders in every corporation and joint stock association for banking purposes issuing the bank notes after a given date should be individually responsible was held to apply to existing corporations. Denio, J., for the court, said: "The defendant's counsel insists that we should not construe the clause so as to disturb vested interests, unless compelled by language which would not admit of any other meaning. But we are not to interpret the Constitution precisely as we would an act of the legislature. The convention was not obliged, like the legislative bodies, to look carefully to the preservation of vested rights. It was competent to deal, subject to ratification by the people, and to the Constitution of the federal

ious uses applies to dispositions in a will made before the adoption of the constitution where the testator died subsequent thereto.¹ An expressed intention that a constitution should invalidate existing but imperfect laws is effective.² An act of the legislature not authorized by the constitution at the time of its passage is absolutely void, and is not validated by a subsequent adoption of an amendment to the constitution authorizing it.³

A Prospective Intention Clearly Manifest will, of course, not be avoided by considerations of inconvenience and hardships.⁴

b. UPON LEGISLATION — Constitutional Provision Annuls Inconsistent Laws. — As a rule, a newly adopted constitution *suo motu* displaces existing inconsistent laws.⁵

Illustrations. — Thus the adoption of a constitution which guarantees a jury trial in the condemnation of land by railways annuls an existing statute providing for the appropriation of land without such trial.⁶ So an act providing for the election of certain officials by the legislature is displaced by a subsequently adopted constitution providing for the appointment of all officers by the governor.⁷ The adoption of constitutions by the federal government and by states formed from the Northwest Territory operated to suspend the pro-

government, with all private and social rights, and with all the existing laws and institutions of the state; if the convention had so willed, and the people had concurred, all former charters and grants might have been annihilated."

1. Forbidding Charitable Devises. — *Blackbourn v. Tucker*, 72 Miss. 735, where the court says: "The constitutional provisions have no relation to the intention of the testator, nor do they regulate the manner in which he may make and publish his will. The question is not what was his will, but it is what is the will of the people of the state? Manifestly, the purpose of the constitution is to prevent one who will not be charitable at his own expense from being so at the expense of his heir at law. One may yet 'sell all that he hath and give to the poor,' but he may not keep his grip on his estate until death relaxes his grasp, and then, at the expense of wife and child, devote it to religious uses. Why should one who, before the adoption of the constitution, had executed a will, over which his dominion remained absolute, stand in any different relation to his family or the public than one who had not? The prohibition is against the thing to be done, and not against the processes by which it is done. The limitation is upon testamentary power, and, if it is unjust or retroactive to apply its terms to one who had made a will, why does not the same objection lie in favor of all the people who at the time of the adoption of the constitution had the testamentary capacity to then make wills? The provisions certainly, in one sense, take away a pre-existing power; but it was one existing as much in every citizen then having testamentary capacity as in *Blackbourn*, who had executed a paper which in no sense bound him or conferred any right upon the persons named therein as legatees. We can see no reason why the prohibition should not operate against *Blackbourn's* right to retain his estate during his life, and then disinherit his heirs by devoting it to religious and charitable purposes, which would not also restrain it as against all others who, before the adoption of the constitution, had the power so

to do. We are of opinion that the will is subject to the operation of the constitution."

2. *State v. Luther*, 56 Minn. 156.

3. Act Unauthorized under Existing Constitution Not Validated by Amendment. — *State v. Tully*, 20 Nev. 427, 19 Am. St. Rep. 374; *Seneca Min. Co. v. Osmun*, 82 Mich. 573.

The removal of a constitutional prohibition against licensing the sale of liquor does not authorize a town council to license drinking saloons under a municipal charter granted before the constitutional amendment. *Dewar v. People*, 40 Mich. 401, 29 Am. Rep. 545; *Mount Pleasant v. Vansice*, 43 Mich. 361.

A statute cannot be enlarged merely by a change in the constitution. *Dewar v. People*, 40 Mich. 401, 29 Am. Rep. 545.

4. *Buckner v. Street*, 1 Dill. (U. S.) 257.

5. Constitution Displaces Inconsistent Laws — United States. — *Permolli v. Municipality No. 1*, 3 How. (U. S.) 589; *Escanaba Co. v. Chicago*, 107 U. S. 688; *Woodman v. Kilbourn Mfg. Co.*, 1 Abb. (U. S.) 158.

California. — *Oakland Paving Co. v. Hilton*, 69 Cal. 479.

Illinois. — *Mitchell v. Illinois, etc., R. etc., Co.*, 68 Ill. 286; *People v. Palmer*, 64 Ill. 41; *Kine v. Defenbaugh*, 64 Ill. 291; *People v. McRoberts*, 62 Ill. 38.

Louisiana. — See *Sigur v. Crenshaw*, 8 La. Ann. 401.

Nebraska. — *State v. Holcomb*, 46 Neb. 88; *Moore v. Herron*, 17 Neb. 703; *State v. Babcock*, 19 Neb. 239.

New York. — See *People v. Brooklyn*, 152 N. Y. 399, where the principle is recognized but held inapplicable to the case under discussion.

North Carolina. — *State v. Stanley*, 66 N. Car. 59. *Compare* *People v. McKee*, 68 N. Car. 429; *People v. Bledsoe*, 68 N. Car. 457.

Wisconsin. — *Connecticut Mut. L. Ins. Co. v. Cross*, 18 Wis. 109.

6. *Mitchell v. Illinois, etc., R., etc., Co.*, 68 Ill. 286; *Kine v. Defenbaugh*, 64 Ill. 291; *People v. McRoberts*, 62 Ill. 38.

7. *State v. Holcomb*, 46 Neb. 88. *Compare* *State v. Stanley*, 66 N. Car. 59.

visions of the ordinance of 1787 in so far as any of its provisions conflict with such constitutions.¹ The same rule applied to the acts of Congress organizing the territorial government of Orleans.² The adoption of the Seventh Amendment to the Federal Constitution had the effect to supersede all pending suits, as well as to prevent the institution of new suits, against a state by citizens of another state.³

Existing Laws Not Unnecessarily Disturbed. — But existing laws and rights are disturbed only in those cases and to that extent that the new constitution contains declarations inconsistent with particular statutes and particular rights.⁴ And where legislation is necessary to give effect to a constitutional provision, laws in existence at the time of its adoption remain effective until legislation is had to enforce such provisions.⁵

Illustrations. — A clause in the recent Constitution of *Kentucky* which discontinued a certain court "as constituted and organized" under a previous constitution was held not to repeal a statute regulating the practice in such courts.⁶ Under the late Constitution of *South Carolina*, which required the issue of municipal bonds to be by popular vote, but also provided that valid and consistent laws should remain in force until repealed, it was held that the issue of bonds by a city council alone, which would have been valid under a prior constitution, was still so, though made after the adoption of the new instrument.⁷ In *Pennsylvania* the rule seems to be broadly laid down that constitutional prohibitions on legislative action are prospective only, and in a new constitution do not repeal local statutes in force at the time of its adoption.⁸

V. CONSTRUCTION AND INTERPRETATION OF CONSTITUTIONS — 1. Definition. —

1. *Strader v. Graham*, 10 How. (U. S.) 82; *Escanaba Co. v. Chicago*, 107 U. S. 688; *Woodman v. Kilbourn Mfg. Co.*, 1 Abb. (U. S.) 158; *Connecticut Mut. L. Ins. Co. v. Cross*, 18 Wis. 109. Compare *Pollard v. Hagan*, 3 How. (U. S.) 212.

2. *Permoli v. Municipality No. 1*, 3 How. (U. S.) 589.

3. *Hollingsworth v. Virginia*, 3 Dall. (U. S.) 378.

4. *Sigur v. Crenshaw*, 8 La. Ann. 401.

5. *Doddridge County v. Stout*, 9 W. Va. 703; *Chahoon v. Com.*, 20 Gratt. (Va.) 733. Compare *Cairo, etc., R. Co. v. Trout*, 32 Ark. 17.

Amendment Needing Legislation to Effectuate Does Not Disturb Existing Law. — An amendment having provided that "the legislature shall prescribe by general law for the election" of certain designated officers "for such term of office as the legislature shall prescribe," it was held that until such laws were passed in due course of legislative action, and elections duly held thereunder, "the persons holding these offices under the constitution and laws as they existed when this amendment was adopted and went into operation will continue to hold their offices upon the same tenure and on the same terms as if this amendment had not been adopted." *State v. Timme*, 54 Wis. 330.

6. **Provision Discontinuing Court "as Constituted and Organized."** — *Piper v. Gunther*, 95 Ky. 115, the court saying, in reply to the contention of the defeated party: "The fallacy of this argument, it seems to us, lies in the assumption that because the old court as constituted and organized is discontinued, the law, whether special or general, regulating the

practice is also discontinued. These 'practice acts,' so to speak, do not form a part of the old courts 'as constituted and organized,' in the meaning of the constitution, and are not, therefore, discontinued simply because the old courts are discontinued. On the contrary, 'that no inconvenience may arise from the alterations and amendments made in this constitution,' the first clause of the schedule provides 'that all laws of this commonwealth in force at the time of the adoption of this constitution, not inconsistent therewith, shall remain in full force until altered or repealed by the general assembly,' etc. These various acts regulating practice are 'laws of the commonwealth.' They are not repealed simply because the courts to which they relate are discontinued, as constituted and organized theretofore, but their repeal is made to depend on whether they are inconsistent with the new constitution; and whether inconsistent or not is a question not involved in the argument at hand."

7. *South Carolina — Provision as to Issue of Municipal Bonds.* — *McCreight v. Zemp*, (S. Car. 1897) 26 S. E. Rep. 984.

8. *Pennsylvania — Prohibition on Special Laws Prospective Only.* — See *Lehigh Iron Co. v. Lower Macungie Tp.*, 81 Pa. St. 482.

The Constitution adopted in *Pennsylvania* in 1874 provided that "the general assembly shall not authorize any county, city, borough, township, or incorporated district to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution, or individual." This was held not to affect the validity of such a statute enacted in 1851. *Indiana County v. Agricultural Soc.*, 85 Pa. St. 357.

By the construction of constitutions, as the term is ordinarily used, is meant the ascertainment of the true sense of the words actually employed, or their "interpretation," and also the determination of the meaning of the provisions of such instruments by the drawing of conclusions respecting subjects that lie beyond the direct expressions of the text from elements known from and given therein, and the application of provisions thus considered to a given state of facts.¹

2. Constitutional and Statutory Construction Compared — Same General Rules Apply. — In the main, the general principles governing the construction of statutes apply also to that of constitutions.²

Court's Discretion in Construing Constitutions More Limited. — But the discretion of the courts is much more limited in respect to the latter; and while a liberal construction is required in the case of legislative enactments, a strict construction is enjoined with reference to the provisions of a constitution.³

The Rules Which Distinguish Mandatory and Directory Statutes are applied but slightly, if at all, to constitutional provisions.⁴ The latter are almost invariably mandatory and rarely, if ever, directory.⁵

3. Internal Construction — a. THE INTENT. — The fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of the people in adopting it.⁶

1. Definition. — Cooley's Const. Lim. (6th ed.), p. 51; Lieber's Legal and Political Hermeneutics, pp. 11, 44; 1 Greenleaf on Ev., § 277; 2 Parsons on Contracts, 491, note a; Sutherland on Statutes, § 236; Bouvier's L. Dict., *sub voce*.

2. General Principles of Statutory Construction Applicable. — Dunn v. Great Falls, 13 Mont. 58; Taylor v. Taylor, 10 Minn. 107; People v. Fancher, 50 N. Y. 291, *per* Allen, J.; Sedgwick on Const. Law, 491-493.

Constitution Less Technical — Many rules for the construction of statutes are of but limited application to the construction of the constitution. The safest rule for construing the latter is to regard not so much the form or manner of the expression as the nature and object of its provisions, and the end to be accomplished, giving the words their just and legitimate meaning. Carroll v. State, 58 Ala. 396, *per* Brickell, C. J.

"The solution of this question [of construction of the constitution] must necessarily depend on the words of the constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several states, together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes, and to which this [Supreme] court has always resorted in construing the constitution." Rhode Island v. Massachusetts, 12 Pet. (U. S.) 721. See also Falconer v. Campbell, 2 McLean (U. S.) 201.

An amendment to the organic law is not subject to the same technical rules of construction as an ordinary act of legislation. Matter of Lee's Bank, 21 N. Y. 9.

3. Judicial Discretion Restricted. — Wolcott v. Wigton, 7 Ind. 44; Lafayette, etc., R. Co. v. Geiger, 34 Ind. 185.

"The discretion of courts is more restricted in applying the rules of construction to a plan of government contained in a written constitution than in the construction of statutes. And

the reason is conclusive. Statutes are often hastily and unskillfully drawn, and thus need construction to make them sensible. But constitutions import the utmost discrimination in the use of language." Greencastle v. Black, 5 Ind. 570, *per* Stuart, J. See also Newell v. People, 7 N. Y. 9.

"A constitution is to be construed as a frame of government, or fundamental law. * * * If constitutions were to be construed in all things as mere statutes, many of them would present great ambiguity." Sharkey, C. J., in Brien v. Williamson, 7 How. (Miss.) 24.

4. Cooley's Const. Lim. (6th ed.), p. 93.

5. People v. Lawrence, 36 Barb. (N. Y.) 177.

6. Intent Governs. — Miller v. Dunn, 72 Cal. 465, 1 Am. St. Rep. 67; Hills v. Chicago, 60 Ill. 86, *per* McAllister, J.; Cooley's Const. Lim. (6th ed.), p. 69.

"In construing a constitution, the thing to be sought is the thought expressed." State v. Doron, 5 Nev. 399; Newell v. People, 7 N. Y. 97.

"No court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends when another construction, equally accordant with the words and sense thereof, will enforce and protect them." Prigg v. Pennsylvania, 16 Pet. (U. S.) 612.

"If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose and so as to subserve it." Legal Tender Cases, 12 Wall. (U. S.) 531; Prigg v. Pennsylvania, 16 Pet. (U. S.) 612.

A constitutional provision should not be so construed as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief it was aimed at. So when a constitutional provision prohibits a municipality from loaning its credit to corporations, the prohibition will be as effective against an indirect as against a direct loan of such credit. Jarrold v. Moberly, 103 U. S. 585.

Language Used Primary Test of Intent. — And since the instrument itself constitutes the authorized statement of that intent, the language employed is the first and most important matter to be considered in this connection.¹

Where Words Convey Unambiguous and Definite Meaning, This Controls. — So that where the words employed, when taken in their ordinary sense and in their grammatical arrangement, embody a definite meaning which involves no conflict with the other parts of the constitution, the meaning thus apparent on its face must be adopted.² For when the language of the constitution is plain it is not within the province of the court to speculate as to the purpose of its framers.³

Construction of Statutes. — The same principle is applied in the construction of a statute.⁴ It is only when there is some obscurity or ambiguity in the lan-

1. The Language Used the Primary Consideration. — "The enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." Marshall, C. J., in *Gibbons v. Ogden*, 9 Wheat. (U. S.) 188; *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 418; *Hills v. Chicago*, 60 Ill. 86.

"A written constitution, framed by men chosen for the work by reason of their peculiar fitness, and adopted by the people upon mature deliberation, implies a degree of deliberation and a carefulness of expression proportioned to the importance of the transaction, and words are presumed to have been used with the greatest possible discrimination." Allen, J., in *People v. New York Cent. R. Co.*, 24 N. Y. 487. See also *Newell v. People*, 7 N. Y. 93, *per* Denio, J.

Bronson, J., in *People v. Purdy*, 2 Hill (N. Y.) 31, said: "We are not at liberty to presume that the framers of the Constitution, or the people who adopted it, did not understand the force of language."

"That which the words declare is the meaning of the instrument." *Newell v. People*, 7 N. Y. 97. In commenting on this rule, *Johnson, J.*, in *Newell v. People*, 7 N. Y. 9, says: "This is true of every instrument; but when we are speaking of the most solemn and deliberate of all human writings, those which ordain the fundamental law of states, the rule rises to a very high degree of significance."

A constitution, "unlike the acts of the legislature, owes its whole force and authority to its ratification by the people, and they judged of it by the meaning apparent on its face." *Smith v. Thursby*, 28 Md. 269, *quoting* *Manly v. State*, 7 Md. 135.

"In the construction of constitutional provisions and statutes, the question is not what was the intention of the framers, but what is the meaning of the words they have used. A constitution does not derive its force from the convention which framed it, but from the people who ratified it, and the intent to be arrived at is that of the people, and this is found only in the words of the text." *Beardstown v. Virginia*, 76 Ill. 34.

2. Plain Meaning of Words Controls — *United States*. — *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *Denn v. Reid*, 10 Pet. (U. S.) 524.

Alabama. — *Carroll v. State*, 58 Ala. 396; *Bartlett v. Morris*, 9 Port. (Ala.) 266.

Illinois. — *Hills v. Chicago*, 60 Ill. 86; *Beardstown v. Virginia*, 76 Ill. 34.

Iowa. — *District Tp. v. Dubuque*, 7 Iowa 262.

Maryland. — *Leonard v. Wiseman*, 31 Md. 201; *Smith v. Thursby*, 28 Md. 244.

Mississippi. — *Hawkins v. Carroll County*, 50 Miss. 735.

Missouri. — *State v. King*, 44 Mo. 285.

New York. — *People v. Purdy*, 2 Hill (N. Y.) 35; *Purdy v. People*, 4 Hill (N. Y.) 384; *Newell v. People*, 7 N. Y. 97; *People v. New York Cent. R. Co.*, 24 N. Y. 485; *People v. Potter*, 47 N. Y. 375.

Nevada. — *State v. Irwin*, 5 Nev. 111; *State v. Doron*, 5 Nev. 399.

North Carolina. — *McAdoo v. Benbow*, 63 N. Car. 464.

Pennsylvania. — *Com. v. Randall*, 10 Phila. (Pa.) 451. See *Denn v. Reid*, 10 Pet. (U. S.) 524; *Cooley's Const. Lim.* (6th ed.), p. 69; 1 *Story on Const.*, § 400.

"That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning." *Hills v. Chicago*, 60 Ill. 90, *quoting* *Newell v. People*, 7 N. Y. 97.

"It is not allowed to interpret what has no need of interpretation. When an instrument is worded in clear and precise terms, when its meaning is evident and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which the words naturally import. To go elsewhere in search of conjectures in order to restrict or extend it is but to elude it. If this dangerous method be once admitted, there will be no instrument which it will not render useless." *Vattel*, book 2, c. 17, § 263. This language is adopted with approval and applied to the construction of the New York Constitution by the Court of Appeals of that state, in the case of *Newell v. People*, 7 N. Y. 83, where the court, *per* *Johnson, J.*, says: "Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing which we are to seek is the thought which it expresses. To ascertain this the first resort in all cases is to the natural signification of the words employed, in the order and grammatical arrangement in which the framers of the instrument have placed them."

3. *State v. Irwin*, 5 Nev. 111; *Hawkins v. Carroll County*, 50 Miss. 735; *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 408; *Carroll v. State*, 58 Ala. 396.

4. See the title **STATUTES**.

guage used that resort may be had to extrinsic aid in its construction.¹

Negative Implied.—In construing the constitution, a court may imply a negative from affirmative words where the implication promotes, but not where it defeats, the intention.²

b. POLICY AND EFFECT—(1) *In General*—Wisdom of Constitutional Provision Not for Courts.—Questions as to the wisdom, expediency, or justice of constitutional provisions afford no basis for construction where the intent to adopt such provisions is expressed in clear and unmistakable terms.³

When General Spirit of Instrument May Be Considered.—Nor can construction read into the provisions of a constitution some unexpressed general policy or spirit, supposed to underlie and pervade the instrument and to render it consonant to the genius of the institutions of the state.⁴ For courts are not at liberty to declare an act void because they deem it opposed to the spirit of the constitution.⁵ But the courts will not ignore the general spirit of the instrument in construing the provisions actually contained therein,⁶ for it is the real intent and purpose rather than the strict verbal interpretation—"the essence rather than the form"⁷—that is sought to be ascertained.⁸

(2) *Arguments Ab Inconvenienti.*—The fact that it may work great inconvenience to a particular class of officers or persons furnishes no grounds for the courts to ignore the evident intent of a provision.⁹

1. No Room for Construction Where Meaning Plain.—Chesapeake, etc., R. Co. v. Miller, 19 W. Va. 422; District Tp. v. Dubuque, 7 Iowa 262; Hamilton v. St. Louis County Ct., 15 Mo. 3. See Matter of Jackson, 14 Blatchf. (U. S.) 245.

"A primary rule of construction is that the intention of the author is to be collected from the words used, taken in ordinary and familiar acceptance; but when the words used are not so plain and explicit as to be understood without a resort to construction, then the intention may be gathered from the subject matter and the object of the provision under consideration." Green v. Weller, 32 Miss. 650, *per* Smith, J.

"When the words used are explicit, they are to govern, of course. If not, then recourse is had to the context, the occasion and necessity of the provision, the mischief felt, and the remedy in view." District Tp. v. Dubuque, 7 Iowa 252.

2. Implying Negative.—Cohens v. Virginia, 6 Wheat. (U. S.) 264.

If courts venture to substitute for the clear language of the instrument their own notions of what it should have been or was intended to be, there will be an end of written constitutions. Purdy v. People, 4 Hill (N. Y.) 384, *per* Paige, Senator; Greencastle Tp. v. Black, 5 Ind. 570.

3. Cooley's Const. Lim. (6th ed.), p. 87; Newell v. People, 7 N. Y. 101; State v. McClelland, 138 Ind. 395.

4. General Unexpressed Spirit No Guide—United States.—Forsythe v. Hammond, 68 Fed. Rep. 774.

Colorado.—People v. Rucker, 5 Colo. 455.

Florida.—Wooten v. State, 24 Fla. 335.

Indiana.—Praigg v. Western Paving, etc., Co., 143 Ind. 358; State v. Gerhardt, 145 Ind. 439.

Michigan.—Whallon v. Ingham, Circuit Judge, 51 Mich. 503.

Minnesota.—Lommen v. Minneapolis Gas-light Co., 65 Minn. 196.

New York.—Cochran v. Van Surlay, 20 Wend. (N. Y.) 381, 32 Am. Dec. 570; People v. Fisher, 24 Wend. (N. Y.) 220.

Ohio.—Walker v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; State v. Smith, 44 Ohio St. 348.

Oklahoma.—People's Bank v. Dalton, 2 Okla. 476.

Tennessee.—State v. Staten, 6 Coldw. (Tenn.) 233.

5. Statute Not Void Because Opposed to Latent Spirit of Constitution—United States.—Forsythe v. Hammond, 68 Fed. Rep. 777.

Colorado.—People v. Rucker, 5 Colo. 455.

Michigan.—Whallon v. Ingham, Circuit Judge, 51 Mich. 503.

New York.—People v. Fisher, 24 Wend. (N. Y.) 215.

Ohio.—Walker v. Cincinnati, 21 Ohio St. 43, 8 Am. Rep. 24; State v. Smith, 44 Ohio St. 348.

Tennessee.—State v. Staten, 6 Coldw. (Tenn.) 238.

6. Brien v. Williamson, 7 How. (Miss.) 17.

7. State v. Conlon, 65 Conn. 478, 48 Am. St. Rep. 227.

8. A written constitution must be interpreted rather with reference to its special and general intent and the ordinary and usual sense of the phraseology than to the literal and technical meaning of the words used. People v. Fancher, 50 N. Y. 288.

9. Courts Cannot Consider Argument from Inconvenience.—Chance v. Marion County, 64 Ill. 66.

"In construing the language of the Constitution, courts have nothing to do with the argument from inconvenience. Their sole duty is to declare *ita lex scripta est*: thus saith the constitution." Greencastle Tp. v. Black, 5 Ind. 571, *per* Stuart, J.; People v. Morrell, 21 Wend. (N. Y.) 584; Newell v. People, 7 N. Y. 109.

"When the terms of a written constitution are clear and unambiguous, and have a well-understood meaning and application, effect must be given to the intent of its framers as indicated by the language employed. The

Strained Construction Not Admitted to Avoid Inconvenience. — Nor are they justified in giving a strained construction or astute interpretation to a constitutional clause — such as will avoid the intent of the framers of the instrument — in order to relieve against any individual or local hardships.¹

Intention to Destroy Private Rights Not Presumed. — But an intention to take away or destroy individual rights is never presumed; and to give effect to a design so unjust and so unreasonable would require the support of the most direct and explicit affirmation declarative of such intent.²

Questions of Expediency May Determine Uncertainty. — So considerations of expediency may be of determining influence in case of doubt as to the real meaning of a constitutional provision arising from the uncertainty of the language used.³

c. THE LANGUAGE EMPLOYED — (1) *Literal Construction* — When Intent May Prevail over Literal Interpretation. — In case the real intention, as deduced from the instrument itself, is not indicated by the literal sense of the terms employed, the former must prevail over the latter.⁴ And where the literal interpretation involves any palpable absurdity, contradiction, or, as it has been held, any extreme hardship or great injustice, the courts have deviated a little from the literal meaning of the words, and interpreted the instrument according to the apparent intent of its authors.⁵

Statutes. — The same principle is applied in the construction of statutes.⁶

Caution. — But it should be employed with much caution.⁷

(2) *Natural and Ordinary Meaning Presumed* — (a) *General Rule* — *Natural Meaning of Words Presumed.* — It is a cardinal rule in the interpretation of constitutions that words are presumed to have been employed in their natural and ordinary meaning.⁸

operation and effect of the instrument will not be extended by construction beyond the fair scope of the terms employed, merely because the more restricted and literal interpretation might be inconvenient or impolitic, or because a case may be supposed to be to some extent within the reasons which led to the introduction of some particular provision, plain and precise in its terms." *Settle v. Van Evrea*, 49 N. Y. 280.

1. *Law v. People*, 87 Ill. 385.

2. "Such constructions should be given as will best protect private rights." *Thompson v. Grand Gulf R., etc., Co.*, 3 How. (Miss.) 247, 34 Am. Dec. 81.

3. *Baltimore v. State*, 15 Md. 376. Compare *Greencastle Tp. v. Black*, 5 Ind. 557.

4. *District Tp. v. Dubuque*, 7 Iowa 262.

5. ***Literal Interpretation Working Hardship Reluctantly Adopted.*** — "When a particular construction of an instrument leads to hardship, inconvenience, or absurdity, the respect due from courts to a co-ordinate branch of the government or to a constitutional convention will not permit them readily to presume that such construction was intended, and they will, under such circumstances, a little deviate from the received sense of the words, not because they have a right to disregard the will of the framers of the instrument, but for the purpose of truly arriving at and carrying out their will." *Wilson, C. J.*, in *Taylor v. Taylor*, 10 Minn. 107.

6. ***Statutes.*** — *Jackson v. Collins*, 3 Cow. (N. Y.) 89, *per* Savage, C. J.; *Donaldson v. Wood*, 22 Wend. (N. Y.) 396; *Watervliet Turnpike Co. v. McKean*, 6 Hill (N. Y.) 616; *Rex v. London*, 1 Show. 491; *Reed v. Davis*, 8 Pick. (Mass.) 516; *Gibson v. Jenney*, 15 Mass. 205.

7. *Taylor v. Taylor*, 10 Minn. 107, *per* Wilson, C. J.

8. ***Words Taken in Ordinary Sense* — *United States.*** — *Gibbons v. Ogden*, 9 Wheat. (U. S.) 188; *Story on the Const.*, § 451.

California. — *Miller v. Dunn*, 72 Cal. 462. 1 Am. St. Rep. 67; *Sprague v. Norway*, 31 Cal. 173; *Matter of Maguire*, 57 Cal. 605; *Weill v. Kenfield*, 54 Cal. 111; *Oakland Paving Co. v. Hilton*, 69 Cal. 493.

Colorado. — *Carpenter v. People*, 8 Colo. 116.

Illinois. — *Springfield v. Edwards*, 84 Ill. 643.

Indiana. — *Greencastle Tp. v. Black*, 5 Ind. 557.

Maryland. — *State v. Mace*, 5 Md. 348; *Manly v. State*, 7 Md. 135.

Mississippi. — *Green v. Weller*, 32 Miss. 650; *Brien v. Williamson*, 7 How. (Miss.) 20.

New Hampshire. — *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82.

New York. — *People v. New York Cent. R. Co.*, 24 N. Y. 486; *Settle v. Van Evrea*, 49 N. Y. 281.

Pennsylvania. — *Cronise v. Cronise*, 54 Pa. St. 255; *Page v. Allen*, 58 Pa. St. 338, 98 Am. Dec. 272.

"A constitution is an instrument of government, made and adopted by the people for practical purposes, connected with the common business and wants of human life. For this reason, pre-eminently, every word in it should be expounded in its plain, obvious and common sense." *Allen, J.*, in *People v. New York Cent. R. Co.*, 24 N. Y. 486; *Story on Const.*, § 451.

Words "must be taken in their ordinary and common acceptance, because they are presumed to have been so understood by the framers and by the people who adopted it.

Constitution Not Interpreted by Technical Rules Applicable to Private Writings. — A constitution is not to be interpreted as a private writing by rules of art which the law gives to ascertain its meaning, but is to be studied in the light of ordinary language, the circumstances attending its formation, and the construction placed upon it by the people whose bond it is.¹

(b) **Technical Terms — Ordinary Rather Than Technical Meaning.** — Even where a word having a technical as well as a popular meaning is used in the constitution, the courts will generally accord to it its popular signification unless the very nature of the subject indicates, or the text suggests, that it is used in its technical sense.²

Words Having Technical Sense in Legal and Constitutional History. — But where a word has acquired a fixed technical meaning in legal and constitutional history it will be presumed to have been employed in that sense in a written constitution.³

Common-law Meaning. — As a rule, words borrowed from the common law are to retain the meaning there given.⁴

Terms Having Settled Legislative or Judicial Construction. — So when the framers of the constitution employ terms which in legislative and judicial interpretation have received a definite meaning and application, which may be more restricted or general than when employed in other relations, it is a safe rule to give to them that signification sanctioned by legislative and judicial use.⁵

(3) **Meaning at Time of Adoption Accepted.** — Terms are to be construed according to their meaning at the time of adoption of the constitution rather than at any other date.⁶ And constitutional powers cannot be enlarged by giving to terms employed a meaning which they may have had long previously, but not when used by the framers of the instrument.⁷

d. INSTRUMENT MUST BE CONSTRUED AS A WHOLE — (1) *General Rule.* — A constitution is to be considered as a whole; the entire instrument is to be examined in arriving at the meaning of any part;⁸ and effect is to be

* * * They judged of it [the constitution] by the meaning apparent on its face, according to the general use of the words employed, where they do not appear to have been used in a legal or technical sense." *Manly v. State*, 7 Md. 135; *Miller v. Dunn*, 72 Cal. 465, 1 Am. St. Rep. 67; *State v. Mace*, 5 Md. 348.

"Every word employed in the constitution is to be expounded in its plain, obvious, and common-sense meaning, unless the context furnishes some ground to control, qualify, or enlarge it." *Story on Const.*, § 451.

Grammatical Construction. — "When language is used in the constitution capable of two interpretations, and there is nothing in the general context of the instrument to determine which interpretation best conforms to the intention of the convention, then resort must be had to a strict grammatical construction of the language to determine its effect." *Vesey v. Hermann*, 1 Nev. 36.

1. *Cronise v. Cronise*, 54 Pa. St. 255.

2. **Words Capable of Ordinary and Technical Meaning.** — *Weill v. Kenfield*, 54 Cal. 111; *Miller v. Dunn*, 72 Cal. 462, 1 Am. St. Rep. 67; *Sprague v. Norway*, 31 Cal. 173; *Matter of Maguire*, 57 Cal. 605.

"Words are generally to be understood in their usual and most known signification, unless they have acquired a technical meaning; and then it is the office of interpretation to determine, by reference to the context, the subject-matter, and the circumstances under which they are used, whether they are used in the ordinary or in a technical sense." *Allen*,

J., in *People v. New York Cent. R. Co.*, 24 N. Y. 488.

3. *Cooley's Const. Lim.* (6th ed.), 74; 1 *Story Const.*, § 453.

4. *Carpenter v. State*, 4 How. (Miss.) 166, 34 Am. Dec. 116; *McGinnis v. State*, 9 Humph. (Tenn.) 43, 49 Am. Dec. 697.

5. *Daily v. Swope*, 47 Miss. 383.

A word having a meaning established by judicial construction must be taken in that established sense. *Jenkins v. Ewin*, 8 Heisk. (Tenn.) 456.

6. **"Legislative Power"** — **Constitutional Meaning.** — *Leavenworth County v. Miller*, 7 Kan. 479, 12 Am. Rep. 425.

7. *Fontain v. Ravenel*, 17 How. (U. S.) 394, *per Taney, C. J.*

8. **Construed as a Whole.** — *Chance v. Marion County*, 64 Ill. 66; *Green v. Weller*, 32 Miss. 652; *Dyer v. Bayne*, 54 Md. 87. See *Broom's Maxims* 521; *Co. Litt.* 381a; *Stowel v. Zouch*, 1 Plowd. 365.

In construing any particular clause of the constitution the whole instrument should first be considered. *U. S. v. Morris*, 1 Curt. (U. S.) 50.

"A rule of construction peculiarly applicable to written constitutions is that one provision must be construed with reference to or in connection with the others, so that full, complete, and harmonious action may be given to all of them; and to do this, the language of any particular clause is not alone to be looked to, but the intention of the framers is to be deduced from the whole and every part taken

given, if possible, to each section, clause, and word.¹ No word is to be rejected or disregarded which may have a material bearing on the rights of the citizen.² Especially if the language of any part be doubtful, it must be interpreted by every fair intendment, to harmonize with the main purpose and not to defeat it.³

Statutes. — The same rule obtains in the construction of statutes.⁴

Plain Meaning of Words in Clause — Different Meaning Elsewhere. — But when the constitution speaks in plain language in reference to a particular matter, the courts have no right to place a different meaning on the words employed, because the literal interpretation may happen to be inconsistent with other parts of the instrument in relation to other subjects.⁵

(2) *Terms Must be Given Uniform Meaning.* — The presumption is that the same meaning attaches to a given word wherever it occurs in a constitution.⁶ The whole instrument should therefore be examined to ascertain the sense in which the words were used in a particular clause.⁷ This rule, however, is not of great importance, and is resorted to only when more satisfactory means of interpretation are lacking.⁸

(3) *All Portions Must be Harmonized if Possible.* — A construction which raises a conflict between parts of a constitution is not admissible, when by any reasonable construction they may be made to harmonize.⁹

together." *Green v. Weller*, 32 Miss. 650, *per* Smith, C. J.

Use of Word in Different Parts of Instrument Compared. — In addition to considering the independent, technical, and popular meanings of a word used in an act or constitution, we may look to other sections of the same instrument for the sense in which the word is used, as an aid to determine whether it has been used in its popular sense in the particular provision under consideration. *People v. Eddy*, 43 Cal., 331, 13 Am. Rep. 143; *Miller v. Dunn*, 72 Cal. 466, 1 Am. St. Rep. 67; *Green v. Weller*, 32 Miss. 652.

1. **Every Part to be Given Effect.** — *District Tp. v. Dubuque*, 7 Iowa 262; *Manly v. State*, 7 Md. 135.

"Statutes must be so interpreted as to give effect to every part thereof and leave each part some office to perform;" a construction is unauthorized which deprives any part of effect and meaning when it is susceptible of another interpretation. *People v. Angle*, 109 N. Y. 564.

It cannot be presumed that any clause in the constitution is without effect, and a construction which would lead to such a result is inadmissible, unless the language renders it imperative. *Marbury v. Madison*, 1 Cranch (U. S.) 174.

"By legal intendment each and every clause has been inserted for some purpose, and, when rightly understood, may have some practical result. There may in construction be transpositions of sections, paragraphs, and sentences, and words may be restricted or enlarged; but it is unauthorized to take a part of a paragraph or section and construe that without reference to another part of the same paragraph or section." *Tuttle v. National Bank of Republic*, 161 Ill. 501.

2. *Thompson v. Grand Gulf R., etc., Co.*, 3 How. (Miss.) 247, 34 Am. Dec. 81.

3. *Smith v. Thursby*, 28 Md. 269.

4. *United States*. — *Ogden v. Strong*, 2 Paine (U. S.) 584.

Alabama. — *Brooks v. Mobile School Com'rs*, 31 Ala. 227.

Illinois. — *Belleville, etc., R. Co. v. Gregory*, 15 Ill. 20, 58 Am. Dec. 589.

Indiana. — *Crawfordsville, etc., Turnpike Co. v. Fletcher*, 104 Ind. 97.

Maryland. — *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522.

Michigan. — *People v. Burns*, 5 Mich. 114; *Atty. Gen. v. Detroit, etc., Plank Road Co.*, 2 Mich. 138.

New Jersey. — *Den v. Dubois*, 16 N. J. L. 285; *Den v. Schenck*, 8 N. J. L. 29.

Vermont. — *Ryegate v. Wardsboro*, 30 Vt. 746.

West Virginia. — *Wheeling Gas Co. v. Wheeling*, 8 W. Va. 320.

Wisconsin. — *Bigelow v. West Wisconsin R. Co.*, 27 Wis. 478.

See also the title **STATUTES**.

5. *Cantwell v. Owens*, 14 Md. 215.

6. **Term Presumed to Have Uniform Meaning Throughout Instrument.** — *Brien v. Williamson*, 7 How. (Miss.) 14; *Rhodes v. Weldy*, 46 Ohio St. 234, 15 Am. St. Rep. 584.

"Where words or phrases are used in one part of a statute or written constitution in a plain and manifest sense, they are to receive the same interpretation when used in every other part, unless it manifestly appears from the context or otherwise that a different meaning was intended to be applied to them." *Green v. Weller*, 32 Miss. 650, *per* Smith, C. J. See also, as applied to statutes, *Pitte v. Shipley*, 46 Cal. 154; *Hoag v. Howard*, 55 Cal. 564.

7. *Manly v. State*, 7 Md. 135; *People v. Purdy*, 2 Hill (N. Y.) 36; *Greencastle Tp. v. Black*, 5 Ind. 570; *Wolcott v. Wigton*, 7 Ind. 44; *Green v. Weller*, 32 Miss. 650.

8. *Story on Const.*, § 454; *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1; *Ogden v. Saunders*, 12 Wheat. (U. S.) 290, *per* Johnson, J.

9. **Different Parts to be Harmonized.** — *People v. Wright*, 6 Colo. 92; *Parker v. Savage*, 6 Lea (Tenn.) 406; *Wolcott v. Wigton*, 7 Ind. 44.

When a constitutional provision will bear two constructions, one of which is consistent with and the other inconsistent with an intention expressed clearly in a previous section,

(4) *Construction Where Provisions Conflict.* — In case of an irreconcilable conflict between the provisions of a constitution, that which is more specific in subject-matter will usually prevail as against a more general one.¹

General and Special Provision as to Amendment. — But where a constitution contains a general provision for its amendment, and also provides that a particular provision of the constitution may be changed only by a different and more stringent method therein indicated, the latter restriction has nevertheless been regarded as itself the subject of amendment under the general provision.²

Later Provisions Prevail. — It has been held that where such a conflict exists preference is to be given to the provision last made in order of time and local position.³

Amendments Prevail Over Original. — Accordingly, a clause in a constitutional amendment will prevail over a provision of the original instrument inconsistent with the former.⁴ For an amendment to the constitution becomes a part of the fundamental law, and its operation and effect cannot be limited or controlled by previous constitutions or laws that may be in conflict with it.⁵

Conflict Between Bill of Rights and Other Provisions. — When the bill of rights and the remainder of the constitution differ, the terms of the latter are binding limitations upon the general declaration of principles contained in the former.⁶

the former must be adopted, that both provisions may stand and have effect. *Chance v. Marion County*, 64 Ill. 66.

1. Conflicting Provisions—More Specific Prevails. — *Warren v. Shuman*, 5 Tex. 441; *Gulf, etc., R. Co. v. Rambolt*, 67 Tex. 654.

2. General and Special Provisions as to Amendment. — The Constitution of *California* provided for its own modification through the adoption by the people of specific amendments previously submitted to it by two thirds of the members of each branch of the legislature. The provision whereby the seat of government was located at Sacramento stipulated that "no law changing the seat of government shall be valid or binding unless the same be approved and ratified by a majority of the qualified electors of the state, voting therefor at a general state election, under such regulations and provisions as the legislature, by a two-thirds vote of each house, may provide, submitting the question of change to the people." In *Livermore v. Waite*, 102 Cal. 113, the court, *per* Harrison, J., said: "By this section the Constitution provides that the seat of government may be changed in the manner therein prescribed, but the mode of effecting such change is not limited to the one thus provided. The legislature might have provided for changing the seat of government to San Jose by passing a law under the provisions of this section, but instead of attempting this course it has seen fit to seek to accomplish the same result through an amendment to the Constitution. Either of these courses was open to its choice." But see dissenting opinion by Patterson J. (p. 124). The proposed amendment was held invalid on other grounds.

Compare *Eason v. State*, 11 Ark. 481, which turned on the construction to be given the provision of the Arkansas Constitution of 1836 that "everything in this article [art. 2, comprising the bill of rights] is excepted out of the general powers of government, and shall forever remain inviolate." A section of the bill of rights provided that "no man shall be put to answer any criminal charge but by pre-

sentment, indictment, or impeachment," to which an amendment was proposed and adopted by the people conferring on justices of the peace authority to try in a summary manner and without indictment one charged with the offense of assault and battery or affray. The court held that the provision above quoted, excepting the provisions of the bill of rights "out of the general powers of government," was a limitation on the power of the legislature to propose amendments, and that the amendment above set forth was consequently void. In the earlier case of *State v. Cox*, 8 Ark. 436, the amendment in question was upheld on the theory that the constitutional restrictions above quoted applied only to the ordinary exercise of the law-making power and not to the legislative submission of amendments.

3. Conflict Between Later and Earlier Provisions. — *Quick v. White-Water Tp.*, 7 Ind. 570.

The same rule is stated in *Gulf, etc., R. Co. v. Rambolt*, 67 Tex. 654. But it is there held that application of this principle should be made only as a last resort, and it is regarded as subservient to the rule that the more specific provisions control the more general.

4. "When there is a repugnancy between a constitutional amendment and some provision in the original which cannot be so construed as to have them both stand and leave to each a legitimate office to perform, the original must be deemed to have been repealed by the amendment." *People v. Angle*, 109 N. Y. 564.

5. *Buckner v. Street*, 1 Dill. (U. S.) 257; *Territory v. Reyburn*, McCahon (Kan.) 141; *In Matter of Executive Communication*, 15 Fla. 730.

6. Bill of Rights and Other Provisions Conflicting. — *Baltimore v. State*, 15 Md. 376; *Matter of Dorsey*, 7 Port. (Ala.) 293. The bills of rights in the American constitutions have not been adopted for the introduction of new law, but to secure old principles against abrogation or violation; they are conservative instruments rather than reformatory. *Weimer v. Bunbury*, 30 Mich. 201.

e. PROVISIONS PRESUMPTIVELY MANDATORY. — Constitutional provisions are understood to be mandatory, unless by express provision or by necessary implication a different intention is manifest.¹ So a statute passed in obedience to a constitutional requirement is mandatory.²

Provisions Regulating Structure and Passage of Bills. — Provisions relating to the structure of a bill, or the forms to be observed in the passage of a bill, are as a general rule merely directory, while provisions relating to the number of members required to pass a bill, or the effect and operation of a bill when passed, are usually regarded as mandatory.³

f. IMPLIED CONSTITUTIONAL POWERS — Necessary Incidental Powers. — It is a general rule that when a constitution confers a power, or enjoins a duty, it also confers by implication any incidental power necessary for the exercise of the one or the performance of the other.⁴ In a clause of a constitution granting powers, the word "necessary" does not always mean "indispensable," but may often be construed to signify a grant of discretion.⁵

Specific Method of Exercising Power Designated — No Other Implied. — The general rule stated above is modified by another — that where the means for the exercise of a granted power are also given, no other or different means or powers can be implied, either on account of convenience or of being more effectual.⁶ And where the manner of exercising a given power is prescribed, the method thus designated is exclusive.⁷

Qualifications for Exercise of Rights. — A constitutional designation of the qualifications for the exercise of specific rights is not subject to legislative modifications. Thus it is not competent for the legislature to add to the constitutional qualifications of voters,⁸ nor change the qualifications of public

1. Provisions Usually Mandatory. — *Varney v. Justice*, 86 Ky. 596; *Cooley's Const. Lim.* (6th ed.) 88-98.

"It will be found upon full consideration to be difficult to treat any constitutional provision as merely directory and not imperative." *People v. Lawrence*, 36 Barb. (N. Y.) 186.

2. *State v. Pierce*, 35 Wis. 99.

3. *Ex p. Falk*, 42 Ohio St. 640.

4. Incidental and Implied Powers. — *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316; *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 738; *Legal Tender Cases*, 12 Wall. (U. S.) 539; *Martin v. Hunter*, 1 Wheat. (U. S.) 304; *U. S. v. Bevans*, 3 Wheat. (U. S.) 336; *U. S. v. Fisher*, 2 Cranch (U. S.) 358; *Story on Const.*, § 430; *Cooley's Const. Lim.* (6th ed.) 98; *Hare's Am. Const. Law*, c. 7. See also *Northwestern Fertilizing Co. v. Hyde Park*, 70 Ill. 634; *Field v. People*, 3 Ill. 79.

"Where the power is granted in general terms, the power is to be construed as coextensive with the terms unless some clear restriction upon it is deducible from the context." *Story on Const.*, § 424; *Cooley's Const. Lim.* (6th ed.) 78. See *DuPage County v. Jenks*, 65 Ill. 275.

"A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code and would scarcely be embraced by the human mind. * * * Its nature therefore requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." *Marshall, C. J.*, in *M'Culloch*

v. Maryland, 4 Wheat. (U. S.) 407. See also *Martin v. Hunter*, 1 Wheat. (U. S.) 326; *Legal Tender Cases*, 12 Wall. (U. S.) 531; *Pollock v. Farmers' L. & T. Co.*, 158 U. S. 617.

"It is not indispensable to the existence of any power claimed for the federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred." *Legal Tender Cases*, 12 Wall. (U. S.) 534, *per Strong, J.*

The Federal Constitution deals in generalities and not in details; its framers could not foresee the distinctions which might arise in the course of national existence, and the provisions of the instrument are confined to broad and general principles. *U. S. Bank v. Deveaux*, 5 Cranch (U. S.) 87.

5. *Cotten v. Leon County*, 6 Fla. 610.

6. *Field v. People*, 3 Ill. 79.

7. *Expressio Unius Est Exclusio Alterius*. — *State v. Barnes*, 24 Fla. 29; *Holland v. State*, 15 Fla. 553; *Field v. People*, 3 Ill. 79; *Opinion of Justices*, 18 Me. 458; *Fletcher v. Oliver*, 25 Ark. 289. "The expression of one thing in the constitution is the exclusion of things not expressed." *Page v. Allen*, 58 Pa. St. 338, 98 Am. Dec. 272.

8. Qualifications of Voters — *Arkansas*. — *Rison v. Farr*, 24 Ark. 161, 87 Am. Dec. 52.

Indiana. — *Quinn v. State*, 35 Ind. 485, 9 Am. Rep. 754.

Maine. — *State v. Symonds*, 57 Me. 148.

officers as prescribed by the constitution.¹

Offices and Terms of Office Created by Constitution. — The legislature cannot shorten the constitutional terms of public office,² nor extend the same.³ Neither can the legislature remove an officer during a term fixed by the constitution, either directly or indirectly, by abolishing the office,⁴ nor practically abolish the office by taking away the salary.⁵

Elective Offices — Postponing Elections. — The legislature cannot fill an elective constitutional office, either directly or by extending the term of the incumbent.⁶ But a legislative act postponing the date of election and providing that the incumbent shall hold during the interim has been held valid so long as the postponement is not so great as to raise the presumption of a design substantially to deprive the office of its elective character.⁷

Qualifications for Office — Act Excluding Duellists. — And a constitution wherein only certain designated classes of persons are precluded from holding offices of public trust is not infringed by a legislative act which renders every person convicted of challenging another to fight a duel ineligible to public office.⁸

4. Extrinsic Aid in the Construction of Constitutions. — Extrinsic aid in the construction of constitutions may be resorted to only where doubts exist which it is impossible to solve from an inspection of the instrument itself.⁹

Where, However, the Text Is Obscure or Ambiguous, the courts, in endeavoring to arrive at the intention of the people thus imperfectly expressed, will consider the object sought to be accomplished or the mischief designed to be remedied by the provision in question.¹⁰

Missouri. — *St. Joseph, etc., R. Co. v. Buchanan County Ct.*, 39 Mo. 485.

Nevada. — *Davies v. McKeeby*, 5 Nev. 369; *Clayton v. Harris*, 7 Nev. 64.

Ohio. — *Monroe v. Collins*, 17 Ohio St. 665.

Pennsylvania. — *McCafferty v. Guyer*, 59 Pa. St. 109.

Tennessee. — *State v. Staten*, 6 Coldw. (Tenn.) 233.

West Virginia. — *Randolph v. Good*, 3 W. Va. 551.

Wisconsin. — *State v. Williams*, 5 Wis. 308; *State v. Baker*, 38 Wis. 71.

1. Qualifications of Voters. — *Feibleman v. State*, 98 Ind. 516, *per* Sanford, C. J.; *Thomas v. Owens*, 4 Md. 189; *Barker v. People*, 3 Cow. (N. Y.) 703, 15 Am. Dec. 322.

2. Shortening Constitutional Term of Office. — *Smith v. Askew*, 48 Ark. 82; *Howard v. State*, 10 Ind. 99; *Cotten v. Ellis*, 7 Jones L. (N. Car.) 545; *Brewer v. Davis*, 9 Humph. (Tenn.) 208, 49 Am. Dec. 706. *Compare* *Christy v. Sacramento County*, 39 Cal. 3.

3. Extending Term. — *State v. Thoman*, 10 Kan. 191; *People v. Bull*, 46 N. Y. 57, 7 Am. Rep. 302; *State v. Brewster*, 44 Ohio St. 589.

4. Removing Officer During Term. — *People v. Dubois*, 23 Ill. 547; *State v. Thoman*, 10 Kan. 191; *Lowe v. Com.*, 3 Metc. (Ky.) 237; *State v. Wiltz*, 11 La. Ann. 439; *State v. Draper*, 50 Mo. 353; *Com. v. Gamble*, 62 Pa. St. 343, 1 Am. Rep. 422; *State v. Messmore*, 14 Wis. 163.

5. Reid v. Smoulter, 128 Pa. St. 324.

6. People v. Bull, 46 N. Y. 57, 7 Am. Rep. 302; *People v. McKinney*, 52 N. Y. 374.

7. Jordan v. Bailey, 37 Minn. 174; *State v. Benedict*, 15 Minn. 198.

8. Barker v. People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322. And see *Matter of Dorsey*, 7 Port. (Ala.) 293.

9. Extrinsic Aids in Construction. — *People v. Potter*, 47 N. Y. 375; *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 657; *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 203; *Smith Statutory and Constitutional Construction* 634.

For the application of the same principle to statutory construction, see *Alexander v. Worthington*, 5 Md. 471; *Ball v. Chadwick*, 46 Ill. 28; *Smith v. People*, 47 N. Y. 330; *Sawyer v. North American L. Ins. Co.*, 46 Vt. 697.

10. When Meaning Ambiguous — Extrinsic Aids Admissible. — When the words used are explicit, they are to govern, of course, but if not, then recourse is had to the context, the occasion and necessity of the provision, the mischief felt, and the remedy in view. *District Tp. v. Dubuque*, 7 Iowa 262.

"It will probably be found, when we look to the character of the Constitution [of the United States], the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as to the known historical fact that many of its provisions were matters of compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied to it which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses. Perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed." *Story, J., in Prigg v. Pennsylvania*, 16 Pet. (U. S.) 610. The last sentence is quoted with approval in *State v. Glenn*, 18 Nev. 43, and in 1 *Story Const.*, § 405a.

α. CIRCUMSTANCES ATTENDING THE FORMATION OF CONSTITUTIONS. — To this end a doubtful provision will be examined in the light of prior¹ and contemporaneous history,² and of the conditions and circumstances under which the constitution was framed.³ The court should look to the history of the times, and examine the state of things existing when the constitution was framed and adopted, to ascertain the old law, the mischief, and the remedy.⁴

Existing Laws. — A constitution is to be treated as prepared and adopted in reference to existing statutory laws, upon the provisions of which, in detail, it must depend, in order to be set in practical operation.⁵

Convention Debates. — The proceedings⁶ and debates⁷ of the constitutional convention, while powerless to vary the terms of the constitution,⁸ are never-

1. Prior History Resorted To. — *Higgins v. Prater*, 91 Ky. 6; *People v. Harding*, 53 Mich. 485, 51 Am. Rep. 95; *Bay City v. State Treasurer*, 23 Mich. 499; *Kennedy v. Gies*, 25 Mich. 83; *Sweet v. Syracuse*, 129 N. Y. 316; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 59, per Cassoday, J.

Constitutions are to be considered in the light of previous history and surrounding circumstances; and their language is not to be measured by mathematical rules merely, but is subject in the nature of things to numerous implied exceptions or qualifications. *Kennedy v. Gies*, 25 Mich. 83; *Bay City v. State Treasurer*, 23 Mich. 499.

2. Contemporaneous History. — The court should look to the nature and objects of the particular powers, duties, and rights in question, with all the lights and aids of contemporary history, and give to the words of each provision just such operation and force, consistent with their legitimate meaning, as will fairly secure and attain the ends proposed. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Prigg v. Pennsylvania*, 16 Pet. (U. S.) 539; *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 202.

In construing any article of doubtful import in the constitution reference will be had to the situation and history of the country at the time, to its contemporaneous exposition, if it has received any, and to the general understanding of the community, if such understanding has been long acquiesced in by all the states and all of the courts of the Union. *Adams v. Storey*, 1 Paine (U. S.) 90.

3. Circumstances under Which Framed. — *Daily v. Swope*, 47 Miss. 380; *Clark v. People*, 26 Wend. (N. Y.) 602, per Walworth, C.; *People v. New York Cent. R. Co.*, 24 N. Y. 485; *Farmers', etc., Bank v. Smith*, 3 S. & R. (Pa.) 63. And see authorities cited in note 1 *supra*, this page.

Constitutional provisions must be interpreted with reference to "the times and circumstances under which the constitution was formed; the general spirit of the times and the prevailing sentiments among the people. Every constitution has a history of its own which is likely to be more or less peculiar; and, unless interpreted in the light of this history, is liable to be made to express purposes which were never within the minds of the people in agreeing to it." *Cooley, C. J.*, in *People v. Harding*, 53 Mich. 485, 51 Am. Rep. 95.

Constitutions are to be construed as the people construed them in their adoption, if possible. *Bay City v. State Treasurer*, 23 Mich. 499.

Qualification. — But it is also said that "a grant of power in the constitution is to be construed according to the fair and reasonable import of its terms, and its construction is not necessarily to be controlled by a reference to what existed when the constitution was adopted." *Per Blatchford, J.*, *Matter of Jackson*, 14 Blatchf. (U. S.) 245.

4. Thus the language used in the Federal Constitution as to the power of pardoning must be construed by the exercise of that power in England prior to the adoption of the Constitution. *Ex p. Wells*, 18 How. (U. S.) 307; *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 657; *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 203.

5. *People v. Potter*, 47 N. Y. 375; *Cass v. Dillon*, 2 Ohio St. 607. And see *People v. Draper*, 15 N. Y. 532.

6. Convention Proceedings Considered. — *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 420; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37; *Clark v. People*, 26 Wend. (N. Y.) 599; *People v. Purdy*, 2 Hill (N. Y.) 31; *People v. New York Cent. R. Co.*, 24 N. Y. 485. See also *State v. Barnes*, 24 Fla. 153.

The history of the calling of the convention, the causes which led to it, and the discussions and issues before the people at the time of the election of delegates, may sometimes be consulted with profit. *People v. Harding*, 53 Mich. 481, 51 Am. Rep. 95, per Cooley, C. J.

7. Debates in Convention — *California*. — *People v. Coleman*, 4 Cal. 54, 60 Am. Dec. 581.

Illinois. — *Springfield v. Edwards*, 84 Ill. 643.

Kentucky. — *Higgins v. Prater*, 91 Ky. 6, per Holt, C. J.

Nebraska. — See remarks of Maxwell, J., in *State v. VanDuyn*, 24 Neb. 586.

Nevada. — *State v. Doron*, 5 Nev. 399.

New York. — *Coutant v. People*, 11 Wend. (N. Y.) 518, per Walworth, C.; *Matter of Lee's Bank*, 21 N. Y. 13.

8. Qualification. — *Higgins v. Prater*, 91 Ky. 6; *State v. Doron*, 5 Nev. 399.

"It seems of doubtful propriety to consult the contemporaneous debates and proceedings of the convention from which the proposed constitution issued, since the inquiry is not with regard to the intention of its framers, but with the people who adopt it. * * * In considering a constitutional provision, the relevancy of the debates and proceedings of those who framed it, to the intention of those who adopted it, is certainly not apparent. However, in consulting the debates and proceedings we but follow precedent." *Per Bis-*

theless valuable aids in determining the purpose and consequent meaning of a doubtful provision.

b. COMMON-LAW PRINCIPLES. — A constitutional provision is to be construed with reference to the principles of the common law.¹ The framers of the instrument are presumed to have intended no change or innovation upon the common law further than is expressly declared.²

General Provision Adopting Common Law. — But a constitutional provision declaring in general terms the adoption of the English common law should be deemed to adopt it only so far as it is in harmony with existing institutions, and as its principles are applicable to the state of the country and the conditions of society.³ Such provision, *e. g.*, does not oblige the courts to follow the English doctrine of ancient lights.⁴

Terms Whose Signification Differs in English and American Law. — And where, in the constitution, technical terms of law or jurisprudence are used which are common to our law and that of England, if there is a difference of signification in the two countries, the meaning which they have in ours is to be preferred.⁵

c. CONTEMPORANEOUS CONSTRUCTION. — Contemporaneous construction of an ambiguous provision of a constitution is always important, and is frequently of controlling influence in determining its meaning.⁶

(1) *Legislative.* — Thus a contemporaneous legislative exposition of a constitutional provision is entitled to great deference, as it may well be supposed to result from the same views of policy and modes of reasoning which prevailed among the framers of the instrument expounded.⁷

choff, J., in *Isola v. Weber*, 13 Misc. Rep. (N. Y. C. Pl.) 100.

In *Taylor v. Taylor*, 10 Minn. 107, Wilson, C. J., expresses the view that the debates of a constitutional convention should influence a court but slightly if at all in expounding a constitution.

1. *Construed with Reference to Common Law.* — *Cooley's Const. Lim.* (6th ed.), p. 75; *State v. Noble*, 118 Ind. 366.

The common law will be upheld in the absence of an apparent contrary intention. *McGinnis v. State*, 9 Humph. (Tenn.) 43, 49 Am. Dec. 697; *Brown v. Fifield*, 4 Mich. 322; *State v. Lash*, 16 N. J. L. 380, 32 Am. Dec. 397; *Cadwallader v. Harris*, 76 Ill. 370; *Moyer v. Pennsylvania Slate Co.*, 71 Pa. St. 293.

The rule that a statute in contravention of the common law must be strictly construed, and cannot be extended by implication, has been held to apply also to a constitutional provision of similar character. *Brown v. Fifield*, 4 Mich. 322. But this seems doubtful. *Cooley's Const. Lim.* (6th ed.), p. 75.

2. *McGinnis v. State*, 9 Humph. (Tenn.) 43, 49 Am. Dec. 697.

3. See generally the title COMMON LAW, *ante*, p. 268.

4. *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629. See *Day v. State*, 7 Gill (Md.) 321.

5. *The Huntress, Davies* (U. S.) 82.

6. *General Rule as to Contemporaneous Construction.* — *Martin v. Hunter*, 1 Wheat. (U. S.) 351; *U. S. Bank v. Halstead*, 10 Wheat. (U. S.) 63; *Cohens v. Virginia*, 6 Wheat. (U. S.) 418; *Stuart v. Laird*, 1 Cranch (U. S.) 308; *People v. Wright*, 6 Colo. 92; *Morgan v. Dudley*, 18 B. Mon. (Ky.) 694, 68 Am. Dec. 735; *Harrison v. State*, 22 Md. 468, 85 Am. Dec. 658; *State v. Mayhew*, 2 Gill (Md.) 487; *Chrisman v. Brookhaven*, 70 Miss. 477; *Story on Const.*, §§ 405-408.

"Great weight has always been attached, and very rightly attached, to contemporaneous exposition." *Marshall, C. J.*, in *Cohens v. Virginia*, 6 Wheat. (U. S.) 418.

A contemporaneous construction of the constitution, of long duration, continually practiced under, and through which many rights have been acquired, ought not to be shaken but upon grounds of manifest error and cogent necessity. *Harrison v. State*, 22 Md. 468, 85 Am. Dec. 658; *State v. Mayhew*, 2 Gill (Md.) 487.

A uniform course of action involving the right of exercise of an important power by the state government, for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightfully exercised. *Briscoe v. Kentucky Bank*, 11 Pet. (U. S.) 257.

In *Stuart v. Laird*, 1 Cranch (U. S.) 308, *Patterson, J.*, in disposing of the contention that the judges of the Supreme Court had no right to sit as circuit judges, not being appointed as such, said: "To this objection, which is of recent date, it is sufficient to observe, that practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."

7. *Contemporaneous Legislation Exposition.* — *People v. Wright*, 6 Colo. 97; *State v. Glenn*, 18 Nev. 44; *People v. Green*, 2 Wend. (N. Y.) 266; *Sedgwick Stat. & Const. Law* 412.

The early and long-continued construction by both national and state legislatures, is entitled to the gravest consideration in determining whether the Federal Constitution has

Contemporaneous General Revision of Statutes. — Thus when a compilation of statutes was prepared and adopted soon after the taking effect of a new state constitution, it constitutes a contemporaneous construction of the constitution in so far as it furnishes any evidence as to how the constitution was then understood.¹

(2) *Judicial.* — For the same reason a judicial interpretation is given exceptional consideration if made near the time of the adoption of the constitution,² and such construction, when given, should be thereafter adhered to.³

d. SUBSEQUENT NONJUDICIAL INTERPRETATION — (1) *Generally.* — The deference due from one department of the government to another would of itself require the judiciary to accord some weight to the practical construction placed upon a doubtful constitutional clause by either the legislative or executive department, and where such exposition has been uniform, of long standing, and acquiesced in by the people, it may determine a question.

Political Questions. — Particularly in determining political questions the courts will frequently follow implicitly a construction placed upon the constitution by the other departments of the government.⁴

Should Be Resorted to Only Where Ambiguity Exists. — But in conformity with the principle that extrinsic aid to interpretation should only be resorted to in case of intrinsic ambiguity, it would seem that contemporaneous and practical construction should never be allowed to vary the meaning of a provision that is in itself free from doubt.⁵

Practical Construction Opposed to Clear Meaning. — Thus where it clearly appears from the unambiguous language of constitutional provisions that members of the general assembly are to be elected by the votes of an entire county, a long-established practice of electing from different sections of a county will not affect the construction of the provisions in question.⁶ There are, however, decisions of eminent courts which go to the extent of disregarding the plain import of the instrument, to avoid the injurious consequences of overturning established, though erroneous, practical construction.⁷

Technical Objection as Against Settled Practice. — And long acquiescence in a law the alleged constitutionality of which is based upon a purely technical objection is entitled to much greater consideration than where the objection goes to the substance of legislation.⁸

(2) *Legislative.* — Legislative construction is under certain circumstances, therefore, of no little importance in constitutional exegesis.⁹

been infringed by a state statute. *Ex p. McNiel*, 13 Wall. (U. S.) 236.

1. *Collins v. Henderson*, 11 Bush (Ky.) 74.

2. *Knowles v. Yates*, 31 Cal. 83; *Hughes v. Hughes*, 4 T. B. Mon. (Ky.) 42.

3. **Judicial Construction** — **Stare Decisis.** — Where the meaning of the constitution on a doubtful question has been once carefully considered and judicially decided, the instrument is to be received in that sense, and every reason is in favor of a steady adherence to the authoritative interpretation. *Maddox v. Graham*, 2 Metc. (Ky.) 85; *Com. v. Allegheny County*, 32 Pa. St. 233.

4. *People v. La Salle County*, 100 Ill. 495.

5. **Practical Construction Not Considered Where Meaning Clear.** — Story on Const., § 407; *Cooley's Const. Lim.* (6th ed.), p. 84. And see *Union Pac. R. Case*, 10 Ct. of Cl. 548, 91 U. S. 72; *Hahn's Case*, 14 Ct. of Cl. 305; *Swift, etc., Co.'s Case*, 14 Ct. of Cl. 481; *Sadler v. Langham*, 34 Ala. 311; *Brown v. State*, 5 Colo. 496; *Greencastle Tp. v. Black*, 5 Ind. 565; *Barnes v. First Parish*, 6 Mass. 401; *Oakley v. Aspinwall*, 3 N. Y. 568; *People v. Allen*, 42 N. Y. 378; *Evans v. Myers*, 25 Pa. St. 114; *Encking v. Simmons*, 28 Wis. 272.

In considering the constitutionality of the legislative appointment of certain state officers, the Supreme Court of Indiana, *per Elliott*, C. J., says: "We are far from asserting that the plain provisions of the constitution may be broken down or overleaped by practical exposition, but what we do assert is, that where there are provisions not entirely clear and free from doubt, practical exposition is of controlling force." *Hovey v. State*, 119 Ind. 386. See also *Biggs v. McBride*, 17 Oregon 640.

6. *State v. Wrightson*, 56 N. J. L. 126.

7. *Stuart v. Laird*, 1 Cranch (U. S.) 299; *Johnson v. Joliet, etc.*, R. Co., 23 Ill. 202; *State v. Mayhew*, 2 Gill (Md.) 487; *Rogers v. Goodwin*, 2 Mass. 475; *Bingham v. Miller*, 17 Ohio 446, 49 Am. Dec. 471. See *Fall v. Hazelrigg*, 45 Ind. 576, 15 Am. Rep. 278; *Essex Co. v. Pacific Mills*, 14 Allen (Mass.) 389; *Scanlan v. Childs*, 33 Wis. 663.

8. *Continental Imp. Co. v. Phelps*, 47 Mich. 299.

9. **Importance of Legislative Construction** — *United States.* — *West River Bridge Co. v. Dix*, 6 How. (U. S.) 507; *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316; *Briscoe v. Kentucky Bank*, 11 Pet. (U. S.) 257; *Cooley v. Board of War-*

Illustrations. — The passage of an act by the first state legislature is a contemporary interpretation of a constitutional clause *in pari materia* of much weight.¹ And the long-continued and unquestioned exercise of a given power by the legislature is a weighty consideration in favor of the constitutionality of such exercise of authority.²

Statutes. — The same principles apply to the legislative interpretation of a statute.³

(3) *Executive.* — Executive interpretation is also followed.⁴ The judiciary often yields to the executive construction of a statute.⁵ The executive interpretation of treaties is entitled to a similar respect.⁶

Practice as to Veto Power. — And questions of the right to exercise the veto power after the adjournment of the legislature have been determined by following executive precedent.⁷

e. RELATIVE CONSTITUTIONAL CONSTRUCTION — (1) *Federal and State Constitutions Compared* — (a) **The Federal Constitution.** — In construing respective provisions of the federal and of the state constitutions it should be borne in mind that the former constitutes a grant of enumerated powers, while the latter is a restriction on general legislative authority.⁸

Strict Construction. — The exercise of any power under the former must be authorized either expressly or by clear implication.⁹

Grant to United States or Restriction on States with Specific Exception. — But in the Federal Constitution as to the grants of power to the United States, and the restrictions upon the states, an exception of any particular case is held to presuppose that those not excepted are embraced within the grant of prohibition. Where no exception is made in terms, none will be made by mere implication or construction.¹⁰

dens, 12 How. (U. S.) 299; *The Propeller Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 457. *California.* — *Washington v. Page*, 4 Cal. 388.

Illinois. — *Bunn v. People*, 45 Ill. 397. *Indiana.* — *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 203.

Maryland. — *Burgess v. Pue*, 2 Gill (Md.) 11; *Bradford v. Jones*, 1 Md. 369; *Baltimore v. State*, 15 Md. 458.

Michigan. — *Bay City v. State Treasurer*, 23 Mich. 499.

Minnesota. — *State v. Benedict*, 15 Minn. 203; *Faribault v. Misener*, 20 Minn. 396.

Nebraska. — *Jackson v. Washington County*, 34 Neb. 680.

Nevada. — *State v. Parkinson*, 5 Nev. 15. *New York.* — *Coutant v. People*, 11 Wend. (N. Y.) 511.

North Carolina. — *Hedgecock v. Davis*, 64 N. Car. 650.

Pennsylvania. — *Moers v. Reading*, 21 Pa. St. 183; *Farmers', etc., Bank v. Smith*, 3 S. & R. (Pa.) 63.

Texas. — *Chambers v. Fisk*, 22 Tex. 504. 1. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *People v. Wright*, 6 Colo. 92.

2. *State v. Mayhew*, 2 Gill (Md.) 487; *Burgess v. Pue*, 2 Gill (Md.) 11.

3. See the title **STATUTES**.

4. *State v. Glenn*, 18 Nev. 34.

5. *Edwards v. Darby*, 12 Wheat. (U. S.) 210; *Surgett v. Lapice*, 8 How. (U. S.) 48; *Bissell v. Penrose*, 8 How. (U. S.) 317; *Union Ins. Co. v. Hoge*, 21 How. (U. S.) 35; *U. S. v. Gilmore*, 8 Wall. (U. S.) 330; *U. S. v. Moore*, 95 U. S. 760.

6. *Castro v. DeUriarte*, 16 Fed. Rep. 93.

7. **Time of Exercise of Veto Power.** — *Solomon v. Cartersville*, 41 Ga. 161, where the court says: "If this was an original question independent of any construction heretofore given by the executive department of the state government to this clause of the constitution, we should be inclined to hold that the governor could not approve and sign any bill after the adjournment of the general assembly; but on looking into the past history of our legislation we find that it has been the practice for many years for the governor to take five days after the adjournment of the general assembly for the revision of bills passed by that body; which usage and practice of the executive department of the state government should not now, in our judgment, be disturbed or set aside."

8. *Ex p. Mabry*, 5 Tex. App. 93; *Ponder v. Graham*, 4 Fla. 23; *Page v. Allen*, 58 Pa. St. 345, 98 Am. Dec. 272.

9. **Federal Constitution Construed Strictly.** — *Marshall, C. J.*, in *Gibbons v. Ogden*, 9 Wheat. (U. S.) 187; *Calder v. Bull*, 3 Dall. (U. S.) 386; *Briscoe v. Kentucky Bank*, 11 Pet. (U. S.) 257; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *U. S. v. Cruikshank*, 92 U. S. 550, *per* Waite, C. J.; *U. S. v. Harris*, 106 U. S. 629; *U. S. v. Cisna*, 1 McLean (U. S.) 257; *Padelford v. Savannah*, 14 Ga. 438; *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185; *Beauchamp v. State*, 6 Blackf. (Ind.) 299; *McComas v. Krug*, 81 Ind. 327, 42 Am. Rep. 135; *Weister v. Hade*, 52 Pa. St. 474; *Sporrer v. Eifler*, 1 Heisk. (Tenn.) 633.

10. *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 657; *Cohens v. Virginia*, 6 Wheat. (U. S.) 378; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 206; *Brown v. Maryland*, 12 Wheat. (U. S.) 438.

Existence of Power — Limitation of Power. — When the existence of a power is in question, the presumption is in favor of the states; when the question is whether the power is limited or absolute, the presumption is in favor of the general government.¹

Provision of State Constitution Approved by Congress Before Admission of State. — Whenever a power is denied by the constitution to both the Congress and the states, a provision in the state constitution in violation of the prohibition, though dictated or approved by Congress prior to its admission, would be null and void.²

(b) **State Constitutions — Legislative Powers Not Prohibited May Be Exercised.** — Under most state constitutions the exercise of all of the usually recognized powers of legislation is valid unless actually prohibited or expressly excepted.³

Exceptions Strictly Construed. — And the exception must be construed strictly as against those who stand upon it, and liberally in favor of the government.⁴

When a State Legislature Is Authorized by the Constitution to Establish Offices the failure to expressly authorize the prescribing of qualifications therefor does not impliedly preclude the exercise of that power.⁵

Inhibitions May Be Implied. — Inhibitions of the state constitution against legislative exercise of power are equally effective and not less to be regarded when they arise by implication.⁶

Constitution a Limitation of Legislative, a Grant to Executive, Department. — The state constitution is a limitation on the powers of the legislative department of the government; but it is to be regarded as a grant of powers to the other departments. Neither the executive nor the judiciary, therefore, can exercise any authority or power except such as is clearly granted by the constitution.⁷

Exceptions. — The *Nebraska*⁸ and *North Carolina*⁹ constitutions provide that

Treaties. — The same principle is applied in the construction of treaties. *Society, etc., v. New Haven*, 8 Wheat. (U. S.) 464.

1. *Pomeroy's Am. Const. Law*, vol. 1, p. 96.

2. *Shorter v. Cobb*, 39 Ga. 302. See also *Marsh v. Burroughs*, 1 Woods (U. S.) 472.

3. **State Legislation Valid Unless Prohibited.** — Federal legislation is void unless permitted by the constitution; state legislation is valid unless prohibited by the state or by the federal constitution.

California. — *Smith v. Twelfth Dist. Judge*, 17 Cal. 547; *State v. Rogers*, 13 Cal. 160; *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581.

Illinois. — *People v. Wilson*, 15 Ill. 392; *Hawthorn v. People*, 109 Ill. 307, 50 Am. Rep. 610; *Winch v. Tobin*, 107 Ill. 215; *Newland v. Marsh*, 19 Ill. 384.

Indiana. — *Walpole v. Elliott*, 18 Ind. 258, 81 Am. Dec. 358.

Michigan. — *People v. Gallagher*, 4 Mich. 244; *Sears v. Cottrell*, 5 Mich. 251; *Scott v. Smart*, 1 Mich. 306; *Williams v. Detroit*, 2 Mich. 560; *People v. Blodgett*, 13 Mich. 153; *Tyler v. People*, 8 Mich. 333.

New Hampshire. — *Concord R. Co. v. Greely*, 17 N. H. 47.

New York. — *Sill v. Corning*, 15 N. Y. 297; *People v. Orange County*, 27 Barb. (N. Y.) 575; *People v. Toynbee*, 2 Park. Cr. Rep. (N. Y. Ct. App.) 490; *People v. New York Cent. R. Co.*, 24 N. Y. 504.

Pennsylvania. — *Com. v. Hartman*, 17 Pa. St. 118; *Kriby v. Shaw*, 19 Pa. St. 258; *Weister v. Hade*, 52 Pa. St. 474.

Texas. — *Logan v. State*, 5 Tex. App. 306.

Virginia. — *Danville v. Pace*, 25 Gratt. (Va.) 9, 18 Am. Rep. 663.

West Virginia. — *State v. McAllister*, 38 W. Va. 485.

Wisconsin. — *Bushnell v. Beloit*, 10 Wis. 195.

The federal government being one of enumerated powers, the constitutionality of an act of Congress is to be tested by the grant of powers contained in the Federal Constitution; but the state governments are presumed to be vested with general powers of legislation, and therefore, in determining whether an act of a state legislature is in violation of its constitution, the inquiry is directed to the limitations imposed on the legislature by the terms of the constitution. *Ex p. Mabry*, 5 Tex. App. 93; *Logan v. State*, 5 Tex. App. 306.

4. *Southern Pac. R. Co. v. Orton*, 6 Sawy. (U. S.) 157.

5. *State v. McAllister*, 38 W. Va. 485.

6. *Page v. Allen*, 58 Pa. St. 345, 98 Am. Dec. 272.

7. *Field v. People*, 3 Ill. 79.

8. *Neb. Const.*, art. 1, § 26.

9. *North Carolina Const.*, art. 1, § 37.

In *People v. McKee*, 68 N. Car. 429, Reade, J., said: "The theory of our state government is 'that all political power is vested in, and derived from, the people.' Const., art. 1, § 2. The constitution is their grant of power, and it is the only grant which they have made. 'And all powers not therein delegated remain with the people.' Article 1, § 37. This last clause will not be found in the former constitutions of the state. The constitution then proceeds to divide the government into three departments, legislative, executive, and judicial, and makes a grant of powers to each department under its appropriate head, and directs that they shall be 'for-

"all powers not herein delegated remain with the people," and these would therefore seem to be excepted from the operation of the general rule above noted.

(2) *Provisions from Other Constitutions.* — When provisions have been adopted into the constitution of the state which are identical with or similar to those of other states, it will be presumed that the framers of such constitution were conversant with and designed to adopt also any construction previously placed on such provisions in such other states.¹

(3) *Provisions Reincorporated in New Constitutions.* — So the adoption into a new or an amended constitution, of a provision that had received a settled judicial construction under the former constitution, carries also the previous construction.²

f. CONSTRUCTION AS DETERMINED BY LOCAL JUDICIAL INTERPRETATION. — Every state has the right to determine for itself the meaning of doubtful provisions in the organic law; and its constitution must be construed in accordance with the interpretation placed upon it by its own courts. Thus the Federal Supreme Court has a right to decide all questions arising under the Constitution of the United States, and the courts of the states are bound thereby,³ even when their own constitutions are infringed.⁴ And, on the other hand, it is the peculiar province of the supreme court of a state to interpret the organic law under which it acts, and its decisions will be adopted by other courts, federal⁵ and state.⁶

VI. SUBJECT MATTER OF CONSTITUTIONS — 1. The Bill of Rights — a. INTRODUCTORY. — The Bill of Rights is the oldest part of existing constitutions. Many of its clauses are substantial re-enactments of Magna Charta provisions,⁷

ever separate and distinct from each other.' * * * It follows that it is not true, as contended for upon the argument, that the legislature is supreme except in so far as it is expressly restrained. However that may be in other governments, or however it may have heretofore been in this state, it is plain, that since the adoption of our present constitution the legislative, just like each of the other departments, acts under a *grant* of powers, and cannot exceed them."

1. *Foreign Construction Adopted.* — *Ex p. Roundtree*, 51 Ala. 42; *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581; *Leavenworth County v. Miller*, 7 Kan. 479, 12 Am. Rep. 425; *Com. v. Hartnett*, 3 Gray (Mass.) 450; *Daily v. Swope*, 47 Miss. 367; *State v. Parkinson*, 5 Nev. 15; *Hess v. Pegg*, 7 Nev. 23; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *Jenkins v. Ewin*, 8 Heisk. (Tenn.) 476; *Atty.-Gen. v. Brunst*, 3 Wis. 787.

2. *Ex p. Roundtree*, 51 Ala. 42.

3. *States Bound by Federal Supreme Court's Construction of Federal Constitution.* — *Linn v. State Bank*, 2 Ill. 87, 25 Am. Dec. 71; *U. S. Bank v. Norton*, 3 A. K. Marsh. (Ky.) 423; *Larrabee v. Talbot*, 5 Gill (Md.) 426, 46 Am. Dec. 637; *Brigham v. Henderson*, 1 Cush. (Mass.) 432, 48 Am. Dec. 610.

4. "The courts of the states are as much bound to uphold the supremacy of the Constitution of the United States as are the federal courts or as they are to sustain the constitutions and laws of their several states. This obligation may, perhaps, even extend to declaring unconstitutional a provision in the state constitution under which the court exercised jurisdiction. But the conflict between the state and the federal constitution must cer-

tainly be a very clear one to call for so solemn a decision." Stiles, J., in *Romine v. State*, 7 Wash. 215.

5. *Federal Courts Follow State Courts' Construction of State Constitution.* — *North Bennington First Nat. Bank v. Bennington*, 16 Blatchf. (U. S.) 53; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Pennsylvania College Cases*, 13 Wall. (U. S.) 190; *Atlantic, etc., R. Co. v. Georgia*, 98 U. S. 359; *Henry County v. Nicolay*, 95 U. S. 619; *Luther v. Borden*, 7 How. (U. S.) 1; *Fairfield v. Gallatin County*, 100 U. S. 50.

"The Supreme Court of Georgia is co-equal and co-ordinate with the Supreme Court of the United States and not inferior and subordinate to that court. As to the reserved powers, the state court is supreme; as to the delegated powers, the United States court is supreme; as to powers both delegated and reserved — concurrent powers — both courts, in the language of Hamilton, are equally supreme." *Per Benning, J.*, in *Padelford v. Savannah*, 14 Ga. 506.

6. *Fowler v. Lamson*, 146 Ill. 472, 37 Am. St. Rep. 163.

7. *Bill of Rights Retains Provisions of Magna Charta.* — Such, *e. g.*, as the guaranty in paragraph 40 of Magna Charta. See *infra*, this title, *Justice Without Purchase*.

"The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the Fourteenth Amendment, in the year 1866." *Davidson v. New Orleans*, 96 U. S. 101.

while others are derived from later documents of similar character, notably the English Bill of Rights of 1689.¹ And the antiquity of these provisions has far more than an historical interest. For in construing both state² and federal³ constitutions the courts emphasize the fact that these provisions of the Bill of Rights were intended, not to announce new principles, but only to carry forward and reaffirm the provisions of their constitutional prototypes in England.

1. Purpose and Use of Bills of Rights. — "The Bill of Rights is historically the most interesting part of these constitutions, for it is the legitimate child and representative of Magna Charta, and of those other declarations and enactments, down to the Bill of Rights of the Act of 1 William and Mary, session 2, by which the liberties of Englishmen have been secured. Most of the thirteen colonies, when they asserted their independence and framed their constitutions, inserted a declaration of the fundamental rights of the people, and the example then set has been followed by the newer states, and indeed, by the states generally in their most recent constitutions. Considering that all danger from the exercise of despotic power upon the people of the states by the executive has long since vanished, their executive authorities being the creatures of popular vote and nowadays rather too weak than too strong, it may excite surprise that these assertions of the rights and immunities of the individual citizen as against the government should continue to be repeated in the instruments of to-day. A reason may be found in the remarkable constitutional conservatism of the Americans, and their fondness for the enunciations of the general maxims of political freedom. But it is also argued that these declarations of principle have a practical value as asserting the rights of individuals and of minorities against arbitrary conduct by a majority in the legislature, which might in the absence of such provisions be tempted at moments of excitement to suspend the ordinary law and arm the magistrate with excessive powers. They are, therefore, it is held, still safeguards against tyranny; and they serve the purpose of solemnly reminding a state legislature and its officers of those fundamental principles which they ought never to overstep." Bryce, *The American Commonwealth* (2d ed. 1891), vol. 1, pp. 422, 423

Provisions of English Bill of Rights of 1689. — The following are some of the declarations of the Bill of Rights of 1689:

1. "That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal.

2. "That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.

3. "That the commission for erecting the late court of commissioners for ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious.

4. "That levying money for or to the use of the Crown, by pretense of prerogative, without grant of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal.

5. "That it is the right of the subjects to

petition the king, and all commitments and prosecutions for such petitioning are illegal.

6. "That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law.

7. "That the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law.

8. "That election of members of Parliament ought to be free.

9. "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

10. "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

11. "That jurors ought to be duly impaneled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

12. "That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.

13. "And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, Parliament ought to be held frequently."

See Stubbs's *Select Charters Illustrative of English Constitutional History*, pp. 524, 525.

2. "The truth is, the bills of rights in the American constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law and thus secured against violation." Cooley, J., in *Weimer v. Bunbury*, 30 Mich. 214. See also *Perce v. Hallett*, 13 R. I. 363.

3. Purpose of Federal Bill of Rights. — In *Robertson v. Baldwin*, 165 U. S. 281, the court, *per* Brown, J., said: "The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of

b. IN THE STATE CONSTITUTION — (1) *Generally*.¹ — In the state constitutions, generally, the Bill of Rights has been the most conspicuous feature, being inserted at the beginning of the instrument. In *Virginia* the first constitution consisted of a bill of rights alone.² This, like the other parts of a constitution, is, of course, subject to amendment.³

(2) *Retroactive Laws* — (a) When and How Inhibited. — The Constitutions of Several States prohibit in various terms the enactment of retrospective laws,⁴ while

the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (article 5) does not prevent a second trial if upon the first trial the jury failed to agree, or if the verdict was set aside upon defendant's motion. U. S. v. Ball, 163 U. S. 672. Nor does the provision of the same article, that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment. *Brown v. Walker*, 161 U. S. 591, and cases cited. Nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial." See also U. S. v. Cruikshank, 92 U. S. 542.

1. But this is not invariable. Hamilton, defending the proposed Federal Constitution, said: "The most considerable remaining objection is that the plan of the convention contains no bill of rights. Among other answers given to this, it has been upon different occasions remarked, that the constitutions of several of the states are in a similar predicament. I add that New York is of the number." The *Federalist* (Hamilton's ed.) 1880, p. 627.

So the Michigan constitution contains no bill of rights.

2. See Poore's *Charters and Constitutions of the United States*, vol. 2, p. 1908.

3. *State v. Cox*, 8 Ark. 436.

4. *Retroactive Laws Prohibited* — *Colorado*. — Const., art. 1, § 2.

Georgia. — Const. (1877) art. 1, § 3, par. 2.

Maryland. — Declaration of Rights, 1867, art. 17.

Missouri. — Const., art. 13, § 7.

Montana. — Const., art. 15, § 13.

Ohio. — Const., art. 2, § 28; *Burgett v. Norris*, 25 Ohio St. 308.

The *Georgia Constitution of 1865* forbade the passage of "retroactive laws, injuriously affecting any right of the citizen." In the constitution of 1868 there was no provision, but that of 1877 forbids the passage of retroactive laws. *Pritchard v. Savannah St.*, etc., R. Co., 87 Ga. 291.

The *Louisiana Constitution of 1868*, c. 3, art. 8 (8), prohibited retrospective laws. The constitution of 1879, although containing a provision against *ex post facto* legislation, laws impairing the obligation of contracts, or divesting vested rights (art. 155), contains no general prohibition.

New Hampshire. — "Retrospective laws are highly injurious, oppressive, and unjust. No such law, therefore, should be made, either for the decision of civil causes, or punishment of

offenses." Const., pt. 1, art. 23. A retrospective law for the decision of civil causes is a law prescribing the rules by which civil causes are to be decided upon the facts existing previously to the making of the law. *Woart v. Winnick*, 3 N. H. 473, 14 Am. Dec. 384.

Under the Constitution of New Hampshire a forfeiture is a civil cause, and a law divesting the defendant of the right to recover must be deemed a retrospective law for the decision of a cause. *Dow v. Norris*, 4 N. H. 16, 17 Am. Dec. 400.

"The objection is substantial, not formal; reasonable, not technical; and the reason of the objection, like the reason of all law, is to be considered in interpretation and administration. The reason of the constitutional prohibition of retrospective legislation is the material and substantial injury, oppression and injustice, caused by its practical operation." *Kent v. Gray*, 53 N. H. 576.

Tennessee. — "No retrospective law, or law impairing the obligation of contracts, shall be made." Tenn. Bill of Rights, § 20. "We understand that construction to be, that retrospective laws may be made where they do not impair the obligation of contracts or divest or impair vested rights." *Wynne v. Wynne*, 2 Swan. (Tenn.) 405, 58 Am. Dec. 66.

The whole clause and both sentences taken together mean that no retrospective law which impairs the obligation of contracts or any other law which impairs their obligation shall be made, the latter words relating equally to both preceding substantives. *Townsend v. Townsend*, Peck (Tenn.) 1, 14 Am. Dec. 722.

Texas. — "No retrospective law, or laws impairing the obligations of contracts, shall be made." Dec. Rights, § 16; *Sutherland v. DeLeon*, 1 Tex. 250.

"The cases to which reference has been made and the opinions of the courts in expounding this constitutional inhibition will serve to illustrate the intention of the convention in imposing the restriction. Laws are deemed retrospective, and within the constitutional prohibition, which by retrospective operation destroy or impair vested rights, or rights to 'do certain actions or possess certain things, according to the laws of the land;' but laws which affect the remedy merely are not within the scope of the inhibition unless the remedy be taken away altogether or encumbered with conditions that would render it useless or impracticable to pursue it. Or if the provisions regulating the remedy be so unreasonable as to amount to a denial of right, as, for instance, if a statute of limitations, applied to existing cases, barred all remedy, or did not afford a reasonable period for their prosecution, or if an attempt were made by law, either by implication or expressly, to

other states have no provision whatever upon the subject.¹ But even in states where specifically and formally prohibited, there are certain classes of retrospective laws which have been sustained as valid and constitutional as salutary and wholesome regulations.²

The Constitution of the United States does not prohibit the several states from passing retroactive laws as such,³ even though they may destroy vested rights. But such laws are void if they partake of the nature of *ex post facto* laws,⁴ or bills of attainder,⁵ or if they impair the obligation of contracts.⁶

(b) **Definition and Nature.** — A **Retroactive or Retrospective Law** is one which operates upon matters which occurred, or rights and obligations which existed, before the time of enactment, and changes their legal effect. As was said by Mr. Justice Story: "Upon principle every statute which takes away or impairs vested rights, acquired under existing laws, or creates new obligations, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."⁷

revive causes of action already barred, such legislation would be retrospective within the intent of the prohibition, and would therefore be wholly inoperative." *DeCordova v. Galveston*, 4 Tex. 479.

1. Retroactive Laws Not Prohibited — Connecticut. — There is nothing in the Constitution of Connecticut against retroactive laws. *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 239.

Iowa. — "There is nothing in our constitution prohibiting in terms the enactment of retrospective laws, and such laws are valid unless they violate some of the provisions of the national or state constitutions. To deny the legislature the power in any case to pass a retroactive law, would be attended with very serious mischief. The interest of justice and the general good of the community frequently require and sanction such legislation, although it should be borne in mind by the legislator that such exercises of power can only be defended upon principle and sustained in law when they are not directed against the vested rights of particular individuals or classes, but have their origin in a just regard for the public welfare." *Bennett v. Fisher*, 26 Iowa 497.

Kansas. — "There is no constitutional provision in this state against retroactive legislation, and therefore the legislature may, in many cases, pass retrospective laws to enforce previous existing moral obligations." *Sedgwick County v. Bunker*, 16 Kan. 498.

Kentucky. — "It has been said by this court that retrospective statutes have ever been regarded as impolitic and unwise, as they are, in general, unjust and oppressive. *Lewis v. Harbin*, 5 B. Mon. (Ky.) 564. And although such statutes have been held valid under the constitution they have always been subjected to such a construction as would circumscribe their operation within the narrowest possible limits consistent with the manifest intention of the legislature to be drawn from language used; and accordingly where the language of the statute was, that the act of limitation should embrace 'all cases in which the right of action accrued, whether before or after the revised statutes took effect,' it did not embrace suits or actions which had been commenced before the statute took effect, as not clearly embraced by its terms." *Hedger v. Rennaker*, 3 Metc. (Ky.) 255. See also *Thornton v. McGrath*, 1 Duv. (Ky.) 355; *Henderson, etc., R. Co. v. Dicker-*

son, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148.

Mississippi. — *Reed v. Beall*, 42 Miss. 472; *Carson v. Carson*, 40 Miss. 349.

Nevada. — The constitution of this state does not forbid the passage of retroactive laws. *Esser v. Spaulding*, 17 Nev. 289; *State v. Consolidated Virginia Min. Co.*, 16 Nev. 434.

Ohio. — The constitution of 1802 contained no provision against retroactive laws. *Butler v. Toledo*, 5 Ohio St. 225; *Burgett v. Norris*, 25 Ohio St. 308.

Pennsylvania. — *Grim v. Weissenberg School Dist.*, 57 Pa. St. 433, 98 Am. Dec. 237; *Lane v. Nelson*, 79 Pa. St. 407.

South Carolina. — *Henry v. Henry*, 31 S. Car. 1.

2. See *infra*, this section, *passim*.

3. General Retrospective Laws Not Forbidden by Federal Constitution. — Retrospective laws which do not impair the obligation of contracts or partake of the nature of *ex post facto* laws are not condemned or forbidden by any part of that instrument (Constitution of the United States). *Satterlee v. Matthewson*, 2 Pet. (U. S.) 380; *Watson v. Mercer*, 8 Pet. (U. S.) 88; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 539; *Baltimore, etc., R. Co. v. Nesbit*, 10 How. (U. S.) 395; *Carpenter v. Pennsylvania*, 17 How. (U. S.) 456; *Locke v. New Orleans*, 4 Wall. (U. S.) 172; *Drehman v. Stifle*, 8 Wall. (U. S.) 595; *Randall v. Kreiger*, 23 Wall. (U. S.) 137; *Calder v. Bull*, 3 Dall. (U. S.) 386; *Aldridge v. Tuscumbia, etc., R. Co.*, 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307; *Andrews v. Russell*, 7 Blackf. (Ind.) 474; *State v. Squires*, 26 Iowa 340; *Henderson, etc., R. Co. v. Dickerson*, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148; *Anderson v. Baker*, 23 Md. 531; *Reed v. Beall*, 42 Miss. 472; *Grim v. Weissenberg School Dist.*, 57 Pa. St. 433, 98 Am. Dec. 237; *Lane v. Nelson*, 79 Pa. St. 407.

4. See the title *EX POST FACTO LAWS*.

5. See the titles *ATTAINDER*, vol. 3, p. 248; *EX POST FACTO LAWS*.

6. See the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*.

7. *Society, etc., v. Wheeler*, 2 Gall. (U. S.) 130. See also *Ex p. Buckley*, 53 Ala. 54.

Retrospective — Retroactive. — "Retrospective" means looking backwards; "retroactive," acting backwards, or affecting what is past. In legal phraseology the terms are used interchangeably by judges and text writers. *Bouvier's Dict.*; *Webster's Dict.*; *Wade on*

The Phrase *Ex Post Facto* is applicable only to criminal and penal statutes.¹

Construed Prospectively, Not Retrospectively. — It is a well-settled rule of construction that laws relate to the future, and are not to be construed retrospectively, or to have a retrospective effect, unless it shall clearly appear that it was so intended by the legislature, and unless such construction is absolutely necessary to give meaning to the language used.²

When Operation Construed Strictly. — "And although such statutes have been held valid under the constitution, they have always been subjected to such a construction as would circumscribe their operation within the narrowest possible limits consistent with the manifest intention of the legislature to be drawn from the language used."³

Construction of Retrospective Remedial Statutes. — Remedial statutes, although retrospective, are construed liberally to accomplish the object, correct the evils, and suppress the mischief aimed at.⁴

Retroactive Laws, § 1; Sedgwick on Stat. and Const. Law; Sutherland on Statutes, § 463.

"The word is usually applied to those acts of the legislature which are made to operate upon some subject, contract, or crime which existed before the passage of the acts, and they are therefore called retrospective laws." Bouvier's Dictionary, *ad verb.*

1. Ex Post Facto Laws Concern Penal and Criminal Matters — *United States*. — Watson v. Mercer, 8 Pet. (U. S.) 110; Fletcher v. Peck, 6 Cranch (U. S.) 87; Ogden v. Saunders, 12 Wheat. (U. S.) 266; Carpenter v. Pennsylvania, 17 How. (U. S.) 456; Locke v. New Orleans, 4 Wall. (U. S.) 172; Drehman v. Stifle, 8 Wall. (U. S.) 595; *In re Sawyer*, 124 U. S. 200; Calder v. Bull, 3 Dall. (U. S.) 386; Cooley on Const. Lim. 264; Ordronaux Const. Legislation, 223; Baltimore, etc., R. Co. v. Nesbit, 10 How. (U. S.) 395; *Ex p.* Garland, 4 Wall. (U. S.) 333 (dissenting opinion).

Alabama. — Hart v. State, 40 Ala. 32, 88 Am. Dec. 752; Holman v. Norfolk Bank, 12 Ala. 417; Bloodgood v. Cammack, 5 Stew. & P. (Ala.) 280; Aldridge v. Tusculumbia, etc., R. Co., 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307.

Arkansas. — Taylor v. Governor, 1 Ark. 21. *California*. — Foster v. Police Comrs., 102 Cal. 483, 41 Am. St. Rep. 194.

Connecticut. — Bridgeport v. Hubbell, 5 Conn. 240.

Georgia. — Wilder v. Lumpkin, 4 Ga. 208; Boston v. Cummins, 16 Ga. 102, 60 Am. Dec. 717.

Illinois. — Coles v. Madison County, 1 Ill. 154.

Indiana. — Strong v. State, 1 Blackf. (Ind.) 193; Andrews v. Russell, 7 Blackf. (Ind.) 474.

Iowa. — State v. Squires, 26 Iowa 340.

Kentucky. — Henderson, etc., R. Co. v. Dickerson, 17 B. Mon. (Ky.) 173, 66 Am. Dec. 148; Davis v. Ballard, 1 J. J. Marsh. (Ky.) 563.

Louisiana. — Municipality Number One v. Wheeler, 10 La. Ann. 745.

Maryland. — Anderson v. Baker, 23 Md. 531; Grinder v. Nelson, 9 Gill. (Md.) 299; Wilson v. Hardesty, 1 Md. Ch. 66.

Massachusetts. — Locke v. Dane, 9 Mass. 360.

Michigan. — Scott v. Smart, 1 Mich. 295.

Missouri. — *Ex p.* Bethurum, 66 Mo. 545.

Nevada. — Esser v. Spaulding, 17 Nev. 289.

New Jersey. — Moore v. State, 43 N. J. L.

203.

New York. — Dash v. Van Kleeck, 7 Johns. (N. Y.) 483, 5 Am. Dec. 291; Burch v. Newbury, 10 N. Y. 391; Southwick v. Southwick, 49 N. Y. 520.

Ohio. — Butler v. Toledo, 5 Ohio St. 225.

Pennsylvania. — Grim v. Weissenberg School Dist., 57 Pa. St. 433, 98 Am. Dec. 237; Com. v. Lewis, 6 Binn. (Pa.) 266.

South Carolina. — Blackman v. Gordon, 2 Rich. Eq. (S. Car.) 43, 44 Am. Dec. 241.

Texas. — Sutherland v. De Leon, 1 Tex. 305; *Ex p.* Mayer, 27 Tex. 715.

Virginia. — Perry v. Com., 3 Gratt. (Va.) 602.

2. Statutes Not Construed Retrospectively. — Farrington v. Tennessee, 95 U. S. 679; Chew Heong v. U. S., 112 U. S. 536; Smith v. Lyon, 44 Conn. 175; Dyer v. Belfast, 88 Me. 140; Lambard, Appellant, 88 Me. 591; Dash v. Van Kleeck, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291; Vanderpool v. La Crosse, etc., R. Co., 44 Wis. 663.

For a Full Discussion of This Topic, see the title STATUTES.

3. Hedger v. Rennaker, 3 Metc. (Ky.) 255.

4. 1 Kent Com. 455: People v. Ulster County, 63 Barb. (N. Y.) 83, *reversed* on another point, 65 N. Y. 300. See generally the title STATUTES.

In *Ex p.* Buckley, 53 Ala. 54, Brickell, C. J., said: "The statutes excluded from judicial favor, and subjected to this strictness of judicial construction — statutes which may be properly denominated retrospective — are such as take away or impair vested rights, acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability, in respect to transactions or considerations already past. Society, etc., v. Wheeler, 2 Gall. (U. S.) 139. * * * There are other statutes which, when operating retrospectively, have not incurred judicial condemnation, and to which a liberal construction for the consummation of the just and beneficent purposes in view, has been freely accorded. Such statutes are intended to remedy a mischief, promote public justice, correct innocent mistakes into which parties may have fallen, cure irregularities, or give effect to the acts and contracts of individuals fairly done and made. These are remedial statutes conducive alike to individuals and public good. 1 Kent 456."

Retrospective Laws Impairing State Rights. — The state may constitutionally pass retrospective laws impairing her own rights.¹

(c) **Classes** — *aa. VALID* — (*aa*) *Curative and Validating Acts* — *aaa. In General.* — The general rule has often been declared that the legislature may validate retrospectively any proceedings which they might have authorized in advance; and it is immaterial that such legislation may operate to divest an individual of a right of action existing in his favor, or subject him to a liability which does not exist originally.²

Curative Acts Validating Defective Deeds of Married Women. — Acts of the legislature validating a deed executed by a husband without his wife joining in the execution,³ or where she had executed a power of attorney to convey lands without authority of law,⁴ or validating her defectively acknowledged deed,⁵ or her deed from the granting clause of which her name had been omitted,⁶ are constitutional and effective, and such defects are thereby cured.

Other Defective Conveyances and Contracts. — Acts curing the defect in the execution of a mortgage which was signed by one witness instead of two,⁷ or of contracts

1. *Mayers v. Byrne*, 19 Ark. 308; *Davis v. Dawes*, 4 W. & S. (Pa.) 401; *Demoville v. Davidson County*, 87 Tenn. 214.

Thus, where certain druggists had made themselves liable for taxes under the revenue laws for certain previous years, and they were released by subsequent act of all liability therefor. *Demoville v. Davidson County*, 87 Tenn. 214.

Prior to 1856, a servant could not recover from a railroad for damages caused by another servant. An Act of 1856 modified this rule, but did not mention the Western & Atlantic Ry., and the court held the act did not apply to the state road. The Act of 1863 made this road liable to other roads. It was held that the statute was retroactive, and that although at the time the wrong was done no suit could have been maintained, if it was pending at the date of the Act of 1863, and was brought after the adoption of the code. *Lewis v. Turner*, 40 Ga. 416.

2. *Per Wallace, J.*, in *Exchange Bank Tax Cases*, 21 Fed. Rep. 99; *Thomson v. Lee County*, 3 Wall. (U. S.) 327; *Green v. Abraham*, 43 Ark. 420; *Sidway v. Lawson*, 58 Ark. 120; *Clinton v. Walliker*, (Iowa 1896) 68 N. W. Rep. 431; *Cooley on Constitutional Limitations* (6th ed.) 457.

Vested Rights. — A curative act, however, although valid as between the parties, cannot be given effect retroactively so as to divest the vested rights of third parties. *Sidway v. Lawson*, 58 Ark. 124; *Smith v. Scarbrough*, 61 Ark. 104; *Shattuck v. Byford*, 62 Ark. 431; *Barrett v. Barrett*, 120 N. Car. 127.

3. *Wildes v. Vanvoorhis*, 15 Gray (Mass.) 139; *Hill v. Yarrowborough*, 62 Ark. 320.

Deed as Feme Sole of Woman Invalidly Divorced. — In 1877 Mrs. Foster obtained a judgment of divorce in an action in which no legal service of summons had been made upon the defendant. In 1885, she, being the owner of the premises in controversy, conveyed the same, without her husband joining in the deed, which deed was invalid by reason of his not joining in the execution. In 1889, the legislature passed an act validating deeds executed by women under such circumstances and conditions. The facts of the case coming within the particular provisions of the act, it was held

that the act was constitutional and validated the deed. *Wistar v. Foster*, 46 Minn. 484, 24 Am. St. Rep. 241.

4. **Deed Executed under Invalid Power of Attorney from Married Woman.** — *Randall v. Kreiger*, 23 Wall. (U. S.) 137; *Dentzel v. Waldie*, 30 Cal. 138.

5. *Chestnut v. Shane*, 16 Ohio 599, 67 Am. Dec. 387. See the title **ACKNOWLEDGMENTS**, vol. 1, p. 564.

6. **Deed of Married Woman Whose Name Omitted from Granting Clause.** — Where a married woman, having the fee simple title to the property, undertook to convey the same, joining in the deed with her husband, but by mistake her name was omitted in the granting clause of the deed, and subsequently the legislature passed an act authorizing the courts to correct such a mistake in a deed of married woman, although occurring before the passage of the act, the court held the act to be valid. *Goshorn v. Purcell*, 11 Ohio. St. 641.

Deed Conveying Property Which Married Woman Unauthorized to Convey. — Where a devise to a married woman restricted her right to convey real estate, but notwithstanding she conveyed the same, and subsequently an act of the legislature was passed to cure the defect in the conveyance, the court held that she had no right to convey and could not divest the estate of her heirs, and that the curative act was invalid. *Shonk v. Brown*, 61 Pa. St. 320. See also *Russel v. Rumsey*, 35 Ill. 372; and the title **ACKNOWLEDGMENTS**, vol. 1, p. 568.

7. **Conveyance Defective as to Number of Witnesses.** — A mortgage was defectively executed in having but one witness, and was ineffectual to pass any interest in the land, the land having been conveyed before the curative act was passed; the court says: "The legislature have the right, perhaps, to cure such irregularities in conveyances as between the parties to them, and all persons who take subsequent to the cure being wrought, but it cannot disturb vested rights." *Thompson v. Morgan*, 6 Minn. 292; *Green v. Drinker*, 7 W. & S. (Pa.) 440.

The same rule was established, and similar language used, with regard to a deed which had been executed in the presence of one witness, the statute requiring two. *Meighen v. Strong*, 6 Minn. 177, 80 Am. Dec. 441.

which were void from lack of a revenue stamp,¹ or absence of authority and power in a bank to take them,² or curing irregularities attending sales of lands by a county court,³ or by executors⁴ or an orphans' court,⁵ are constitutional and valid. And so also is an act authorizing the guardian of infant children to convey their real estate to a person to whom the parent of the children before his death had contracted to sell.⁶

Curing Defects in Acts of Municipal Corporations. - Generally speaking acts of the legislature curing defects in contracts, and proceedings of municipal corporations defectively executed by counties,⁷ by cities,⁸ school districts,⁹ and boards of trustees of towns,¹⁰ are constitutional and proper exercise of legislative power. Curing defects in the issuance of county road bonds¹¹ or school

1. Instrument Invalid for Want of Revenue Stamps. - A draft drawn in 1863 was invalid under Acts of Congress for want of a sufficient revenue stamp. An Act of Congress of 1864 provided that no instrument executed prior to the act should be deemed invalid and of no effect for reason of not having the required stamp, if a sufficient stamp should be subsequently affixed thereto. On the trial the stamp was affixed, and the lower court held the draft validated thereby, which holding the Supreme Court affirmed. *Gibson v. Hibbard*, 13 Mich. 214. See also *State v. Norwood*, 12 Md. 195; *Atwell v. Grant*, 11 Md. 101.

2. Note to Bank Which Has Forfeited Charter Validated. - In November, 1819, a bank forfeited its charter. In January, 1820, defendants executed a note to the bank. In 1822 an act was passed legalizing the acts of such corporations as had forfeited their charters; it was held that the act validated the note, and judgment for the bank was sustained. *Bleakney v. Farmers', etc., Bank*, 17 S. & R. (Pa.) 64, 17 Am. Dec. 635.

Validating Deed of Person Non Compos Mentis. - Where a deed executed by a person of unsound mind was attempted to be validated by act of the legislature, the act was held unconstitutional and void. See Mo. Const. 1875, art. 2, § 15; *Routson v. Wolf*, 35 Mo. 174.

An Act Validating a Deed to a Foreign Corporation, and releasing the rights of the commonwealth has been held valid. *Caverow v. Mutual Ben. L. Ins. Co.*, 52 Pa. St. 287.

3. Defective Sale by County Court. - A county court having jurisdiction of the subject-matter sold swamp lands, but the sales were attended with irregularities and informalities. An act validating the titles to the lands was held constitutional, and the court says: "As between individuals, the legislature has no power to interfere and declare an act or deed valid which was previously void. But counties are not individuals. They are political divisions of the state; their functions are of a public nature; they hold their property in subordination and under the control of the legislature. The law recognizes a difference between a deed void *ab initio* and one defectively executed." *Barton County v. Walser*, 47 Mo. 189.

4. Conveyance by Foreign Executors. - The executors under the will had power to sell the land in controversy, but the sale was invalid for the reason that the executors had failed to qualify under the laws of Iowa. A subsequent act of the legislature validating conveyances made before that time by foreign executors

was held valid, and the deed was held to convey a good title to the purchaser. *Smith v. Callaghan*, (Iowa 1885) 24 N. W. Rep. 50. See also *Wilkinson v. Leland*, 2 Pet. (U. S.) 627; *De Zbranikov v. Burnett*, 10 Tex. Civ. App. 442.

5. Land Was Sold in New Jersey by Order of the Orphans' Court, and a deed made to another than the actual purchaser at such sale, but to one appointed to represent them. Subsequently the Supreme Court of New Jersey having decided that a deed made by the commissioners in partition to any one other than the person reported as the purchaser was void. Afterwards the legislature enacted a law that upon proof of the absence of fraud such deeds might be given in evidence. This cured the defect in the title. *Kearney v. Taylor*, 15 How. (U. S.) 516.

6. Authorizing Guardian to Convey Ward's Estate. - A private act of the assembly authorizing the guardians of infant children, the title to whose real estate is vested in the guardians, to convey such estate to a person with whom the parent of the children before his death contracted to sell, is valid. *Estep v. Hutchman*, 14 S. & R. (Pa.) 435.

7. Curing Defective Execution by Counties. - *Redd v. Henry County*, 31 Gratt. (Va.) 695; *Cumberland County v. Randolph*, 89 Va. 614; *Bell v. Farmville, etc., R. Co.*, 91 Va. 99.

8. Cities. - *Rogers v. Keokuk*, 154 U. S. 546; *Chester v. Pennell*, 169 Pa. St. 300; *Devers v. York City*, 150 Pa. St. 208; *Melick v. Williamsport*, 162 Pa. St. 408; *Donley v. Pittsburgh*, 147 Pa. St. 348, 30 Am. St. Rep. 738.

9. The Acts of a School District Board, being invalid in that the meeting was improperly called, were afterwards validated by act of the legislature. *First School Dist. v. Ufford*, 52 Conn. 44.

10. Board of Town Trustees. - The acts of a board of trustees and other officers, where the election inspector failed to make the return of the election of such officers in the time prescribed by law, were afterwards validated by act of legislature. *Gardner v. Haney*, 86 Ind. 17.

11. County Road Bonds. - And where the County Court had issued bonds for construction of roads, which bonds were void for the reason that the question of the expenditures had not been submitted to the voters of the county, a subsequent act of legislature authorized the County Court to issue bonds in lieu of those illegally issued was held valid. *Steines v. Franklin County*, 48 Mo. 188;

bonds,¹ and in the time and manner of holding an election,² or in a loan of money made by a county without authority of law,³ or of a city council in passing ordinances,⁴ or proceedings of a board of supervisors had at a special instead of a regular meeting,⁵ is within the power of the legislature. And so the legislature can cure the acts of counties and cities in taking stock in a railway when the same has been done without authority of law,⁶ and it can validate contracts and proceedings of municipal corporations invalid merely for want of power to execute them.⁷

Bradley v. Franklin County, 65 Mo. 638; *Ritchie v. Franklin County*, 22 Wall. (U. S.) 67.

An act providing that where proceeds of sale of bonds have been received by the proper county officers the county shall thereafter be estopped from denying their validity, and that payment of interest on school bonds shall be a waiver of any supposed error, or want of authority affecting their validity, is not unconstitutional. *Nolan County v. State*, 83 Tex. 182.

1. School Bonds.—An act providing that money loaned on school bonds afterwards declared by the Supreme Court to be void, may be repaid out of sale of subsequent school bonds, does not conflict with art. 15, § 13 of the Constitution, providing that the legislature shall pass no law retrospective in its operation, or which imposes on the people a new liability in respect to transactions or considerations already past. *State v. Dickerman*, 16 Mont. 278.

2. Curing Defect in Election.—An act of the legislature curing a defect in an election to consider whether paupers should be a township or county charge as to the time and manner of holding the election, is valid, it being within the power of the legislature to determine this question without a vote of the people. *Fox v. Kendall*, 97 Ill. 72.

3. Unauthorized County Loan.—Where a county board had loaned money and taken mortgage security for the loan, but such loan and the taking of such security was without authority, a curative act, passed subsequently, granting such authority and validating the mortgage, was held valid and effective. *Halstead v. Lake County*, 56 Ind. 363.

4. Resolutions of the Common Council were not presented to the mayor on the next day after they were passed and approved by him or returned with objections and then passed, or allowed to take effect by not being returned within five days, as required by the charter; an act validating all such resolutions was held retroactive and valid. *State v. Newark*, 27 N. J. L. 185; *State v. Union*, 33 N. J. L. 350.

5. Irregular Proceedings of Supervisors.—Where the initial steps for the laying out and construction of a gravel road were taken by the board of supervisors at a special instead of a regular meeting of the board, which act was illegal and rendered the proceedings invalid, a subsequent act of the legislature, curing such defects, was held to be retroactive and validate the whole proceeding, so that an injunction brought to restrain the collection of taxes levied to pay for the construction of the road was disallowed. *Johnson v. Wells County*, 107 Ind. 15.

6. Validating Unauthorized Act of County or City in Taking Stock in Railroad.—*Rogers v.*

Keokuk, 154 U. S. 546; *Thomson v. Lee County*, 3 Wall. (U. S.) 327; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Bartholomew County v. Bright*, 18 Ind. 93; *McMillen v. Boyles*, 6 Iowa 304; *People v. Mitchell*, 35 N. Y. 551; *Redd v. Henry County*, 31 Gratt. (Va.) 695; *Cumberland County v. Randolph*, 89 Va. 614; *Bell v. Farmville, etc.*, R. Co., 91 Va. 99.

Bonds issued in aid of railroad without authority can be cured by subsequent act of legislature. *Shurtleff v. Wiscasset*, 74 Me. 130; *State v. Miller*, 66 Mo. 328.

A county having made a subscription which was void to stock in a railroad, the legislature passed an act authorizing the county to ratify such subscription. Upon such ratification the subscription was held binding upon the county. *Hannibal, etc., R. Co. v. Marion County*, 36 Mo. 294; *The People v. Ingham County*, 20 Mich. 95.

Illinois Doctrine.—In Illinois it is held that in case of a void proceeding in voting bonds to a railroad the legislature has no power to pass a law rendering the election and subscription valid, as this would be to compel a municipal corporation to incur a debt for local purposes, which is unconstitutional. *Marshall v. Silliman*, 61 Ill. 218; *Wiley v. Silliman*, 62 Ill. 170; *Cairo, etc., R. Co. v. Sparta*, 77 Ill. 505; *Barnes v. Lacon*, 84 Ill. 461; *Williams v. Roberts*, 88 Ill. 11.

7. Validating Contracts of Municipalities Invalid Merely for Want of Precedent Authority.—*Connecticut.*—*Bridgeport v. Housatonic R. Co.*, 15 Conn. 475.

Indiana.—*Bartholomew County v. Bright*, 18 Ind. 93.

Iowa.—*McMillen v. Boyles*, 6 Iowa 304.

Massachusetts.—*Fowler v. Danvers*, 8 Allen (Mass.) 83; *Freeland v. Hastings*, 10 Allen (Mass.) 586; *Grover v. Pembroke*, 11 Allen (Mass.) 88.

Michigan.—*People v. Ingham County*, 20 Mich. 95.

Minnesota.—*Kunkle v. Franklin*, 13 Minn. 127; *Comer v. Folsom*, 13 Minn. 219; *Wilson v. Buckman*, 13 Minn. 441.

Missouri.—*Hannibal, etc., R. Co. v. Marion County*, 36 Mo. 294.

New Jersey.—*State v. Union*, 33 N. J. L. 350.

New York.—*People v. Mitchell*, 35 N. Y. 551.

Pennsylvania.—*Schenley v. Com.*, 36 Pa. St. 29, 78 Am. Dec. 359.

Texas.—*Blum v. Looney*, 69 Tex. 1; *Nolan County v. State*, 83 Tex. 182; *Morris v. State*, 62 Tex. 728.

Wisconsin.—*Blount v. Jamesville*, 31 Wis. 648; *Single v. Marathon County*, 38 Wis. 363.

Where a contract which a municipal corpora-

Recording Acts. — It is within the constitutional power of the legislature to provide for the recording of deeds and conveyances executed prior to the act, and to determine the priorities of such conveyances conditioned upon the filing thereof,¹ and to extend the time for filing such conveyances.²

bbb. Defective Acknowledgments. — Acts of the legislature curing defects in acknowledgments of conveyances due to the failure to observe some statutory requirement or to resort to the proper officers to take acknowledgments are valid and constitutional.³

ccc. Wills. — The legislature has constitutional authority to pass a statute affecting the execution of wills and to give it a retrospective effect upon testaments already made at the time of its passage, but which have not taken effect by the death of the testator.⁴

tion has attempted to make is invalid merely for want of legislative authority to create it, it can be made valid by subsequent law. *Nolan County v. State*, 83 Tex. 182.

Municipal Ordinance Validating Repealed Ordinance. — *Morris v. State*, 62 Tex. 728, was a case of validating an ordinance of municipal government passed to revive a repealed ordinance, and the court says: "There is no constitutional provision as to the manner a municipality shall enact its laws, and so it is competent for the legislature to validate an ordinance passed to revive a repealed ordinance."

Ratifying Unauthorized Land Grant. — The legislature having power to make a grant of land, it has the power to ratify a grant already made without its authority. *Blum v. Looney*, 69 Tex. 1.

Curative Acts Passed Pending Judicial Proceedings. — And such curative acts are valid if made during pending judicial proceedings. *State v. Union*, 33 N. J. L. 350; *Redd v. Henry County*, 31 Gratt. (Va.) 695.

Validating Act of Municipality in Issuing Bonds for Soldiers' Bounties. — Acts validating the action of counties and towns in issuing bonds to pay bounties to soldiers, void for want of power to execute them, have been held effective. *Bartholomew v. Harwington*, 33 Conn. 408; *Booth v. Woodbury*, 32 Conn. 118; *Baldwin v. North Bradford*, 32 Conn. 47; *Stuart v. Warren*, 37 Conn. 225; *Potter v. Canaan*, 37 Conn. 222; *Johnson v. Campbell*, 49 Ill. 316; *State v. Sullivan*, 43 Ill. 413; *Sithin v. Shelby County*, 66 Ind. 109; *Miller v. Putnam County*, 29 Ind. 75; *Fulton County v. Onstott*, 29 Ind. 384; *Nave v. King*, 27 Ind. 356; *Miami County v. Bearrs*, 25 Ind. 110; *King v. Course*, 25 Ind. 202; *Coffman v. Keightley*, 24 Ind. 509; *State v. Demarest*, 32 N. J. L. 540; *State v. Reed*, 31 N. J. L. 133. See also *Thompson v. Pittston*, 59 Me. 545; *Winchester v. Corinna*, 55 Me. 9.

But the legislature has no authority to validate the act of a municipality in reimbursing one who has paid commutation money to relieve himself from the draft. *Moulton v. Raymond*, 60 Me. 121; *Thompson v. Pittston*, 59 Me. 545.

1. Recording Acts—Prior Conveyances. — Where a deed was executed in 1829, but was not recorded, and in 1837 an act was passed providing that when two or more deeds should thereafter be executed by the same person, conveying the same premises to different per-

sons, the one recorded within twelve months from the time of execution should have preference, such statute was construed to apply to conveyances made previous to its passage; and as it gave sufficient time for filing and recording the prior conveyance, and the right of priority could have been thereby preserved, the act was held constitutional and valid. *Tucker v. Harris*, 13 Ga. 1, 58 Am. Dec. 488.

An act requiring all marriage settlements theretofore made to be recorded within twelve months after the passage of the act, and providing that if they were not so recorded they should not be of any force and effect against *bona fide* purchasers and creditors in good faith, was held to be retroactive and valid. *Boston v. Cummins*, 16 Ga. 102, 60 Am. Dec. 717.

See also the title RECORDING ACTS.

2. Spivey v. Rose, 120 N. Car. 163.

3. This Question Has Been Fully Treated under the title ACKNOWLEDGMENTS, vol. I, p. 564, *et seq.*, to which the reader is referred. See also *Cupp v. Welch*, 50 Ark. 294; *Sidway v. Lawson*, 58 Ark. 117; *Bryan v. Bryan*, 62 Ark. 79; *Hill v. Yarborough*, 62 Ark. 320; *Shattuck v. Byford*, 62 Ark. 431; *Pelt v. Payne*, (Ark. 1895) 30 S. W. Rep. 426, *mem.* 60 Ark. 637; *Barrett v. Barrett*, 120 N. Car. 127; *Spivey v. Rose*, 120 N. Car. 163.

Retrospective Only. — When a statute is retrospective by its terms it has no effect prospectively, and a defective acknowledgment made after the curative act took effect is not aided thereby. *Reynolds v. Kingsbury*, 15 Iowa 238; *Newman v. Samuels*, 17 Iowa 529; *Jones v. Berkshire*, 15 Iowa 248, 83 Am. Dec. 412.

A curative act generally applies only retrospectively. *Lucas v. State*, 86 Ind. 180; *Marsh v. Nelson*, 101 Pa. St. 51.

4. Hoffman v. Hoffman, 26 Ala. 535; *Lovoren v. Lamprey*, 22 N. H. 434; *Long v. Zook*, 13 Pa. St. 400; *Blackman v. Gordon*, 2 Rich. Eq. (S. Car.) 43, 44 Am. Dec. 241.

Such curative acts are unconstitutional as to the will of a person who died before the passage of the act. *McCarty v. Hoffman*, 23 Pa. St. 507.

Retrospective Operation of General Statutes Regulating Operation of Wills. — Where a specific enactment regulating the execution of wills has been held valid and construed to have a retrospective operation, the affirmation of the proposition stated in the text is necessarily involved in the decision. Such a case is *Lovoren v. Lamprey*, 22 N. H. 434.

add. Official Proceedings. — The legislature has power to cure defects in returns of sheriffs to levies of execution; ¹ to confirm the act of a sheriff in improperly selling land under execution; ² to validate judgments entered on the wrong

In some states, however, upon principles of construction only, statutes effecting a change in the existing law and enlarging the operation of a devise in general words, have been held prospective only, and not to affect testaments made before the acts. *Gable v. Daub*, 40 Pa. St. 217; *Quin's Estate*, 144 Pa. St. 444. See also *Packer v. Packer*, 179 Pa. St. 580; *Kurtz v. Saylor*, 20 Pa. St. 205. And there are cases where general statutes limiting the effect of or prohibiting the disposition of property by will, which before the statutes was lawful, have been construed to have a prospective operation only. *Ashburnham v. Bradshaw*, 2 Atk. 36; *American Baptist Missionary Union v. Peck*, 10 Mich. 341; *Taylor v. Mitchell*, 57 Pa. St. 209.

These two classes of decisions are generally rested upon the same reasoning, namely, the general rule of construction that statutes should be given a prospective operation; but the two classes are well distinguished in the following extract from the opinion of Goldthwaite, J., in *Hoffman v. Hoffman*, 26 Ala. 544: "The principle which we extract from these decisions [*Gillmore v. Shooter*, 2 Mod. 310; *Ashburnham v. Bradshaw*, 2 Atk. 36; *Atty.-Gen. v. Andrews*, 1 Ves. 225] is simply, that where the words do not force them, the courts will not construe a statute so as to defeat a will or bequest which would have been valid had the testator died immediately after making it; and to that extent we regard them as authority. But it does not follow, that if the effect of the statute was to sustain rather than invalidate, to save rather than to destroy, the same rule of construction would have been adopted. In many of the states the artificial rule which prevented a devise, no matter in what words expressed, from passing lands subsequently acquired, has been changed by statute providing that the real estate acquired by the testator after the execution of his will shall pass by general words, unless a contrary intention appear on the face of the will; and in New York, Massachusetts, and New Hampshire, it has been held that these statutes extended to every case where the testator died after they took effect; thus giving to them, in one sense, a retroactive operation. *DePeyster v. Clendinning*, 8 Paige (N. Y.) 295; *Bishop v. Bishop*, 4 Hill (N. Y.) 138; *Cushing v. Aylwin*, 12 Met. (Mass.) 169; *Pray v. Watterston*, 12 Met. (Mass.) 262; *Loveren v. Lamprey*, 22 N. H. 434. It is true that the courts of Pennsylvania, Connecticut, and North Carolina, have confined the operation of similar statutes to devises made since their passage; resting their decisions on the cases of *Gillmore v. Shooter*, 2 Mod. 310, and *Ashburnham v. Bradshaw*, 2 Atk. 36, and the general rule of construction against the retroactive operation of statutes. *Mullock v. Souder*, 5 W. & S. (Pa.) 198; *Brewster v. McCall*, 15 Conn. 274; *Battle v. Speight*, 9 Ired. L. (N. Car.) 288. With all deference we think the error of these decisions arises from mistaking the true principle of the cases on which they rest, and giv-

ing too much force to the rule of construction. The object of the legislature was to preserve and give effect to the intention of the testator by abolishing a purely technical rule, which too frequently defeated it. Whenever a statute is leveled against an abuse, or in furtherance of an acknowledged principle of right and justice, every reason exists for its most liberal application; and in such cases it may fairly be presumed that it was the intention of the legislature that the boon of the statute should be extended to every case which its words could properly include."

See generally on this subject the title WILLS.

Statutes Regulating Wills Held, on Constitutional Grounds, Not Retroactive. — Prior to 1848, the Supreme Court of Pennsylvania had decided in several cases that a testator's mark to his name at the foot of a testamentary paper, but without proof that the name was written by his express direction is not the signature required by the Act of 1833. And in 1848 the legislature passed an act that "Every last will and testament heretofore made, or hereafter to be made, except such as may have been finally adjudicated prior to the passage of this act, to which the testator's name is subscribed by his direction, or to which the testator has made his mark, or cross, shall be deemed and taken to be valid." This act was held not to be retrospective as to a testator who died before the act; the court saying: "It is destitute of retroactive force, not only because it was an act of judicial power, but because it contravenes the declaration * * * that no person shall be deprived of life, liberty, or property except by the judgment of his peers or the law of the land." *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567. And for cases of laws void for same reason see *Reiser v. William Tell Sav. Fund Assoc.*, 39 Pa. St. 137; *Haley v. Philadelphia*, 68 Pa. St. 45, 8 Am. Rep. 153.

1. Defective Returns to Levies of Executions. — *Mather v. Chapman*, 6 Conn. 54; *Beach v. Walker*, 6 Conn. 190; *Norton v. Pettibone*, 7 Conn. 319, 18 Am. Dec. 116; *Booth v. Booth*, 7 Conn. 365; *Menges v. Wertman*, 1 Pa. St. 218.

In *Mather v. Chapman*, 6 Conn. 54, the judgment had been entered, but appealed to the Supreme Court, and was pending there when the law was passed curing the defects in levy complained of; but it was held that the curative act was controlling in the case.

2. Confirming Improper Execution Sale. — Prior to 1826 certain levies of officers and sales of land made thereunder were void for the reason that the officer had embraced in his return certain charges, which were eminently just, but unauthorized by law. Too much land having been sold by reason thereof, the proceeding being an entire and indivisible act was wholly void. The Act of 1826, providing that no levies of executions previously made should be deemed void because the officer had embraced in his return, as part of the costs of the levy, other and greater costs than were

day,¹ or cure proceedings formally defective;² to validate the proceedings of a term of court held without authority of law;³ to cure acts and omissions of officers as to registration of deeds,⁴ or filing and indorsing assignees' bonds;⁵ to make valid and effective unsigned records of a court;⁶ to legalize judgments entered upon an unauthorized waiver of summons by a defendant;⁷ and to render eligible to an office a person who was not so at the time of election thereto.⁸

eee. Taxation. — The legislature has the power, where a tax is invalid or void by reason of noncompliance with the law in its assessment, to supply the defect and provide for its reassessment in the case of either a general⁹ or a

allowed by law, was held a constitutional and valid act. *Beach v. Walker*, 6 Conn. 190.

Defective returns to a levy of execution, in that it did not show that the appraisers were chosen from the town where the land was situated, by reason of which defect the title did not pass to the purchaser at execution sale, were cured by a subsequent act of the legislature, which act was held constitutional and valid. *Mather v. Chapman*, 6 Conn. 54.

In *Menges v. Dentler*, 33 Pa. St. 495, 75 Am. Dec. 616; *overruling Menges v. Wertman*, 1 Pa. St. 218, it was decided, however, that a statute giving validity to an execution sale, which had previously been declared void by the supreme court of the state, was unconstitutional and void.

1. **Judgments Entered on Wrong Day.** — *Underwood v. Lilly*, 10 S. & R. (Pa.) 101. Judgments had been entered on the first instead of the third day of the term of court. Five years subsequently the legislature passed an act curing the defect, and validating the judgments, which act was sustained and the judgments held effective.

2. **Proceedings Formally Defective.** — Where jurisdiction has attached and there has been a formal defect in the proceedings the legislature can validate the same. *Lane v. Nelson*, 79 Pa. St. 407.

An act of the legislature validating a sale of land by the Orphans' Court without appraisalment is valid. *Davis v. State Bank*, 7 Ind. 316.

A curative statute validating the acts of listers of taxes who took but did not subscribe the required oath, has been upheld. *Smith v. Hard* 59 Vt. 13.

An act curing defects in the election of trustees and in a levy of taxes made by them has been sustained. *Millikin v. Bloomington*, 49 Ind. 62.

A county board having taken an assignment of a mortgage to secure a loan made without authority the legislature passed an act curing the defect. This was held a valid exercise of legislative power. *Halstead v. Lake County*, 56 Ind. 363.

Where a road was established by the county commissioners, but the commissioner appointed to view the same was appointed by the clerk in vacation and not by the board, which appointment was illegal, a curative act passed by the legislature curing the defects in the establishment of the road was held constitutional and effective. *Bennett v. Fisher*, 26 Iowa 497. And all defects in the proceedings of a city council in extending a street have been held to be confirmed by a subsequent act of

legislature. *Smith v. Buffalo*, 90 Hun (N. Y.) 118.

Limitation. — But the legislature cannot validate a judicial proceeding or judgment void for want of jurisdiction, or other reason. *Richards v. Rote*, 68 Pa. St. 248; *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656; *McDaniel v. Correll*, 19 Ill. 226, 68 Am. Dec. 587; *Yeatman v. Day*, 79 Ky. 186; *Maxwell v. Goetschius*, 40 N. J. L. 383, 29 Am. Rep. 242; *Nelson v. Rountree*, 23 Wis. 367.

3. **A Term of Court Held Without Any Authority** of law was subsequently validated, and judgments rendered at such time given full force. *Walpole v. Elliott*, 18 Ind. 258, 81 Am. Dec. 358.

4. *Rainey v. Gordon*, 6 Humph. (Tenn.) 345.

5. *Johnson v. Hill*, 90 Wis. 19; *Freiberg v. Singer*, 90 Wis. 608.

6. Where a judgment rendered in 1871 was not signed by the court, and was therefore invalid, and an execution could not be issued upon it, an act passed in 1881 validating all unsigned records was held effective, the court saying: "We have no doubt of the power of the legislature to enact a statute making valid and effective judgments where the only infirmity in the proceeding and the record is the omission of the judge's signature to the record of each day's proceedings." *Cookerly v. Duncan*, 87 Ind. 332.

7. *Muncie Nat. Bank v. Miller*, 91 Ind. 441; *Van Slyke v. Shryer*, 98 Ind. 132.

8. **Disqualification for Office Removed.** — At the time of the election of a woman to the office of county superintendent, she was not eligible. A judgment having been entered against her for possession of the office, was appealed to the supreme court on the 18th day of March, 1876. On the 17th day of March, 1876, an act was approved removing ineligibility to hold this office on account of sex. It was held that the act cured and legalized the election which was held in the absence of positive law authorizing it, and that the law as it stood at the time judgment was rendered controlled the case. *Huff v. Cook*, 44 Iowa 639.

9. **Taxes — Assessment Void.** — *Iowa R. Land Co. v. Soper*, 39 Iowa 112; *McCoy v. Michew*, 7 W. & S. (Pa.) 386; *Tallman v. Janesville*, 17 Wis. 71; *Cross v. Milwaukee*, 19 Wis. 509.

Judgments having been obtained against a county, the board of supervisors, for the purpose of paying them, made a levy which was in excess of the maximum levy authorized by law. The supreme court having decided the levy to be void, the legislature passed an act validating the levy, and the act was sustained

special tax.¹

Municipal Assessments. — And also, where debts were incurred by a municipal corporation without legal authority, to ratify the same and provide for assessment and collection of taxes for their payment.²

(bb) *Statutes Providing Remedies* — aaa. **In General.** — Where a right already exists it is in the power of the legislature to provide a remedy,³ and it is within its

by the court. *Iowa R. Land Co. v. Soper*, 39 Iowa 112.

When Curative Acts Valid — Cannot Cure Want of Jurisdiction. — The legislature has the power to pass curative acts by which various acts and proceedings of the officers and boards, charged with the assessment and levy of taxes, are rendered legal and valid. But when the officer or tribunal has no jurisdiction or power the act is void and subsequent legislation cannot cure it. *People v. Goldtree*, 44 Cal. 323.

In *Hart v. Henderson*, 17 Mich. 218, Cooley, C. J., said: "While it is unquestionably within the power of the legislature to cure irregularities in the proceedings for the assessment and collection of any taxes which are authorized by law, and to perpetuate their lien upon the land until paid, it is not within its province to declare that a demand which is asserted against a citizen, without authority of law, shall constitute a lien upon his property, and that he shall be precluded from asserting his rights in the courts in regard to the property, except subject to a judgment for the unlawful demand. Curative statutes may cover any mere irregularity in the course of proceedings for the enforcement of a lawful demand, but they can never cure a want of jurisdiction either in tax proceedings or those of any other description."

1. Special Taxes — Curing Defects in Levy. — *Brevort v. Detroit*, 24 Mich. 324; *Wilson v. Buckman*, 13 Minn. 441; *Comer v. Folsom*, 13 Minn. 219; *May v. Holdridge*, 23 Wis. 93.

In *Boardman v. Beckwith*, 18 Iowa 292, the levies of taxes were made without any lawful authority, the law having been repealed, and by oversight no provision having been made for the levy of the taxes of 1858. In 1860 the legislature passed an act to cure and render legal and valid these illegal and void levies, and it was held that the act was constitutional, valid, and operative, and rendered the taxes levied in 1858 collectible.

Where there were certain defects in assessments of taxes which were cured by act of the legislature, the court said: "We do not think the courts have the power to go behind assessments, thus declared legal and binding, and inquire into alleged errors and irregularities in the assessments." *People v. Todd*, 23 Cal. 184.

Where the assessor had omitted to return an abstract of the assessment to the town clerk's office by the first day of December, as required by law, it was held that such assessment lists, by reason of such omission, were invalid and no tax could lawfully be laid thereon or collected. Such omissions were cured by act of the legislature, but the statute was strictly construed, the court saying it would not be given an operation to any greater extent or for any other purpose than explicitly

stated in the act. *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550; *Cowgill v. Long*, 15 Ill. 202; *Musselman v. Logansport*, 29 Ind. 533.

An act providing that the ordinances of the city of Clinton respecting the paving of the streets, and the resolutions assessing and levying the taxes therefor, be legalized, and that the actions of the city council in respect thereto be of as binding force as though in strict conformity to law, was a valid curative act, though passed after an action had been commenced to recover a special assessment for improvements made under the ordinance referred to. *Clinton v. Walliker*, (Iowa 1896) 68 N. W. Rep. 431.

And so when proceedings of a county in the construction of a levee were void by reason of the failure to file with the county auditor a petition signed by a majority of the property owners, a curative act afterwards passed was held effective as it was within the power of the legislature to provide for a reassessment and reapportionment of the costs of the improvement. *Richman v. Muscatine County*, 77 Iowa 517, 14 Am. St. Rep. 308.

Where special judgment taxes had been declared illegal by the supreme court, but no judgment had been rendered upon the filing of the first opinion, and pending the decision of the case upon petition for rehearing the legislature passed an act affirming the legality of the taxes, it was held that the legislative act established their validity. *Iowa R. Land Co. v. Sac County*, 39 Iowa 124.

Under an act of assembly providing that when any assessment or special tax is invalid by reason of nonconformity to any law or ordinance, such invalidity may be cured by the city council, the city council may cure the defect in a paving contract caused by the failure to determine the kind and quality of the material to be used before advertising for bids. *Tuttle v. Polk*, 84 Iowa 12.

2. See *supra*, this section, *Curative and Validating Acts — In General*.

3. Providing Remedies. — *Cuyahoga Falls Real Estate Assoc. v. McCaughy*, 2 Ohio St. 152; *Pittsburgh, etc., Turnpike Road Co. v. Com.*, 2 Watts (Pa.) 433; *Sutherland v. De Leon*, 1 Tex. 250.

A decree of divorce and alimony was obtained, but the decree not being a lien upon the lands of the defendant, the plaintiff was unable to collect the same. Subsequently an act was passed by the legislature providing that judgments for alimony might be enforced as other judgments. An execution issued upon the judgment and levied upon lands was sustained. *Atkins v. Atkins*, 18 Neb. 474.

It is not unconstitutional to provide a new additional remedy for a just right, already in being, and which would be lost and destroyed if no remedy were provided. *Hope v. Johnson*, 2 Yerg. (Tenn.) 123.

power to enforce a previous moral obligation.¹

bbb. No Vested Right in Remedies. — A party has no vested right in a remedy,² and the legislature may pass laws creating, altering, modifying, or even taking away remedies for the recovery of debts;³ may change the grounds upon which an

1. Enforcing Existing Moral Obligations. — *Butler v. Toledo*, 5 Ohio St. 225; *Lewis v. McElvain*, 16 Ohio 347; *Johnson v. Bentley*, 16 Ohio 97.

The legislature may in many cases pass retrospective laws to enforce previously existing moral obligations. Thus where S. county subscribed to the capital stock of a railroad, and subsequently a new county was created by detaching a portion of S. county, but no provision was made in the act for the collection of the proportion of taxes due by such detached portion of S. county by reason of such subscription, it was held that a subsequent act of the legislature making provision for collecting such taxes was a valid and proper exercise of legislative power. *Sedgwick County v. Bunker*, 16 Kan. 498.

An act reimbursing a county for costs expended by it in causes removed to it from other counties, and putting part of the expenses upon it, was sustained. *Lycoming v. Union*, 15 Pa. St. 166, 53 Am. Dec. 575.

Doubtful Legality of Bank's Organization — Statute Giving Right to Recover on Notes. — Certain notes having been executed to a bank which was supposed to have been illegally organized, and doubts being entertained by the legislature as to the right of said bank to recover the debts due thereon, the legislature passed an act authorizing said bank, through its trustee, to commence and prosecute suits against the debtors of the bank; the court held the act constitutional and valid. *Lewis v. McElvain*, 16 Ohio 347.

Imposing on Municipality Payment of Unenforceable but Just Obligation. — It is competent for the legislature to impose upon the city payment of a demand which was without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, but which from some irregularity or omission in the proceedings by which it was created cannot be enforced. *New Orleans v. Clark*, 95 U. S. 644.

2. Laws Regulating Remedies Confer No Vested Rights. — *Iverson v. Shorter*, 9 Ala. 713; *Appeal of Mechanics*, etc., Bank, 31 Conn. 63; *Lockett v. Usry*, 28 Ga. 345; *Woods v. Soucy*, 166 Ill. 407; *Rosenthal v. Wehe*, 58 Wis. 621.

3. An Act Providing for the Revivor of Judgments which have been or may hereafter be rendered, or which are or may become dormant, is not in conflict with the section of the constitution which inhibits passage of retroactive laws. *Bartol v. Eckert*, 50 Ohio St. 31.

Action Not to Abate by Death — Pending Action. — An act passed during the pendency of the suit, which reads, "Nor shall any action of tort * * * abate by the death of either party," applies to such suit and is constitutional. *Pritchard v. Savannah St., etc., R. Co.*, 87 Ga. 204.

Act Legalizing Illegal Tax Defeats Pending Suit. — An illegal tax had been paid under

protest; during the pendency of suit to recover the money paid, the legislature passed an act legalizing the tax; it was held that the act defeated the cause of action. *Grim v. Weissenberg School Dist.*, 57 Pa. St. 433, 98 Am. Dec. 237.

Act Providing Remedy to Enforce Tax Lien. — The revenue laws of 1858-1867 provided that taxes should be a perpetual lien upon real estate, but provided no remedy for their enforcement. In 1871 an amendment was passed affording a remedy by foreclosure. As the amendment did not create any additional lien for past due taxes, but merely provided a remedy to make the lien available, the law was sustained. *Schoenheit v. Nelson*, 16 Neb. 235.

A Statute Providing for the Redemption of the Interest of the Debtor in Real Estate, which should be sold, by the debtor or any *bona fide* creditor within two years, applies although the purchasing creditor was a creditor at the passage of the act, as the creditor has no vested right in the remedy. *Iverson v. Shorter*, 9 Ala. 713.

Right Founded Solely on Statute — Effect of Repeal. — A right of action or a remedy founded solely on a statute, or a pending suit to enforce such remedy, not prosecuted to judgment, is terminated by the repeal of such statute, without a saving clause. *Bennett v. Hargus*, 1 Neb. 419.

Act Abolishing Specific Remedy Provided for in Contract. — Although the contract contains a provision that the party may resort to a particular remedy for its enforcement, a general act of the legislature abolishing a remedy is not an impairment of the obligation of the contract. Accordingly where a lease was made in 1845 for four years, providing generally for distress for rent, it was held that an act abolishing this distress for rent was valid and applied to this lease, notwithstanding it took away the right. *Conkey v. Hart*, 14 N. Y. 22.

Act Abolishing All Remedy. — A law which provided that no action of any kind should be maintained in any court of the state for intoxicating liquors sold in any other state or county whatever, or any action to recover possession of such intoxicating liquors or the value thereof, was sustained in *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290.

Act Regulating Foreclosure Proceedings. — A statute relating to foreclosure of mortgages requiring "an abstract of the writ of possession with the time of obtaining the possession" to be filed, was applied to mortgages in existence at the time of its enactment. *Bird v. Keller*, 77 Me. 270.

Act Forbidding Suits Against Bank After Receiver Appointed. — An act which authorizes an equal distribution of the property to the creditors of an insolvent bank, and declares, "No action shall be maintained against any bank after the appointment of receivers thereof, but all the creditors shall have their remedy under the provisions of this bill," is constitu-

attachment may issue;¹ may authorize the court to amend civil process;² may change the remedy as to issuing executions;³ may change the form of action,⁴ the rule for payment and recovery of costs,⁵ the time for holding a

tional. *Leathers v. Shipbuilders' Bank*, 40 Me. 386.

Act Limiting Right of Attachments Against Insolvents.—An act for the equal distribution of insolvent debtors' estates, provided that the assignment shall vest the debtor's property in the assignee, although the same may be attached, and shall dissolve such attachment, applies to an attachment made after the statute went into operation, for the purpose of securing a *bona fide* debt, incurred before its enactment. *Bigelow v. Pritchard*, 21 Pick. (Mass.) 169.

Act Cutting Off Defense that Contracts Are Against Public Policy or Statute.—In *Cuyahoga Falls Real Estate Assoc. v. McCaughy*, 2 Ohio St. 152, a case arose under an act of the legislature authorizing trustees for the creditors generally of the Cuyahoga Falls Real Estate Association to take such proper proceedings to collect all bonds, bills, mortgages, etc., and providing it should not be lawful for the defendants to plead as defense, that the written evidences of indebtedness were void on account of their being contracts against public policy or against or in violation of any statute law of the state. Justice Thurman said in the opinion: "Now there was nothing in equity or good morals to render the mortgage in question void. If it ever was void, it was so only because a statute, founded upon principles of public policy solely, declared it so. That policy was a matter of public concern, and the general assembly has seen fit to change it. Under these circumstances we do not see that the defendant should be permitted to rely upon it. * * * They [retrospective laws] were frequently sustained under the former constitution, and have also been sustained by the highest courts of other states, and by the Supreme Court of the United States."

1. Act Changing Grounds for Attachment.—An amended affidavit setting up new grounds for attachment was allowed, and the new ground applied to action pending when the statute was enacted. *Rosenthal v. Wehe*, 58 Wis. 621.

Where a cause of action arose prior to the statute, it was held that the right to attachment provided should be applied retrospectively. *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120.

2. An Act Authorizing the Court to Amend Civil Process by striking out the name of a party applies to cases pending and is constitutional. It is a general rule of construction that where an enactment deals with practice and procedure, it applies to all actions unless otherwise expressed, whether commenced before or after the enactment. *Murray v. Mattison*, 63 Vt. 479.

3. Change of Remedy as to Issuing Execution and extending the time for issuing the same applied to judgments rendered before the passage of the act. *Henschall v. Schmidt*, 50 Mo. 454; *Bolton v. Landsdown*, 21 Mo. 399; *Selsby v. Redlon*, 19 Wis. 17.

And so an act authorizing a justice to issue garnishee process was applied to a judgment rendered before the passage of the act. *Fisher v. Hervey*, 6 Colo. 16.

A statute which repealed an enactment providing that amendments to an execution caused the levy to fail, and which provided that a levy should not fail if the execution was amended, was held to apply to cases pending at the time of its passage, and not to be in violation of a constitutional provision inhibiting retrospective laws. *Baker v. Smith*, 91 Ga. 142.

A statute provided that a homestead should not be subject "to the lien of any judgment," or to sale on execution. By subsequent amendment, the words quoted were stricken out. It was held that this amendment made the section retroactive and gave a prior judgment a lien on the homestead. *Leak v. Gay*, 107 N. Car. 468.

Contractual Distinguished from Remedial Portions of Law.—Such portions of an execution law as affect the obligations of the contract become a part of the contract, but so far as execution laws are remedial they may be modified and changed at any time. "The method of enforcing liability may be changed, but the liability itself cannot be impaired." *Coriell v. Ham*, 4 Greene (Iowa) 455, 61 Am. Dec. 134. See also *Schmidt v. Holtz*, 44 Iowa 446.

An act which provided for a resale of property upon execution upon a showing that the price was inadequate was held to apply to a previously executed mortgage, and constituted a part of the remedy only. *Chaffee v. Aaron*, 62 Miss. 29.

The Law in Force at the Time of a Sale of Lands upon Execution must control the manner of proceeding, by the officer conducting such sale, and not the law in force at the time of the rendition of the judgment, except those cases specially provided by statute. *Allen v. Parish*, 3 Ohio 187.

See also the title **SHERIFFS' SALES**.

4. Changing Actions of Criminal to Civil Character.—An act providing that suits to obtain the forfeiture of liquors should be held to be *in rem* and proceeded in as civil cases has been held to apply to an action pending at the time of the passage of the act. *Hine v. Belden*, 27 Conn. 384.

Legal Changed to Equitable Remedy, or Vice Versa.—A statute which merely gives a remedy at law where it could previously have been made available in equity, or *vice versa*, may consistently with the constitution operate retrospectively so as to embrace contracts already made. *Paschall v. Whitsett*, 11 Ala. 478.

Requiring Joint Action against Parties to Promissory Note.—A statute requiring a joint action against the several parties to a promissory note, whereas prior to the statute the plaintiff could maintain separate action against the various parties, was held to be constitutional. *McMillan v. Sprague*, 4 How. (Miss.) 647, 35 Am. Dec. 472.

5. Taxation of Costs—Changing Rule where Nominal Damages Recovered.—An act providing that in all cases in which the plaintiff recovers only nominal damages the court may

term of court; ¹ may abolish imprisonment for debt; ² may authorize a court to correct its judgments; ³ may change the rule for measure of damages; ⁴ may change the law as to the necessary parties to a suit, ⁵ as to the continuance of

allow costs to the plaintiff or defendant or neither party, applies to a case pending at the time of the passage of the act. *Taylor v. Keeler*, 30 Conn. 324.

Statute Passed Pending Appeal. — Pending an appeal to the supreme court an act took effect providing for the payment of costs in case of a change of venue. This act was held to apply to such pending appeal. *Lee v. Buckheit*, 49 Wis. 54. See also *Ackley v. Tarbox*, 19 App. Pr. (N. Y. Supreme Ct.) 119. And compare *Pruyn v. Lynch*, 44 Hun (N. Y.) 587.

Statutes in Force at Time Right to Costs Accrues Control. — The right to costs is created by statute and depends wholly upon it, and the right does not become fixed until the termination of the suit. The recovery of costs must be controlled by the statutes in force at the time the right to costs accrues, not at the time of taxation. *Meigs v. Parke*, 1 Morr. (Iowa) 378; *Billings v. Segar*, 11 Mass. 340; *Onondaga v. Briggs*, 3 Den. (N. Y.) 173; *Hepworth v. Gardner*, 4 Utah 439.

Law in Force at Time of Verdict Governs. — Right to costs is governed by the law in force at the time of final verdict, in cases begun before, but tried after the change in law.

Maine. — *Ellis v. Whittier*, 37 Me. 548.

Massachusetts. — *Com. v. Cambridge*, 4 Met. (Mass.) 35.

New York. — *McMasters v. Vernon*, 4 Duer (N. Y.) 625; *Hunt v. Middlebrook*, 14 How. Pr. (N. Y. Supreme Ct.) 300; *Moore v. Westervelt*, 14 How. Pr. (N. Y. Super. Ct.) 279; *Crary v. Norwood*, 5 Abb. Pr. (N. Y. Supreme Ct.) 219; *People v. Herkimer C. P.*, 4 Wend. (N. Y.) 210; *Jackett v. Judd*, 18 How. Pr. (N. Y. Supreme Ct.) 385; *Jones v. Underood*, 18 How. Pr. (N. Y. Supreme Ct.) 532; *Torry v. Hadley*, 14 How. Pr. (N. Y. Supreme Ct.) 357; *Fisher v. Hunter*, 15 How. Pr. (N. Y. Supreme Ct.) 156; *Phipps v. Van Cott*, 15 How. Pr. (N. Y. Supreme Ct.) 121.

South Carolina. — *Kapp v. Loyns*, 13 S. Car. 288.

A case having been dismissed in 1862 and motion for new trial continued until 1864, at which time the law for taxation of costs and amount of recovery thereof had been changed, the court held that the costs should be governed by the law existing at the time of the verdict, which was the dismissal in 1862. *Scudder v. Gori*, 28 How. Pr. (N. Y. Super. Ct.) 155.

An act fixing the amount to be taxed as costs for attorney's fees for the foreclosure of certain mortgages at \$25, was applied to mortgages executed before the passage of the act. *Kosuth County v. Wallace*, 60 Iowa 508.

1. Changing Term Time of Court. — The legislature can change the time for holding a term of court, as the law does not suppose that the parties contracted with reference to the remedy. *Rathbone v. Bradford*, 1 Ala. 312; *Woods v. Buie*, 5 How. (Miss.) 285.

2. The Right to Imprison a Debtor is no part of the contract, and he may be released from imprisonment without impairing its obligation.

Sturges v. Crowningshield, 4 Wheat. (U. S.) 122; *Mason v. Haile*, 12 Wheat. (U. S.) 370; *Woodfin v. Hooper*, 4 Humph. (Tenn.) 13. And a legislature can abolish imprisonment for debt. *Mason v. Haile*, 12 Wheat. (U. S.) 370; *Oriental Bank v. Freese*, 18 Me. 109, 36 Am. Dec. 701.

3. Correcting Judgments. — An act requiring a court to which application is made by *habeas corpus* for the release of any prisoner confined under sentence erroneous in time or place, to correct the sentence, is retroactive, and authorizes the correction of sentences passed previous to the passage of the act. *Ex p. Bethurum*, 66 Mo. 545.

4. Measure of Damages. — A statute which enlarged the remedy for the infringement of a patent by giving as damages the entire profits was applied to a case pending at the time the statute was enacted as to infringements which had occurred, in an action where the plaintiff was allowed to recover for all infringements up to the time of trial. *Untermeyer v. Freund*, 58 Fed. Rep. 205, 50 Fed. Rep. 77.

Prior to an amendment of the statute fixing the measure of damages the defendant converted certain stock belonging to the plaintiff. Upon appeal from a judgment rendered subsequently to the enactment of the amendment, in an action of conversion begun prior to the amendment, it was held that the measure of damages was that prescribed by the amendment to the statute. *Dent v. Holbrook*, 54 Cal. 145.

5. Statutes Changing the Parties necessary to the determination of controversies will take effect upon prior as well as subsequent transactions, and the actions arising therefrom. *Crawford v. Alabama Branch Bank*, 7 How. (U. S.) 279; *Tompkins v. Forrestal*, 54 Minn. 119; *Raymond v. Sheboygan*, 76 Wis. 335. See also *Hancock v. Ritchie*, 11 Ind. 48; *Graham v. State*, 7 Ind. 470, 65 Am. Dec. 745.

An act authorizing assignees of judgments to sue in their own name applies to judgments previously recovered. *Clark v. Willet*, 59 N. J. L. 308. See also *Tompkins v. Forrestal*, 54 Minn. 119; *Augusta Bank v. Augusta*, 49 Me. 507 (act authorizing coupon holders to sue in their own name); *McSimans v. Lancaster*, 63 Wis. 596.

Right of Partner to Sue Firm, and Vice Versa. — A law providing that in suits pending or to be brought the action should not abate by reason of the fact that the plaintiff or defendant was a member of the firm, the opposite party to the action, was sustained and was held to apply to a suit pending at the time the statute was passed. *Hepburn v. Curtis*, 7 Watts (Pa.) 300, 32 Am. Dec. 760.

A Statute Requiring a Joint Action Against the Several Parties to a Promissory Note, whereas before the plaintiff could maintain separate actions, is constitutional. *McMillan v. Sprague*, 4 How. (Miss.) 647, 35 Am. Dec. 412.

Substituting Receiver in Actions Against Insolvent Bank. — Where a receiver had been appointed to wind up the affairs of an insolvent

cases and times of pleading therein,¹ or as to the rules of practice in the courts.²

ccc. Evidence and Witnesses. -- There is no vested right in a rule of evidence, and as such rules only affect the remedy it is within the constitutional power of the legislature to modify them.³ And the same rule applies to the qualifications and competency of witnesses.⁴

bank, but before completing his trust a subsequent act authorized the court to appoint his successor and provided that suits pending, instituted by or against said bank, should not abate, but the receiver appointed should be substituted, was held constitutional. *Searcy v. Stubbs*, 12 Ga. 437.

1. **Regulating Times of Pleading.** — An act providing that in actions of foreclosure commenced or to be commenced between certain dates, the defendants should not be held to answer till nine months from the date of service of the original notice on the first defendant served, was held constitutional and valid. *Holloway v. Sherman*, 12 Iowa 282, 79 Am. Dec. 537. See also *Willis v. Fincher*, 68 Ga. 444.

Retarding Proceedings Against Persons in Military Service. — An act providing that "All actions now pending or hereafter brought" should, if the defendant was in the actual military service of the United States, stand continued during the actual continuance of said service, was held valid. *McCormick v. Rusch*, 15 Iowa 127, 83 Am. Dec. 401.

Staying civil process against a person in the service of the United States, for the term of such service, is constitutional. *Breitenbach v. Busch*, 44 Pa. St. 313, 84 Am. Dec. 442.

2. **The Legislature Can Change a Rule of Practice** making the change applicable to all cases brought before or after the passage of the act. *Appeal of Mechanics*, etc., Bank, 31 Conn. 63; *Roberts v. Thomson*, 28 Ill. 79; *Honore v. Home Nat. Bank*, 80 Ill. 489; *Ballard v. Ridgley*, 1 Morr. (Iowa) 28; *Bibbins v. Polk County*, (Iowa 1897) 69 N. W. Rep. 1007; *Ingraham v. Dooley*, 1 Morr. (Iowa) 29; *People v. Tibbets*, 4 Cow. (N. Y.) 389; *Murray v. Mattison*, 63 Vt. 479.

Where there is no saving clause as to existing legislation in a repealing act, which provides a new procedure, all rights of action will be enforced under the new procedure, without regard to whether suit had been instituted or not. *Illinois Cent. R. Co. v. Wenona*, 163 Ill. 288; *Dobbins v. Peoria First Nat. Bank*, 112 Ill. 553; *Winslow v. People*, 117 Ill. 152.

Where at the time of appeal the case was to be heard in order of filing, and a subsequent law gave preference to this class of cases, it was held valid. *Hoa v. Le Franc*, 18 La. Ann. 393.

An Act Changing the Mode of Summoning Jurors in Felony Cases applies to all cases tried after the passage of the act, though the crime was committed and the examining court may have passed upon the case before the passage of the act. *Perry v. Com.*, 3 Gratt. (Va.) 602.

3. **Right to Modify Rules of Evidence.** — *Sumner v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106; *Robinson v. State*, 84 Ind. 452; *Heagy v. State*, 85 Ind. 260; *Ballard v. Ridgley*, 1 Morr. (Iowa) 28; *Ingraham v. Dooley*, 1 Morr. (Iowa) 29; *Harlan v. Sigler*, 1 Morr.

(Iowa) 39; *Sanders v. Greenstreet*, 23 Kan. 425; *Fales v. Wadsworth*, 23 Me. 553; *Hughes v. Cannon*, 2 Humph. (Tenn.) 589; *Ehle v. Brown*, 31 Wis. 405.

Illustrations. — A statute making sealed instruments only presumptive evidence of consideration and permitting them to be read in evidence does not impair the obligation of the contract, where the question is failure of consideration. *MCurtie v. Stevens*, 13 Wend. (N. Y.) 527; *Case v. Boughton*, 11 Wend. (N. Y.) 106.

But where the question arose on a plea of want of consideration in the execution of the contract, the court refused to apply the law to previously executed contracts. *Mann v. Eckford*, 15 Wend. (N. Y.) 503.

An act changing the rule of evidence which provided that all contracts theretofore executed between certain fixed dates, for the payment of money, should be presumed to have intended Confederate money, is constitutional. *Cowan v. McCutchen*, 43 Miss. 207.

An act to perpetuate the testimony of the title of certain real property, by which it was provided that the testimony when taken according to the act should be *prima facie* evidence of the facts, was upheld as constitutional and proper exercise of legislative power. *Howard v. Moot*, 64 N. Y. 268.

The legislature has the power to enact a law providing that the validity of existing marriages shall not be questioned in the trial of collateral issues, on account of the insanity or idiocy of either of the parties, and the same was applied to marriages existing at the time of its passage. *Goshen v. Richmond*, 4 Allen (Mass.) 458.

A law providing that after five years from the probate of a will, no action being brought to contest it, the same should be conclusive evidence of title, was applied to a will probated before the passage of the act. *Kenyon v. Stewart*, 44 Pa. St. 179.

4. **The Question Who Are Competent Witnesses** is governed by the law in force at the time of trial. *Ralston v. Lothain*, 18 Ind. 303; *West v. His Creditors*, 1 La. Ann. 365; *Rich v. Flanders*, 39 N. H. 304; *John v. Bridgman*, 27 Ohio St. 42.

An act making a husband and wife competent witnesses for and against each other, except as to certain enumerated acts, was held applicable to cases pending and causes of action existing at the time of the passage of the act. *Westerman v. Westerman*, 25 Ohio St. 500; *John v. Bridgman*, 27 Ohio St. 43; *Wilson v. Wilson*, 86 Ind. 472.

A deposition having been taken while a witness was incompetent to testify, the law was afterwards so changed as to remove his incompetency to testify, and the court permitted the deposition to be read upon the trial of the case. *Oliver v. Moore*, 12 Heisk. (Tenn.) 482.

At the time of the finding of an indictment

add. Statutes of Limitations — Legislative Power to Change Statute of Limitations. — It is within the power of the legislature to prescribe a statute of limitations, provided only that sufficient time elapses between the passage of the act and the bar of the cause of action to enable the creditor to assert his claim.¹

the persons jointly indicted were not competent witnesses for each other, but before the trial the law was changed rendering them competent to so testify, and the law was applied to the case. *Laughlin v. Com.*, 13 Bush (Ky.) 261.

1. Statutes of Limitations — *United States*. — *Hawkins v. Barney*, 5 Pet. (U. S.) 457; *Jackson v. Lamphire*, 3 Pet. (U. S.) 280; *Ross v. Duval*, 13 Pet. (U. S.) 45; *Sohn v. Waterson*, 17 Wall. (U. S.) 596; *McGahey v. Virginia*, 135 U. S. 662; *Mitchell v. Clark*, 110 U. S. 643; *Koshkonong v. Burton*, 104 U. S. 675; *MacFarland v. Jackson*, 137 U. S. 258; *Terry v. Anderson*, 95 U. S. 628; *Samples v. City Bank*, 1 Woods (U. S.) 523.

Alabama. — *Martin v. Martin*, 35 Ala. 560.

California. — *Billings v. Hall*, 7 Cal. 1.

Georgia. — *George v. Gardner*, 49 Ga. 441.

Indiana. — *State v. Clark*, 7 Ind. 468; *DeMoss v. Newton*, 31 Ind. 219; *Leard v. Leard*, 30 Ind. 171; *Pritchard v. Spencer*, 2 Ind. 486.

Iowa. — *Maltby v. Cooper*, 1 Morr. (Iowa) 59; *Watts v. Everett*, 47 Iowa 269.

New Hampshire. — *Willard v. Harvey*, 24 N. H. 344.

Maine. — *Sampson v. Sampson*, 63 Me. 328; *Beal v. Nason*, 14 Me. 344.

Massachusetts. — *Call v. Hagger*, 8 Mass. 423; *Smith v. Morrison*, 22 Pick. (Mass.) 430; *Bigelow v. Bemis*, 2 Allen (Mass.) 496; *Loring v. Alline*, 9 Cush. (Mass.) 68.

Michigan. — *Ludwig v. Stewart*, 32 Mich. 27; *Krone v. Krone*, 37 Mich. 308; *Parsons v. Wayne Circuit Judge*, 37 Mich. 287.

Minnesota. — *Cook v. Kendall*, 13 Minn. 324; *Holcombe v. Tracy*, 2 Minn. 241; *Burwell v. Tullis*, 12 Minn. 572.

Mississippi. — *Power v. Telford*, 60 Miss. 195; *Briscoe v. Anketell*, 28 Miss. 371, 61 Am. Dec. 553; *Cameron v. Louisville, etc., R. Co.*, 69 Miss. 78.

Nebraska. — *Horbach v. Miller*, 4 Neb. 45.

New Jersey. — *Marsdon v. Seabury*, 3 N. J. L. 275.

New York. — *Acker v. Acker*, 81 N. Y. 143; *Lawrence v. Leake, etc., Orphan House*, 2 Den. (N. Y.) 577; *Dunham v. Sage*, 52 N. Y. 229 (close case); *Wheeler v. Jackson*, 105 N. Y. 681.

North Carolina. — *Cox v. Brown*, 6 Jones L. (N. Car.) 100.

Pennsylvania. — *Kenyon v. Stewart*, 44 Pa. St. 179.

South Carolina. — *Stoddard v. Owings*, 42 S. Car. 88.

Tennessee. — *Mathewson v. Spencer*, 4 Sneed (Tenn.) 383; *Girdner v. Stephens*, 1 Heisk. (Tenn.) 280, 2 Am. Rep. 700; *Yancy v. Yancy*, 5 Heisk. (Tenn.) 353, 13 Am. Rep. 5.

Texas. — *De Cordova v. Galveston*, 4 Tex. 470; *Odum v. Garner*, 86 Tex. 374; *Parker v. Buckner*, 67 Tex. 20 *McLane v. Paschal*, 62 Tex. 102; *Martin v. Kuykendall*, (Tex. Civ. App. 1894) 26 S. W. Rep. 144.

Washington. — *McQuesten v. Morrill*, 12 Wash. 335; *McAuliff v. Parker*, 10 Wash. 141; *Raymond v. Morrison*, 9 Wash. 156.

West Virginia. — *State v. Mines*, 38 W. Va. 125; *State v. Brookover*, 38 W. Va. 141; *Sturm v. Fleming*, 31 W. Va. 701.

Wisconsin. — *Eaton v. Manitowoc County*, 40 Wis. 668; *Howell v. Howell*, 15 Wis. 55; *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68; *Osborn v. Jaines*, 17 Wis. 573; *Pleasants v. Rohrer*, 17 Wis. 577; *Smith v. Packard*, 12 Wis. 371; *Sprecher v. Wakeley*, 11 Wis. 432; *Falkner v. Dorman*, 7 Wis. 388; *Parker v. Kane*, 4 Wis. 18, 65 Am. Dec. 283.

It is the settled doctrine of this court, that the legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, provided in each case a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of the suit before the bar takes effect. *Wheeler v. Jackson*, 137 U. S. 255.

But a statute changing the time within which an action may be brought affects merely the remedy in which no one has any vested right, provided only that he is given a reasonable time after the change in which to bring his action. *Bradley v. Norris*, 63 Minn. 156.

Illustrations. — A statute changing time within which a writ of error can be sued out, from two years to one year, has been applied to judgments previously entered. *Odum v. Garner*, 86 Tex. 374; *Martin v. Kuykendall*, (Tex. Civ. App. 1894), 26 S. W. Rep. 144.

Where a person went into possession of land claiming title by adverse possession, but had not been in possession long enough to acquire title under a statute which allowed him to claim six hundred and forty acres when a code which limited such claim to one hundred and sixty acres was adopted, the provisions thereof were applied to his former possession and restricted his right to claim more than one hundred and sixty acres. *Hardy v. Dunlap*, 7 Tex. Civ. App. 339.

But under the special provision of the statute of *South Carolina* it was held that where the plaintiff's possession of land commenced in 1870, when the period of time necessary to bar the state was forty years, it was necessary for such possession to continue forty years, to bar the right of the state, although the statute was amended in 1873 so as to reduce the time necessary to create the bar to twenty years. *Heyward v. Farmers' Min. Co.*, 42 S. Car. 138, 46 Am. St. Rep. 702.

Legislature Judge of Reasonable Time Allowed to Cut Off Existing Rights. — In *Michigan* it is held that so far as such a statute of limitations is to have a retroactive effect, it must fix a definite time within which the action shall be brought; to allow the court to say what would be a reasonable time, would be a limitation by the court, and not by the legislature. *Ludwig v. Stewart*, 32 Mich. 27.

A reasonable time must be given after the passage of a limitation act, to permit the creditor to bring his action, and the legislature is

Changed Statute May Operate on Existing Causes of Action. — And it is well settled that the mere fact that the cause of action accrued before the passage of the act, is not sufficient to take it out of the operation of the statute.¹

Period of Redemption from Judicial Sales. — So the legislature has power to lessen the time to redeem from judicial sale.²

Barring All Suit on Existing Cause of Action — Reviving Barred Cause. — It has not power, however, to cut off the remedy or bar suit upon an existing cause of action *instantly*, or without giving a reasonable time to prosecute,³ nor to

the exclusive judge of what is such reasonable time. *De Moss v. Newton*, 31 Ind. 219; *Leard v. Leard*, 30 Ind. 171; *Call v. Hagger*, 8 Mass. 423; *Smith v. Morrison*, 22 Pick. (Mass.) 430; *Ludwig v. Stewart*, 32 Mich. 27.

A statute by which actions brought by heirs to recover real estate sold by executor, administrators, and guardians on license, are limited to five years from the date of deed, applies to sales made before and after the passage of the act.

"In this case no vested rights were disturbed, as the demandants were minors and the statute did not begin to run till after its passage." *Beal v. Nason*, 14 Me. 341.

1. Modified Statute Applies to Existing Causes of Action — *United States*. — *Koshkonong v. Burton*, 104 U. S. 668.

Alabama. — *Cox v. Davis*, 17 Ala. 714, 52 Am. Dec. 199; *Henry v. Thorpe*, 14 Ala. 103; *Nickles v. Haskins*, 15 Ala. 620, 50 Am. Dec. 154.

Florida. — *Wade v. Doyle*, 17 Fla. 522.

Illinois. — *Turney v. Saunders*, 5 Ill. 527.

Indiana. — *Winston v. McCormick*, 1 Ind. 56; *Manchester v. Doddridge*, 3 Ind. 360.

Iowa. — *Maltby v. Cooper*, 1 Morr. (Iowa) 59; *Sleeth v. Murphy*, 1 Morr. (Iowa) 321, 41 Am. Dec. 232; *Phares v. Walters*, 6 Iowa 106; *Montgomery v. Chadwick*, 7 Iowa 114; *Wright v. Keithler*, 7 Iowa 92.

Kentucky. — *Pearce v. Patton*, 7 B. Mon. (Ky.) 162, 45 Am. Dec. 61; *Lewis v. Harbin*, 5 B. Mon. (Ky.) 564.

Massachusetts. — *Loring v. Alline*, 9 Cush. (Mass.) 68; *Wright v. Oakley*, 5 Met. (Mass.) 400; *Willard v. Clarke*, 7 Met. (Mass.) 435; *Penniman v. Rotch*, 3 Met. (Mass.) 218.

Minnesota. — *Burwell v. Tullis*, 12 Minn. 577.

Montana. — *Gillette v. Hibbard*, 3 Mont. 412.

New Hampshire. — *Gilman v. Cutts*, 23 N. H. 376.

New Jersey. — *Marsdon v. Seabury*, 3 N. J. L. 275.

New York. — *Acker v. Acker*, 81 N. Y. 143; *Spoor v. Welles*, 3 Barb. Ch. (N. Y.) 109.

South Carolina. — *Stoddard v. Owings*, 42 S. Car. 88.

Texas. — *Mellinger v. Houston*, 68 Tex. 37; *De Cordova v. Galveston*, 4 Tex. 470.

Utah. — *Garland v. Bear Lake, etc., Water Works, etc., Co.*, 9 Utah 350.

Vermont. — *Wires v. Farr*, 25 Vt. 41; *Royce v. Hurd*, 24 Vt. 620.

Washington. — *McAuliff v. Parker*, 10 Wash. 141; *Baer v. Choir*, 7 Wash. 631; *Raymond v. Morrison*, 9 Wash. 156; *Tacoma Bldg., etc., Assoc. v. Clark*, 8 Wash. 289.

West Virginia. — *State v. Mines*, 38 W. Va. 125; *North Western Bank v. Hays*, 37 W. Va. 475.

"A statute of limitations may undoubtedly

have effect upon actions which have already accrued, as well as upon actions which accrue after its passage; whether it does so or not will depend upon the language of the act and the apparent intent of the legislature to be gathered therefrom." *Sohn v. Waterson*, 17 Wall. (U. S.) 596.

2. Lessening Time of Redemption from Judicial Sales. — *Butler v. Palmer*, 1 Hill (N. Y.) 325; *People v. Livingston*, 6 Wend. (N. Y.) 526.

3. Reasonable Time to Prosecute Must Be Allowed — *United States*. — *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 207; *Jackson v. Lamphire*, 3 Pet. (U. S.) 280.

Arkansas. — *Duke v. State*, 56 Ark. 485.

Iowa. — *Maltby v. Cooper*, 1 Morr. (Iowa) 59.

Kentucky. — *Berry v. Ransdall*, 4 Metc. (Ky.) 292.

Maine. — *Kennebec Purchase v. Laboree*, 2 Me. 294, 11 Am. Dec. 79.

Massachusetts. — *Call v. Hagger*, 8 Mass. 423.

Michigan. — *Price v. Hopkin*, 13 Mich. 318.

Texas. — *Gautier v. Franklin*, 1 Tex. 744.

Wisconsin. — *Osborn v. Jaines*, 17 Wis. 573; *Pleasants v. Rohrer*, 17 Wis. 577.

"If the legislature were to pass an act of limitations by which all actions upon past dispossessions were to be barred, without any allowance of time for the commencement thereof *in futuro*, it would be difficult to support its constitutionality, for it would be completely retrospective in its operation on vested rights." *Society, etc., v. Wheeler*, 2 Gall. (U. S.) 141. See also *Call v. Hagger*, 8 Mass. 423.

Where One Remedy Is Left, though Act Retroactively Cuts Off Another. — In *Maltby v. Cooper*, 1 Morr. (Iowa) 59, the legislature passed an act barring actions by assumpsit in five years, and this was applied retroactively by the court to a note which had already run five years, the party still having a remedy by action in debt, which was not barred by the statute. See also *Power v. Telford*, 60 Miss. 195.

Cannot Revive Cause of Action Already Barred — *Arkansas*. — *Couch v. McKee*, 6 Ark. 495; *Hawkins v. Campbell*, 6 Ark. 513.

Indiana. — *Stipp v. Brown*, 2 Ind. 647; *McKinney v. Springer*, 8 Blackf. (Ind.) 506.

Iowa. — *Thompson v. Read*, 41 Iowa 48.

Kansas. — *Morton v. Sharkey*, McCahon (Kan.) 113.

Kentucky. — *McCracken County v. Mercantile Trust Co.*, 84 Ky. 344.

Maine. — *Dyer v. Belfast*, 88 Me. 140.

Massachusetts. — *Kinsman v. Cambridge*, 121 Mass. 558; *Loring v. Boston*, 12 Gray (Mass.) 209; *Smith v. Morrison*, 22 Pick. (Mass.) 430.

Mississippi. — *Davis v. Minor*, 1 How. (Miss.) 183, 28 Am. Dec. 325.

New Hampshire. — *Wourt v. Winnick*, 3 N. H. 473, 14 Am. Dec. 384.

revive a cause of action after it has become barred by the statute of limitations.¹

Statutes Limiting the Duration of Judgment Liens are within the power of the legislature, and are held valid in all cases where they do not change the period of limitation previously established so as necessarily or practically to deny all remedy, and cut off existing rights of action.²

eee. Divorce and Marriage. — The legislature can confer power upon the courts to grant divorces for causes happening before the passage of the act, and such acts are not unconstitutional as being retrospective or affecting vested rights;³ and it may provide for a division of property on account of adultery committed before the passage of the act;⁴ and for a decree that the guilty party in divorce shall not remarry during the lifetime of the other party.⁵

The Legislature Has Power to Validate Prior Invalid Marriages, and to legitimate children born before the passage of the act.⁶

North Carolina. — Taylor v. Harrison, 2 Dev. L. (N. Car.) 374; Cox v. Brown, 6 Jones L. (N. Car.) 100; Phillips v. Cameron, 3 Jones L. (N. Car.) 390.

Oregon. — Baldro v. Tolmie, 1 Oregon 176.

Tennessee. — Girdner v. Stephens, 1 Heisk. (Tenn.) 280, 2 Am. Rep. 700; Yancy v. Yancy, 5 Heisk. (Tenn.) 353, 13 Am. Rep. 5.

Texas. — Grigsby v. Peak, 57 Tex. 142; Melinger v. Houston, 68 Tex. 37.

Vermont. — Lowry v. Keyes, 14 Vt. 66; Bradford v. Brooks, 2 Aik. (Vt.) 284, 16 Am. Dec. 715; Wires v. Farr, 25 Vt. 41.

Wisconsin. — Sprecher v. Wakeley, 11 Wis. 432; Pleasants v. Rohrer, 17 Wis. 577; Knox v. Cleveland, 13 Wis. 245; Von Baumbach v. Bade, 9 Wis. 559, 76 Am. Dec. 283; Whitney v. Brunette, 15 Wis. 61; Parish v. Eager, 15 Wis. 532; Hill v. Kricke, 11 Wis. 442.

1. An act of the legislature repealing a statute of limitations with respect to actions pending at the time of the repeal, and which are barred by the statute, is a retrospective law for the trial of a civil cause, repugnant to the constitution of the state, and wholly inoperative. Woart v. Winnick, 3 N. H. 473, 14 Am. Dec. 384.

But it is competent for the legislature to compel a county to pay its just debts, though the same may be barred by the statute of limitations. Caldwell County v. Harbert, 68 Tex. 321.

An act permitting an amendment to an appeal bond does not authorize the amendment of a bond on appeal from a judgment, a right to review which had become barred before the enactment of the statute. Decatur First Nat. Bank v. Preston Nat. Bank, 85 Tex. 560.

2. **Limiting Judgment Lien.** — Burwell v. Tullis, 12 Minn. 572.

In Ohio a question arose as to preferences among creditors in the fund arising from a sale of property under executions. It was held that judgment creditors, who had not sued out and levied execution within twelve months from the date of the judgment lost their lien and preference as against subsequent judgment creditors, who had sued out and levied execution within twelve months, and this in case of judgments recovered before the enactment of the law, as well as afterwards, although the prior statute did not require execution to be issued within any specified time in order to preserve the lien. McCormick v. Alexander, 2 Ohio 78.

A statute of 1873 provided that a judgment should be a lien for ten years, and allowed three years in which to renew it. An act of 1885 repealed the three years clause. It was held unconstitutional as to judgments which had run the ten years before the passage, but the three years for reviving which had not expired. King v. Belcher, 30 S. Car. 381.

3. **Statute Assigning Causes for Divorce Retroactive.** — Berthelemy v. Johnson, 3 B. Mon. (Ky.) 90, 38 Am. Dec. 179; Carson v. Carson, 40 Miss. 349; Jones v. Jones, 2 Overt. (Tenn.) 2, 5 Am. Dec. 645.

Bigelow v. Bigelow, 108 Mass. 38, arose under a statute providing that if after divorce from bed and board the parties live apart for five years the court, on proof, might grant an absolute divorce, and the statute was held retroactive and valid.

But see Greenlaw v. Greenlaw, 12 N. H. 200, where it was held, following Clark v. Clark, 10 N. H. 380, 34 Am. Dec. 165, that a statute providing that the innocent party could have a divorce where the other was convicted of a felony and actually imprisoned, did not authorize a divorce where the party was convicted and imprisoned before the act. See also Given v. Marr, 27 Me. 212; Sherburne v. Sherburne, 6 Me. 210, where it is held generally that statutes enacting causes for divorce cannot be applied retroactively.

4. West v. West, 2 Mass. 223.

5. **Act Forbidding Guilty Party to Remarry.** — Elliott v. Elliott, 38 Md. 357.

6. **Validating Prior Marriages and Legitimizing Children.** — Where a statute declared that if any person whose husband or wife shall have absented himself or herself for the space of five years, without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its validity shall be pronounced by a court of competent authority, it was applied to a marriage which had taken place before the passage of the act, and legitimated the children born before the passage of the act. Brower v. Bowers, 1 Abb. App. Dec. (N. Y.) 214.

And so in Virginia where the legislature passed a law declaring that the issue of a marriage deemed null in law should nevertheless be legitimate, it was held to legitimate children born before the act, so as to entitle them to share the estate, and as next of kin to en-

fff. Usury Laws. — Laws removing the defense of usury, or validating the contract so that an usurious contract may be enforced, are constitutional and apply to previously executed contracts.¹

(cc) *Penalty Statutes.* — If a statute creating a penalty is repealed without a saving clause, after a right of action to recover the penalty has accrued, the repeal of the statute destroys such right of action.² And the repeal of such a statute without a saving clause, during the pendency of a suit to enforce the liability, but before final judgment, abates the action,³ and if repeal takes place

title them to administration, where the father had died after the act took effect. *Stones v. Keeling*, 3 Hen. & M. (Va.) 228, note; *Rice v. Efford*, 3 Hen. & M. (Va.) 225.

See also *Monson v. Palmer*, 8 Allen (Mass.) 551; *Goshen v. Richmond*, 4 Allen (Mass.) 458.

1. Usury. — "It has been quite generally decided that the repeal of such laws [usury laws] without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld as against all objections on the ground that they deprived parties of vested rights or impaired the obligation of contracts." *Ewell v. Daggs*, 108 U. S. 143.

To the same effect, see *Savings Bank v. Bates*, 8 Conn. 505; *Mechanics*, etc., *Mut. Sav. Bank*, etc., *Assoc.*, *Allen*, 28 Conn. 97; *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 239; *Parmelee v. Lawrence*, 48 Ill. 331; *Hays v. Walker*, 7 Blackf. (Ind.) 540; *Andrews v. Russell*, 7 Blackf. (Ind.) 474; *Grimes v. Doe*, 8 Blackf. (Ind.) 371; *Sparks v. Clapper*, 30 Ind. 204; *Wood v. Kennedy*, 19 Ind. 68; *Perrin v. Lyman*, 32 Ind. 18; *Grinder v. Nelson*, 9 Gill (Md.) 299; *Wilson v. Hardesty*, 1 Md. Ch. 66; *Brandon v. Green*, 7 Humph. (Tenn.) 130. And see generally the title *USURY*.

2. Repeal of Statute Creating Penalty Retroactive — *United States*. — *Confiscation Cases*, 7 Wall. (U. S.) 454; *U. S. v. Tynen*, 11 Wall. (U. S.) 88; *U. S. v. Preston*, 3 Pet. (U. S.) 57; *Maryland v. Baltimore*, etc., *R. Co.*, 3 How. (U. S.) 534; *U. S. v. Passmore*, 4 Dall. (U. S.) 372.

Georgia. — *St. Mary's Bank v. State*, 12 Ga. 475.

Massachusetts. — *Com. v. Marshall*, 11 Pick. (Mass.) 350, 22 Am. Dec. 377.

Michigan. — *Engle v. Shurts*, 1 Mich. 150; *Breitung v. Lindauer*, 37 Mich. 217.

New York. — *Knox v. Baldwin*, 80 N. Y. 610; *Victory Webb Printing, etc., Co. v. Beecher*, 97 N. Y. 651.

Wisconsin. — *Dillon v. Linder*, 36 Wis. 344; *Rood v. Chicago*, etc., *R. Co.*, 43 Wis. 146.

3. Repeal Pending Action Abates Action — *United States*. — *In re Hall*, 167 U. S. 38; *Yeaton v. U. S.*, 5 Cranch (U. S.) 281; *U. S. v. Schooner Peggy*, 1 Cranch (U. S.) 104; *Norris v. Crocker*, 13 How. (U. S.) 431.

Alabama. — *Pope v. Lewis*, 4 Ala. 489.

California. — *San Luis Obispo First Nat. Bank v. Henderson*, 101 Cal. 307.

Connecticut. — *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 239.

Maine. — *Macnawhoc Plantation v. Thompson*, 36 Me. 365; *Oriental Bank v. Freese*, 18 Me. 109, 36 Am. Dec. 701.

Michigan. — *Bay City, etc., R. Co. v. Austin*, 21 Mich. 411.

Nebraska. — *Globe Pub. Co. v. State Bank*, 41 Neb. 175; *Kleckner v. Turk*, 45 Neb. 177.

New York. — *Butler v. Palmer*, 1 Hill (N. Y.) 324; *Curtis v. Leavitt*, 15 N. Y. 229; *Smith v. Banker*, 3 How. Pr. (N. Y. Supreme Ct.) 142; *Church v. Rhodes*, 6 How. Pr. (N. Y. Supreme Ct.) 281; *Schoepflin v. Calkins*, 5 N. Y. Misc. Rep. (Erie Supreme Ct.) 159.

Pennsylvania. — *Com. v. Beatty*, 1 Watts (Pa.) 382; *Stoever v. Immell*, 1 Watts (Pa.) 258; *Abbott v. Com.*, 8 Watts (Pa.) 517, 34 Am. Dec. 492; *Respublica v. Duane*, 4 Yeates (Pa.) 347.

Texas. — *Hubbard v. State*, 2 Tex. App. 506; *Montgomery v. State*, 2 Tex. App. 618.

Wisconsin. — *Rood v. Chicago, etc., R. Co.*, 43 Wis. 146.

Under the constitution and laws of New Hampshire it is held that the right of an individual to a penalty incurred under a statute is a civil cause and cannot be taken away by a repeal of the statute under which the penalty accrued. *Dow v. Norris*, 4 N. H. 16, 17 Am. Dec. 400, *overruling* *Lewis v. Foster*, 1 N. H. 61, where the constitutional question "was neither raised nor considered." See also *Lakeman v. Moore*, 32 N. H. 410.

Illustrations. — No proceedings can be pursued under a repealed statute. *Hatfield Tp. Road*, 4 Yeates (Pa.) 392.

A statute of Nebraska required corporations to give notice annually by publication in newspaper of the amount of existing debts, and provided that on failure to do so the stockholders should be jointly and severally liable for all debts then existing, and for all that should be contracted before such notice given. Suit was brought for debts contracted during the default of notice and during the pendency of suit, but before judgment the statute was repealed. The action was held to have abated. *Globe Pub. Co. v. State Bank*, 41 Neb. 175; *Kleckner v. Turk*, 45 Neb. 177.

Where the law required an insurance company to pay a certain per cent. of premiums for the benefit of the fire department, and further required a bond to be given by every agent for the faithful annual account of premiums received, and a penalty of two hundred dollars to be given for every policy issued by an agent who had not given bond, an agent paid failed to give bond, but paid the per cent. of premiums as required. During the pendency of a suit to recover the penalties from him, the legislature passed an act relieving from the penalty in all cases where the premiums had been paid, though no bond had been given. It was held that the action was defeated by the new

after judgment it arrests the judgment.¹

bb. INVALID — (aa) General Rule. — An act of the legislature which seeks to divest or impair vested rights of property is generally held to be unconstitutional and void.²

statute. *West Troy Fire Department v. Ogden*, 59 How. Pr. (N. Y. Supreme Ct.) 21.

Where a bond had been given providing that the defendant should not depart the jail limits, and this condition was broken, but subsequently the legislature passed an act enlarging such limits so as to embrace the territory the entry on which constituted the breach of the bond, the act was held to be retroactive and to relieve from the penalty of the bond. *Patterson v. Philbrook*, 9 Mass. 151; *Locke v. Dane*, 9 Mass. 360; *Walter v. Bacon*, 8 Mass. 468.

1. Repeal After Judgment. — *U. S. v. Schooner Peggy*, 1 Cranch (U. S.) 104; *The Schooner Rachel v. U. S.*, 6 Cranch (U. S.) 329; *Curtis v. Leavitt*, 15 N. Y. 229.

The repeal of the statute creating a penalty relieves unpunished parties from punishment. *Maryland v. Baltimore*, etc., R. Co., 3 How. (U. S.) 534; *U. S. v. Morris*, 10 Wheat. (U. S.) 287; *Thompson v. Bassett*, 5 Ind. 535; *State v. Youmans*, 5 Ind. 280.

But in *People v. Moore*, 1 Idaho 662, the court follows *Barnet v. Barnet*, 15 S. & R. (Pa.) 72, 16 Am. Dec. 516, and holds that the question to be determined is whether there was error at the time of the judgment below, and unless it was specially provided in the act that it should apply to cases pending on appeal, it would not be so applied.

2. Vested Rights Cannot Be Impaired — *United States*. — *Eastman v. Clackamas County*, 32 Fed. Rep. 24; *Calder v. Bull*, 3 Dall. (U. S.) 386.

Arkansas. — *Cooper v. Freeman Lumber Co.*, 61 Ark. 36.

Connecticut. — *Albertson v. Landon*, 42 Conn. 209.

Illinois. — *Thompson v. Alexander*, 11 Ill. 54; *Bond v. Betts*, 1 Ill. 205; *People v. Thatcher*, 95 Ill. 109; *U. S. Mortgage Co. v. Gross*, 93 Ill. 483; *Dobbins v. Peoria First Nat. Bank*, 112 Ill. 553; *People v. Peacock*, 98 Ill. 172; *Marsh v. Chesnut*, 14 Ill. 223; *Conway v. Cable*, 37 Ill. 82, 87 Am. Dec. 240; *Billings v. Dettin*, 15 Ill. 218; *McDaniel v. Correll*, 19 Ill. 226, 68 Am. Dec. 587.

Iowa. — *Wright v. Marsh*, 2 Greene (Iowa) 94; *Newman v. Samuels*, 17 Iowa 530; *Brinton v. Seever*, 12 Iowa 389.

Indiana. — *McKinney v. Springer*, 8 Blackf. (Ind.) 506; *Stipp v. Brown*, 2 Ind. 647; *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200; *Lewis v. Breckenridge*, 1 Blackf. (Ind.) 220, 12 Am. Dec. 228.

Maine. — *Kennebec Purchase v. Laboree*, 2 Me. 275, 11 Am. Dec. 79; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559; *Oriental Bank v. Freese*, 18 Me. 109, 36 Am. Dec. 701; *Berry v. Clary*, 77 Me. 482.

Maryland. — *Kelso v. Stigar*, 75 Md. 376; *Second Universalist Soc. v. Dugan*, 65 Md. 460.

Massachusetts. — *Ball v. Wyeth*, 99 Mass. 338; *Dunn v. Sargent*, 101 Mass. 336; *Prentice v. Dehon*, 10 Allen (Mass.) 353; *Bucher v. Fitchburg R. Co.*, 131 Mass. 156.

Michigan. — *Matter of Canfield*, 98 Mich. 644; *Daniells v. Watertown Tp.*, 61 Mich. 514.

Minnesota. — *Thompson v. Morgan*, 6 Minn. 292; *Kipp v. Johnson*, 31 Minn. 360; *Whitney v. Wegler*, 54 Minn. 235.

Mississippi. — *Davis v. Minor*, 1 How. (Miss.) 183, 28 Am. Dec. 325; *Woodman v. Fulton*, 47 Miss. 682; *Commercial Bank v. Chambers*, 8 Smed. & M. (Miss.) 9.

New Hampshire. — *Merrill v. Sherburne*, 1 N. H. 199, 8 Am. Dec. 52; *Woart v. Winnick*, 3 N. H. 473, 14 Am. Dec. 384; *Clark v. Clark*, 10 N. H. 380, 34 Am. Dec. 165; *Greenlaw v. Greenlaw*, 12 N. H. 200; *Pembroke v. Epsom*, 44 N. H. 113; *Gilman v. Cutts*, 23 N. H. 382; *Rich v. Flanders*, 39 N. H. 304; *Lakeman v. Moore*, 32 N. H. 410.

New Jersey. — *Boston Franklinit Co. v. Condit*, 19 N. J. Eq. 395; *Henry v. Dilley*, 25 N. J. L. 302; *Van Note v. Downey*, 28 N. J. L. 219; *Addoms v. Marx*, 50 N. J. L. 253.

New York. — *Benson v. New York*, 10 Barb. (N. Y.) 223; *People v. Westchester County*, 4 Barb. (N. Y.) 64; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291; *Westervelt v. Gregg*, 12 N. Y. 202, 52 Am. Dec. 160; *Sayre v. Wisner*, 8 Wend. (N. Y.) 661; *New York*, etc., R. Co. v. *Van Horn*, 57 N. Y. 473; *Berley v. Rampacher*, 5 Duer (N. Y.) 183; *Calkins v. Calkins*, 3 Barb. (N. Y.) 305; *Danks v. Quackenbush*, 3 Den. (N. Y.) 594; *Quackenbush v. Danks*, 1 Den. (N. Y.) 128; *Wood v. Oakley*, 11 Paige (N. Y.) 400; *Butler v. Palmer*, 1 Hill (N. Y.) 324.

North Carolina. — *Houston v. Bogle*, 10 Ired. L. (N. Car.) 496.

Ohio. — *Chesnut v. Shane*, 16 Ohio 599, 67 Am. Dec. 387; *Burgett v. Norris*, 25 Ohio St. 308.

Pennsylvania. — *Alter's Appeal*, 67 Pa. St. 341, 5 Am. Rep. 433; *McCarty v. Hoffman*, 23 Pa. St. 507; *Norman v. Heist*, 5 W. & S. (Pa.) 171, 40 Am. Dec. 493; *Bedford v. Shilling*, 4 S. & R. (Pa.) 401, 8 Am. Dec. 718; *Snyder v. Bull*, 17 Pa. St. 58; *Greenough v. Greenough*, 11 Pa. St. 493, 51 Am. Dec. 567; *Schafer v. Eneu*, 54 Pa. St. 304; *Shonk v. Brown*, 61 Pa. St. 320; *Hegarty's Appeal*, 75 Pa. St. 503; *Kay v. Pennsylvania Co.*, 65 Pa. St. 269, 3 Am. Rep. 628; *Lane v. Nelson*, 79 Pa. St. 407.

Rhode Island. — *Talbot v. Talbot*, 14 R. I. 57.

South Carolina. — *Blackman v. Gordon*, 2 Rich. Eq. (S. Car.) 43, 44 Am. Dec. 241; *King v. Belcher*, 30 S. Car. 381.

Tennessee. — *Mynatt v. Hubbs*, 6 Heisk. (Tenn.) 284; *Gridner v. Stephens*, 1 Heisk. (Tenn.) 280, 2 Am. Rep. 700; *Collins v. East Tennessee*, etc., R. Co., 9 Heisk. (Tenn.) 841.

Texas. — *Paschal v. Perez*, 7 Tex. 348; *Houston v. Houston City St. R. Co.*, 83 Tex. 548.

Washington. — *Garneau v. Port Blakely Mill Co.*, 8 Wash. 467.

Wisconsin. — *Dillon v. Linder*, 36 Wis. 344.

(bb) *What Are Vested Rights.* — A vested right has been defined to be an immediate fixed right of present or future enjoyment.¹

Illustrations. — Thus an act seeking to validate wills when the testator died prior to the passage of the act is void.² So where an estate for life has been created by will, and the remaindermen have advanced sums of money for necessary repairs and support of the life tenant, a statute constituting such advancements a charge against the property in which the life estate existed is invalid.³ A statute curing defective acknowledgments of deeds, taken previous to the act, was held invalid where vested rights had intervened.⁴ The right to recover upon a liquor dealer's bond becomes vested on the violation of the bond, and a repeal of the statute cannot affect the right to recover.⁵ Where the statute of limitations has once run, a subsequent repeal of the limitation law cannot be given a retrospective effect, so as to disturb a vested right of defense.⁶

Husband's Interest in Wife's Personalty. — The interest of the husband in a remainder in personal property bequeathed to the wife upon the contingency of her surviving a life tenant is so far vested that it cannot be taken away by a statute passed before the happening of the contingency.⁷ And the husband's

1. Vested Rights Defined. — *Marshall v. King*, 24 Miss. 90, citing *Fearne on Contingent Remainders*, 1.

"An estate is vested," says Chancellor Kent, "when there is an immediate right of present enjoyment or a present fixed right of future enjoyment." 4 Kent's Com. 202.

"Very loose notions are entertained in respect to vested rights. * * * What are vested rights? In the widest sense they are rights which are complete and consummate so that nothing remains to be done to fix the right of the citizen to enjoy them." Van Syckel, J., in dissenting opinion in *Moore v. State*, 43 N. J. L. 243.

"When I say that a right is vested in a citizen, I mean that he has the power to do certain actions or to possess certain things according to the law of the land." Chase, J., in *Calder v. Bull*, 3 Dall. (U. S.) 386.

"The rule that a vested right of action is property just as tangible things are, and is protected from arbitrary legislation, applies to those rights of action which spring from contracts or the common law. The right to a particular remedy is not a vested right." Collins v. East Tennessee, etc., R. Co., 9 Heisk. (Tenn.) 841.

A right of property is a perfect and exclusive right, but no one can have such a right before he has acquired a better right to the property than any other person in the world. The right only to recover property is not a perfect and exclusive right. *Calder v. Bull*, 3 Dall. (U. S.) 386.

"Every right resting in a perfect obligation is vested, but a right conferred by statute is no more sacred than if it were sanctioned merely by the law of nature or the common law." *Butler v. Palmer*, 1 Hill (N. Y.) 324.

2. Act Seeking to Validate Will After Testator's Death. — Husband and wife having no lineal descendants, and each owning property, determined to make their wills in favor of each other, so that the survivor should have all they possessed. The wills were laid together upon a table for execution, and each signed one, which was duly witnessed, indorsed, and sealed

up. After the death of the husband it was found that each, by mistake, had signed the will of the other. To remedy this error the legislature of 1870 passed an act conferring authority upon the Register's Court to take proof of the mistake and proceed as a court of chancery to reform the will. It was held that the act to reform the will was invalid, the estate having passed to and vested in the collateral line of kindred. *Alter's Appeal*, 67 Pa. St. 341, 5 Am. Rep. 433. See also *McCarty v. Hoffman*, 23 Pa. St. 507; *Taylor v. Mitchell*, 57 Pa. St. 209; *Kurtz v. Saylor*, 20 Pa. St. 205.

3. *Albertson v. Landon*, 42 Conn. 209.

4. Defective Acknowledgments. — "A subsequent act of the legislature may cure the defective execution of a deed as between the parties, but not so as to affect the interest of other parties accrued meantime." *Meighen v. Strong*, 6 Minn. 177, 80 Am. Dec. 441. See also *Brinton v. Seevers*, 12 Iowa 389; *Thompson v. Morgan*, 6 Minn. 292; and the title *ACKNOWLEDGMENTS*, vol. 1, p. 568.

5. *State v. Williams*, (Tex. Civ. App. 1895) 30 S. W. Rep. 477.

6. Statute of Limitations. — *McKinney v. Springer*, 8 Blackf. (Ind.) 506; *Woodman v. Fulton*, 47 Miss. 682; *Davis v. Minor*, 1 How. (Miss.) 183, 28 Am. Dec. 325. See *supra*, this section, *Classes* (of retroactive laws) — *Valid* — *Statute of Limitations*.

7. Husband's Interest in Personalty Bequeathed to Wife in Remainder. — *Dunn v. Sargent*, 101 Mass. 336, where it is said: "It has been held by the courts of some states, that a wife's right of dower may be cut off by an act of the legislature at any time before it becomes consummate upon the death of the husband. But these decisions proceed upon the theory that such a right is not an interest in property, but a mere possibility created by law and not in any sense vested or assignable."

Husband's Interest in Legacy to Wife. — The husband had a vested interest in a legacy which was bequeathed to his wife prior to the Act of 1848 for the more effectual protection of the property of married women, although the legacy was not reduced to possession when

interest in the wife's personalty owned at the time of the marriage is a vested right which cannot be impaired by subsequent legislation.¹

(cc) *What Are Not Vested Rights.* — On the other hand, a mere expectancy of the future benefit, or a contingent interest in property founded upon anticipated continuance of existing laws, is not a vested right, and such right may be enlarged or abridged or entirely taken away by legislative enactment.² Thus the right of dower of a married woman in her husband's real estate is not a vested interest, and may be abridged or taken away at any time before the death of the husband.³ A statute making joint heirs tenants in common may embrace estates existing at its passage.⁴

c. IN THE FEDERAL CONSTITUTION — (1) *The Original Draft* — (a) *In General.* — The original draft of the Constitution of the United States contained no separate Bill of Rights. A proposition therefor in the convention was rejected by an equal division of the states,⁵ and the arguments thereafter employed by two of the leading members of the convention — Hamilton⁶ and

the act took effect. The legislature had no power to deprive the husband of his right to such legacy. *Westervelt v. Gregg*, 12 N. Y. 202, 52 Am. Dec. 160; *Richardson v. Akin*, 87 Ill. 138.

1. *Husband's Interest in Wife's Chattels.* — National Metropolitan Bank v. Hitz, 1 Mackey (D. C.) 111; *Holmes v. Holmes*, 4 Barb. (N. Y.) 295; *White v. White*, 5 Barb. (N. Y.) 474; *Westervelt v. Gregg*, 12 N. Y. 208, 52 Am. Dec. 160; *Snyder v. Snyder*, 3 Barb. (N. Y.) 621; *Hurd v. Cass*, 9 Barb. (N. Y.) 366. Compare *Clarke v. McCreary*, 12 Smed. & M. (Miss.) 347.

2. *Expectancies Not Vested* — *United States.* — *Randall v. Kreiger*, 23 Wall. (U. S.) 148.

Illinois. — *McNeer v. McNeer*, 142 Ill. 388; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Martin v. Robson*, 65 Ill. 129, 16 Am. Rep. 578; *Lucas v. Lucas*, 103 Ill. 121; *Richardson v. Akin*, 87 Ill. 138; *Weidenger v. Spruance*, 101 Ill. 278; *Henson v. Moore*, 104 Ill. 403.

Indiana. — *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200; *Noel v. Ewing*, 9 Ind. 37.

Iowa. — *Lucas v. Sawyer*, 17 Iowa 517.

Maine. — *Barbour v. Barbour*, 46 Me. 9.

Massachusetts. — *Sewall v. Lee*, 9 Mass. 363.

Michigan. — *Tong v. Marvin*, 15 Mich. 60.

Mississippi. — *Magee v. Young*, 40 Miss. 164, 90 Am. Dec. 322.

New York. — *Moore v. New York*, 8 N. Y. 110, 59 Am. Dec. 473; *Westervelt v. Greg*, 12 N. Y. 208, 52 Am. Dec. 160; *Norris v. Beyea*, 13 N. Y. 273.

Ohio. — *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355.

Pennsylvania. — *Melizet's Appeal*, 17 Pa. St. 449, 55 Am. Dec. 573.

West Virginia. — *Wyatt v. Smith*, 25 W. Va. 813.

A statute is not objectionable as retroactive because it purports to operate on prior continued or qualified rights, but only where it operates to divest settled and vested rights. *Clarke v. McCreary*, 12 Smed. & M. (Miss.) 347.

3. *Dower Not a Vested Right* — *United States.* — *Randall v. Kreiger*, 23 Wall. (U. S.) 137.

Alabama. — *Ware v. Owens*, 42 Ala. 212, 94 Am. Dec. 642; *Boyd v. Harrison*, 36 Ala. 533.

Connecticut. — *Starr v. Pease*, 8 Conn. 541.

Illinois. — *Henson v. Moore*, 104 Ill. 403; *McNeer v. McNeer*, 142 Ill. 388.

Indiana. — *May v. Fletcher*, 40 Ind. 575; *Noel v. Ewing*, 9 Ind. 37; *Taylor v. Sample*, 51 Ind. 423.

Iowa. — *Lucas v. Sawyer*, 17 Iowa 517.

Maine. — *Barbour v. Barbour*, 46 Me. 9.

Michigan. — *Pratt v. Tefft*, 14 Mich. 191; *Ligare v. Semple*, 32 Mich. 438.

Minnesota. — *Morrison v. Rice*, 35 Minn. 436; *Guerin v. Moore*, 25 Minn. 462; *Bailey v. Mason*, 4 Minn. 546.

Mississippi. — *Magee v. Young*, 40 Miss. 164, 90 Am. Dec. 322.

New York. — *Moore v. New York*, 4 Sandf. (N. Y.) 456, 8 N. Y. 110, 59 Am. Dec. 473; *Jackson v. Edwards*, 22 Wend. (N. Y.) 498.

Ohio. — *Ruffner v. McLenan*, 16 Ohio 639; *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355.

Pennsylvania. — *Melizet's Appeal*, 17 Pa. St. 449, 55 Am. Dec. 573.

Wisconsin. — *Bennett v. Harms*, 51 Wis. 251.

4. *Making Joint Heirs Tenants in Common.* — Such a statute impairs no vested right, but renders the tenure more beneficial. *Miller v. Miller*, 16 Mass. 59; *Burghardt v. Turner*, 12 Pick. (Mass.) 539; *Wildes v. Vanvoorhis*, 15 Gray (Mass.) 147; *Annable v. Patch*, 3 Pick. (Mass.) 363; *Holbrook v. Finney*, 4 Mass. 567, 3 Am. Dec. 243; *Stevenson v. Cofferin*, 20 N. H. 150.

5. See *Elliott's Debates*, vol. 5, p. 538. The motion was made on Sept. 12, 1787. Only ten states voted.

6. *Hamilton's Argument Against Federal Bill of Rights.* — "A minute detail of particular rights is certainly far less applicable to a constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to one which has the regulation of every species of personal and private concerns. If therefore the loud clamors against the plan of the convention, on this score, are well founded, no epithets of reprobation will be too strong for the constitution of this state. But the truth is, that both of them contain all which, in relation to their objects, is reasonable to be desired. I go further and affirm that bills of rights, in the sense and to the extent, they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various ex-

Wilson¹ — in defending this action probably voice the sentiments of those responsible for that result. There are, however, certain scattered provisions in the original instrument which would belong normally to a bill of rights.² Among these is the guaranty protecting:—

(b) **Privileges and Immunities of Citizens of Other States.** — The Constitution of the United States provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states."³ These have been defined as "those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose the Union."⁴ This clause is not intended to give the laws of any

ceptions to powers not granted, and on this very account would afford a colorable pretext to claim more than was granted. For, why declare that things shall not be done, which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" The Federalist (Hamilton's ed. 1880), No. 84, pp. 630, 631.

1. **Wilson's Argument.** — 'Mr. Wilson was equally clear in accounting for the omission to insert a bill of rights in the Constitution of the United States. In a government, he observed, consisting of enumerated powers, such as was then proposed for the United States, a bill of rights, which is an enumeration of the powers reserved by the people, must either be a perfect or an imperfect statement of the powers and privileges reserved. To undertake a perfect enumeration of the civil rights of mankind is to undertake a very difficult and hazardous, and perhaps an impossible task; yet if the enumeration is imperfect all implied power seems to be thrown into the hands of the government, on subjects in reference to which the authority of government is not expressly restrained, and the rights of the people are rendered less secure than they are under the silent operation of the maxim that every power not expressly granted remains in the people. This, he stated, was the view taken by a large majority of the national conventions.'" Curtis, Const. Hist. of U. S. (1889), pp. 643, 644.

2. **Scattered Guaranties of Rights in Original Constitution.** — On the strength of these Hamilton, in "The Federalist," replying to the criticism that the new constitution lacked a bill of rights, argued as follows: "Independent of those which relate to the structure of the government, we find the following. Article I., section 3, clause 7: 'Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment and punishment according to law.' Section 9 of the same article, clause 2: 'The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it.' Clause 3: 'No bill of attainder, or *ex post facto* law shall be passed.' Clause 7: 'No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under

them shall, without the consent of Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.' Article III., section 2, clause 3: 'The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crime shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.' Section 3 of the same article: 'Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.' And clause 3 of the same section: 'The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.'"

3. U. S. Const., art. 4, § 2.

Does Not Limit State's Authority Over Its Own Citizens. — This clause of the Constitution does not operate as a limitation of the authority of a state over its own citizens. *Cole v. Cunningham*, 133 U. S. 107; *Bradwell v. Illinois*, 16 Wall. (U. S.) 130. See also the title CIVIL RIGHTS, *ante*, p. 68.

A state court may enjoin one of its citizens from bringing suit in attachment against another of its citizens in another state. *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448.

A Corporation Is Not a Citizen within the meaning of this clause of the Constitution. *Paul v. Virginia*, 8 Wall. (U. S.) 168. And see the title FOREIGN CORPORATIONS.

4. *Washington, J.*, in *Corfield v. Coryell*, 4 Wash. (U. S.) 381. See also the title CIVIL RIGHTS, *ante*, pp. 69, 72.

Right to Acquire and Hold Property. — A citizen of the United States cannot be denied the right to take and hold absolutely real and personal property in any state of the Union, nor can he be denied the right to accept the conveyance of such property in trust for his sole benefit, or for the benefit of himself and others; and a statute which denies to a resident of another state the right to take and hold in trust, otherwise than by last will and testament, property in a given state, is unconstitutional. *Farmers' L. & T. Co. v. Chicago, etc.*, R. Co., 27 Fed. Rep. 146; *Shirk v. La Fayette*, 52 Fed. Rep. 857; *Robey v. Smith*, 131 Ind. 342, 31 Am. St. Rep. 439.

Right to Sue in Courts of Sister States. — The

one state the slightest force in another state, nor are special privileges enjoyed by citizens in their own states secured in other states thereby.¹ The purpose

right to institute and maintain action of any kind in the courts of the several states is guaranteed by this provision. Thus an act suspending the privilege of all persons aiding the rebellion against the United States to prosecute and defend actions and judicial proceedings in any state, is unconstitutional and void. *Davis v. Pierce*, 7 Minn. 13, 82 Am. Dec. 65; *Wilcox v. Davis*, 7 Minn. 23; *Keough v. McNitt*, 7 Minn. 30; *Jackson v. Butler*, 8 Minn. 117.

In *Cofrode v. Gartner*, 79 Mich. 332, it was held, Campbell, J., dissenting, that under this provision of the Federal Constitution the circuit court of Michigan had no right to dismiss an action although both the plaintiff and the defendant were citizens of other states, the court having by consent acquired jurisdiction over the parties to the action.

A similar decision was reached (Cassoday, C. J., dissenting) in *Eingartner v. Illinois Steel Co.*, 94 Wis. 70. In this case both plaintiff and defendant were residents of Illinois, and the cause of action, alleged personal injuries suffered by the plaintiff through the negligence of the defendant, arose in Illinois.

Arrest and Bail in Civil Action.—A discrimination in a statute between resident and non-resident citizens of the United States in regard to the right to arrest and hold to bail defendants in civil actions is unconstitutional and void. *Black v. Seal*, 6 Houst. (Del.) 541.

Discriminating License Tax.—A state has no right to discriminate in regard to license and occupation taxes between resident and non-resident citizens of the United States. *Ward v. Maryland*, 12 Wall. (U. S.) 418. For a full consideration of this subject, see the title OCCUPATION, BUSINESS AND PRIVILEGE TAXES.

Unequal Taxation.—A statute which discriminates between residents and nonresidents in regard to rate of taxation is invalid within this provision of the Constitution. *Wiley v. Parmer*, 14 Ala. 627; *Oliver v. Washington Mills*, 11 Allen (Mass.) 280; *Farmington v. Downing*, (N. H. 1893) 30 Atl. Rep. 345; *Sprague v. Fletcher*, 69 Vt. 60.

1. Does Not Confer Special Privileges or Give Extra-territorial Force to Laws.—*Paul v. Virginia*, 8 Wall. (U. S.) 168; *Conner v. Elliott*, 18 How. (U. S.) 591; *Com. v. Milton*, 12 B. Mon. (Ky.) 212, 54 Am. Dec. 528.

"It is sufficient * * * to say that according to the express words and clear meaning of this clause, no privileges are secured by it except those which belong to citizenship. Rights attached by the law to contracts, by reason of the place where such contracts are made or executed, wholly irrespective of the citizenship of the parties to those contracts, cannot be deemed 'privileges of a citizen' within the meaning of the Constitution." *Conner v. Elliott*, 18 How. (U. S.) 591.

"The language is that they 'shall have the privileges and immunities of citizens in the several states.' In my opinion the meaning is, that in a given state every citizen of every other state shall have the same privileges and immunities—that is, the same rights—which

the citizens of that state possess. In the first place they are not to be subjected to the disabilities of alienage. They can hold property by the same titles by which every other citizen may hold it, and by no other. Again, any discriminating legislation which should place them in a worse situation than a proper citizen of the particular state would be unlawful. But the clause has nothing to do with the distinctions founded on domicile. A citizen of Virginia, having his home in that state, and having never been within the state of New York, has the same rights under our laws which a native-born citizen domiciled elsewhere would have, and no other rights. Either can be the proprietor of property here, but neither can claim any rights which under our laws belong only to residents of the state. But where the laws of the several states differ, a citizen of one state asserting rights in another must claim them according to the laws of the last mentioned state, not according to those which obtain in his own. The position that a citizen carries with him, into every state into which he may go, the legal institutions of the one in which he was born cannot be supported." *Lemmon v. People*, 20 N. Y. 608.

The Use of Fishing Grounds Belonging to the State may by appropriate state legislation be confined to the citizens of the state. *McCready v. Virginia*, 94 U. S. 391; *Corfield v. Coryell*, 4 Wash. (U. S.) 371; *State v. Tower*, 84 Me. 444; *People v. Lowndes*, 130 N. Y. 455; *State v. Medbury*, 3 R. I. 138. See also the titles CIVIL RIGHTS, *ante*, p. 73; FISH AND FISHERIES.

Requiring Security for Costs for Nonresident.—A statute requiring a nonresident plaintiff to give security for costs is not unconstitutional. *Holt v. Tennallytown, etc.*, R. Co., 81 Md. 219; *Haney v. Marshall*, 9 Md. 210; *Cummings v. Wingo*, 31 S. Car. 427.

Dispensing with Undertaking in Attachment Against Nonresidents.—A statute requiring an undertaking in attachment in suits against residents of the states, but dispensing with it in suits against nonresidents, does not violate this provision of the Constitution. *Head v. Daniels*, 38 Kan. 9; *Campbell v. Morris*, 3 Har. & M. (Md.) 565; *Olmstead v. Rivers*, 9 Neb. 234; *Kincaid v. Francis*, *Cooke* (Tenn.) 49; *Reid v. Mickles*, (Tex. Civ. App. 1895) 29 S. W. Rep. 563. See also *Pyrolusite Manganese Co. v. Ward*, 73 Ga. 491.

Assignment of Claims for Collection Out of State.—An act to protect residents of the state against the assignment of claims against them for the purpose of having such claims collected in another jurisdiction and thereby evading the exemption laws of the state, is constitutional and valid. *Sweeny v. Hunter*, 145 Pa. St. 363.

Statute of Limitations.—A provision to the effect that when a defendant is out of the state the statute of limitations will not run against the plaintiff where the latter is a resident of the state, but will so run where he is not, is valid and constitutional. *Chemung Canal Bank v. Lowery*, 93 U. S. 72.

and construction of this provision of the constitution have been examined elsewhere in this work.¹

(c) *Other Guaranties in the Original Constitution.* — A clause in the Federal Constitution secures the protection of each state against invasion and domestic violence.² It rests with Congress to provide the means of fulfilling this guaranty,³ and the power of determining whether occasion demands its enforcement has by Congress been conferred upon the President.⁴ The original constitution also guarantees the privilege of the writ of habeas corpus⁵ and the right of trial by jury,⁶ and forbids the enactment of bills of attainder,⁷ *ex post facto* laws,⁸ or laws impairing the obligation of contracts.⁹

(2) *The First Ten Amendments* — (a) *Origin and History.* — When the Federal Constitution came before the states for adoption, the absence of a formal and separate Bill of Rights created serious opposition,¹⁰ and it was only through the assurances of its supporters that the deficiencies complained of would be supplied that the constitution was finally ratified.¹¹ Accordingly in the first Congress amendments of this character were proposed,¹² and by 1791, or within a

Assessing Lands of Nonresidents. — A statute providing that the lands of nonresidents shall be valued for assessment by three householders of the township where the land is situated is valid. *Redd v. St. Francis County*, 17 Ark. 416.

Limiting Widow's Interest in Husband's Land. — A statute which provides that the widow shall not be entitled to an interest in land conveyed by the husband, when the wife at the time of the conveyance was a nonresident of the state, is not repugnant to this constitutional provision. *Buffington v. Grosvenor*, 46 Kan. 730. *Following Bennett v. Harms*, 51 Wis. 251.

A Regulation of the Liquor Traffic by a statute denying to any except male inhabitants of the state the right to sell intoxicating liquors is a proper exercise of the state's police power. *Welsh v. State*, 126 Ind. 71. See also *Austin v. State*, 10 Mo. 591 (two years' residence required as qualification for license).

Allowing Texas Cattle to Run at Large. — An act imposing liability upon the possessor of Texas cattle for allowing them to run at large and spread "Texas fever" does not contravene this clause. *Kimmish v. Ball*, 129 U. S. 217.

Regulating Practice of Medicine. — Laws regulating the practice of medicine, and exempting from the necessity of an examination physicians practicing in the state at the time the law went into effect, are valid. *State v. Creditor*, 44 Kan. 565, 21 Am. St. Rep. 306; *State v. Carey*, 4 Wash. 424. See the title **PHYSICIANS AND SURGEONS**.

1. See the title **CIVIL RIGHTS**, *ante*, p. 68.

2. **Protection of States from Invasion and Domestic Violence.** — Art. IV., § 4. See Story on the Constitution (5th ed.) §§ 1818-1825.

3. *Luther v. Borden*, 7 How. (U. S.) 42.

4. *Luther v. Borden*, 7 How. (U. S.) 42; *Martin v. Mott*, 12 Wheat. (U. S.) 29, where it is said: "The power thus confided by Congress to the President is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a corre-

spondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? We are all of opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases every delay and every obstacle to an efficient and immediate compliance necessarily tend to jeopard the public interests."

5. Art. I., § 9, clause 2. See the title **HABEAS CORPUS**.

6. Art. III., § 2, clause 3. See *infra*, this section, **Jural and Forensic Rights**.

7. Art. I., § 9, clause 7. See **ATTAINDER**, vol. 3, p. 248; and the title **EX POST FACTO LAWS**.

8. Art. I., § 9, clause 7. See the title **EX POST FACTO LAWS**.

9. Art. I., § 9, clause 7. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**.

10. See *Curtis*, Const. History of the United States, vol. i, pp. 628, 664, 682; *Murphy v. People*, 2 Cow. (N. Y.) 820; *O'Neil v. Vermont*, 144 U. S. 361; *Davidson v. New Orleans*, 96 U. S. 101.

11. *O'Neil v. Vermont*, 144 U. S. 370.

12. **History of Introduction of Original Amendments.** — "Mr. Madison, at the first session of Congress, brought forward in the House of

year from the final adoption of the original instrument by all the states, were ratified. These have been called the Federal Bill of Rights.¹

(b) **Character and Scope — First Ten Amendments Limit Only National Government.** — While the first ten amendments of the Federal Constitution are apparently unlimited in application by their terms, a long series of adjudications has restricted their scope exclusively to the sphere of the Federal government, its courts, and officers. This doctrine was first announced in the state courts,² but soon afterwards received emphatic approval in the Federal tribunals,³ and it has now become the settled law of both jurisdictions, as well in reference to the entire group of amendments⁴ as to the specific provisions of each.

Specific Provisions — Illustrations. — Thus it has been held that the machinery of the state governments is in no wise affected by the clause in the first amendment permitting the right of the people to assemble;⁵ nor by that of the second

Representatives a proposition to amend the Constitution; and that body finally adopted seventeen amendments, which were sent to the Senate for its concurrence. The fourteenth of these amendments provided that no state should infringe the right of trial by jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press. The Senate expunged this amendment, which was the only one restricting the powers of the states, and consolidated and adopted the substance of all the others, with a few trifling exceptions. They also amended the preamble by reciting, as the reason of their proposing the amendments to the states for adoption, that the conventions of a number of the states had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added. Ten of the amendments thus agreed to by Congress were afterwards sanctioned by the requisite number of states, and thus became part of the Constitution." *Murphy v. People*, 2 Cow. (N. Y.) 815, note.

1. *Robertson v. Baldwin*, 165 U. S. 275.

2. **First Ten Amendments to Federal Constitution Limit Only Federal Action.** — *Jackson v. Wood*, 2 Cow. (N. Y.) 819, note, and *Murphy v. People*, 2 Cow. (N. Y.) 815, both decided in 1824, appear to be the first reported cases deciding this question. To the same effect are *Barker v. People*, 3 Cow. (N. Y.) 701, 15 Am. Dec. 322; *Reed v. Rice*, 2 J. J. Marsh. (Ky.) 44, 19 Am. Dec. 122. See also *James v. Com.*, 12 S. & R. (Pa.) 235.

3. *Barron v. Baltimore*, 7 Pet. (U. S.) 243. This is the leading case on the question, but was preceded not only by the state decisions cited in the preceding note, but also by *Bonaparte v. Camden*, etc., R. Co., 1 Baldw. (U. S.) 205, where, however, the applicability of these amendments to the states was merely doubted and not squarely denied.

In the case first cited in this note, Marshall, C. J., in discussing the question, says: "If the original Constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government and on those of the state; if in every inhibition intended to act on state power words are employed which directly express that intent, some strong reason must be assigned for departing from

this safe and judicious course in framing the amendments before that departure can be assumed. We search in vain for that reason. Had the people of the several states, or any of them, required changes in their constitutions, had they required additional safeguards to liberty from the apprehended encroachments of their particular governments, the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by the discontented state, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of Congress and the assent of three-fourths of their sister states could never have occurred to any human being as a mode of doing that which might be effected by the state itself. Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original Constitution and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language."

4. *United States*. — *Spies v. Illinois*, 123 U. S. 166, where the court says: "That the first ten articles of amendment were not intended to limit the powers of the state governments in respect to their own people, but to operate on the national government alone, was decided more than a half century ago, and that decision has been steadily adhered to since." *Presser v. Illinois*, 116 U. S. 265; *Justices v. Murray*, 9 Wall. (U. S.) 278.

Connecticut. — *Colt v. Eves*, 12 Conn. 252.

Georgia. — *Campbell v. State*, 11 Ga. 353, where the doctrine seems to be admitted with reluctance.

Michigan. — *Weimer v. Bunbury*, 30 Mich. 208.

Missouri. — *North Missouri R. Co. v. Maguire*, 49 Mo. 495, 8 Am. Rep. 141.

Vermont. — *Lincoln v. Smith*, 27 Vt. 336; *Hare's Am. Const. Law* (1889), vol. 1, pp. 507, 508; *Cooley's Const. Lim.* (5th ed.), p. 26.

5. **Public Assemblies.** — *U. S. v. Cruikshank*, 92 U. S. 552, the court saying: "The particular amendment now under consideration

amendment guaranteeing the right to bear arms;¹ nor by the provisions of the fourth amendment forbidding the use of search warrants except upon probable cause and supported by oath² and containing a particular description;³ nor by those of the fifth amendment generally,⁴ and particularly those clauses which require presentments or indictments by a grand jury,⁵ forbid placing an accused twice in jeopardy,⁶ require the observance of due process of law,⁷ and prohibit the taking of private property for public use without just compensation.⁸ So the powers of the state governments are not restricted by the sixth amendment, guaranteeing a speedy and public trial to the accused;⁹ nor by those of the seventh amendment, preserving the right of jury trial in civil cases;¹⁰ nor by the eighth amendment, which prohibits cruel and unusual punishments, etc.¹¹

Moral Effect on State Action — Effect of Later Amendments. — But though these ten amendments, while standing alone, are thus shown to be without legal effect in the sphere of the state governments, yet they have been considered as having at least a moral force even there,¹² and there is some authority for the view

assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the states. The power for that purpose was originally placed there, and it has never been surrendered to the United States. The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or duties of the national government, is an attribute of national citizenship, and, as such, under the protection of and guaranteed by the United States."

1. Right to Bear Arms. — *Presser v. Illinois*, 116 U. S. 265; *U. S. v. Cruikshank*, 92 U. S. 542; *Fife v. State*, 31 Ark. 455, 25 Am. Rep. 556; *Andrews v. State*, 3 Heisk. (Tenn.) 165, 8 Am. Rep. 8. See also *State v. Newsom*, 5 Ired. L. (N. Car.) 250, and the title CARRYING WEAPONS, vol. 5, pp. 730, 738.

2. Search Warrants. — *Smith v. Maryland*, 18 How. (U. S.) 76. See also the title SEARCHES AND SEIZURES.

3. Reed v. Rice, 2 J. J. Marsh. (Ky.) 44, 19 Am. Dec. 122.

4. Fifth Amendment. — *Twitchell v. Com.*, 7 Wall. (U. S.) 321; *Thorington v. Montgomery*, 147 U. S. 490; *Prescott v. State*, 19 Ohio St. 184, 2 Am. Rep. 388.

5. Presentment and Indictment — *Kansas*. — *State v. Barnett*, 3 Kan. 250, 87 Am. Dec. 471. *Kentucky*. — *Jane v. Com.*, 3 Metc. (Ky.) 18. *Louisiana*. — *State v. Carro*, 26 La. Ann. 377. *Ohio*. — *Prescott v. State*, 19 Ohio St. 184, 2 Am. Rep. 388.

South Carolina. — *State v. Shumpert*, 1 S. Car. 85.

Vermont. — *State v. Keyes*, 8 Vt. 57, 30 Am. Dec. 450.

6. Twice in Jeopardy. — *Fox v. Ohio*, 5 How. (U. S.) 434.

7. Due Process of Law. — *Holmes v. Jennison*, 14 Pet. (U. S.) 587; *Kelly v. Pittsburgh*, 104 U. S. 78; *Boyd v. Ellis*, 11 Iowa 97.

8. Taking Private Property for Public Use. — *Barron v. Baltimore*, 7 Pet. (U. S.) 243; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 158; *Withers v. Buckley*, 20 How. (U. S.) 84.

9. Speedy and Public Trial. — *Jackson v. Wood*, 2 Cow. (N. Y.) 819, note. Compare *Matter of Smith*, 10 Wend. (N. Y.) 458.

10. Right of Jury Trial in Civil Cases — *United States*. — *Barron v. Baltimore*, 7 Pet. (U. S.) 243; *Livingston v. Moore*, 7 Pet. (U. S.) 469, affirming *Livingston v. Moore*, 1 Baldw. (U. S.) 424; *Fox v. Ohio*, 5 How. (U. S.) 410; *Walker v. Sauvinet*, 92 U. S. 90; *Bonaparte v. Camden*, etc., R. Co., 1 Baldw. (U. S.) 220; *Pearson v. Yewdall*, 95 U. S. 294; *Twitchell v. Com.*, 7 Wall. (U. S.) 321; *Edwards v. Elliott*, 21 Wall. (U. S.) 532; *Justices v. Murray*, 9 Wall. (U. S.) 274; *In re King*, 51 Fed. Rep. 434. *Connecticut*. — *Colt v. Eves*, 12 Conn. 243.

Indiana. — *Lake Erie*, etc., R. Co. v. *Heath*, 9 Ind. 558.

Massachusetts. — *Com. v. Whitney*, 108 Mass. 5; *Bigelow v. Bigelow*, 120 Mass. 320.

New York. — *Livingston v. New York*, 8 Wend. (N. Y.) 85, 22 Am. Dec. 622; *Barker v. People*, 3 Cow. (N. Y.) 701, 15 Am. Dec. 322; *Matter of Smith*, 10 Wend. (N. Y.) 458.

Vermont. — *Huntington v. Bishop*, 5 Vt. 189.

11. Cruel and Unusual Punishments. — *Pervear v. Com.*, 5 Wall. (U. S.) 475; *In re Kemmler*, 136 U. S. 436; *Com. v. Hitchings*, 5 Gray (Mass.) 482; *Barker v. People*, 3 Cow. (N. Y.) 701, 15 Am. Dec. 322. See also the title CRUEL AND UNUSUAL PUNISHMENTS.

12. "I do not take into consideration the humane provisions of the constitutions of the United States and of this state, as to cruel and unusual punishments, further than they show the sense of the whole community." *Duncan, J.*, in *James v. Com.*, 12 S. & R. (Pa.) 235.

Campbell v. State, 11 Ga. 353, presents a view of the question somewhat different from the cases cited in the foregoing notes. The court, *per Lumpkin, J.*, there says: "The question to be decided now is, not whether these amendments were intended to operate as a restriction upon the government of the United States, but whether it is competent for a state legislature, by virtue of its inherent powers, to pass an act directly impairing the great principles of protection to person and property embraced in these amendments. That the power to pass any law infringing on these principles is taken from the federal government, no one denies. But is it a part of the reserved rights of a state to do this? May the legislature of a state, for example,

that by virtue of later amendments the provisions of these first ten have been made to operate, in part at least, upon the states.¹

(3) *The Thirteenth Amendment.* — The leading purpose of this amendment was to effect the abolition of African slavery in the United States.²

What Are Involuntary Servitudes. — But the addition of the words "involuntary servitude" to the prohibition of the amendment gave it a broader scope, and it has been applied to servitude in fact involuntary, though taking the specious form of apprenticeship.³ Nor is the effect of the amendment limited to African servitude alone, for it applies as well to Mexican peonage, and the Chinese coolie system,⁴ and also the slave customs prevailing among the uncivilized

unless restrained by its own constitution, pass a law 'respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and petition the government for a redress of grievances'? If so, of what avail, I ask, is the negation of these powers to the general government? Our revolutionary sires wisely resolved that religion should be purely voluntary in this country; that it should subsist by its own omnipotence or come to nothing. Hence they solemnly determined that there should be no church established by law and maintained by the secular power. Now the doctrine is that Congress may not exercise this power, but that each state legislature may do so for itself. As if a national religion and state religion, a national press and state press, were quite separate and distinct from each other; and that the one might be subject to control, but the other not! Such logic, I must confess, fails to commend itself to my judgment. For let it constantly be borne in mind that notwithstanding we may have different governments, a nation within a nation, *imperium in imperio*, we have but one people; and that the same people which, divided into separate communities, constitute the respective state governments, comprise, in the aggregate, the United States government; and that it is in vain to shield them from a blow aimed by the federal arm if they are liable to be prostrated by one dealt with equal fatality by their own."

1. See *O'Neil v. Vermont*, 144 U. S. 323, dissenting opinions 363, 370. And compare the cases cited *infra*, this section, *The Fourteenth Amendment*, p. 965.

2. **Abolished African Slavery in United States.** — *Slaughter-House Cases*, 16 Wall. (U. S.) 68; *Civil Rights Cases*, 109 U. S. 23.

3. **Meaning of Personal Servitude.** — "That a personal servitude was meant is proved by the use of the word 'involuntary,' which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word 'servitude' is of larger meaning than 'slavery,' as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have

been evaded if only the word 'slavery' had been used." *Miller, J., in Slaughter-House Cases*, 16 Wall. (U. S.) 69.

"Apprenticeship" Held Involuntary Servitude. — In *Matter of Turner*, 1 Abb. (U. S.) 84, Chase's Dec. (U. S.) 157, it appeared that the petitioner, a young negro and ex-slave who had not attained her majority, was bound as apprentice to her former owner, in accordance, as was claimed, with the law of Maryland regarding negro apprentices. The law with regard to white and negro apprentices was very different. "The petitioner," said the court, "under this indenture, is not entitled to any education; a white apprentice must be taught reading, writing, and arithmetic. The petitioner is liable to be assigned and transferred at the will of the master to any person in the same county; the white apprentice is not so liable. The authority of the master over the petitioner is described in the law as a 'property and interest;' no such description is applied to authority over a white apprentice." Under these circumstances it was held that the alleged apprenticeship was an involuntary servitude within the meaning of the Thirteenth Amendment to the United States Constitution, and was therefore invalid.

In *Clark's Case*, 1 Blackf. (Ind.) 122, 12 Am. Dec. 213, the Supreme Court of Indiana refused specific performance of a similar indenture, the Constitution of that state forbidding involuntary servitude.

4. **Effects Not Limited to African Race.** — "We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the Thirteenth Article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so, if other rights are assailed by the states, which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood, is that in any fair and just construction of any section or phrase of these amendments it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose

Indian tribes of Alaska.¹ But the amendment is not applicable to the contracts of sailors who, during their service on shipboard, agree to surrender, for a time, their personal liberty.² Nor does it apply to the case of one who is compelled to work out a highway tax.³

Executory Contracts as to Slaves. — The amendment did not have the effect of annulling all executory contracts with reference to slaves, and where slaves were sold prior to the adoption of the amendment and notes given for the purchase price, recovery thereon was permitted after the adoption of the amendment, notwithstanding the vendor and plaintiff had warranted the subjects of the

was supposed to be accomplished, as far as constitutional law can accomplish it." *Slaughter-House Cases*, 16 Wall. (U. S.) 72.

1. Slave Customs Among Alaskans. — In *In re Sah Quah*, 31 Fed. Rep. 327, it was held that a usage of slavery which prevailed among certain tribes of the barbarous natives of Alaska, according to which the life of the slave was entirely at the disposal of his master or mistress, and which was accompanied by many circumstances of barbarity, such as the mutilation of the bodies of the slaves to impress upon them a sense of their inferiority, was in contravention of the Thirteenth Amendment of the United States Constitution, and a slave held according to such usage was liberated by the court.

2. Contracts of Sailors — Restraint of Liberty. — *Robertson v. Baldwin*, 165 U. S. 275, where certain sailors who had deserted and were arrested and forcibly placed on board the vessel sought relief through habeas corpus. The court said: "The question whether sections 4598 and 4599 conflict with the Thirteenth Amendment, forbidding slavery and involuntary servitude, depends upon the construction to be given to the term 'involuntary servitude.' Does the epithet 'involuntary' attach to the word 'servitude' continuously, and make illegal any service which becomes involuntary at any time during its existence, or does it attach only at the inception of the servitude, and characterize it as unlawful because unlawfully entered into? If the former be the true construction, then no one, not even a soldier, sailor, or apprentice, can surrender his liberty, even for a day; and the soldier may desert his regiment upon the eve of battle, or the sailor abandon his ship at any intermediate port or landing, or even in a storm at sea, provided only he can find means of escaping to another vessel. If the latter, then an individual may, for a valuable consideration, contract for the surrender of his personal liberty for a definite time and for a recognized purpose, and subordinate his going and coming to the will of another during the continuance of the contract; not that all such contracts would be lawful, but that a servitude which was knowingly and willingly entered into could not be termed 'involuntary.' * * * It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional, such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards. The amendment, however, makes no distinction be-

tween a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview. From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained — as Molloy forcibly expresses it, 'to rot in her neglected brine.' Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and in some cases the safety of the ship itself. Hence, the laws of nearly all maritime nations have made provision for securing the personal attendance of the crew on board, and for their criminal punishment for desertion or absence without leave during the life of the shipping articles." Mr. Justice Harlan dissented.

3. Working Out Highway Tax. — "Such labor has never been regarded or construed by any of the authorities as falling within the terms of the constitution forbidding slavery and involuntary servitude. Militia service is also compulsory; and, if the theory of the petitioner is correct, such service, when involuntary, is within the terms of section 6 of the Bill of Rights, and the Thirteenth Amendment to the Constitution of the United States. Such, however, is not the case, and we do not think that article 8 of the Constitution of this state conflicts in any way with section 6 of the Bill of Rights or with the Thirteenth Amendment. There are certain services which may be commanded of every citizen by his government, and obedience enforced thereto; among these services are labor on the streets or highways and training in the militia. As the performance of work upon an assessment or levy, payable in labor for the repair of roads or streets is not the kind of involuntary servitude evidently intended to be embraced within the provisions of the Constitution of the state or of the United States, the power to impose such labor by the legislature, or a city acting under its authority, cannot well be questioned." *Matter of Dassler*, 35 Kan. 684.

transaction to be "slaves for life."¹ So in the settlement of partnership affairs a quarter of a century after the adoption of the amendment a surviving partner was held accountable for the rental value of the firm property, including that of slaves.²

(4) *The Fourteenth Amendment* — (a) *Purpose and Effect.* — This amendment was the outgrowth of conditions existing at the close of the war between the states, and was intended to insure the preservation of the constitutional results of that struggle.³ At the same time it was a re-enactment of ancient civil guaranties, and is to be considered with reference to that fact.⁴

While *Intended Primarily for the Benefit of the African Race*,⁵ it has been so broadened by judicial construction as to have become a sort of new Magna Charta for all races domiciled within the United States.

Effect of Fourteenth Amendment on Application of First Ten Amendments. — A theory has of late been advanced that the adoption of the Fourteenth Amendment has operated to render the provisions of the first ten amendments applicable to the states because these latter confer certain privileges and immunities upon citizens of the United States which by the Fourteenth Amendment the states are prohibited from abridging.⁶ But this point, while of great importance,

1. *Executory Contracts Relating to Slaves.* — *Osborn v. Nicholson*, 13 Wall. (U. S.) 663, the court saying: "Whatever we may think of the institution of slavery viewed in the light of religion, morals, humanity, or a sound political economy, as the obligation here in question was valid when executed, sitting as a court of justice, we have no choice but to give it effect. We cannot regard it as differing in its legal efficacy from any other unexecuted contract to pay money made upon a sufficient consideration at the same time and place. Neither in the precedents and principles of the common law, nor in its associated system of equity jurisprudence, nor in the older system known as the civil law, is there anything to warrant the result contended for by the defendants in error. Neither the rights nor the interests of those of the colored race lately in bondage are affected by the conclusions we have reached." *McDaniel v. White*, 32 Tex. 489. Compare *Algier v. Black*, 32 Tex. 168; *Emancipation Proclamation Cases*, 31 Tex. 534. And see *Mittelholzer v. Fullarton*, 6 Q. B. 989, 51 E. C. L. 988, where a similar ruling was made as to the enforcement of a contract to transfer the services of certain apprentices. During the life of the contract, the apprenticeships were terminated by the authorities of the colony.

2. *Clay v. Field*, 138 U. S. 464.

3. *Slaughter-House Cases*, 16 Wall. (U. S.) 71. See also *Strauder v. West Virginia*, 100 U. S. 303.

4. *Munn v. Illinois*, 94 U. S. 124. See also cases cited *infra*, this section.

5. *State v. Ah Chen*, 16 Nev. 50, 40 Am. Rep. 488; *Slaughter-House Cases*, 16 Wall. (U. S.) 36. See the title CIVIL RIGHTS, *ante*, p. 72, first paragraph of note.

6. *Does Fourteenth Amendment Render Prior Amendments Applicable to States?* — *O'Neil v. Vermont*, 144 U. S. 323, dissenting opinions. In this case a majority of the court held that no federal question was involved, and therefore declined to open the record. Three of the judges dissented from this opinion and advanced the theory stated in the text. Mr. Justice Field, at p. 363, in stating it, says:

"While, therefore, the ten amendments, as limitations on power, and so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the federal government, and not to the states, yet, so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon State power by ordaining that no state shall make or enforce any law which shall abridge them. If I am right in this view, then every citizen of the United States is protected from punishments which are cruel and unusual. It is an immunity which belongs to him, against both state and federal action. The state cannot apply to him, any more than the United States, the torture, the rack, or thumbscrew, or any cruel and unusual punishment, any more than it can deny to him security in his house, papers, and effects against unreasonable searches and seizures, or compel him to be a witness against himself in a criminal prosecution. These rights, as those of citizens of the United States, find their recognition and guaranty against federal action in the Constitution of the United States, and against state action in the Fourteenth Amendment. The inhibition by that amendment is not the less valuable and effective because of the prior and existing inhibition against such action in the constitutions of the several states. The amendment only gives additional security to the rights of the citizen."

Mr. Justice Harlan says, at p. 370: "I fully concur with Mr. Justice Field that, since the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty, or property recognized and guaranteed by the Constitution of the United States can be denied or abridged by a state in respect to any person within its jurisdiction."

The same point was raised in the following cases, but was not decided by the court: *Spies v. Illinois*, 123 U. S. 131; *In re Kemmler*, 136 U. S. 436. See also *Thorington v. Montgomery*, 147 U. S. 490.

may as yet be regarded as unsettled.¹

Effect on Provisions of State Constitutions.—One effect of the adoption of the amendment and the laws passed for its enforcement was to annul so much of the state constitutions as was inconsistent therewith.²

(b) **Privileges and Immunities**—*aa. MEANING OF PHRASE.*—The privileges and immunities referred to in the Fourteenth Amendment are all those rights which are fundamental and belong to citizens of all free governments.³

No New Privileges and Immunities Were Conferred upon citizens by the amendment; it simply provided an additional guaranty for the enforcement of those already existing.⁴

bb. TO WHOM AVAILABLE.—The privileges and immunities guaranteed by this amendment are those of citizens of the United States as distinguished from those of citizens of the several states.⁵

cc. TO WHAT RIGHTS APPLICABLE.—**The Right to Labor**, to pursue any lawful employment in a lawful manner, and to make lawful contracts, are such rights as the amendment protects.⁶

But the Right to Practice Law in the State Courts is not such a privilege and immunity.⁷

In *Walker v. Sauvinet*, 92 U. S. 90, it was held that the right of trial by jury was not thus guaranteed as against a state action by the Fourteenth Amendment.

1. See an article on "Federal Protection Against State Power," 6 Harv. Law Rev. 405, by Emlin McClain, where this theory is discussed and its probable results pointed out.

2. **Fourteenth Amendment—Annulment of Inconsistent Provisions of State Constitutions.**—*Neal v. Delaware*, 103 U. S. 370; *Anthony v. Halderman*, 7 Kan. 50; *Wood v. Fitzgerald*, 3 Oregon, 568; *Lonas v. State*, 3 Heisk. (Tenn.) 287.

But under the Fourteenth Amendment, section 3, persons in office by lawful appointment or election before its promulgation are not removed therefrom, or their former acts rendered void, *ipso facto*. Legislation by Congress to carry out the purpose of the section is required. *Griffin's Case*, Chase's Dec. (U. S.) 364.

3. **Slaughter-House Cases**, 16 Wall. (U. S.) 36; *In re Tiburcio Parrott*, 6 Sawy. (U. S.) 349.

4. **Conferred No New Privileges.**—*Minor v. Happersett*, 21 Wall. (U. S.) 162; *U. S. v. Sanges*, 48 Fed. Rep. 78; *In re Kemmler*, 136 U. S. 436; *Ward v. Flood*, 48 Cal. 36, 17 Am. Rep. 405; *State v. Gibson*, 36 Ind. 389, 10 Am. Rep. 42. See also the title CIVIL RIGHTS, *ante*, pp. 71, 75.

5. **Rights of Citizens of United States Protected—United States.**—*Slaughter-House Cases*, 16 Wall. (U. S.) 36; *Cully v. Baltimore*, etc., R. Co., 1 Hughes (U. S.) 536; *Ex p. Kinney*, 3 Hughes (U. S.) 9; *U. S. v. Anthony*, 11 Blatchf. (U. S.) 200.

Indiana.—*Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738.

Louisiana.—*State v. Judge*, 39 La. Ann. 132.

Maryland.—*Short v. State*, 80 Md. 392.

Missouri.—*Lehew v. Brummell*, 103 Mo. 546, 23 Am. St. Rep. 895.

New York.—*People v. Gallagher*, 93 N. Y. 438, 45 Am. Rep. 232.

Ohio.—*State v. McCann*, 21 Ohio St. 198.

Utah.—*Holden v. Hardy*, (Utah 1896) 46

Pac. Rep. 756; *State v. Bates*, (Utah 1896) 47 Pac. Rep. 78.

West Virginia.—*State v. Peel Splint Coal Co.*, 36 W. Va. 802.

See also the title CIVIL RIGHTS, *ante*, p. 75.

The Fourteenth Amendment cannot make a person a citizen of any certain state against his wish or intention. *Sharon v. Hill*, 11 Sawy. (U. S.) 290.

An Indian Who Has Not Been Naturalized or made a citizen by one of the recognized legal modes does not become one by virtue of this amendment, though he has separated himself from his tribe and subjected himself to the national and state governments. *Elk v. Wilkins*, 112 U. S. 94. See also the title CITIZENSHIP, *ante*, p. 18.

A Negro Born in Canada and whose parents were slaves escaped from Virginia is neither made a citizen of the United States nor given the right of suffrage by these amendments, although he was a resident of the United States before they were adopted. *Hedgman v. Board of Registration*, etc., 26 Mich. 51.

6. **Right to Pursue Employment and Make Contracts.**—*In re Tiburcio Parrott*, 6 Sawy. (U. S.) 349, 1 Fed. Rep. 481; *The Stockton Laundry Case*, 26 Fed. Rep. 611; *In re Grice*, 79 Fed. Rep. 627; *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Ex p. Spinney*, 10 Nev. 324; *State v. Fire Creek Coal, etc., Co.*, 33 W. Va. 188, 25 Am. St. Rep. 891; *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, the court saying: "A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit. And, as incident to this, is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence, and to inherit, purchase, lease, sell, and convey property of every kind."

7. **Right to Practice Law.**—*In re Lockwood*, 154 U. S. 116; *Matter of Taylor*, 48 Md. 28, 30 Am. Rep. 451; *Bradwell v. Illinois*, 16 Wall. (U. S.) 130.

The Right of Suffrage is not one of the necessary privileges and immunities of citizens of the United States, the abridgment of which is prohibited in the Fourteenth Amendment.¹

The Right to Intermarry Is Not Such a Privilege and Immunity, but a social institution of great importance subject to state regulation, and a statute prohibiting intermarriage between white persons and negroes is not a discriminating or unequal law contrary to the terms of the constitutional provision.² Nor does the fact that such a law imposes a penalty only upon the white persons violating its provisions impair its validity.³

Punishment of Crimes. — A law punishing adultery and fornication between a white person and a negro more severely than the same offense between persons of the same race and color does not deny equal protection of the laws under the Fourteenth Amendment.⁴ Nor does it limit the power of states in dealing with crimes within their borders, except that no state can deprive particular persons, or classes of persons, of equal and impartial justice under the law.⁵

Military Organization, Drill, and Parade under Arms, are subjects especially under the control of the government of every country, and legislation thereon by the states will not interfere with the privileges and immunities of citizens of the United States unless it should conflict with prior legislation by the national government.⁶

(c) **Equal Protection of the Laws** — *aa. IN GENERAL.* — **Prohibits Discriminating Laws.** — This guaranty prohibits laws which are capable of being exercised arbitrarily and with discrimination, unequally and unjustly and without regard to legal discretion.⁷ State legislation is not obnoxious to this provision, if all persons subject to it are treated alike under similar circumstances and conditions in respect both to the privileges conferred and the liabilities imposed.⁸

1. Right of Suffrage. — *Minor v. Happersett*, 21 Wall. (U. S.) 162; *U. S. v. Reese*, 92 U. S. 214; *U. S. v. Anthony*, 11 Blatchf. (U. S.) 200; *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136; *Gougar v. Timberlake*, (Ind. 1897) 46 N. E. Rep. 339; *Stone v. Smith*, 159 Mass. 413. See also the title **CIVIL RIGHTS**, *ante*, pp. 70, 71.

2. Intermarriage Between Whites and Negroes — *United States.* — *Ex p. Francois*, 3 Woods (U. S.) 367; *Ex rel. Hobbs*, etc., 1 Woods (U. S.) 537; *Ex p. Kinney*, 3 Hughes (U. S.) 9.

Alabama. — *Green v. State*, 58 Ala. 190, 29 Am. Rep. 739, *overruling Burns v. State*, 48 Ala. 195, 17 Am. Rep. 34.

Arkansas. — *Dodson v. State*, 61 Ark. 57.

Indiana. — *State v. Gibson*, 36 Ind. 389, 10 Am. Rep. 42.

Missouri. — *State v. Jackson*, 80 Mo. 175, 50 Am. Rep. 499.

Tennessee. — *Lonas v. State*, 3 Heisk. (Tenn.) 287.

Texas. — *Frasher v. State*, 3 Tex. App. 263, 30 Am. Rep. 131.

3. Frasher v. State, 3 Tex. App. 263, 30 Am. Rep. 131; *Ex p. Francois*, 3 Woods (U. S.) 367. But see *contra*, *Ex p. Francois*, 3 Woods (U. S.) 370, note.

4. Adultery Between Whites and Negroes. — *Pace v. Alabama*, 106 U. S. 583, 69 Ala. 231; *Ellis v. State*, 42 Ala. 525; *Green v. State*, 58 Ala. 190, 29 Am. Rep. 739; *Ford v. State*, 53 Ala. 150.

5. Caldwell v. Texas, 137 U. S. 697. See also *Leeper v. Texas*, 139 U. S. 462; *Cavitt v. State*, 15 Tex. App. 190; *In re Krug*, 79 Fed. Rep. 308.

Arrest of Person Unlawfully Brought into State

by Private Persons. — A lawful arrest under authority of a state court of one unlawfully brought into the state by private parties is not a violation of the Fourteenth Amendment to the United States Constitution providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. *In re Mahon*, 34 Fed. Rep. 525.

6. Right to Parade under Arms. — *Com. v. Murphy*, 166 Mass. 171; *Presser v. Illinois*, 116 U. S. 267, where the court says: "The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without and independent of an Act of Congress or law of the state authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the state and federal governments, acting in due regard to their respective prerogatives and powers."

7. Legislation Unequal in Operation. — *Yick Wo v. Hopkins*, 118 U. S. 356; *In re Wo Lee*, 26 Fed. Rep. 471. See also *In re Wo Lee*, 26 Fed. Rep. 471; and the title **CIVIL RIGHTS**, *ante*, pp. 80, 81.

8. State Legislation Valid, if Rights Alike When Circumstances Similar — *United States.* — "Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And

bb. TO WHOM AVAILABLE — (*aa*) *Chinese.* — A Law Forbidding Chinamen from Testifying For or Against Any White Person has been held to be not within the prohibition of

when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions." *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 209. See also *Minneapolis, etc., R. Co. v. Herrick*, 127 U. S. 210; *Walston v. Nevin*, 128 U. S. 578; *Hayes v. Missouri*, 120 U. S. 68; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512; *Wurts v. Hoagland*, 114 U. S. 606; *Dow v. Beidelman*, 125 U. S. 680; *Missouri v. Lewis*, 101 U. S. 22, followed by *Sullivan v. Haug*, 82 Mich. 548; *Covington, etc., Turnpike Road Co. v. Sandford*, 164 U. S. 578; *New York, etc., R. Co. v. New York*, 165 U. S. 628; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556; *Ames v. Union Pac. R. Co.*, 64 Fed. Rep. 165; *Brass v. North Dakota*, 153 U. S. 391; *Lowe v. Kansas*, 163 U. S. 81; *Duncan v. Missouri*, 152 U. S. 377; *Cotting v. Kansas City Stock-Yards Co.*, 79 Fed. Rep. 679; *Munn v. Illinois*, 94 U. S. 113, 69 Ill. 80; *In re Grice*, 79 Fed. Rep. 645; *Louisville, etc., R. Co. v. Railroad Com'rs*, 19 Fed. Rep. 693.

Florida. — *Jacksonville, etc., R. Co. v. Prior*, 34 Fla. 271.

Georgia. — *Augusta, etc., R. Co. v. Randall*, 70 Ga. 304.

Indiana. — *Pennsylvania Co. v. State*, 142 Ind. 428; *Warren v. Sohn*, 112 Ind. 213.

Iowa. — *Bucklew v. Central Iowa R. Co.*, 64 Iowa 603; *McAunich v. Mississippi, etc., R. Co.*, 20 Iowa 338; *Tredway v. S. C. & St. P. R. Co.*, 43 Iowa 527; *Owen v. Sioux City*, 91 Iowa 190.

Minnesota. — *Cameron v. Chicago, etc., R. Co.*, 63 Minn. 384; *Johnson v. Chicago, etc., R. Co.*, 29 Minn. 425.

Montana. — *State v. French*, 17 Mont. 54. *New Hampshire.* — See *Boston, etc., R. Co. v. State*, 32 N. H. 215.

New York. — *People v. Kings County*, 13 Misc. Rep. (N. Y. Supreme Ct.) 587.

North Carolina. — *State v. Moore*, 104 N. Car. 714, 17 Am. St. Rep. 696.

Tennessee. — *Dugger v. Mechanics', etc., Ins. Co.*, 95 Tenn. 245.

Texas. — *Merchants' Ins. Co. v. Levy*, (Tex. Civ. App. 1895) 33 S. W. Rep. 996; *Phoenix Ins. Co. v. Levy*, (Tex. Civ. App. 1895) 33 S. W. Rep. 992; *Campbell v. Cook*, 86 Tex. 630, 40 Am. St. Rep. 878.

Utah. — *Holden v. Hardy*, (Utah 1896) 46 Pac. Rep. 756.

Wisconsin. — *Bittenhaus v. Johnston*, 92 Wis. 588.

A city ordinance prohibiting a railroad by name from using any vehicle propelled by steam in a certain street, it alone having had the right theretofore to use the street for that purpose, does not discriminate against that road or deny it the equal protection of the law. *Richmond, etc., R. Co. v. Richmond*, 96 U. S. 521. See also, upon this subject, the title CIVIL RIGHTS, *ante*, p. 77, *et seq.*

Appeal from City Ordinance Allowed to Residents Only. — Where an appeal from a city ordinance

annexing contiguous territory is permitted to resident freeholders only, there is no denial of the equal protection of the laws to nonresident freeholders. *Taggart v. Claypool*, 145 Ind. 590.

Attachment Undertaking Required Only Where Defendants Residents. — Where, in attachment proceedings, an undertaking is required if the defendants are residents, but not if they are all nonresidents. *Head v. Daniels*, 38 Kan. 1.

Discriminating as to Recovery of Damages from Municipality. — A law providing that no damages can be recovered against any city or town for personal injuries by persons who are residents of countries where such damages are not recoverable under its laws is a denial of equal protection of the law and unconstitutional. *Pearson v. Portland*, 69 Me. 278.

Regulating Challenges in Capital Cases. — A statute allowing the state fifteen peremptory challenges in capital cases in cities of over one hundred thousand population, while elsewhere in the state it is allowed only eight, does not deny the accused the equal protection of the laws.

Hayes v. Missouri, 120 U. S. 68, where the court says (p. 72): "Allowing the state fifteen peremptory challenges in capital cases, tried in cities containing a population of over one hundred thousand inhabitants, is simply providing against the difficulty of securing in such cases an impartial jury in cities of that size which does not exist in other portions of the state. So far from defeating, it may furnish the necessary means of giving that equal protection of its laws to all persons which that amendment declares shall not be denied to any one within its jurisdiction."

A Law Authorizing Changes of Venue generally throughout a state, but exempting a certain locality, is repugnant to the Fourteenth Amendment as denying equal protection of the laws. *State v. Hayes*, 81 Mo. 574.

Giving Prior Lien for Materials Furnished Certain Corporations. — A statute giving persons furnishing supplies to railroad, mining, and manufacturing companies a lien to take precedence over any mortgage, deed of trust, sale, etc., made after a certain date, is valid and not a denial of equal protection of the laws. *Virginia Development Co. v. Crozer Iron Co.*, 90 Va. 126, 44 Am. St. Rep. 893; *Gilchrist v. Helena, etc., R. Co.*, 58 Fed. Rep. 708; *Central Trust Co. v. Sloan*, 65 Iowa 655.

Fixing Rates for Railroads, Stock Yards, etc., and allowing no judicial inquiry into their reasonableness, denies them such protection. *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 458, where the court said: "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation

the Fourteenth Amendment as denying equal protection of the laws to all.¹

But the Denial to the Chinese of the Right to Fish in the Waters of the State under penalty of fine and imprisonment is unconstitutional.²

An Ordinance Requiring All Chinese Inhabitants of a City to Remove Outside Its Limits or into a part designated denies them the equal protection of the laws.³

Chinese Born Within the United States Are Citizens thereof, and of the state in which they reside, within the meaning of this amendment, and the laws excluding immigrants who are Chinese laborers do not apply to them.⁴

(bb) *Miscellaneous Persons* — *Pile Driving in Non-navigable Streams.* — A law forbidding owners of land along a river not navigable to drive piles anywhere within the river for any purpose denies them the lawful use of their property and the equal protection of the laws.⁵

Rights of Municipal Corporations as Against States. — The Fourteenth Amendment secures no rights to a municipal corporation, as against the state, to the equal protection of its laws, which can limit legislation to charge them with public obligations; and their inhabitants, as members of such corporations, have no greater immunity with reference thereto.⁶

The Word "Persons" Includes Aliens as well as citizens.⁷

(cc) *Corporations.* — Private corporations as well as natural persons are within the constitutional provision guaranteeing the equal protection of the laws.⁸

by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws." See also *Cotting v. Kansas City Stock-Yards Co.*, 79 Fed. Rep. 679.

The Rules of Practice of a State Court as interpreted by the court of last resort, where they apply to all persons alike, do not deny equal protection of the laws. *Fielden v. Illinois*, 143 U. S. 452; *Iowa Cent. R. Co. v. Iowa*, 160 U. S. 392, where the court says: "It is apparent that this defense merely asserted that the rights of the corporation as a citizen of the United States would be impaired by enforcing the claim urged against it on the motion instead of by another and less summary form of action. But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege, or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of by another."

Jury Trial in Election Contests. — The fact that only certain classes of officials are entitled to a jury trial in election contests over their offices does not deny equal protection. *Taliaferro v. Lee*, 97 Ala. 92.

1. Forbidding Chinamen to Testify. — *People v. Brady*, 40 Cal. 210, 6 Am. Rep. 604, where the court says: "I think I have shown that there is no difference in principle; that the law does not cause them to be isolated from those competent to testify, although the fact of their

exclusion may increase the chances that they will be so isolated. But if the position be admitted, then the question resolves itself into this: Has the legislature the power to declare classes of persons such as Indians and Mongolians incompetent to testify? That it may rightfully do so independently of the Fourteenth Amendment, cannot be questioned. The legislature of every state in the Union, so far as I know, and certainly of nearly every one, has continuously asserted and exercised this power during its entire history. To declare who shall be competent to testify and to regulate the production of evidence has always been considered a proper exercise of legislative power. It has excluded persons for non-conformity of religious belief, for inability to understand the nature of an oath, for having been convicted of an infamous crime, for having negro blood, for being an Indian or a Mongolian, and I am not aware that the power of the legislature to pass such laws has ever been questioned." And see *State v. Rash*, 1 *Houst. Cr. Cas. (Del.)* 271.

2. *In re Ah Chong*, 2 Fed. Rep. 733.

3. *In re Lee Sing*, 43 Fed. Rep. 359.

4. *Gee Fook Sing v. U. S.*, 49 Fed. Rep. 146, 7 U. S. App. 27; *Lem Hing Dun v. U. S.*, 49 Fed. Rep. 148, 7 U. S. App. 31. See also the title *CITIZENSHIP*, *ante*, p. 17.

5. *Janesville v. Carpenter*, 77 Wis. 301, 20 Am. St. Rep. 123.

6. *State v. Williams*, 68 Conn. 131.

7. *In re Ah Fong*, 3 Sawy. (U. S.) 144; *In re Tiburcio Parrott*, 6 Sawy. (U. S.) 349, 1 Fed. Rep. 481. See also the title *CIVIL RIGHTS*, *ante*, p. 77.

8. *Corporations Entitled to Equal Protection as "Persons."* — *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26; *Home Ins. Co. v. New York*, 134 U. S. 594; *San Mateo County v. Southern Pac. R. Co.*, 13 Fed. Rep. 722; *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 87 Tex. 19; *Covington, etc., Turnpike Road Co. v. Sandford*, 164 U. S. 578, (Ky. 1893) 20 S. W. Rep. 1031; *Singer Mfg. Co. v. Wright*, 33 Fed. Rep.

And it is a denial of equal protection of the laws, to discriminate in legislation between different corporations, or between corporations and natural persons engaged in the same business.¹

Foreign Corporations. — But a foreign corporation is not within the jurisdiction of a state, and before it is admitted to do business therein it must comply with any restrictions which the state may see fit to impose upon it, with the exception of corporations employed by the Federal Government or those whose business is strictly commerce, interstate or foreign.²

cc. IN TAXATION. — The Fourteenth Amendment does not prevent a state from adjusting its system of taxation in all proper and reasonable ways, nor compel it to adopt an iron rule of equal taxation. Thus where all corporate securities are assessed at the same rate and on the same basis there is no discrimination which the state is not competent to make.³ This clause does not prevent states from exempting certain property from taxation where the property is for public use and the general public receive the benefit of the exemption.⁴

dd. IN EXERCISE OF POLICE POWER. — The Fourteenth Amendment does not limit the subjects upon which the police power of the state may be exerted, and statutes for this purpose are valid so long as they do not discriminate between persons to whom they apply.⁵ A full discussion of the police power of the states and the limitations thereon will be found elsewhere in this work.⁶

121; *Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386; *Sullival v. Oregon R., etc., Co.*, 19 Oregon 319; *Dugger v. Mechanics', etc., Ins. Co.*, 95 Tenn. 245. *Contra*, *Insurance Co. v. New Orleans*, 1 Woods (U. S.) 85.

See also the title CIVIL RIGHTS, *ante*, p. 78.

1. Discrimination Between Corporations Forbidden. — *Louisville, etc., R. Co. v. Railroad Com'rs*, 19 Fed. Rep. 679. See also *San Mateo County v. Southern Pac. R. Co.*, 13 Fed. Rep. 733, 8 Sawy. (U. S.) 238.

2. Foreign Corporations. — *Pembina Consol. Silver Min., etc., Co. v. Pennsylvania*, 125 U. S. 181; *Philadelphia F. Assoc. v. New York*, 119 U. S. 110; *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Ducat v. Chicago*, 10 Wall. (U. S.) 410; *Southern Bldg., etc., Assoc. v. Norman*, 98 Ky. 294; *Daggs v. Orient Ins. Co.*, 136 Mo. 382; *Dugger v. Mechanics', etc., Ins. Co.*, 95 Tenn. 245.

See also the title FOREIGN CORPORATIONS.

A provision for a special mode of service on foreign corporations is not a denial of equal protection of the laws.

Shafer Iron Co. v. Stone, 88 Mich. 470, where the court says: "When a foreign corporation comes within this state and seeks to carry on its business here, it must do so in compliance with our laws. A corporation created by a state is a mere creation of local law. It has been repeatedly held, and there seems to be no conflict of authority, that corporations of one state have no right to exercise their franchises in any other state except by the consent of such other state."

3. Taxation. — *Sandford v. Poe*, 37 U. S. App. 378, 165 U. S. 194; *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461; *Southern Bldg., etc., Assoc. v. Norman*, 98 Ky. 294; *Jennings v. Coal Ridge Imp., etc., Co.*, 147 U. S. 147; *Pittsburgh, etc., R. Co. v. Backus*, 154 U. S. 421, 133 Ind. 625; *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 133 Ind. 609;

Columbus Southern R. Co. v. Wright, 151 U. S. 470, 89 Ga. 574; *Mackay v. San Francisco*, 113 Cal. 392; *State v. French*, 109 N. Car. 722, 26 Am. St. Rep. 590; *State v. Stevenson*, 109 N. Car. 730, 26 Am. St. Rep. 595; *Northern Pac. R. Co. v. Barnes*, 2 N. Dak. 310, 395; *Northern Pac. R. Co. v. Tressler*, 2 N. Dak. 397; *Sawyer v. Dooley*, 21 Nev. 390; *Com. v. Edgerton Coal Co.*, 164 Pa. St. 284.

See, for a full discussion of this topic, the title TAXATION.

4. Exempting Property Employed for Public Uses. — *Northern Pac. R. Co. v. Carland*, 5 Mont. 146, where the court says, pp. 185: "From this able consideration of the object, scope, and purpose of the Fourteenth Amendment, by this able judge, it clearly appears that it was designed as a limitation upon the power of the states; that unequal taxation by the states, so far as it can be prevented, with other unequal burdens, is prohibited; that property may be exempted by the state from taxation without invading the provisions of the amendment, when the public benefit to be derived from such exemptions is equivalent to the tax that would otherwise be exacted; and that such exemption can only be sustained where the property exempted is used for the promotion of the public well-being."

5. Police Power. — The clause of the Fourteenth Amendment ordaining that no state shall deny to any person within its jurisdiction the equal protection of the laws "does not limit, nor was it designed to limit, the subjects upon which the police power of the state may be exerted." *Field, J.*, delivering the opinion of the court in *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 29. See also *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205; *Jones v. Brim*, 165 U. S. 180; *Davis v. Massachusetts*, 167 U. S. 43.

6. See the title POLICE POWER.

ee. TRIAL BY JURY AS AFFECTED BY THE FOURTEENTH AMENDMENT. — Whether jury service is a right, or a mere duty and burden, has been a mooted question.¹ But at any rate it is not an incident of citizenship.²

Negroes cannot demand that juries shall consist partly of their own race; it is sufficient that as a class they are not excluded from jury service.³

Chinamen are not entitled to be tried by mixed juries including those of their own race.⁴

Women are not eligible to jury service at common law, save in the one instance of a writ *de ventre inspiciendo*.⁵ Even in *Wyoming* they are excluded from such service,⁶ though the constitution requires that "both male and female citizens shall equally enjoy all civil, political, and religious rights and privileges;"⁷ and such exclusion contravenes neither the provision nor the Fourteenth Amendment to the Federal Constitution.⁸

(d) **Racial Discrimination — Federal Legislation.** — Congress under the Fourteenth Amendment cannot pass direct legislation operating on individuals. The amendment is prohibitory upon the states only, and under it Congress can enact only such corrective legislation as may be necessary or proper for counteracting or redressing the effect of state laws or acts.⁹

State Legislation. — In many of the states statutes exist commanding equal and impartial accommodation to all, without discrimination on account of race, color, or previous condition of servitude, in the facilities and privileges of common carriers, inns, restaurants, theatres and other places of amusement, and in public schools. Such statutes are valid exercises of the police power of the state.¹⁰

1. **Jury Service a Right or Duty.** — "It may be that jury duty is no more a civil or political right than militia service, and that is by the terms of the constitution restricted to able-bodied male citizens between certain ages who have 'no conscientious scruples averse to bearing arms.' Const. Wyo., art. 17, § 1. It may be that jury duty is a right or privilege, that of assisting in the administration of justice, as it is put by some of the courts — an important function of government, affecting the rights and interests of both sexes. We do not feel justified in deciding a question of such grave importance on the spur of the moment, and without a full argument." *McKinney v. State*, 3 *Wyoming* 724. See also *Haggard v. Com.*, 79 *Ky.* 366.

In *Brittle v. People*, 2 *Neb.* 198, the majority of the court held that jury service was a right, and that a territorial restriction of jurors to "free white males" was imperative after the admission of the state under an Act of Congress which forbade a "denial of the elective franchise, or of any other right" on account of color. But *Mason, C. J.*, in a dissenting opinion, discussed at length the history of the jury as an institution to show that such service had generally been considered burdensome.

2. *State v. Ah Chew*, 16 *Nev.* 50, 40 *Am. Rep.* 488; *McKinney v. State*, 3 *Wyoming* 719.

3. See also *Murray v. Louisiana*, 163 *U. S.* 101; *Ex p. Murray*, 66 *Fed. Rep.* 297; *Nashville v. Sheperd*, 3 *Baxt. (Tenn.)* 373; *Williams v. State*, 44 *Tex.* 34; *Mitchell v. Com.*, 33 *Gratt. (Va.)* 845.

For a full discussion of the question of race discrimination in the selection of jurors, see the title *CIVIL RIGHTS*, *ante*, p. 81.

4. *State v. Ah Chew*, 16 *Nev.* 50, 40 *Am. Rep.* 488.

5. **Female Jury.** — *Blackstone's Com.* 362. This proceeding was employed in Massachusetts in 1778. See *Harvard Law Review*, April, 1889. It was resorted to in England, *Reg. v. Wycherley*, 8 *C. & P.* 262, 34 *E. C. L.* 381, so late as 1838, and is still probably a part of the common law of most American states. See 39 *Alb. L. J.* 326.

6. **Wyoming — Women Excluded from Juries.** — "It has been the settled law of this jurisdiction ever since its organization, that male electors only were qualified to serve as jurors, although for that period women have been entitled to vote and hold office as well as men. At one time it was held by the *nisi prius* courts of the territory of Wyoming that women were competent jurors, but that ruling was speedily overturned by the same courts. The question was never passed upon by the Supreme Court, either state or territorial. We have not much doubt that women were not eligible as jurors under the territorial statutes, as the right to vote and hold office does not include the right, if right it may be termed, to serve as a juror." *McKinney v. State*, 3 *Wyoming* 723. The court was speaking only of the custom, however; it expressly declined to decide whether as a question of law women were qualified to serve as jurors in Wyoming.

7. *Wyoming Const.*, art. 6, § 1.

8. *McKinney v. State*, 3 *Wyoming* 719.

9. *Civil Rights Cases*, 109 *U. S.* 3. See also *Civil Rights Bill*, 1 *Hughes (U. S.)* 541. See the title *CIVIL RIGHTS*, *ante*, p. 75.

10. See the title *CIVIL RIGHTS*, *ante*, p. 84, *et seq.*

A **Skating Rink** has been held to be a place of public amusement, and within the terms of a statute enjoying equal accommodations at such resorts. *People v. King*, 110 *N. Y.* 418, *affirming* 42 *Hun (N. Y.)* 186, 6 *Am. St. Rep.*

Separate Schools. — Where separate schools of equal excellence are provided for the children of white persons and those of negroes, and they are prohibited from intermingling, there is no denial of equal protection of the laws under the Fourteenth Amendment.¹

d. RIGHTS GUARANTEED BY BOTH STATE AND FEDERAL CONSTITUTIONS — (1) *Jural and Forensic Rights* — (a) **Free and Prompt Redress** — *aa. IN GENERAL.* — Among the most highly prized and hardly won of the rights conferred by Magna Charta were those guaranteed by the brief but expressive clause: "We will sell to no man, we will not deny to any man, either justice or right."² In a large number of state constitutions provisions of like import have been inserted, adding, however, the element of promptness to that of freedom of redress as there guaranteed.³ These provisions were borrowed from Magna Charta,⁴ and should be interpreted in the light of the

389. But compare *Bowlin v. Lyon*, 67 Iowa 536, 56 Am. Rep. 355.

Restaurant. — In *Sauvinet v. Walker*, 27 La. Ann. 14, the plaintiff, who was a negro, and was refused accommodations on account of his color, at a restaurant kept by the defendant, was allowed to recover damages for such exclusion under the provisions of the Louisiana Civil Rights Act of 1869.

Horse-racing is an amusement, and under the laws of New York a racing association which has received a franchise from the state must conduct its business for the benefit of the public, and it is the absolute right of any citizen who conducts himself properly, and who complies with the reasonable rules of the public corporation, to demand admission to a racing meeting held by such association. *Grannan v. Westchester Racing Assoc.*, 16 N. Y. App. Div. 8.

Common Carriers. — The Fourteenth Amendment is not violated by a statute providing that common carriers shall furnish separate but equal accommodations to whites and negroes. *Plessy v. Ferguson*, 163 U. S. 537. See the Civil Rights Bill, 1 Hughes (U. S.) 541.

And it seems that carriers have a right, in the absence of prohibitory legislation, to make reasonable rules providing for the separation of white and colored passengers. See *Chesapeake, etc., R. Co. v. Wells*, 85 Tenn. 613; *Central R. Co. v. Green*, 86 Pa. St. 421; *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62, decided before the Fourteenth Amendment. But where the accommodation furnished was distinctly inferior, such regulation is unreasonable. *Coger v. Northwestern Union Packet Co.*, 37 Iowa 145.

But a statute regulating the accommodation by carriers of whites and blacks is, in so far as it applies to interstate commerce, unconstitutional and void. *Hall v. De Cuir*, 95 U. S. 485; *State v. Hicks*, 44 La. Ann. 770. See *Plessy v. Ferguson*, 163 U. S. 548.

1. Schools. — *U. S. v. Buntin*, 10 Fed. Rep. 730; *Ward v. Flood*, 48 Cal. 51, 17 Am. Rep. 405; *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738; *State v. Gray*, 93 Ind. 303; *Lehew v. Brummell*, 103 Mo. 546, 23 Am. St. Rep. 895; *Marion v. Territory*, 1 Okla. 210. See generally, on this subject, the title CIVIL RIGHTS, *ante*, pp. 84, 86.

A state constitutional provision that "white and colored persons shall not be taught in the same school," is not repugnant to the Four-

teenth Amendment, even though no schools are provided for colored persons. *Martin v. Board of Education*, 42 W. Va. 514.

State Taxation for Purposes of Education must be provided by general laws applicable to all classes and races alike, and a law excluding negroes by implication from any share in the common school fund is contrary to the Fourteenth Amendment. *Davenport v. Cloverport*, 72 Fed. Rep. 689; *Claybrook v. Owensboro*, 16 Fed. Rep. 297, 23 Fed. Rep. 634; *Dawson v. Lee*, 83 Ky. 49. See also *Norman v. Boaz*, 85 Ky. 557; *Marshall v. Donovan*, 10 Bush (Ky.) 681; *Markham v. Manning*, 96 N. Car. 132.

2. Magna Charta, par. 40 (Creasy's Translation in English Constitution).

3. The Following Constitutions declare that every person ought to have a certain remedy at law for all injuries to the person, property, or character, and to obtain justice.

(a) Freely without purchase, completely and without denial, promptly and without delay: *Alabama* Const., art. 1, § 14; *Arkansas* Const., art. 2, § 13; *Colorado* Const., art. 2, § 6; *Connecticut* Const., art. 1, § 12; *Delaware* Const., art. 1, § 9; *Illinois* Const., art. 2, § 19; *Indiana* Const., art. 1, § 12; *Kentucky*; *Maine* Const., art. 1, § 19; *Maryland* Const., Dec. of Rights, § 19; *Massachusetts* Const., art. 1, § 11; *Minnesota* Const., art. 1, § 8; *Mississippi*; *Missouri* Const., art. 2, § 10; *New Hampshire* Const., art. 1, § 14; *North Carolina* Const., art. 1, § 25; *Oregon* Const., art. 1, § 10; *Pennsylvania* Const., art. 1, § 11; *Rhode Island* Const., art. 1, § 5; *Tennessee* Const., art. 1, § 7; *Vermont* Const., art. 1, § 4; *West Virginia* Const., art. 3, § 17; *Wisconsin* Const., art. 1, § 9.

(b) By due course of law: *Alabama*; *Arkansas*; *Connecticut*; *Delaware* Const., art. 1, § 9; *Illinois*; *Indiana*; *Kansas* Const., art. 18; *Kentucky*; *Maine*; *Maryland*; *Massachusetts*; *Minnesota*; *New Hampshire*; *New Mexico*; *North Carolina*; *Oregon*; *Rhode Island*; *South Carolina* Const., art. 1, § 15; *Tennessee*; *Texas* Const., art. 1, § 13; *Vermont*; *West Virginia*; *Wisconsin*.

(c) Promptly and without delay: *Kansas*; *South Carolina*.

(d) By due course of law without denial or delay: *Louisiana* Const., § 11; *Nebraska* Const., art. 1, § 13; *Ohio* Const., art. 1, § 16.

4. Provisions Borrowed from Magna Charta — *Indiana*. — *Henderson v. State*, 137 Ind. 552.

history of that instrument.¹

bb. JUSTICE WITHOUT PURCHASE — Object of Provision. — The constitutional guaranty of justice without purchase, re-enacted from Magna Charta, was designed to abolish the fines which were anciently paid to expedite or delay law proceedings and procure favor.²

Tax on Litigation — Fees — Security for Costs. — It is not violated by the imposition of a uniform tax on litigation,³ or by a statutory provision that certain fees for services by county officers shall be taxed against the litigants, and paid into the county treasury,⁴ or requiring a litigant to pay entry and continuance fees⁵ or to give security for costs.⁶

Tax-title Suits — Deposit in Court. — A statutory requirement that before any person can prosecute or defend a suit against a tax-title claimant he shall deposit in court the amount of the purchase money with all taxes and costs is not unconstitutional.⁷

Payment of Taxes on Debts. — The legislature may require the payment of all taxes due on a demand as a condition precedent to bringing an action thereon.⁸

Jury Fee. — The legislature may require that in civil cases the party demanding the jury shall advance the expenses of the venire.⁹

Rhode Island. — *Perce v. Hallett*, 13 R. I. 363; *Conley v. Woonsocket Sav. Inst.*, 11 R. I. 147.

Tennessee. — *Harrison v. Willis*, 7 Heisk. (Tenn.) 35, 19 Am. Rep. 604; *Townsend v. Townsend*, Peck (Tenn.) 14, 14 Am. Dec. 722, where it is said: "In 2d Institute 55 my Lord Coke says the king is the speaker, and in contemplation of law, is constantly present in all his courts, pronouncing the words of Magna Charta, *Nulli vendemus, nulli negabimus, aut differemus justitiam vel rectum*. In Tennessee every legislature is in contemplation of law during the whole session, and the judge of every court during the whole term, in the constant repetition of the words 'right and justice' must be 'administered without sale, denial, or delay.'"

1. *Perce v. Hallett*, 13 R. I. 363.

2. *Justice Without Purchase — Object of Provision.* — *Perce v. Hallett*, 13 R. I. 363; *Harrison v. Welles*, 7 Heisk. (Tenn.) 35, 19 Am. Rep. 604; *Henderson v. State*, 137 Ind. 552; *Conley v. Woonsocket Sav. Inst.*, 11 R. I. 147.

That is to say, for the attainment of justice — the end of law — the right must be administered without sale. "Original process * * * must issue without price, except that which the law fixes, and without denial, though the defendant be a favorite of the king or government, who interferes in his behalf, and must be proceeded on by the judges, after suit instituted upon it, without delay, themselves or by order of the king, or, as we say, act of the legislature. And the judges where the causes depend must issue the proper judicial process without fee or reward, except that fixed by law." *Townsend v. Townsend*, Peck (Tenn.) 15, 14 Am. Dec. 722, citing 2 Inst. 55, 56.

3. *Uniform Tax on Litigation.* — *Harrison v. Willis*, 7 Heisk. (Tenn.) 35, 19 Am. Rep. 604; *State v. Howran*, 8 Heisk. (Tenn.) 824; *State v. Stanley*, 3 Lea (Tenn.) 524.

The statute of *Tennessee* authorized the collection of a certain tax on each suit, to be included in the execution when the suit was determined. The court, in holding the law constitutional, said: "The right to litigate one's rights in the courts is a species of prop-

erty — an incorporeal property; and all property is taxable in this state." *Harrison v. Willis*, 7 Heisk. (Tenn.) 35, 19 Am. Rep. 604.

In *State v. Howran*, 8 Heisk. (Tenn.) 824, a statute allowing the county court to impose a tax on each indictment in state cases to be entered in the bill of costs was sustained.

If the amount collected is not sufficient to pay all the costs, the state tax on litigation must first be paid. *State v. Stanley*, 3 Lea (Tenn.) 524.

4. *Fees for Services of County Officers.* — *Henderson v. State*, 137 Ind. 552, the court saying: "Its purpose * * * is to create a fund out of which those who perform official services may be paid the salaries fixed by the law. It is a matter of no concern to a litigant whether the sheriff who serves his writs is paid by him direct or whether he receives his pay through the medium of the county treasurer."

5. *Entry and Continuance Fees.* — *Perce v. Hallett*, 13 R. I. 363; *Hewlett v. Nutt*, 79 N. Car. 263.

6. *Security for Costs.* — *Gesford v. Critzer*, 7 Ill. 698; *Conley v. Woonsocket Sav. Inst.*, 11 R. I. 147.

7. *Tax Title Suits — Deposit in Court.* — *Smith v. Smith*, 19 Wis. 615, 88 Am. Dec. 707; *Pope v. Macon*, 23 Ark. 644; *Craig v. Flanagan*, 21 Ark. 319.

8. *Walker v. Whitehead*, 43 Ga. 538.

9. *Jury Fees.* — *Conneau v. Geis*, 73 Cal. 176, 2 Am. St. Rep. 785; *Venine v. Archibald*, 3 Colo. 163, *Connors v. Burlington*, etc., R. Co., 74 Iowa 383; *People v. Hoffman*, 3 Mich. 248; *Adams v. Corriston*, 7 Minn. 456; *Rollins v. Nolting*, 53 Minn. 232; *Randall v. Kehlor*, 60 Me. 43, 11 Am. Rep. 169; *People v. Van Tassel*, 13 Utah 9.

But the court has no power to make such a requirement unless expressly authorized by statute. *Clayton v. Clark* 55 N. J. L. 539.

In a justice's court, if the party calling for a jury refuses to pay the jurors' fees in advance, the justice may proceed to try the case without a jury. *Rollins v. Nolting*, 53 Minn. 232.

The failure of the court to require the advancement of the jury fee as a prerequisite to

cc. JUSTICE WITHOUT DELAY. — This familiar clause of the Bill of Rights has not been a frequent subject of judicial exposition. But in *Tennessee* an act which provided that execution should not issue until two years after judgment, unless the plaintiff should consent to receive in satisfaction the notes of certain banks, was held to infringe this guaranty.¹

(b) **Jury Trial** — aa. IN GENERAL. — The preservation of the common-law right to trial by jury in both civil and criminal cases is guaranteed by the Federal Constitution,² as well as by the fundamental law of the several states.³ It is well settled that the federal provision is a restriction only on the general government and its officers,⁴ and the states may constitutionally abolish, alter, or amend the existing right of trial by jury.⁵

The right is preserved in substance as it existed at the time of the adoption of the Constitution, and in the classes of cases to which it was then applicable.⁶

the right to a jury is not ground for reversing the judgment. *Pitkin County v. Brown*, 2 Colo. App. 473.

The failure to pay the jury fee on the first day of the term, as required by statute, does not forfeit the right to have a trial by jury, when such failure does not operate to the prejudice of the opposite party. *Allen v. Plummer*, 71 Tex. 546.

1. **Justice Without Delay** — *Tennessee*. — *Townsend v. Townsend*, Peck (Tenn.) 15, 14 Am. Dec. 722, the court saying: "In 2d Institute 56, justice is said to be the end and right, the mean whereby we may attain the end, and that is the law. What that mean consists in is more specially explained in *Sullivan* 523, where it is stated to be original and judicial process. Original process, he says, must issue without price, except that which the law fixes, and without denial, though the defendant be a favorite of the king or government, who interferes in his behalf, and must be proceeded on by the judges, after suit instituted upon it, without delay, themselves or by order of the king, or, as we say, act of the legislature. And the judges where the causes depend must issue the proper judicial process without fee or reward, except that fixed by law. In other words, where judgment is rendered the judges shall cause execution to issue, notwithstanding any order or act of assembly or other pretended authority whatsoever. This is the long-fixed, well-known meaning and legal construction of the words right and justice without sale, denial, or delay. They clearly comprehend the case of executions suspended by act of the legislature in every instance where justice requires that it should immediately issue; as it manifestly does where the law, operating upon the contract when first made, held out to the creditor the promise of immediate execution after judgment."

2. **Trial by Jury**. — Amendments, Const. U. S., arts. 6, 7.

The provision in the Seventh Amendment of the Constitution of the United States which declares that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law applies to the facts tried by a jury in a cause in a state court. *Justices v. Murray*, 9 Wall. (U. S.) 274; *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226.

Consular Tribunals. — An American placed on trial in the American consular tribunal in

Japan for the crime of murder committed on board an American ship in the harbor of Yokohama in that empire has no constitutional right to a jury trial. *In re Ross*, 140 U. S. 454.

3. *Stimson's Am. Stat. Law*, § 130.

4. **Federal Provision a Restriction on Federal Government Only** — *United States*. — *Barron v. Baltimore*, 7 Pet. (U. S.) 243; *Spies v. Illinois*, 123 U. S. 131; *Livingston v. Moore*, 7 Pet. (U. S.) 469, affirming *Livingston v. Moore*, 1 Baldw. (U. S.) 424; *Fox v. Ohio*, 5 How. (U. S.) 410; *Walker v. Sauvinet*, 92 U. S. 90; *Bonaparte v. Camden, etc., R. Co.*, 1 Baldw. (U. S.) 220; *Pearson v. Yewdall*, 95 U. S. 294; *Twitchell v. Com.*, 7 Wall. (U. S.) 321; *Eilenbecker v. District Ct.*, 134 U. S. 31; *Edwards v. Elliott*, 21 Wall. (U. S.) 532; *Justices v. Murray*, 9 Wall. (U. S.) 274; *In re King*, 51 Fed. Rep. 434.

Alabama. — *Boring v. Williams*, 17 Ala. 510.

Colorado. — *Huston v. Wadsworth*, 5 Colo. 213.

Connecticut. — *Colt v. Eves*, 12 Conn. 243.

Indiana. — *Lake Erie, etc., R. Co. v. Heath*, 9 Ind. 558; *Baker v. Gordon*, 23 Ind. 204.

Louisiana. — *Joseph v. Bidwell*, 28 La. Ann. 382, 26 Am. Rep. 102.

Massachusetts. — *Com. v. Whitney*, 108 Mass. 5; *Bigelow v. Bigelow*, 120 Mass. 320.

New York. — *Livingston v. New York*, 8 Wend. (N. Y.) 85, 22 Am. Dec. 622; *Lee v. Tillotson*, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624; *Barker v. People*, 3 Cow. (N. Y.) 701, 15 Am. Dec. 322; *In re Newcomb* (Supreme Ct.) 18 N. Y. Supp. 16; *Matter of Smith*, 10 Wend. (N. Y.) 458.

North Carolina. — *State v. Whitaker*, 114 N. Car. 18.

Vermont. — *Huntington v. Bishop*, 5 Vt. 189; *Hall v. Armstrong*, 65 Vt. 421.

The Territories. — The federal provision is in force in the territories. *Bradford v. Territory*, 1 Okla. 366. See also *Walker v. New Mexico, etc., R. Co.*, 7 N. Mex. 282.

5. The Fourteenth Amendment to the Federal Constitution providing that no state shall "deprive any person of life, liberty, or property, without due process of law," does not require a jury. *Fant v. Buchanan*, (Miss. 1895) 17 So. Rep. 371; *Walker v. Sauvinet*, 92 U. S. 90; *Hall v. Armstrong*, 65 Vt. 421.

6. *United States*. — *Callan v. Wilson*, 127 U. S. 540.

Alabama. — *Boring v. Williams*, 17 Ala. 510.

The language of the courts in some early cases, to the effect that the constitutional provision extends only to those offenses which were crimes at common law and does not apply to newly created statutory offenses,¹ is believed to be too broad. The true rule applies the provision to that class of cases in which it existed at common law.²

bb. WHEN INAPPLICABLE — (aa) Equity Causes. — The constitutional guaranty of the right to trial by jury does not extend to the trial of equity causes; and the legislature may provide that all cases in equity shall be tried without the intervention of a jury.³

Florida. — Lavey *v.* Doig, 25 Fla. 611; Blanchard *v.* Raines, 20 Fla. 467.

Georgia. — Flint River Steamboat Co. *v.* Foster, 5 Ga. 194, 48 Am. Dec. 248.

Illinois. — Ross *v.* Irving, 14 Ill. 171.

Indiana. — Anderson *v.* Caldwell, 91 Ind. 454, 46 Am. Rep. 613; Lake Erie, etc., *R. Co. v.* Heath, 9 Ind. 558; Wright *v.* Fultz, 138 Ind. 594; Dillman *v.* Cox, 23 Ind. 440; Allen *v.* Anderson, 57 Ind. 388; McMahon *v.* Works, 72 Ind. 19.

Missouri. — Vaughn *v.* Scade, 30 Mo. 600.

Nevada. — State *v.* McClear, 11 Nev. 39.

New Hampshire. — State *v.* Almy, (N. H. 1892) 28 Atl. Rep. 372; Opinion of Justices, 41 N. H. 550.

New York. — Riggs *v.* Shannon, 27 Abb. N. Cas. (N. Y. C. Pl.) 456.

Ohio. — Work *v.* State, 2 Ohio St. 297, 59 Am. Dec. 671.

Pennsylvania. — Haines *v.* Levin, 51 Pa. St. 414; Wynkoop *v.* Cooch, 89 Pa. St. 451; Rhines *v.* Clark, 51 Pa. St. 96.

South Carolina. — State *v.* Williams, 40 S. Car. 373; New Town Cut *v.* Seabrook, 2 Strobb. L. (S. Car.) 560; Frazee *v.* Beattie, 26 S. Car. 348.

Wisconsin. — Gaston *v.* Babcock, 6 Wis. 503; Stilwell *v.* Kellogg, 14 Wis. 461; Dane County *v.* Dunning, 20 Wis. 210; Mead *v.* Walker, 17 Wis. 189.

1. Van Swartow *v.* Com., 24 Pa. St. 131; Tims *v.* State, 26 Ala. 165; Kimball *v.* Connor, 3 Kan. 414.

2. In *McInerney v. Denver*, 17 Colo. 302, Helm, J. said: "Some cases there are which hold that a new offense created by statute since the adoption of the Constitution is not covered by constitutional guarantees relating to trial by jury and the like, the theory adopted being that these guarantees apply only to specific cases in which the rights named had, previous to the Constitution, been recognized. But we think it a sounder view that the principle referred to, in whatever words it may be stated, is more comprehensive, and that it includes all statutory offenses created since the adoption of the Constitution which belong to the classes of cases theretofore triable by jury."

3. *Equity Causes — United States.* — Goodyear *v.* Providence Rubber Co., 2 Cliff. (U. S.) 351.

Arkansas. — State *v.* Churchill, 48 Ark. 426.

California. — Loftus *v.* Fischer, 113 Cal. 286; Cahoon *v.* Levy, 5 Cal. 294; Crocker *v.* Carpenter, 98 Cal. 418.

Florida. — Wiggins *v.* Williams, 36 Fla. 637; Hughes *v.* Hannah, (Fla. 1897) 22 So. Rep. 613.

Georgia. — Mahan *v.* Cavender, 77 Ga. 118. See also *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248.

Illinois. — Heacock *v.* Hosmer, 109 Ill. 245; Flaherty *v.* McCormick, 113 Ill. 538; Boyd *v.* Swallows, 59 Ill. App. 635; Ross *v.* Irving, 14 Ill. 171.

Indiana. — Helm *v.* Huntington First Nat. Bank, 91 Ind. 44; Allen *v.* Anderson, 57 Ind. 388; Monnett *v.* Turpie, 132 Ind. 482.

Kansas. — Kimball *v.* Connor, 3 Kan. 414; Hixon *v.* George, 18 Kan. 253.

Missouri. — O'Day *v.* Conn, 131 Mo. 321; Conran *v.* Sellow, 28 Mo. 320; Weil *v.* Kume, 49 Mo. 158; Estes *v.* Fry, 94 Mo. 266.

Nevada. — Lake *v.* Tolles, 8 Nev. 285.

New Hampshire. — The holding in *Marston v. Brackett*, 9 N. H. 336, that the defendant has a constitutional right in a bill in chancery to have disputed facts determined by a jury, is doubted in *Copp v. Henniker*, 55 N. H. 210, 20 Am. Rep. 194; *Perkins v. Scott*, 57 N. H. 81, and probably overruled by *Bellows v. Bellows*, 58 N. H. 60; *State v. Saunders*, 66 N. H. 39.

New York. — Dunnell *v.* Keteltas, 16 Abb. Pr. (N. Y. Supreme Ct.) 205; McCarty *v.* Edwards, 24 How. Pr. (N. Y. Supreme Ct.) 236; Laufer *v.* Sayles, 5 N. Y. App. Div. 582; *Brigham v. Gott* (Supreme Ct.) 3 N. Y. Supp. 518; *Riggs v. Shannon*, 27 Abb. N. Cas. (N. Y. C. Pl.) 456.

Ohio. — Hull *v.* Bell, 54 Ohio St. 228.

Pennsylvania. — Wynkoop *v.* Cooch, 89 Pa. St. 450.

South Carolina. — Lucken *v.* Wichman, 5 S. Car. 411.

Vermont. — Plimpton *v.* Somerset, 33 Vt. 283.

Wisconsin. — Mead *v.* Walker, 17 Wis. 189; Dane County *v.* Dunning, 20 Wis. 210; Stilwell *v.* Kellogg, 14 Wis. 461. And see *Truman v. McCollum*, 20 Wis. 360, where doubt is expressed of the power of the legislature to make the findings of a jury conclusive in an equity cause. And in *Callanan v. Judd*, 23 Wis. 343, an act requiring a jury in foreclosure cases was held invalid. But a jury may be required in a statutory proceeding, though equitable in its nature. *Bentley v. Davidson*, 74 Wis. 420.

Joinder of Legal and Equitable Causes of Action. — Where legal and equitable issues are united and a demand is made for a jury trial of the issues, without specifying any particular issue, a jury is properly refused. *Greenleaf v. Egan*, 30 Minn. 316; *Lindley v. Sullivan*, 133 Ind. 588; *Pedens v. Cavins*, 134 Ind. 494, 39 Am. St. Rep. 276; *Lace v. Fixen*, 39 Minn. 46.

The consolidation of a habeas corpus proceeding with a civil action will not deprive the parties of a trial by jury. *Orr v. Miller*, 98 Ind. 436.

Instances. — In the foreclosure of mortgages,¹ the foreclosure of mechanics' liens,² the partition of real estate,³ in actions to quiet title,⁴ for an accounting,⁵ or an injunction,⁶ a jury trial cannot be demanded as a matter of right. The verdict of a jury in such cases is merely advisory, and the chancellor is not bound by its finding.⁷

Legislature Giving an Equitable Form to a Legal Action. — Where the answer converts a legal into an equitable action it should be conducted according to the rules which govern equity cases;⁸ but the legislature cannot, by giving an equitable

1. Jury Trial in Foreclosure of Mortgages — California. — *Downing v. Le Du*, 82 Cal. 471; *La Société Française, etc.*, *v.* Selheimer, 57 Cal. 623. *Compare Santa Cruz Rock Pavement Co. v. Bowie*, 104 Cal. 286.

Indiana. — *Brighton v. White*, 128 Ind. 320; *Albrecht v. C. C. Foster Lumber Co.*, 126 Ind. 318; *Johnson v. Johnson*, 115 Ind. 112; *Carmichael v. Adams*, 91 Ind. 526.

Iowa. — *Leach v. Kundson*, (Iowa 1896) 66 N. W. Rep. 913; *Clough v. Seay*, 49 Iowa 111. *Kansas.* — *Morgan v. Field*, 35 Kan. 162.

Minnesota. — *Sumner v. Jones*, 27 Minn. 312 (foreclosure of mechanic's lien).

Nebraska. — *Dohle v. Omaha Foundry, etc., Co.*, 15 Neb. 436 (foreclosure of mechanic's lien).

New York. — *Carroll v. Deimel*, 95 N. Y. 252; *Knickerbocker L. Ins. Co. v. Nelson*, 8 Hun (N. Y.) 21; *Riggs v. Shannon*, 27 Abb. N. Cas. (N. Y. C. Pl.) 456.

South Carolina. — See *Camden Bank v. Thompson*, 46 S. Car. 499.

Washington. — *Wheeler v. Ralph*, 4 Wash. 617; *Installment Bldg., etc., Co. v. Wentworth*, 1 Wash. 467.

Wisconsin. — *Stillwell v. Kellogg*, 14 Wis. 461; *Connecticut Mut. L. Ins. Co. v. Cross*, 18 Wis. 109. See also *Callanan v. Judd*, 23 Wis. 343.

An act providing that the court may, in entering a foreclosure, if it finds the petitioner entitled to possession, issue an execution of ejectment for the delivery of possession is constitutional. *Middletown Sav. Bank v. Bacharach*, 46 Conn. 513.

In *Sale v. Meggett*, 25 S. Car. 72, where a defendant to an action in foreclosure set up a paramount title under a judgment, it was held that the issue of title raised by him should be passed on by a jury, on the law side of the court, and then the matter of equitable cognizance be determined by the court, but all in the same case.

2. In Foreclosure of Mechanic's Liens — California. — *Curnow v. Happy Valley Blue Gravel, etc., Co.*, 68 Cal. 262.

Dakota. — *Gull River Lumber Co. v. Keefe*, 6 Dakota 160.

Minnesota. — *Sumner v. Jones*, 27 Minn. 312.

Nebraska. — *Dohle v. Omaha Foundry, etc., Co.*, 15 Neb. 436.

New York. — *Schillinger Fire Proof Cement, etc., Co. v. Arnett*, 86 Hun (N. Y.) 182.

Washington. — *Installment Bldg., etc., Co. v. Wentworth*, 1 Wash. 467; *Wheeler v. Ralph*, 4 Wash. 617.

3. Partition. — A court of equity has jurisdiction of suits for the partition of lands, and no jury can be demanded. *Flaherty v. McCormick*, 113 Ill. 538; even if there is a dispute as to the title. *Flaherty v. McCormick*,

113 Ill. 538; *Pillow v. Southwest Virginia Imp. Co.*, 92 Va. 144.

Exceptions to the report of commissioners in partition cases are addressed to the court. *Dillman v. Cox*, 23 Ind. 440; *Allen v. Anderson*, 57 Ind. 388.

Under the *New York Code*, where issues of fact are presented in an action for partition, a jury trial is a matter of right. *Hewlett v. Wood*, 62 N. Y. 75.

In *Indiana* the partition of real estate is not a matter of exclusively equitable jurisdiction, and a jury may be demanded. *Kitts v. Willson*, 106 Ind. 147; *Martin v. Martin*, 118 Ind. 227; *Abernathy v. Allen*, 132 Ind. 84.

4. Quieting Title. — Where, in an action to quiet title, a counterclaim in the nature of ejectment is set up, the defendant is not entitled to jury. *Larkin v. Wilson*, 28 Kan. 513.

An act which empowers a court of equity to quiet title to real estate where the records have been destroyed is valid, even though the effect of a decree confirming title is the same as a judgment in ejectment. *Harding v. Fuller*, 141 Ill. 308.

Extending the jurisdiction of a court of equity to quiet title to cases where the land is unoccupied does not impair the right of trial by jury, as at common law ejectment would not lie where the defendant was not in possession. *Grand Rapids, etc., R. Co. v. Sparrow*, 36 Fed. Rep. 210.

5. An Action for an Accounting of Trust Property, and for a partition thereof and the appointment of a receiver to effect the same, is properly triable by the court. *Judd v. Dike*, 30 Minn. 380.

6. Injunction. — An action to restrain the operation of an elevated railroad is purely equitable, and the fact that a prayer for damages already sustained is joined therewith will not entitle the party to a jury. *Lynch v. Metropolitan El. R. Co.*, 129 N. Y. 274, 26 Am. St. Rep. 523.

7. Snell v. Harrison, 83 Mo. 651; *Brownlee v. Martin*, 21 S. Car. 392; *Hall v. Linn*, 8 Colo. 264; *Phillips v. Edsall*, 127 Ill. 535; *Bentley v. Davidson*, 74 Wis. 420.

8. Where the Answer Converts a Legal into an Equitable Action. — *O'Day v. Conn*, 131 Mo. 321; *Frye v. Hill*, 14 Wash. 83; *Dinley v. McCullagh*, 92 Hun (N. Y.) 454.

But where the plaintiff in his complaint states two legal causes of action, the only defense to one of which is a general denial, he is, as to that issue at least, entitled to a jury trial, though an equitable defense to the other cause of action is interposed. *Beary v. Hoster*, (Supreme Ct.) 6 N. Y. Supp. 330.

An answer in an action in equity to foreclose a mortgage, pleading payment and the statute of limitations, does not entitle the defendant

form to a legal action, deprive the parties of a trial by jury.¹

(bb) *Summary Proceedings.* — In a Summary Proceeding to Enforce a Debt, where the party may be presumed, from his entering into the contract, to have consented to such a mode of enforcing it, the defendant is not entitled to a jury trial.² This rule governs proceedings to enforce recognizances, or the bonds of sheriffs.³ The legislature may authorize the employment of summary proceedings for the eviction of tenants⁴ and the enforcement of maritime liens.⁵

to a jury. *Leach v. Kundson*, (Iowa 1896) 66 N. W. Rep. 913. Nor does an answer pleading a counterclaim. *McLaurin v. Hodges*, 43 S. Car. 187; *Ryman v. Lynch*, 76 Iowa 587; *Johnson v. Johnson*, 115 Ind. 112.

A defendant, by allowing, without objection, equitable issues to be made up by the cross-complaints of his codefendants, waives any right to demand a jury trial. *Frye v. Hill*, 14 Wash. 83.

In an action of ejectment, affirmative allegations in the answer, to the effect that a deed from the defendant to the plaintiff under which the plaintiff claims title was intended as mere security for a debt, do not constitute an equitable defense. *Locke v. Moulton*, 108 Cal. 49.

In *Cogswell v. New York, etc., R. Co.*, 105 N. Y. 319, where the plaintiff brought an action for both legal and equitable relief in respect to the same cause of action, it was held that by such election he submitted to have the issues tried by the court, alone or with the aid of a jury, as the court in its discretion should determine. *Followed in Olmsted v. Rich*, (Supreme Ct.) 6 N. Y. Supp. 826.

1. Legislature Giving Equitable Form to Legal Action. — *Curtis v. Sutter*, 15 Cal. 262; *Donahue v. Meister*, 88 Cal. 121, 22 Am. St. Rep. 283; *Wiggins v. Williams*, 36 Fla. 637; *McCoy v. Johnson*, 70 Md. 490; *Tabor v. Cook*, 15 Mich. 322; *Brown v. Buck*, 75 Mich. 274, 13 Am. St. Rep. 438; *Norris's Appeal*, 64 Pa. St. 275; *North Pennsylvania Coal Co. v. Snowden*, 42 Pa. St. 488, 82 Am. Dec. 530; *Haines's Appeal*, 73 Pa. St. 172; *Tillmes v. Marsh*, 67 Pa. St. 507. See also *Harding v. Fuller*, 141 Ill. 308; *McKinsey v. Squires*, 32 W. Va. 41.

Mr. Justice Strong, in *North Pennsylvania Coal Co. v. Snowden*, 42 Pa. St. 488, 82 Am. Dec. 530, said: "It [the constitutional provision] cannot mean that the legislature may confer upon the Supreme Court and the Courts of Common Pleas the power of trying, according to the course of chancery, any question which has always been triable, according to the course of law, by a jury. If it can, then an ejectment founded solely on legal title, an action of debt on bond, or a replevin, or an action of trespass, may be sent into chancery, all contested facts in it be decided by the judge, and the intervention of a jury be unknown. * * * No power in our government can take from the litigant the right to have his case tried by a jury, substantially in the mode and with the same effect as that which belonged to jury trials in similar cases, when the Constitution of 1776 was adopted."

In *Donahue v. Meister*, 88 Cal. 121, 22 Am. St. Rep. 283, an action was brought to quiet title, the plaintiff being in possession; the answer set up as a defense a cause of action in ejectment, averring that the defendant was rightfully in possession and was ousted by the

plaintiff before the commencement of the action, and that the plaintiff wrongfully withheld the possession from the defendant. The lower court refused a jury, because the case was a proceeding in equity. In remanding the case for a jury trial the Supreme Court said that the right to a jury trial of legal issues cannot be avoided by calling an action equitable; nor can the plaintiff, by bringing an equitable action, deprive the defendant of a jury trial, to which he would have been entitled if the parties had been inverted, and the defendant had sued the plaintiff.

In *Wiggins v. Williams*, 36 Fla. 637, a statute extending the jurisdiction of a court of chancery beyond the limits exercised by it at the time of the adoption of the Constitution by giving the claimants of timber lands the right to have an injunction against trespassers without reference to the character of the injury as being irreparable or the adequacy of the legal remedy for the wrong, and providing for an assessment of damages by the court, was held unconstitutional in so far as it awarded an account for damages for a mere trespass cognizable at law, and in respect to which the court of equity had no jurisdiction independent of the statute.

2. Summary Proceedings to Enforce Debts. — *Columbia Bank v. Okely*, 4 Wheat. (U. S.) 235. See also SUMMARY PROCEEDINGS.

The action of the legislature in giving a corporation a summary process for the collection of its debts was sustained in *Newbern Bank v. Taylor*, 2 Murph. (N. Car.) 266; *Columbia Bank v. Okely*, 4 Wheat. (U. S.) 235.

3. Alabama. — *Johnston v. Atwood*, 2 Stew. (Ala.) 225.

Georgia. — *Young v. Wise*, 45 Ga. 81.

Illinois. — *Whitehurst v. Coleen*, 53 Ill. 247.

Kentucky. — *Murry v. Askew*, 6 J. J. Marsh. (Ky.) 27; *Creighton v. Johnson*, Litt. Sel. Cas. (Ky.) 240.

New York. — *Gildersleeve v. People*, 10 Barb. (N. Y.) 35.

A statute authorizing judgment against the sureties in the bond upon the dissolution of an injunction was declared unconstitutional. *Hughes v. Hughes*, 4 T. B. Mon. (Ky.) 42.

But a statute giving the court power to render judgment against the sheriff and the sureties on his official bond for misconduct in office, was held valid. *Lewis v. Garrett*, 5 How. (Miss.) 434; *Lewis v. Fellows*, 6 How. (Miss.) 261.

4. Frazer v. Beattie, 26 S. Car. 348; *Jones v. Fox*, 23 Fla. 454; *Swygert v. Goodwin*, 32 S. Car. 146.

5. An Act Giving a Lien on Ships, steamboats, and other vessels, and providing a summary means of enforcing it, is not unconstitutional. *Edwards v. Elliott*, 36 N. J. L. 449, 13 Am.

Contempt Proceedings. — The power to punish summarily for contempt of court without the interposition of a jury is necessarily inherent in judicial tribunals; and, except where modified by local statute, no jury can be demanded.¹

In Taxation. — The constitutional provision does not apply to summary proceedings for the assessment and collection of taxes.²

Prosecutions of Minor Offenses. — The constitutional provision has no application to the prosecution of minor and trivial offenses, before justices and police magistrates, such offenses having been summarily punished at common law.³

Rep. 463; *Sheppard v. Steele*, 43 N. Y. 57, 3 Am. Rep. 660.

1. Contempt Proceedings — United States. — *Respublica v. Oswald*, 1 Dall. (Pa.) 319; *Ex p. Wall*, 107 U. S. 265; *Eilenbecker v. District Ct.*, 134 U. S. 31; *In re Debs*, 158 U. S. 595; *Interstate Commerce Commission v. Brimson*, 154 U. S. 488.

Arkansas. — *Neel v. State*, 9 Ark. 259, 50 Am. Dec. 209.

Colorado. — *Wyatt v. People*, 17 Colo. 252.

Connecticut. — *Huntington v. McMahon*, 48 Conn. 174; *In re Clayton*, 59 Conn. 510, 21 Am. St. Rep. 128.

Georgia. — *Lee v. Lee*, 97 Ga. 736.

Indiana. — *Garrigans v. State*, 93 Ind. 239; *Ex p. Robinson*, 3 Ind. 52.

Iowa. — *Ex p. Grace*, 12 Iowa 208; *McDonnell v. Henderson*, 74 Iowa 619.

Kansas. — *State v. Durein*, 46 Kan. 695.

Kentucky. — *Wells v. Caldwell*, 1 A. K. Marsh. (Ky.) 441.

Maine. — *Mariner v. Dyer*, 2 Me. 165.

Michigan. — *In re Sheppard*, (Mich. 1896) 67 N. W. Rep. 971.

Minnesota. — *State v. Becht*, 23 Minn. 411.

Missouri. — *Hart v. Robinett*, 5 Mo. 11.

Nebraska. — *Gandy v. State*, 13 Neb. 445.

New Hampshire. — *State v. Matthews*, 37 N. H. 450; *Bates's Case*, 55 N. H. 325.

New Jersey. — *State v. Doty*, 32 N. J. L. 403, 90 Am. Dec. 671.

Oklahoma. — *Burke v. Territory*, 2 Okla. 499.

South Dakota. — *State v. Mitchell*, 3 S. Dak. 223.

Texas. — *Crow v. State*, 24 Tex. 12.

Vermont. — *In re Cooper*, 32 Vt. 253.

See the title CONTEMPT.

The fact that the act constituting the contempt is also a crime under the statute will not entitle the party to a jury trial. *Manderscheid v. District Ct.*, 69 Iowa 240.

In *Eilenbecker v. District Ct.*, 134 U. S. 31, the court said: "If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it."

A statute which authorizes a circuit court, or circuit judge in vacation, to punish in a summary manner, by fine or imprisonment or both, a person who shall refuse to obey a subpoena of a notary public to appear and have his deposition taken, was held unconstitutional and void, as depriving the party of a trial by jury. *Puterbaugh v. Smith*, 131 Ill. 199, 19 Am. St. Rep. 30.

In *Interstate Commerce Commission v. Brimson*, 154 U. S. 489, Mr. Justice Harlan said: "Surely it cannot be supposed that the question of contempt of the authority of a

court of the United States, committed by a disobedience of its orders, is triable, of right, by a jury."

2. Taxation — Georgia. — *Harper v. Elberton*, 23 Ga. 566.

Massachusetts. — *Howe v. Cambridge*, 114 Mass. 388.

Minnesota. — *Mille Lacs County v. Morrison*, 22 Minn. 178.

Missouri. — *State v. Moss*, 69 Mo. 495.

New Hampshire. — *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 455.

North Carolina. — *Cowles v. Brittain*, 2 Hawks (N. Car.) 204.

Rhode Island. — *Crandall v. James*, 6 R. I. 144.

South Carolina. — *New Town Cut v. Seabrook*, 2 Strohh. L. (S. Car.) 560.

Vermont. — *In re Hackett*, 53 Vt. 354.

See the title TAXATION.

An act empowering the mayor and aldermen to construct sidewalks and assess the expense against the property benefited is not unconstitutional because giving one aggrieved no right of appeal to a jury. *Howe v. Cambridge*, 114 Mass. 388.

In *State v. Allen*, 2 McCord L. (S. Car.) 55, an act which imposed a penalty of ten thousand dollars on any one who should sell lottery tickets, or keep an office for that purpose, was, in so far as it authorized the tax collector to issue an execution for the same without conviction by a jury, held unconstitutional and void, although by the act it was called a tax and not a penalty.

Imposing a penalty of treble the amount of taxes he would otherwise be liable for, upon a person who shall upon a hearing before a county board be found guilty of having delivered a false list of his property to the assessor, does not violate the right of trial by jury. *State v. Moss*, 69 Mo. 495.

3. Minor Offenses — California. — *Ex p. Ah Peen*, 51 Cal. 280.

Colorado. — *McInerney v. Denver*, 17 Colo. 302.

Florida. — *Hunt v. Jacksonville*, 34 Fla. 504, 43 Am. St. Rep. 214; *Theisen v. McDavid*, 34 Fla. 440.

Georgia. — *Williams v. Augusta*, 4 Ga. 509.

Indiana. — *State v. M'Cory*, 2 Blackf. (Ind.) 5.

Iowa. — *State v. Beneke*, 9 Iowa 203; *State v. Bryan*, 4 Iowa 349; *Higgins v. Farmers' Ins. Co.*, 60 Iowa 50.

Kansas. — *State v. Topeka*, 36 Kan. 76, 59 Am. Rep. 529; *Matter of Rolfs*, 30 Kan. 758.

Louisiana. — *Monroe v. Meuer*, 35 La. Ann. 1192; *State v. Fourcade*, 45 La. Ann. 717, 40 Am. St. Rep. 249; *State v. Gutierrez*, 15 La. Ann. 190; *State v. Noble*, 20 La. Ann. 325.

Maryland. — *Matter of Glenn*, 54 Md. 572.

(cc) *Proceedings in Aid of Execution, etc.* — In *Proceedings Supplementary to Execution*, the defendant is not entitled to a jury.¹ But an action by a judgment creditor to subject fraudulently conveyed property, which but for such fraud would have been subject to levy on execution, is not a proceeding supplementary to execution, and the plaintiff is entitled to a jury trial.²

Insolvency Proceedings. — A statute authorizing the issue of a warrant to take possession of all the estate of a debtor on the petition of a creditor, without a trial by jury, is constitutional.³ So in an action by the assignee in insolvency to set aside an execution sale and to cancel the record of the sheriff's certificate thereof, upon the ground that the judgment and sale thereunder constituted a preference permitted by the insolvent in favor of creditors, the defendant is not entitled to a jury.⁴

Garnishment, though partly regulated by statute, is a common-law proceeding in which a jury may be demanded.⁵

(dd) *Probate Matters.* — In probate matters it is only where the statute expressly gives the right that a jury can be demanded.⁶ Thus the hearing of exceptions to an administrator's report, or proceeding by way of citation to compel him to make a report, are exclusively for the court.⁷

Will Contests. — Unless provided by statute the parties to a contested will case have no right to a trial by jury.⁸ And under a statute giving chancery

Minnesota. — *Mankato v. Arnold*, 36 Minn. 62; *State v. Harris*, 50 Minn. 128.

Missouri. — *Marshall v. Standard*, 24 Mo. App. 192.

Nebraska. — *Liberman v. State*, 26 Neb. 464, 18 Am. St. Rep. 791.

New York. — *People v. Webb*, 16 Hun (N. Y.) 42; *Duffy v. People*, 1 Hill (N. Y.) 355; *People v. Justices*, 74 N. Y. 406; *People v. Police Com'rs*, 59 N. Y. 96; *Murphy v. People*, 2 Cow. (N. Y.) 815; *People v. Van Houten*, 13 N. Y. Misc. Rep. (Rockland Ct. Sess.) 603.

Oregon. — *Wong v. Astoria*, 13 Oregon 538.

Ohio. — *Inwood v. State*, 42 Ohio St. 186; *Quigley v. State*, 5 Ohio Cir. Ct. Rep. 638.

Pennsylvania. — *Byers v. Com.*, 42 Pa. St. 89.

South Carolina. — *Anderson v. O'Donnell*, 29 S. Car. 355; *Ex p. Schmidt*, 24 S. Car. 363; *State v. Whitaker*, 114 N. Car. 818. Compare *Beaufort v. Ohlandt*, 24 S. Car. 158.

Tennessee. — *Trigally v. Memphis*, 6 Coldw. (Tenn.) 382.

Vermont. — *State v. Conlin*, 27 Vt. 318; *In re Dougherty*, 27 Vt. 325.

Virginia. — *Ex p. Marx*, 86 Va. 40.

West Virginia. — *Beasley v. Beckley*, 28 W. Va. 81.

See also the titles JURY AND JURY TRIAL; CRIMINAL LAW.

An act providing for the cancellation, by boards of excise, of licenses granted for the sale of intoxicating liquors, is not in contravention of the constitution. *People v. Police Com'rs*, 59 N. Y. 92.

A statute authorizing a magistrate, summarily and without jury, to convict of being disorderly one who has abandoned his family, and to require from him sureties for good behavior, is not unconstitutional. *Duffy v. People*, 1 Hill (N. Y.) 355.

But, in *Matter of Rolfs*, 30 Kan. 758, in construing the *Kansas* constitutional provision that in all prosecutions the accused shall be entitled to a jury trial, it was held that one

convicted under a city ordinance of a criminal offense could not be deprived of an appeal to a tribunal where a jury trial could be secured. *Brewer, J.*, said: "So long, therefore, as the fundamental law contains the guaranty which it does, I think no party can be subjected to a prosecution for an act of a criminal nature, whether that prosecution be brought by the state directly, or any corporation created by the state, without in some way and before some tribunal being secured an opportunity of having the truth of that charge inquired into by an impartial jury of the district."

1. *Supplementary Proceedings* — *Iowa*. — *Eikenberry v. Edwards*, 67 Iowa 619, 56 Am. Rep. 360.

Nebraska. — *Monroe v. Reid*, 46 Neb. 316.

South Carolina. — *Kennesaw Mills Co. v. Walker*, 19 S. Car. 104.

Washington. — *Murne v. Schwabacher*, 2 Wash. Ter. 130.

But where issues of fact are formed, such as in ordinary cases are triable by a jury, the party demanding it may have a jury. *McMahan v. Works*, 72 Ind. 19. See the title SUPPLEMENTARY PROCEEDINGS, in the ENCYC. OF PL. AND PR.

2. *Scott v. Indianapolis Wagon Works*, 48 Ind. 75.

3. *Insolvency Proceedings.* — *O'Neil v. Glover*, 5 Gray (Mass.) 144. But the legislature cannot provide for the determination of an issue of fact by a jury of six. *Thomas v. Hilton*, 3 Wash. Ter. 365. See the title INSOLVENCY AND BANKRUPTCY.

4. *Yanish v. Pioneer Fuel Co.*, 64 Minn. 175.

5. *Garnishment.* — *Treush v. Ottenberg*, 6 U. S. App. 403; *Cahoon v. Levy*, 5 Cal. 294; *Clark v. Foxworthy*, 14 Neb. 241. See the title GARNISHMENT.

6. *Probate Matters.* — *Wright v. Fultz*, 138 Ind. 594; *Lavey v. Doig*, 25 Fla. 611.

7. *Boyd v. Swallows*, 59 Ill. App. 635.

8. *Lavey v. Doig*, 25 Fla. 611; *Schmidt v. Schmidt*, 47 Minn. 451.

courts jurisdiction of will contests, and providing that they "shall" be tried by a jury, the word "shall" has no greater force than the word "may," and a jury may be waived.¹

(*ee*) *Divorce Proceedings*. — In the absence of a statute, the parties to a divorce suit have no right to a trial by jury.² And in an action for divorce and alimony in which it is also sought to set aside certain fraudulent conveyances the fraudulent vendors of the husband are not entitled to have the charge of their conspiracy with him to defraud the wife tried by a jury.³

(*ff*) *Eminent Domain Proceedings*. — In the proceedings incident to the exercise of the power of eminent domain the citizen is not, as a matter of right, entitled to a common-law jury to assess his compensation,⁴ unless the constitution so provides, in which latter case the right is absolute, regardless of statute.⁵

1. *Whipple v. Eddy*, 161 Ill. 114.

2. *Divorce Proceedings* — *Arkansas*. — *Simpson v. Simpson*, 25 Ark. 487.

California. — *Cassidy v. Sullivan*, 64 Cal. 266.

Illinois. — *Suesemilch v. Suesemilch*, 43 Ill. App. 573.

Indiana. — *Leffel v. Leffel*, 35 Ind. 76.

Maine. — *Coffin v. Coffin*, 55 Me. 361.

Missouri. — *Mead v. Mead*, 1 Mo. App. 247.

Pennsylvania. — *Allison v. Allison*, 46 Pa. St. 321; *Carre v. Carre*, 2 Yeates (Pa.) 207.

Washington. — *Madison v. Madison*, 1 Wash. Ter. 60.

See 7 ENCYC. OF PL. AND PR., p. 118.

3. *Prouty v. Prouty*, 4 Wash. 174.

4. *Eminent Domain Proceedings* — *United States*. — *Bonaparte v. Camden*, etc., R. Co., 1 Baldw. (U. S.) 205; *U. S. v. Engerman*, 46 Fed. Rep. 176.

Arkansas. — *Cairo*, etc., R. Co. *v. Trout*, 32 Ark. 17.

California. — *Koppikus v. State Capitol Com'rs*, 16 Cal. 243; *Heyneman v. Blake*, 19 Cal. 579 (Const. of 1879, § 14, art. I, provides for a jury trial, unless waived).

Delaware. — *Whiteman v. Wilmington*, etc., R. Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411.

Illinois. — *Johnson v. Joliet*, etc., R. Co., 23 Ill. 202.

Indiana. — *Dronberger v. Reed*, 11 Ind. 420; *Norristown*, etc., Turnpike Co. *v. Burket*, 26 Ind. 53; *Hymes v. Aydelott*, 26 Ind. 431; *Anderson v. Caldwell*, 91 Ind. 451, 46 Am. Rep. 613; *Indianapolis*, etc., Gravel Road Co. *v. Christian*, 93 Ind. 360; *Ross v. Davis*, 97 Ind. 79; *Lipes v. Hand*, 104 Ind. 503; *Drebert v. Trier*, 106 Ind. 510; *Lavery v. State*, 109 Ind. 217; *Baltimore*, etc., R. Co. *v. Ketrang*, 122 Ind. 5; *Evansville*, etc., R. Co. *v. Miller*, 30 Ind. 209. *Compare Lake Erie*, etc., R. Co. *v. Heath*, 9 Ind. 558; *Louisville*, etc., R. Co. *v. Dryden*, 39 Ind. 393.

Kansas. — *Central Branch Union Pac. R. Co. v. Atchison*, etc., R. Co., 28 Kan. 453, 10 Am. & Eng. R. Cas. 528.

Maryland. — *Baltimore Belt R. Co. v. Baltzell*, 75 Md. 94, 51 Am. & Eng. R. Cas. 669.

Minnesota. — *Bruggerman v. True*, 25 Minn. 123.

New Hampshire. — *Backus v. Lebanon*, 11 N. H. 19, 35 Am. Dec. 466; *Mount Washington Road Co.'s Petition*, 35 N. H. 134; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 66; *Dalton v. North Hampton*, 19 N. H. 362.

New Jersey. — *American Print Works v. Lawrence*, 21 N. J. L. 248.

New York. — *Beekman v. Saratoga*, etc., R. Co., 3 Paige (N. Y.) 45, 22 Am. Dec. 679; *Livingston v. New York*, 8 Wend. (N. Y.) 85, 22 Am. Dec. 622; *Cruger v. Hudson River R. Co.*, 12 N. Y. 190.

North Carolina. — *Raleigh*, etc., R. Co. *v. Davis*, 2 Dev. & B. L. (N. Car.) 451; *Chowan*, etc., R. Co. *v. Parker*, 105 N. Car. 246.

Ohio. — *Kramer v. Cleveland*, etc., R. Co., 5 Ohio St. 140; *Willyard v. Hamilton*, 7 Ohio pt. II., 111, 30 Am. Dec. 195.

Oregon. — *Kendall v. Post*, 8 Oregon 141.

Pennsylvania. — *Pennsylvania R. Co. v. First German Lutheran Cong.*, 53 Pa. St. 445.

Texas. — *Buffalo Bayou*, etc., R. Co. *v. Ferris*, 26 Tex. 588; *Houston Tap.*, etc., R. Co. *v. Milburn*, 34 Tex. 224; *Rhine v. McKinney*, 53 Tex. 354.

Vermont. — *Gold v. Vermont Cent. R. Co.*, 19 Vt. 478.

See also the title EMINENT DOMAIN, 7 ENCYC. OF PL. AND PR., p. 545.

5. *Arkansas*. — *Ex p. Reynolds*, 52 Ark. 330.

California. — *Weber v. Santa Clara County*, 59 Cal. 265; *Trahern v. San Joaquin County*, 59 Cal. 320.

Florida. — *Jacksonville*, etc., R. Co. *v. Adams*, 33 Fla. 608.

Illinois. — *Mitchell v. Illinois*, etc., R., etc., Co., 68 Ill. 286; *People v. Stuart*, 97 Ill. 123.

Michigan. — *Port Huron*, etc., R. Co. *v. Callanan*, 61 Mich. 12; *Paul v. Detroit*, 32 Mich. 108.

Missouri. — *St. Joseph*, etc., R. Co. *v. Cudmore*, 103 Mo. 634; *Chicago*, etc., R. Co. *v. Miller*, 106 Mo. 458; *St. Joseph*, etc., R. Co. *v. Shambaugh*, 106 Mo. 557; *Chicago*, etc., R. Co. *v. Elliott*, 108 Mo. 321; *Chicago*, etc., R. Co. *v. Bates*, 109 Mo. 53; *Chicago*, etc., R. Co. *v. McGrew*, 113 Mo. 390; *Kansas City*, etc., R. Co. *v. Cox*, 41 Mo. App. 499.

New York. — *House v. Rochester*, 15 Barb. (N. Y.) 517; *Clark v. Utica*, 18 Barb. (N. Y.) 451.

Ohio. — *Lamb v. Lane*, 4 Ohio St. 167; *Matter of Wells County Road*, 7 Ohio St. 16; *Lawrence R. Co. v. O'Harra*, 48 Ohio St. 343.

Pennsylvania. — *Williams v. Pittsburgh*, 83 Pa. St. 71.

A constitutional right to the assessment of damages by a jury means a tribunal of twelve men presided over by a court. *Lamb v. Lane*, 4 Ohio St. 167.

A constitutional provision for a jury of

A constitutional or statutory right to a jury trial is satisfied if the jury may be obtained on appeal; the primary assessment may be made by commissioners or viewers.¹

(gg) *Mandamus Proceedings*. — The trial of issues of fact by a jury in mandamus proceedings is not a constitutional right.²

(hh) *Quo Warranto Proceedings*. — As a result of different systems of practice prevailing prior to the adoption of the state constitutions, and of statutory regulations, the decisions respecting the right of a jury in quo warranto proceedings are conflicting. By some this right is clearly upheld,³ while in other jurisdictions it is denied.⁴ But where all the facts are admitted by the parties, and there is no conflict or dispute about them, it is not error to refuse a jury in such a proceeding.⁵

Removal of Officers. — So the legislature may provide a proceeding and tribunal without a jury for the summary removal of civil officers for misdemeanors, incompetency, and corruption in office.⁶

twelve will not authorize the legislature to provide for the determination of damages by a majority. Jacksonville, etc., R. Co. v. Adams, 33 Fla. 608.

All the safeguards ordinarily attaching to jury trials are implied in the use of the term "jury" in the constitutional provisions on this subject. Paul v. Detroit, 32 Mich. 108.

But a taxpayer cannot resist the collection of a tax for opening a street on the ground that the condemnation of land for the street was not made by a constitutional jury of twelve, the city and property owners having consented to a jury of eleven. Borgman v. Detroit, 102 Mich. 261.

A municipal corporation is not an "incorporated company" within the meaning of a constitutional provision allowing a jury where an incorporated company shall be interested for or against the right. Kansas City v. Vineyard, 128 Mo. 75. The fact that certain of the defendants are incorporated companies does not give the other defendants a right to demand a jury. Kansas City v. Smart, 128 Mo. 272.

1. *Alabama*. — Woodward Iron Co. v. Cabaniss, 87 Ala. 328.

Arkansas. — *Ex p.* Reynolds, 52 Ark. 330.

Georgia. — Atlanta v. Central R., etc., Co., 53 Ga. 120; Oliver v. Union Point, etc., R. Co., 83 Ga. 257, 39 Am. & Eng. R. Cas. 107.

Illinois. — Toledo, etc., R. Co. v. Darst, 61 Ill. 231.

Indiana. — Bachelor v. Cole, 132 Ind. 143.

Iowa. — Deaton v. Polk County, 9 Iowa 594.

Maryland. — Steuart v. Baltimore, 7 Md. 500.

Massachusetts. — Smith v. Boston, 1 Gray (Mass.) 72; Whitman v. Boston, etc., R. Co., 16 Gray (Mass.) 530.

Missouri. — Quincy, etc., R. Co. v. Ridge, 57 Mo. 599; Chicago, etc., R. Co. v. McGrew, 113 Mo. 390; Chicago, etc., R. Co. v. Randolph Town Site Co., 103 Mo. 451; St. Joseph, etc., R. Co. v. Shambaugh, 106 Mo. 557; West End Narrow Gauge R. Co. v. Almeroth, 13 Mo. App. 91.

New Hampshire. — Upper Coos R. Co. v. Parsons, 66 N. H. 181.

New Jersey. — Johnson v. Baltimore, etc., R. Co., 45 N. J. Eq. 454.

New York. — People v. Haverstraw, 80 Hun (N. Y.) 385.

Ohio. — Lamb v. Lane, 4 Ohio St. 167.

South Dakota. — Dell Rapids v. Irving, 7 S. Dak. 310.

Tennessee. — Hord v. Nashville, etc., R. Co., 2 Swan (Tenn.) 497.

2. **Mandamus Proceedings.** — Castle v. Lawlor, 47 Conn. 340; Chumaseo v. Potts, 2 Mont. 243; State v. Suwannee County, 21 Fla. 1; State v. Sherwood, 15 Minn. 221, 2 Am. Rep. 116. See also State v. Burnsville Turnpike Co., 97 Ind. 416; Chamberlain v. Warburton, 1 Utah 267; Mott v. State, 145 Ind. 353; Territory v. Chicago, etc., R. Co., 2 Okla. 108.

In Castle v. Lawlor, 47 Conn. 340, the court said: "It is obvious that there was and could be no trial by jury in the proceeding for a writ of mandamus at common law, for no issue of fact could be tried in that proceeding. Such a trial was provided for in the statute of 1711, 9th of Anne; but that statute as such was never in force in Connecticut and was not a part of the common law."

And see the title MANDAMUS, ENCYC. OF PL. AND PR.

3. **Quo Warranto Proceedings** — *Florida*. — Buckman v. State, 34 Fla. 48.

Idaho. — People v. Havird, 2 Idaho 498.

Indiana. — Reynolds v. State, 61 Ind. 392.

Kansas. — State v. Allen, 5 Kan. 213.

Michigan. — People v. Doesburg, 16 Mich. 133.

New York. — People v. Albany, etc., R. Co., 57 N. Y. 161.

Oklahoma. — Bradford v. Territory, 1 Okla. 366.

Pennsylvania. — Com. v. Walter, 83 Pa. St. 105, 24 Am. Rep. 154.

Wisconsin. — State v. Messmore, 14 Wis. 115.

4. *Arkansas*. — State v. Johnson, 26 Ark. 281.

Connecticut. — State v. Lewis, 51 Conn. 113.

Massachusetts. — Atty.-Gen. v. Sullivan, 163 Mass. 446.

Minnesota. — State v. Minnesota Thresher Mfg. Co., 40 Minn. 213.

Missouri. — State v. Vail, 53 Mo. 97; State v. Lupton, 64 Mo. 415, 27 Am. Rep. 253.

See the title QUO WARRANTO, ENCYC. OF PL. AND PR.

5. Lee v. State, 49 Ala. 43.

6. Rankin v. Jauman, (Idaho 1894) 36 Pac. Rep. 502.

(ii) *Election Contests*. — A trial by jury cannot be demanded in proceedings to determine the right to office under an election.¹

(jj) *Miscellaneous Proceedings* — Commitment of Infants — Insanity — Paupers — Guardians. — Statutory proceedings before a magistrate or by a jury of less than twelve for the commitment of infants to reformatory institutions,² to determine insanity or lunacy,³ for the settlement of paupers,⁴ and for the appointment of guardians,⁵ are not within the constitutional guaranty.

Recommitment After Conditional Pardon. — Whether a released convict is entitled to a jury trial upon proceedings for recommitment, seems to be uncertain.⁶

Boundaries. — A statutory proceeding for the appointment of commissioners to determine and locate the true boundary line between landowners, without any issue made in court or trial by jury, is valid.⁷

Dower. — In an action for admeasurement of dower where the defense was that the plaintiff had, by an antenuptial arrangement, released her claim of dower, it was held that the defendants were entitled to a jury trial.⁸

Claims Against Government. — The trial of claims against the government is a statutory proceeding, having no existence at common law, and a jury may be dispensed with.⁹

Damages to Property by Mob. — So an act providing for a jury of six to ascertain the damages to property sustained at the hands of a mob is constitutional.¹⁰

Disagreement of Jury. — The statute of *Louisiana*, allowing the judge on disagreement of the jury to decide the cause, is constitutional.¹¹

Amendment of Record. — The legislature may authorize the court to amend the

1. *Election Contests* — *Alabama*. — *Taliaferro v. Lee*, 97 Ala. 92.

Arkansas. — *Wheat v. Smith*, 50 Ark. 266.

Connecticut. — *State v. Lewis*, 51 Conn. 113.

Georgia. — *Freeman v. State*, 78 Ga. 663.

Minnesota. — *Whallon v. Bancroft*, 4 Minn. 109; *Newton v. Newell*, 26 Minn. 529.

Missouri. — *State v. Vail*, 53 Mo. 107.

Pennsylvania. — *Ewing v. Filley*, 43 Pa. St. 384; *Com. v. Leech*, 44 Pa. St. 332.

Texas. — *Williamson v. Lane*, 52 Tex. 335.

See also *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141; *People v. Doesburg*, 16 Mich. 133.

And see the title ELECTIONS.

"It is not," said Lowrie, C. J., in *Ewing v. Filley*, 43 Pa. St. 384, "in the act of organization of the state, nor in the perpetuation of its organic succession, but in the administration of rights under the organization, that the constitution secures the right of trial by jury. The jury is the popular element in the determination of rights which need enforcement by means of the state organization; but there is a much larger popular element in our elections—the votes of all the people; and all our political practice shows that we have not considered a jury an essential means of deciding contested elections of public officers."

2. **Commitment of Infants to Reformatory Institutions.** — *Matter of Ferrier*, 103 Ill. 367, 42 Am. Rep. 10; *Ex p. Crouse*, 4 Whart. (Pa.) 9; *Ex p. Ah Peen*, 51 Cal. 280; *State v. Brown*, 50 Minn. 353, 36 Am. St. Rep. 651.

3. **Insanity.** — *Black Hawk County v. Springer*, 58 Iowa 417; *Fant v. Buchanan*, (Miss. 1895) 17 So. Rep. 371; *Matter of Bresee*, 82 Iowa 573.

The proceedings for the appointment of a guardian for an insane person are not within the constitutional provision. *Gaston v. Babcock*, 6 Wis. 503.

No jury can be demanded to determine insanity after conviction of an offense. *State v. Judge*, 48 La. Ann. 503.

4. *Shirley v. Lunenburg*, 11 Mass. 379.

5. *Shroyer v. Richmond*, 16 Ohio St. 455; *Hagany v. Cohnen*, 29 Ohio St. 82.

6. **Conditional Pardon — Recommitment.** — On a hearing to remand a convict who had violated the conditions of his pardon, he was held not entitled to a jury trial except upon the question whether he was the same person who was convicted. *State v. Wolfer*, 53 Minn. 135, 39 Am. St. Rep. 582.

But that one who is charged with having violated the conditions of his release must be tried in the same manner as other offenders, see *People v. Moore*, 62 Mich. 496.

7. *Gates v. Brooks*, 59 Iowa 510, *followed in* *Coombs v. Quinn*, 66 Iowa 469; *Caldwell v. Nash*, 68 Iowa 658.

8. *Kinne v. Kinne*, 2 Thomp. & C. (N. Y.) 393.

9. **Claims Against Government.** — *McElrath v. U. S.*, 102 U. S. 426; *Bledsoe v. State*, 64 N. Car. 392; *Pelham v. State*, 30 Tex. 422.

In *McElrath v. U. S.*, 102 U. S. 440, the court said: "Suits against the government in the Court of Claims, whether reference be had to the claimant's demand, or to the defense, or to any set-off or counterclaim which the government may assert, are not controlled by the Seventh Amendment. They are not suits at common law within its true meaning. The government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits."

10. *Matter of Pennsylvania Hall*, 5 Pa. St. 204; *McElrath v. U. S.*, 102 U. S. 440.

11. *Joseph v. Bidwell*, 28 La. Ann. 382, 26 Am. Rep. 102.

record to conform to what was tried before the jury and found by the verdict.¹

(kk) *Where No Issue Is Raised.* — **Assessing Damages on Default.** — It has never been the practice to have damages upon a default assessed by a jury.²

Plea of Guilty. — Statutes authorizing the court, on a plea of guilty of murder, to examine witnesses and determine the degree of the crime, are constitutional.³

(ll) *Curtailling Functions of Jury* — **Directing Verdict.** — The court cannot, in a criminal case, on a plea of "not guilty," direct the jury to return a verdict of guilty, however strong, clear, and unimpeached the evidence may be for the prosecution.⁴ But in civil cases where the facts are undisputed, and there is no real question for the jury to determine, a verdict may generally be directed.⁵

Involuntary Nonsuit. — The power of the court to deprive a party of trial by jury by ordering a peremptory nonsuit, against the will of the plaintiff, is denied by the Supreme Court of the United States⁶ and by many of the states;⁷ but such a practice is sanctioned in other

1. *Parks v. Boynton*, 98 Pa. St. 370.

2. **Where No Issue Is Raised.** — Seeley v. Bridgeport, 53 Conn. 1; *Raymond v. Danbury*, etc., R. Co., 43 Conn. 596; *Batchelder v. Bartholomew*, 44 Conn. 502; *Deane v. Wilamette Bridge Co.*, 22 Oregon 167. See *Central*, etc., R. Co. v. *Morris*, 68 Tex. 49.

In an action in **Replevin** where the plaintiff discontinues, the court may assess the defendant's damages. *Hopkins v. Ladd*, 35 Ill. 178; *Lamy v. Remuson*, 2 N. Mex. 245.

In *Central*, etc., R. Co. v. *Morris*, 68 Tex. 49, the court, in holding that the trial judge had committed no error in calling a jury to assess damages, said: "We are of opinion * * * that under the course of procedure at common law, when a judgment was rendered by default and the cause of action was not liquidated, a jury was always called to assess the damages."

3. **Plea of Guilty.** — *People v. Noll*, 20 Cal. 164; *People v. Lennox*, 67 Cal. 113; *State v. Almy*, (N. H. 1892) 28 Atl. Rep. 372; *Craig v. State*, 49 Ohio St. 415; *Jones v. Com.*, 75 Pa. St. 403.

In **Texas**, where the Constitution prohibits non-jury trials in felony cases even on a plea of guilty, a statute authorizing the court, on a plea of guilty of a misdemeanor, to hear evidence and assess the punishment should the defendant waive a jury was held constitutional. *Moore v. State*, 22 Tex. App. 117.

4. **Directing Verdict** — **Criminal Cases.** — *Territory v. Kee*, 5 N. Mex. 510; *U. S. v. Taylor*, 11 Fed. Rep. 470; *U. S. v. Battiste*, 2 Sumn. (U. S.) 243; *Tucker v. State*, 57 Ga. 503; *Huffman v. State*, 29 Ala. 40.

Contra. — *U. S. v. Anthony*, 11 Blatchf. (U. S.) 200.

In *U. S. v. Taylor*, 11 Fed. Rep. 470, Mr. Chief Justice McCrary said of the holding in *U. S. v. Anthony*, 11 Blatchf. (U. S.) 200: "I find * * *, upon an examination of the subject that, with this single exception, the authorities are, with entire unanimity, against the right of a court in a criminal case to direct a verdict of guilty." See the title **DIRECTING VERDICT**, 6 ENCYC. OF PL. AND PR., p. 667.

5. **Civil Cases.** — *Hodges v. Easton*, 106 U. S. 408. And see the title **DIRECTING VERDICT**, 6 ENCYC. OF PL. AND PR., p. 667.

After the evidence was in, on a trial before a jury, the court ordered a verdict for the

plaintiff, subject to the opinion of the court whether, on the evidence, the defendant was liable, and then rendered judgment for the defendant. It was held that the plaintiff was unlawfully deprived of his right to a trial by jury. *Baylis v. Travellers' Ins. Co.*, 113 U. S. 316.

The court cannot, consistently with the right of trial by jury, without the consent of the parties, submit a part of the facts to the jury, and itself determine the remainder. Thus where the judgment recites that it was rendered "upon the special verdict of the jury, and facts conceded or not disputed upon the trial," and the record does not disclose the evidence, and no general verdict is rendered, the judgment, not being sustained by the special verdict, will be reversed. *Hodges v. Easton*, 106 U. S. 408.

See the title **JURY AND JURY TRIAL**.

6. **Involuntary Nonsuit** — *United States*. — *Elmore v. Grymes*, 1 Pet. (U. S.) 469; *D'Wolf v. Rabaud*, 1 Pet. (U. S.) 476; *Crane v. Morris*, 6 Pet. (U. S.) 598; *Castle v. Bullard*, 23 How. (U. S.) 172; *Boucicault v. Fox*, 5 Blatchf. (U. S.) 87; *Foote v. Silsby*, 1 Blatchf. (U. S.) 445.

7. *Alabama*. — *Hunt v. Stewart*, 7 Ala. 525; *Smith v. Seaton*, Minor (Ala.) 75; *Saunders v. Coffin*, 16 Ala. 421; *Phillips v. Jordon*, 3 Stew. (Ala.) 42.

Arkansas. — *Carr v. Crain*, 7 Ark. 241; *Ringo v. Field*, 6 Ark. 43; *Martin v. Webb*, 5 Ark. 72, 39 Am. Dec. 363; *Hill v. Rucker*, 14 Ark. 706.

Illinois. — *Wolcott v. Studebaker*, 34 Fed. Rep. 8.

Indiana. — *Williams v. Port*, 9 Ind. 551.

Kansas. — *Case v. Hannahs*, 2 Kan. 490.

Massachusetts. — *Rose v. Learned*, 14 Mass. 154; *Mitchell v. New England Marine Ins. Co.*, 6 Pick. (Mass.) 117.

Michigan. — *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Dougl. (Mich.) 124.

Mississippi. — *Winston v. Miller*, 12 Smed. & M. (Miss.) 550.

Missouri. — *St. Louis Floating Dock Ins. Co. v. Souldard*, 8 Mo. 665; *Barada v. Carondelet*, 8 Mo. 644; *Clark v. Steamboat Mound City*, 9 Mo. 146; *Perrin v. Wilson*, 9 Mo. 148; *Welles v. Biddle*, 9 Mo. 159; *Marshall v. Wolfe*, 11 Mo. 608; *Martin v. Henley*, 13 Mo. 312.

jurisdictions.¹

Demurrer to Evidence. — To compel a plaintiff to join in a demurrer to the evidence, where the evidence is conceded to be true, and all reasonable inferences that may be drawn therefrom are admitted, does not infringe the constitutional guaranty that trial by jury shall remain inviolate.²

(*nm*) **Jury in Appellate Courts.** — There is no constitutional objection to legislative action increasing the jurisdiction of inferior courts in civil cases, or conferring original jurisdiction of certain causes on courts without power to grant a jury trial, if an appeal can be taken from the judgment to a court where a trial by jury may be obtained;³ and the right to the appeal may be subjected to reasonable restrictions.⁴

New Mexico. — *Herrera v. Chaves*, 2 N. Mex. 86; *Montoya v. Donohoe*, 2 N. Mex. 214.

North Carolina. — *Dickey v. Johnson*, 13 Ired L. (N. Car.) 450; *Hatchell v. Odom*, 2 Dev. & B. L. (N. Car.) 304; *Smith v. Smith*, 8 Ired L. (N. Car.) 31; *Tiddy v. Harris*, 101 N. Car. 589.

Pennsylvania. — *Girard v. Gettig*, 2 Binn. (Pa.) 234; *Widdifield v. Widdifield*, 2 Binn. (Pa.) 248; *Irving v. Taggart*, 1 S. & R. (Pa.) 360.

South Carolina. — *Petrie v. Columbia*, etc., R. Co., 29 S. Car. 303 (except where there is no evidence tending to show the material allegations).

Tennessee. — *Scruggs v. Brackin*, 4 Yerg. (Tenn.) 528; *Bacon v. Parker*, 2 Overt. (Tenn.) 57.

Vermont. — *French v. Smith*, 4 Vt. 363, 24 Am. Dec. 616; *Smith v. Crane*, 12 Vt. 487.

Virginia. — *Thweat v. Finch*, 1 Wash. (Va.) 219; *Ross v. Gill*, 1 Wash. (Va.) 87.

Wyoming. — *Mulhern v. Union Pac. R. Co.*, 2 Wyoming 465; *Hoy v. Smith*, 2 Wyoming 459.

1. *California.* — *Ringgold v. Haven*, 1 Cal. 108; *Delrymple v. Hanson*, 1 Cal. 125; *Mateer v. Brown*, 1 Cal. 221, 52 Am. Dec. 303; *Ensminger v. McIntire*, 23 Cal. 593.

Connecticut. — *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 468.

Georgia. — *Tison v. Yawn*, 15 Ga. 491, 60 Am. Dec. 708; *Long v. Lewis*, 16 Ga. 154.

Iowa. — *Eddy v. Wilson*, 1 Greene (Iowa) 259.

Kentucky. — *Shay v. Richmond*, etc., Turnpike Road Co., 1 Bush. (Ky.) 108; *Jackson v. Holliday*, 3 T. B. Mon. (Ky.) 366.

New York. — *Pratt v. Hull*, 13 Johns. (N. Y.) 334; *Clements v. Benjamin*, 12 Johns. (N. Y.) 299; *Foot v. Sabin*, 19 Johns. (N. Y.) 154, 10 Am. Dec. 208; *Betts v. Jackson*, 6 Wend. (N. Y.) 173; *Jansen v. Acker*, 23 Wend. (N. Y.) 480; *Fort v. Collins*, 21 Wend. (N. Y.) 109; *Rudd v. Davis*, 3 Hill (N. Y.) 287; *Stuart v. Simpson*, 1 Wend. (N. Y.) 376; *Demeyer v. Souzer*, 6 Wend. (N. Y.) 436; *Wilson v. Williams*, 14 Wend. (N. Y.) 146, 28 Am. Dec. 518.

In *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 468, the court held that the Act of 1852, authorizing the granting of nonsuits in civil actions, where the plaintiff, who has produced his evidence and rested his cause, shall have failed to make out a *prima facie* case, was not repugnant to the Constitution of the state as impairing the right of trial by jury.

2. *Hopkins v. Nashville*, etc., R. Co., 96 Tenn. 409. See the title DEMURRERS TO EVIDENCE, 6 ENCYC. OF PL. AND PR. 438.

3. **Jury in Appellate Courts.** — *Connecticut.* — *State v. Brennan's Liquors*, 25 Conn. 278; *Beers v. Beers*, 4 Conn. 535, 10 Am. Dec. 186.

Georgia. — *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248.

Maryland. — *Stewart v. Baltimore*, 7 Md. 500.

Massachusetts. — *Butler v. Worcester*, 112 Mass. 541.

Missouri. — *State v. Allen*, 45 Mo. App. 551.

North Carolina. — *Reddie v. Moore*, 2 Murphy (N. Car.) 41, 5 Am. Dec. 518; *Wilson v. Simonton*, 1 Hawks (N. Car.) 482.

Ohio. — *Norton v. McLeary*, 8 Ohio St. 209; *Lamb v. Lane*, 4 Ohio St. 167; *Reckner v. Warner*, 22 Ohio St. 275.

Pennsylvania. — *Emerick v. Harris*, 1 Binn. (Pa.) 416; *Biddle v. Com.*, 13 S. & R. (Pa.) 405; *Haines v. Levin*, 51 Pa. St. 414.

Tennessee. — *Morford v. Barnes*, 8 Yerg. (Tenn.) 444.

In *Norton v. McLeary*, 8 Ohio St. 205, the court said: "The mode of obtaining it [a jury trial] may be more inconvenient than heretofore. But on this subject a discretion is given to the legislature, which must be so far abused as to be clearly violative of the substantial right before this court can interfere to nullify legislative action."

A law repealing the statute giving jury trials in the Supreme Court is constitutional. *Mathews v. Tripp*, 12 R. I. 256.

An express constitutional provision for assessing damages by a jury in certain cases does not preclude an assessment by viewers in the first instance. *Lamb v. Lane*, 4 Ohio St. 167.

4. **Reasonable Restrictions.** — The appellant may be required first to declare on oath or affirmation that he verily believes injustice has been done him, and that the appeal is not taken for the purposes of delay. *Biddle v. Com.*, 13 S. & R. (Pa.) 405. Or that he expects to recover more than a specified amount. *Curtis v. Gill*, 34 Conn. 49. Or he may be required to pay the costs before the entry of the appeal. *McDonald v. Schell*, 6 S. & R. (Pa.) 240. Or give a bond to prosecute the appeal. *State v. Brennan's Liquors*, 25 Conn. 278. Or a bond to pay the costs adjudged against him. *Reckner v. Warner*, 22 Ohio St. 275.

In an action to recover leased premises the appellant may be required to give a bond for the payment of all costs accrued and to accrue, and also for all rent that may accrue to the

A Magistrate may be invested with power to try and sentence an accused, if he has an unqualified and unfettered right of appeal and a trial by jury in the appellate court.¹

Bond for Appearance. — The defendant's right of appeal may be conditioned on his giving a bond for his appearance.²

Failure to Appear. — And on his failure to appear in the appellate court he may be sentenced after default.³

(iii) *Compulsory References.* — The court has no power to order the reference of an action at law without the consent of both parties.⁴ In some states the prac-

time of final judgment. *Haines v. Levin*, 51 Pa. St. 412.

1. Power of Magistrate. — *State v. Beneke*, 9 Iowa 203; *State v. Craig*, 80 Me. 85; *Com. v. Whitney*, 108 Mass. 5; *Jones v. Robbins*, 8 Gray (Mass.) 329; *Collier v. Territory*, 2 Okla. 444; *State v. Williams*, 40 S. Car. 373; *State v. Whitaker*, 114 N. Car. 818; *Lincoln v. Smith*, 27 Vt. 360. *Contra*, *Matter of Dana*, 7 Ben. (U. S.) 1; *Miller v. Com.*, 88 Va. 618. See *McInerney v. Denver*, 17 Colo. 302; *Callan v. Wilson*, 127 U. S. 540.

In *Jones v. Robbins*, 8 Gray (Mass.) 329, the defendant was convicted of larceny and sentenced to imprisonment for six months by the justice.

The appellant from a conviction by a jury of six in a justice's court may be required to procure copies of appeal at his own expense. *In re Marron*, 60 Vt. 199.

In *Matter of Dana*, 7 Ben. (U. S.) 1, Justice Blatchford said: "If Congress has the power to deprive the defendant of his right to a trial by jury, for one trial, and to put him, if convicted, to an appeal to another court, to secure a trial by jury, it is difficult to see why it may not also have the power to provide for several trials by a court, without a jury, on several successive convictions, before allowing a trial by a jury."

An act of the legislature of Kentucky providing for a trial by jury of six in inferior courts did not include the county courts. The defendant having been tried for a violation of the liquor law before a jury of six in the county court, the verdict was sustained, it appearing that he was entitled to an appeal to the Circuit Court, where the error would have been remedied by giving the appellant the benefit of a trial by twelve jurors. *Helvenstine v. Yantis*, 88 Ky. 695.

In *Callan v. Wilson*, 127 U. S. 540, the defendant was tried for conspiracy, before the police court of the District of Columbia, and sentenced to pay a fine. It was held that the police court was without jurisdiction, and that the fact that the defendant was entitled to a jury on appeal would not satisfy the requirements of the constitution. The prisoner was ordered discharged.

2. Appeal Conditioned on Giving Bond for Appearance. — *State v. Beneke*, 9 Iowa 203; *Com. v. Whitney*, 108 Mass. 5; *Jones v. Robbins*, 8 Gray (Mass.) 329.

The defendant cannot be required to either suffer the punishment or give a bond with two or more securities in such sum as the judge who tried him may prescribe. *Reeves v. State*, 96 Ala. 33; *State v. Everett*, 14 Minn. 439. Or to give a bond for the payment of

such fine and costs as may be imposed. *Matter of Jahn*, 55 Kan. 694; *Greene v. Briggs*, 1 Curt. (U. S.) 311.

A statute requiring of a person claiming on appeal a bond conditioned that during the pendency of his appeal he will not violate any of the provisions of the act, is unconstitutional. *Saco v. Wentworth*, 37 Me. 165, 58 Am. Dec. 786. It is not competent for the legislature to require any increase of the penalty to be imposed by the appellate court after conviction by a jury. *State v. Gurney*, 37 Me. 156, 58 Am. Dec. 782.

3. The defendant being defaulted in the appellate court, was arrested after default and placed at the bar for sentence, when he moved to arrest the judgment because he had not had a trial by jury; but the motion was overruled. *Com. v. Whitney*, 108 Mass. 5.

4. Compulsory References—Actions at Law—United States. — *U. S. v. Rathbone*, 2 Paine (U. S.) 578.

California. — *Williams v. Benton*, 24 Cal. 424; *Grim v. Norris*, 19 Cal. 140, 79 Am. Dec. 206; *Smith v. Polack*, 2 Cal. 92.

Indiana. — *Paulison v. Halsey*, 38 N. J. L. 488; *Beattie v. David*, 40 N. J. L. 102.

Iowa. — *McMartin v. Bingham*, 27 Iowa 234, 1 Am. Rep. 265.

Minnesota. — *St. Paul, etc., R. Co. v. Gardner*, 19 Minn. 132, 18 Am. Rep. 334.

Nebraska. — *Mills v. Miller*, 3 Neb. 94; *Lamaster v. Scofield*, 5 Neb. 148.

Ohio. — *Johnson v. Wallace*, 7 Ohio, pt. II, 62; *Averill Coal, etc., Co. v. Verner*, 22 Ohio St. 372.

South Carolina. — *Smith v. Bryce*, 17 S. Car. 538.

Vermont. — *Plimpton v. Somerset*, 33 Vt. 283.

In *U. S. v. Rathbone*, 2 Paine (U. S.) 581, Thompson, J., observed: "The convenience and utility of adopting this mode of trial by referees, where the controversy involves the examination of long accounts, have led me to look at the question with a wish to find the practice sanctioned by the Constitution and laws of the United States; but have not been able to find any ground upon which such authority can be sustained."

In *Plimpton v. Somerset*, 33 Vt. 283, an act providing for a compulsory reference of suits at law, and making the referee's report *prima facie* evidence of the facts therein reported, should either party demand a jury, was held unconstitutional, so far as it applied to actions suitable for trial by jury according to the course of the common law.

In *Averill Coal, etc., Co. v. Verner*, 22 Ohio St. 372, at the time the order of reference was

tice of compulsory reference in cases involving the examination of long accounts having existed before the adoption of the constitution it is held that a reference does not violate the right of trial by jury.¹ However, it is well settled that in equity cases the court can order a compulsory reference.²

cc. COMPOSITION OF JURY—(*aa*) *Number*.—A common-law jury consists of neither more nor less than twelve men, whose determination is required to be unanimous.³

And in Criminal Cases, cognizable at common law by a jury, a verdict rendered

made the defendant was in default of answer, and no demand for a jury was made at that time or at any time during the pendency of the action. The defendant objected to the reference and obtained leave to answer at a future day. The answer was filed within the rule granted, and upon it issues of fact were joined. The defendant, instead of demanding a jury, appeared before the referee, and without further protest or objection to his jurisdiction, submitted its cause to him for adjudication. It was held that, having thus embraced and enjoyed an opportunity of obtaining a favorable decision from the referee, it waived its objection to the manner in which the reference was made, and also its right to demand a jury.

Arbitration.—A law compelling a party to arbitrate upon a claim which is properly the subject of an action is unconstitutional, as depriving him of a trial according to the course of the common law. *People v. Haws*, 37 Barb. (N. Y.) 440; *Baldwin v. New York*, 45 Barb. (N. Y.) 359.

1. Examination of Long Accounts—*Missouri*.—*Edwardson v. Garnhart*, 56 Mo. 85.

New Hampshire.—*Perkins v. Scott*, 57 N. H. 55; *Copp v. Henniker*, 55 N. H. 179, 20 Am. Rep. 194; *Sargent v. Putnam*, 58 N. H. 182.

New York.—*Lee v. Tillotson*, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624; *Van Marter v. Hotchkiss*, 1 Keyes (N. Y.) 585; *Sands v. Tillinghast*, 24 How. Pr. (N. Y. Supreme Ct.) 435.

Oregon.—*Tribou v. Strowbridge*, 7 Oregon 156.

Wisconsin.—*Dane County v. Dunning*, 20 Wis. 210; *Mead v. Walker*, 17 Wis. 189; *Monitor Iron Works Co. v. Ketchum*, 47 Wis. 177; *Cairns v. O'Brien*, 40 Wis. 469.

In *Tribou v. Strowbridge*, 7 Oregon 156, the statute providing for compulsory reference had been passed by the territorial legislature and was in force at the adoption of the constitution.

In *Colorado*, *Kansas*, and *North Carolina* statutes providing for the compulsory reference of actions involving the examination of long accounts are held to be open to no constitutional objection. *Huston v. Wadsworth*, 5 Colo. 213; *Williams v. Elliott*, 17 Kan. 523; *Klutts v. McKenzie*, 65 N. Car. 102; *Leak v. Covington*, 87 N. Car. 501.

2. Equity Cases—*California*.—*Williams v. Benton*, 24 Cal. 424; *Jones v. Gardner*, 57 Cal. 641.

Illinois.—*Moss v. McCall*, 75 Ill. 190; *Patten v. Patten*, 75 Ill. 446.

Iowa.—*Burt v. Harrah*, 65 Iowa 643; *State v. Orwig*, 25 Iowa 280.

Massachusetts.—*Topliff v. Jackson*, 12 Gray (Mass.) 565.

See the title REFEREES AND REFERENCES.

3. Common-law Jury—Twelve Men—*United States*.—*American Pub. Co. v. Fisher*, 166 U. S. 464.

Alabama.—*Collins v. State*, 88 Ala. 212; *Bell v. State*, 44 Ala. 393; *Brazier v. State*, 44 Ala. 387.

Arkansas.—*Warwick v. State*, 47 Ark. 568.

California.—*Gillepie v. Benson*, 18 Cal. 410.

Florida.—*Jacksonville, etc., R. Co. v. Adams*, 33 Fla. 608.

Illinois.—*Harris v. People*, 128 Ill. 585, 15 Am. St. Rep. 153.

Michigan.—*Hill v. People*, 16 Mich. 355; *McRae v. Grand Rapids, etc., R. Co.*, 93 Mich. 399.

Mississippi.—*Byrd v. State*, 1 How. (Miss.) 177; *Dowling v. State*, 5 Smed. & M. (Miss.) 664; *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116; *Dixon v. Richards*, 2 How. (Miss.) 771.

Missouri.—*Vaughn v. Scade*, 30 Mo. 600; *Foster v. Kirby*, 31 Mo. 496; *Henning v. Hannibal, etc., R. Co.*, 35 Mo. 408.

Montana.—*Kleinschmidt v. Dunphy*, 1 Mont. 118; *Aylesworth v. Reece*, 1 Mont. 200. *New Mexico*.—*Territory v. Ortiz*, (N. Mex. 1895) 42 Pac. Rep. 87.

New York.—*Cruger v. Hudson River R. Co.*, 12 N. Y. 198; *Cancemi v. People*, 18 N. Y. 128.

Ohio.—*Kent v. Perkins*, 36 Ohio St. 639; *Work v. State*, 2 Ohio St. 297, 59 Am. Dec. 671.

Oklahoma.—*Bradford v. Territory*, 1 Okla. 366.

Texas.—*Jester v. State*, 26 Tex. App. 369; *Rich v. State*, 1 Tex. App. 206.

Wisconsin.—*May v. Milwaukee, etc., R. Co.*, 3 Wis. 219.

See the title JURY AND JURY TRIAL.

It was held in *Kneeland v. State*, 62 Ga. 395, that the adoption of a constitution providing for a jury of twelve in all cases did not preclude a subsequent conviction in the city court by a jury of less than twelve, by consent of the defendant, under a statute passed before the adoption of the constitution, and that the said provision of the constitution was not intended to operate upon the then existing machinery of the city courts until some other machinery was provided by law.

In *American Pub. Co. v. Fisher*, 166 U. S. 464, Mr. Justice Brewer said: "Unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition."

by a different number is a nullity,¹ even though the accused expressly waives the right to a jury of twelve.²

Misdemeanors. — But a defendant on trial for a misdemeanor punishable by a fine may waive his right to a jury of twelve.³

Legislative Authority. — The legislature has no power, in the absence of constitutional authority, to pass an act arbitrarily fixing the number of the jury at less than twelve in cases civil or criminal, nor to provide that a number less than twelve can render a verdict in any case where the Constitution gives to the parties a right to a trial by jury.⁴ But in some of the states constitutional

1. Criminal Cases — Alabama. — *Bell v. State*, 44 Ala. 393.

California. — *People v. O'Neil*, 48 Cal. 257.

Indiana. — *Brown v. State*, 16 Ind. 496; *Allen v. State*, 54 Ind. 461.

Michigan. — *Hill v. People*, 16 Mich. 351.

Minnesota. — *State v. Everett*, 14 Minn. 439.

Mississippi. — *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116; *Hunt v. State*, 61 Miss. 577.

Missouri. — *State v. Van Matre*, 49 Mo. 268; *State v. Meyers*, 68 Mo. 266; *State v. Mansfield*, 41 Mo. 471.

Montana. — *Territory v. Ah Wah*, 4 Mont. 149.

New Hampshire. — Opinion of Justices, 41 N. H. 550.

New Mexico. — *Territory v. Ortiz*, (N. Mex. 1895) 42 Pac. Rep. 87.

New York. — *Cancemi v. People*, 18 N. Y. 128.

Ohio. — *Williams v. State*, 12 Ohio St. 622; *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671; *Bennett's L. Cr. Cas.* 482.

Texas. — *Jester v. State*, 26 Tex. App. 369; *Rich v. State*, 1 Tex. App. 206.

See the title JURY AND JURY TRIAL.

Record. — If the record discloses the names of but eleven jurors, it cannot be inferred or presumed that the accused was tried by a full jury. *State v. Meyers*, 68 Mo. 266; *Rich v. State*, 1 Tex. App. 206; even though the judgment entered stated that a jury of twelve good and lawful men was impaneled. *Huebner v. State*, 3 Tex. App. 458.

The entry in a misdemeanor case recited a verdict found by "a jury of good and lawful men, to wit, P. H. Ebner," and that name was signed to the verdict as foreman. It was held that no presumption could be indulged in aid of the entry or verdict, which imports a jury composed of but one man. *Marks v. State*, 10 Tex. App. 334. See the title VERDICT.

2. Waiver by Accused — Alabama. — *Bell v. State*, 44 Ala. 393.

California. — *People v. O'Neil*, 48 Cal. 257.

Indiana. — *Brown v. State*, 16 Ind. 496; *Allen v. State*, 54 Ind. 461.

Michigan. — *Hill v. People*, 16 Mich. 351.

Minnesota. — *State v. Everett*, 14 Minn. 439.

Mississippi. — *Hunt v. State*, 61 Miss. 577.

Missouri. — *State v. Mansfield*, 41 Mo. 471.

Montana. — *Territory v. Ah Wah*, 4 Mont. 149.

New Hampshire. — Opinion of Justices, 41 N. H. 550.

New Mexico. — *Territory v. Ortiz*, (N. Mex. 1895) 42 Pac. Rep. 87.

New York. — *Cancemi v. People*, 18 N. Y. 128.

Ohio. — *Williams v. State*, 12 Ohio St. 622.

Contra. — That a defendant may waive his right in criminal cases to a jury of twelve, see *State v. Kaufman*, 51 Iowa 581, 33 Am. Rep. 148; *State v. Grossheim*, 79 Iowa 75; *State v. Sackett*, 39 Minn. 69.

In *State v. Sackett*, 39 Minn. 69, the defendant was charged with assault and battery, in the Municipal Court of Minneapolis. By agreement the case was tried before eleven jurors, and the verdict was sustained on appeal. The Constitution provides for waiver in both civil and criminal cases.

In *State v. Kaufman*, 51 Iowa 581, 33 Am. Rep. 148, the prisoner being on trial for forgery, one of the jurors became ill, by consent was excused, and the trial was proceeded with. This case was followed in *State v. Grossheim*, 79 Iowa 75.

In *Cancemi v. People*, 18 N. Y. 128, a juror was withdrawn and a stipulation was signed in open court by the prisoner, his counsel, and the counsel for the state, providing "that the verdict in this cause be rendered by and taken from the remaining eleven jurors, and that the twelve names now appearing of record as the jury in this cause may remain, so that by the record this cause shall appear to have been tried by twelve jurors." This was held to be error.

3. Misdemeanors. — *Com. v. Dailey*, 12 Cush. (Mass.) 80; *State v. Borowsky*, 11 Nev. 119; *Murphy v. Com.*, 1 Metc. (Ky.) 365; *State v. Cox*, 8 Ark. 436.

But he does not waive it by failing to object. *Warwick v. State*, 47 Ark. 568.

In *Kentucky* a verdict by a jury of eleven, by the defendant's consent, finding the defendant guilty of a misdemeanor and assessing the punishment at fifty dollars fine and six months confinement in the county jail was sustained. *Tyra v. Com.*, 2 Metc. (Ky.) 1.

The defendant was indicted for betting on an election, and tried by a jury of eleven, with his consent. *Murphy v. Com.*, 1 Metc. (Ky.) 365.

4. Legislative Authority — Alabama. — *Col-lins v. State*, 88 Ala. 212.

Florida. — *Jacksonville, etc., R. Co. v. Adams*, 32 Fla. 608.

Georgia. — *Allen v. State*, 51 Ga. 264.

Indiana. — *Lake Erie, etc., R. Co. v. Heath*, 9 Ind. 558.

Iowa. — *Eshelman v. Chicago, etc., R. Co.*, 67 Iowa 296.

Michigan. — *Hill v. People*, 16 Mich. 355.

Missouri. — *Vaughn v. Scade*, 30 Mo. 600; *Foster v. Kirby*, 31 Mo. 496.

New Hampshire. — Opinion of Justices, 41 N. H. 550.

provisions confer the power to authorize juries of less than twelve,¹ and in *Utah* the constitution itself provides for juries of eight except in capital cases.²

Verdicts by Less than Twelve. — Many states have, by their constitution, provided for a verdict by less than the full number in particular cases.³

Jury of Eight — Federal Constitution. — A constitutional provision for the trial of criminal cases by a jury of eight is not in conflict with the Federal Constitution.⁴

Washington. — *Thomas v. Hilton*, 3 Wash. Ter. 365.

Wisconsin. — *Norval v. Rice*, 2 Wis. 22.

A special statute of *Alabama* provided for a trial of certain offenses by a jury of eight persons. The defendant objected to such a jury, when the court granted him a jury of twelve. It was held that the act authorizing the jury of eight was void, and aside from that there was no provision for a trial by jury in any mode. Judgment was reversed. *Collins v. State*, 88 Ala. 212.

But a statute providing that in civil cases a jury shall consist of six unless one of the parties demand twelve is constitutional. And the party demanding twelve may be required to deposit with the clerk an amount sufficient to pay the additional expense caused thereby. *Conners v. Burlington, etc., R. Co.*, 74 Iowa 383.

The legislature may provide a speedy method of trying title in replevin proceedings by a jury of six, it being optional with the parties whether they avail themselves of it. *Berry v. Chamberlain*, 53 N. J. L. 463.

An act authorizing a verdict by a jury of less than twelve, where jurors are taken sick, is void, *Eshelman v. Chicago, etc., R. Co.*, 67 Iowa 296; and a municipal corporation has an equal right with a natural person to raise the objection. *Kelsh v. Dyersville*, 68 Iowa 137.

Under the *Iowa* statute it is held that one who appeals from a conviction by a jury in a justice's court, may waive his jury trial in the district court. *State v. Ill.*, 74 Iowa 441.

A constitutional delegation to the legislature of the power to provide for the punishment of misdemeanors before justices of the peace thereby dispenses with the trial by jury in such cases. *Connelly v. State*, 60 Ala. 89.

1. Number of Jurors Less than Twelve Authorized — *Colorado.* — The (Constitution 1876), art. 2, § 23, provides that the jury in civil cases and in criminal cases in courts not of record may consist of less than twelve as prescribed by law.

Michigan. — The Constitution (1850), art. 4, § 46, authorizes the legislature to provide for trial by a jury of less than twelve. An act of the legislature delegating the power to the court was held unconstitutional. *McRae v. Grand Rapids, etc., R. Co.*, 93 Mich. 399.

South Dakota. — Constitution (1889), art. 6, § 6.

Washington. — Constitution (1889), art. 1, § 21.

Stimson, in his *American Statute Law*, mentions the Constitution of *Florida* as one which authorizes a jury of less than twelve. But this was written before the adoption of the *Florida* Constitution of 1887, and that instrument contains no such provision. See also *Jacksonville, etc., R. Co. v. Adams*, 33 Fla. 608.

2. Utah. — Constitution (1895), art. 1, § 10.

3. Verdicts by Less than Twelve. — In the following states constitutional and statutory provisions concerning this point are in force, as indicated below:

(a) **Three-fourths Verdict** — In *California.* — The Constitution (1879), art. 1, § 7, provides for a three-fourths verdict in civil cases, and is supplemented by Code Civ. Pro., § 618.

Nevada. — The Constitution (1864), art. 1, § 3, provides for a three-fourths verdict in civil cases, and is supplemented by § 3197 of the General Statutes.

South Dakota. — The Constitution (1889), art. 6, § 6, authorizes the legislature to provide for a three-fourths verdict. But this appears to have been done only in civil cases cognizable by a justice of the peace.

Texas. — The Constitution (1876), art. 4, § 13, enacts the three-fourths rule in civil cases and in misdemeanors. In that state, moreover, a jury must be specially demanded before it can be allowed at all. See Const., art. 5, § 10; General Statutes, 1895, § 3188.

In the following states also the legislature is authorized to permit verdicts by three-fourths in civil cases:

Idaho. — Constitution (1889), art. 1, § 7.

Washington. — Constitution (1889), art. 1, § 21.

Wyoming. — Constitution (1889), art. 1, § 9.

Louisiana. — The Constitution (1879), art. 116, authorizes the legislature to provide for a verdict by "a less number than the whole."

(b) **Two-thirds Verdict** — *Montana.* — The Constitution (1889), art. 3, § 23, provides for a verdict by two-thirds vote in civil cases and misdemeanors, *i. e.*, crimes less than a felony.

Utah. — The Constitution (1895), art. 7, § 10, provides: "In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of eight jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

4. Jury of Eight — Federal Constitution. — In *State v. Bates*, (*Utah* 1896), 47 Pac. Rep. 78, the defendant was tried under an indictment charging murder in the second degree, and convicted. The Constitution provided: "In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors." The conviction was sustained. The court said: "While the description of the offense included murder in the first degree, as well as murder in the second degree, the grand jury characterized the crime as murder in the second degree, and thereby expressed an intent to accuse the defendant of that offense, and not with a capital crime. The defendant was tried for mur-

Delegation to the Courts. — But a power vested by the Constitution in the legislature cannot be delegated to the court.¹

Unanimous Verdict. — And in the absence of constitutional authority the legislature cannot provide for other than unanimous verdicts.²

Territories. — The Constitution and laws of the United States, in their provisions for trial by jury in suits at common law, are in force in the territories,³ and an act of the territorial legislature providing for a verdict by three-fourths of the jury in suits at common law is unconstitutional.⁴

Consent and Waiver. — In Civil Cases the parties may agree that the jury shall consist of any number,⁵ although the court cannot compel litigants to accept less than a constitutional jury.⁶

Acts Amounting to Waiver. — Trial by jury is a privilege that may be waived in all civil cases,⁷ by submitting without objection to a trial by the

der in the second degree, as the rulings of the court and its charge to the jury show, and he was convicted of and sentenced for that crime. Therefore the crime was within the second clause of the above section."

1. Power Cannot Be Delegated to the Court. — Under a constitution providing that "the right of trial by jury shall remain," and that "the legislature may authorize a trial by a jury of a less number than twelve men," an act of the legislature was held unconstitutional which authorized the court to proceed with the trial of a case before a less number of jurors than were originally impaneled to try the same, when by reason of death, sickness, or other cause any of the jurors are unable to attend. *McRae v. Grand Rapids, etc., R. Co.*, 93 Mich. 399; *Justices McGrath and Montgomery* dissenting.

2. Unanimous Verdicts. — *Jacksonville, etc., R. Co. v. Adams*, 33 Fla. 608; and see note 4, p. 987, *supra*, this section, *Legislative Authority*. See generally the titles JURY AND JURY TRIAL; VERDICT.

3. Territories of the United States. — *American Pub. Co. v. Fisher*, 166 U. S. 464; *Bradford v. Territory*, 1 Okla. 366; *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593. And in the District of Columbia, *Callan v. Wilson*, 127 U. S. 540.

"By the Act of April 7, 1874, c. 80, 18 Stat. 27, Congress, legislating for all the territories, declared that no party 'shall be deprived of the right of trial by jury in cases cognizable at common law;' and while this may not in terms extend all the provisions of the Seventh Amendment to the territories, it does secure all the rights of trial by jury as they existed at common law." *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593.

4. American Pub. Co. v. Fisher, 166 U. S. 464; *Bradford v. Territory*, 1 Okla. 366; *Carroll v. Byers*, (Arizona 1894) 36 Pac. Rep. 499; *Kleinschmidt v. Dunphy*, 1 Mont. 118.

Utah. — The Supreme Court of the Territory of Utah, in *Hess v. White*, 9 Utah 61, decided that the statute of that territory permitting a verdict of a jury in civil cases upon the concurrence of nine members was not in conflict with the Federal Constitution. The case was followed in *American Pub. Co. v. Fisher*, 10 Utah 147; *Tucker v. Salt Lake City*, 10 Utah 173; *Fred. W. Wolf Co. v. Salt Lake City Brewing Co.*, 10 Utah 179; *Mackey v. Enzensperger*, 11 Utah 154; *Leedom v. Earls Furniture, etc.,*

Co., 12 Utah 172; *Pratt v. Parsons*, 13 Utah 31; *Smith v. Salt Lake City R. Co.*, 13 Utah 33. One of the early decisions being appealed to the Supreme Court of the United States, the law was held unconstitutional. *American Pub. Co. v. Fisher*, 166 U. S. 464.

5. Consent — Waiver. — *Huron v. Carter*, 5 S. Dak. 4; *Cravins v. Grant*, 4 T. B. Mon. (Ky.) 126; *Roach v. Blakey*, 89 Va. 767; *Kreuchi v. Dehler*, 50 Ill. 176.

By consent, one juror may be discharged and issue submitted to the remaining eleven. *Cravins v. Gant*, 4 T. B. Mon. (Ky.) 126.

One who in the lower court treats the questions involved as purely legal and acquiesces in the disposal of them by the court as such cannot be heard on appeal to object that facts were involved which should have been decided by a jury. *Barnes v. Perine*, 12 N. Y. 18; *Grigsby v. Western Union Tel. Co.*, 5 S. Dak. 561.

6. McRae v. Grand Rapids, etc., R. Co., 93 Mich. 399; *Huron v. Carter*, 5 S. Dak. 4; *Vaughn v. Scade*, 30 Mo. 600.

7. Waiver of Trial by Jury in Civil Cases — United States. — *Kearney v. Case*, 12 Wall. (U. S.) 275; *Perego v. Dodge*, 163 U. S. 160; *U. S. v. Rathbone*, 2 Paine (U. S.) 578.

Georgia. — *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248.

Illinois. — *Whipple v. Eddy*, 161 Ill. 114; *Kreuchi v. Dehler*, 50 Ill. 176.

Missouri. — *O'Day v. Conn*, 131 Mo. 321; *Merrill v. St. Louis*, 83 Mo. 252, 53 Am. Rep. 576; *Chicago, etc., R. Co. v. Randolph Town Site Co.*, 103 Mo. 451.

New York. — *Tubbs v. Embree*, 89 Hun (N. Y.) 475.

Wisconsin. — *May v. Milwaukee, etc., R. Co.*, 3 Wis. 219; *Norval v. Rice*, 2 Wis. 22.

The jury can only be dispensed with by the agreement and consent of both parties. *Lewis v. Klotz*, 39 La. Ann. 259; *Desche v. Gies*, 56 Md. 135.

Noting a cause for trial at a term of court where the jury forms no part is a waiver of a jury trial. *Tubbs v. Embree*, 89 Hun (N. Y.) 475.

If, after a jury trial has been waived, new parties are brought in and the situation so changed that some of the parties desire a jury trial, the granting of a trial by jury is within the sound discretion of the court. *Foster v. Hinson*, 76 Iowa 714.

A stipulation to waive a jury trial has no

court,¹ by expressly renouncing the right,² and by failing to appear at the trial.³ But the right to a jury is not waived by submitting to a trial by the court after a jury trial has been denied.⁴

Power of Court. — The agreement of the parties to waive a jury does not prevent the trial judge from calling a jury.⁵

More than Twelve. — No legal verdict in a criminal case can be returned by a jury composed of more than twelve.⁶ If such a jury has been impaneled, and the last juror sworn can be pointed out during the trial, he may be dismissed and the trial proceeded with.⁷

That the verdict in a civil case was rendered by a greater number than twelve is no ground of error⁸ unless the objection was made in the court below.⁹

force after the trial in which such stipulation is made. *Carthage v. Buckner*, 8 Ill. App. 152.

The fact that the defendant did not object to trial by jury on the first trial, upon pleadings which did not demand a jury, will not estop him to object on the second trial, the declaration being amended and additional issues presented. *Nashville, etc., R. Co. v. Foster*, 10 Lea (Tenn.) 351.

1. Acts Amounting to Waiver — *Georgia*. — *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248.

Indiana. — *Madison, etc., R. Co. v. White-neck*, 8 Ind. 217.

Iowa. — *Foster v. Hinson*, 76 Iowa 714; *Connors v. Burlington, etc., R. Co.*, 74 Iowa 383.

Kentucky. — *Tabler v. Anglo-American Assoc. (Ky. 1895)* 32 S. W. Rep. 602.

Massachusetts. — *Walcott v. O'Connor*, 163 Mass. 21.

New York. — *Gleason v. Keteltas*, 17 N. Y. 491; *Pegram v. New York El. R. Co.*, 147 N. Y. 135.

Tennessee. — *Garrison v. Hollins*, 2 Lea (Tenn.) 684.

Wisconsin. — *Millett v. Hayford*, 1 Wis. 401.

Compare *Desche v. Gies*, 56 Md. 135, holding that it must appear from the record that there was a consent or agreement to waive jury trial.

An act requiring either party desiring a jury to demand, in case of original suits, a jury in his first pleading tendering an issue triable by a jury, and in the case of all other suits to demand a jury within the first three days of the trial term, is a reasonable regulation. *Garrison v. Hollins*, 2 Lea (Tenn.) 684; *East Tennessee, etc., R. Co. v. Martin*, 85 Tenn. 134; *Gleaves v. Davidson*, 85 Tenn. 380.

Where a statute expressly points out the manner of waiving a jury in a civil case it impliedly abolishes all other methods. Unless the waiver is made in the statutory manner it will not operate as a waiver. *Meeker v. Gilbert*, 3 Wash. Ter. 369; *Sale v. Meggett*, 25 S. Car. 72.

But the Supreme Court of the United States held, in *Kearney v. Case*, 12 Wall. (U. S.) 275, that parties could still waive a jury in the same manner that they could before the passage of the act requiring a written stipulation; but that in such case no error could be considered in the action of the court on such trial. *Fol-lowed* in *Bond v. Duston*, 112 U. S. 604; *Perego v. Dodge*, 163 U. S. 160.

2. United States. — *Columbia Bank v. Okely*, 4 Wheat. (U. S.) 235; *Bamberger v. Terry*, 103

U. S. 40; *Wayne County v. Kennicott*, 103 U. S. 554.

Colorado. — *Leahy v. Dunlap*, 6 Colo. 552.

Michigan. — *Hudson v. Roos*, 72 Mich. 363.

Missouri. — *O'Day v. Conn*, 131 Mo. 321.

New York. — *Bantle v. Krebs*, (Supreme Ct.)

4 N. Y. Supp. 824.

South Carolina. — *State v. Pacific Guano Co.*, 28 S. Car. 63; *Marshall v. Marshall*, 42 S. Car. 436.

Virginia. — *Roach v. Blakey*, 89 Va. 767.

Where both parties insist at the trial that the case shall be disposed of by the court, they are estopped afterwards to object that the case should have been submitted to a jury on a question of fact. *Bantle v. Krebs*, (Supreme Ct.) 4 N. Y. Supp. 824.

3. Armstrong v. State, Minor (Ala.) 160; *Willets v. Ridgway*, 9 Ind. 367. See also *Gillespie v. Benson*, 18 Cal. 410.

4. May v. Milwaukee, etc., R. Co., 3 Wis. 219; *Norval v. Rice*, 2 Wis. 22; *Robinson's Estate*, 106 Cal. 493.

5. McCarthy v. Missouri R. Co., 15 Mo. App. 385.

6. Jury of More than Twelve. — *Bullard v. State*, 38 Tex. 504, 19 Am. Rep. 30; *State v. Hudkins*, 35 W. Va. 247.

In *Bullard v. State*, 38 Tex. 504, 19 Am. Rep. 30, the appellant had been indicted for horse stealing, tried before a jury of thirteen men, convicted, and sentenced to the penitentiary.

7. Bullard v. State, 38 Tex. 504, 19 Am. Rep. 30; *Davis v. State*, 9 Tex. App. 634; *Muirhead v. Evans*, 6 Exch. 447.

In *Davis v. State*, 9 Tex. App. 634, a juror whose name had been stricken from the list was sworn with the jury of twelve. Two witnesses had testified when the fact was discovered; the court ordered the juror to retire, and the trial proceeded.

In *Muirhead v. Evans*, 6 Exch. 447, the last juror sworn could not be pointed out, and the court treated the proceedings as null and void, and directed twelve of the same jury to be sworn over again, the court saying that if the juror last sworn could have been pointed out it would have been proper to dismiss him.

8. Tillman v. Ailles, 5 Smed. & M. (Miss.) 373, 43 Am. Dec. 520. *Contra*, *Wolfe v. Martin*, 1 How. (Miss.) 30, an action of assumpsit.

In *Tillman v. Ailles, 5 Smed. & M. (Miss.) 373, 43 Am. Dec. 520, a jury of thirteen passed upon an issue of assumpsit.*

9. Berry v. Kenney, 5 B. Mon. (Ky.) 120; *Ross v. Neal*, 7 T. B. Mon. (Ky.) 408.

(bb) *Qualifications — Impartiality.* — The accused is entitled to an impartial jury, free from the disqualifications of consanguinity and affinity, bias, prejudice, or fixed opinion.¹ The right is one which belongs to the state as well as to the accused.² A statute declaring that a juror shall not be disqualified from acting as such, even though he has formed and expressed an opinion of the guilt or innocence of the accused, if the court shall be satisfied that he will render an impartial verdict, is not an infringement of the right.³

Knowledge of English Language. — An act disqualifying persons to serve as jurors who cannot read and write the English language is constitutional.⁴

Statute Requiring Jurors to Be Taxpayers. — But a statute which required jurors to be taxpayers was held to infringe the constitutional guaranty of jury trial.⁵

1. *Impartiality.* — *Coughlin v. People*, 144 Ill. 140.

Grand Jury. — An act prohibiting exceptions to the rulings of inferior courts, in refusing to set aside an indictment for a defect in the formation of the grand jury, is unconstitutional. *Palmore v. State*, 29 Ark. 248.

Challenges to Jurors. — The state may, by statute, limit the number of peremptory challenges allowed the accused, without impairing the right of trial by jury. *Dowling v. State*, 5 Smed. & M. (Miss.) 664. Or allow peremptory challenges to the prosecution. *Walter v. People*, 32 N. Y. 147; *Jones v. State*, 1 Ga. 610; *Hudgins v. State*, 2 Ga. 173; *Warren v. Com.*, 37 Pa. St. 45; *Hartzell v. Com.*, 40 Pa. St. 462.

New Trials. — A statute denying more than two new trials is constitutional. *East Tennessee, etc., R. Co. v. Mahoney*, 89 Tenn. 311.

2. *Jewell v. Com.*, 22 Pa. St. 94.

3. *Where Juror Formed and Expressed Opinion — Statute — United States.* — *Spies v. Illinois*, 123 U. S. 131.

Illinois. — *Coughlin v. People*, 144 Ill. 140; *Spies v. People*, 122 Ill. 262, 3 Am. St. Rep. 320.

New York. — *People v. Wah Lee Mon*, (Supreme Ct.) 13 N. Y. Supp. 767; *People v. McGonegal*, 136 N. Y. 62; *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492.

Ohio. — *McHugh v. State*, 42 Ohio St. 154; *Palmer v. State*, 42 Ohio St. 596; *Frazier v. State*, 23 Ohio St. 551; *Cooper v. State*, 16 Ohio St. 328.

Utah. — *People v. Thiede*, 11 Utah 241.

But the discretion conferred on the court is a sound legal discretion, and may be reviewed and reversed for manifest abuse. *Palmer v. State*, 42 Ohio St. 596.

The statute of *California* taking away the challenge to a juror for implied bias on the ground that the juror had formed or expressed an unqualified opinion as to the guilt of the accused is constitutional. *People v. Ah Lee Doon*, 97 Cal. 173.

But the legislature cannot deprive the defendant of the right to challenge for actual bias. *State v. McClear*, 11 Nev. 39.

A statute prescribing the questions that shall be asked a juror on his *voir dire*, and declaring that when answered as therein prescribed, he shall be adjudged a competent juror, is constitutional. *Woolfolk v. State*, 85 Ga. 69.

See generally the title JURY AND JURY TRIAL.

4. *Knowledge of English.* — *State v. Welsor*, 117 Mo. 570.

In *Atlas Min. Co. v. Johnston*, 23 Mich. 36,

the court, on its own motion, excused a juror because he was deaf and did not understand the English language. This was held no error, a jury being finally obtained to which neither party objected.

Inability to understand the English language does not necessarily disqualify jurors, where the proceedings are interpreted to them. *Trinidad v. Simpson*, 5 Colo. 65; *Territory v. Romine*, 2 N. Mex. 114.

In *Texas* the inability of the jury to speak and understand the language in which the proceedings on the trial are conducted is a violation of the Constitution. *Lyles v. State*, 41 Tex. 172, 19 Am. Rep. 38; *McCampbell v. State*, 9 Tex. App. 124, 35 Am. Rep. 726.

That the juror does not speak or understand the English language is a sufficient ground of challenge. *State v. Push*, 23 La. Ann. 14.

See the title JURY AND JURY TRIAL.

5. *Taxpayers.* — *Reece v. Knott*, 3 Utah 454, the court saying: "It is true, the statute prohibits any person from acting as a juror unless he is a taxpayer, but the question arises whether this statute is not in conflict with the Constitution of the United States, which provides, article 7, amendments: 'The right of trial by jury shall be preserved.' When the framers of the Constitution used the word 'jury,' they used it with reference to its signification at common law, which was a jury of twelve men and householders. Then has the legislature the right under this constitutional provision to restrict or impair the right of trial by jury, by prescribing any terms different from those that constitute a legal jury at common law? If they have a right to say he shall pay taxes before being eligible, have they not the same right to say that he shall possess any amount of property which they may deem proper, and thus virtually have the effect to exclude many good citizens from a seat in the jury box? Where are we to draw the line if the power to prescribe a property qualification be conceded? Suppose the legislature should say that before a man was eligible he should be worth ten thousand dollars — and certainly they have a right to exempt from taxation all property under this amount — would it not operate, in a country where most of the people are poor, to the entire exclusion of the right of trial by jury? And no matter however oppressive this must seem, yet, if you concede to the legislature the power in the one case, you must grant it in the other. Whenever this question has been raised it has been decided, we believe, by

(c) **Rights of Accused in Criminal Cases** — *aa. TRIAL BY JURY* — **Cannot Waive Jury.** — The decisions adverse to the right of the accused to waive a jury of twelve in criminal cases apply with greater force to his right to dispense with the jury altogether and submit to a trial and sentence by the court. It seems to be the general rule that, in the absence of statute, the accused cannot waive his right to a jury trial in either felonies¹ or misdemeanors.²

Statutes Authorizing Waiver in Criminal Cases. — But, on the theory that the right to trial by jury is more or less under legislative control, statutes authorizing the waiver of juries in criminal cases have been sustained where the constitution did not withhold jurisdiction from the tribunal.³

bb. SPEEDY TRIAL. — Every person held on a criminal charge has a right to

our highest courts that the legislature has not the right to affix any terms other than those prescribed at common law for the qualification of jurors."

But in *Cooper v. State*, 64 Md. 40, a statute which provided for taking the names of jurors partly from the tax list was upheld. In *Gibson v. Mississippi*, 162 U. S. 580, it was said *obiter* that a state may confine the selection of jurors to freeholders.

See generally the title **JURY AND JURY TRIAL.**

1. Cannot Waive Jury in Cases of Felony. — *Wilson v. State*, 16 Ark. 601; *Wartner v. State*, 102 Ind. 51; *State v. Carman*, 63 Iowa 130, 50 Am. Rep. 741; *State v. Larrigan*, 66 Iowa 426; *Williams v. State*, 12 Ohio St. 622.

A jury of twelve men being the only legally constituted tribunal for the trial of an indictment for a felony, it necessarily follows that the court or judge is not such tribunal, and that in the absence of a jury he has by law no jurisdiction. If he attempts to sit as a substitute for a jury, and perform their functions in such cases, his acts must be regarded as nugatory. *Harris v. People*, 128 Ill. 585, 15 Am. St. Rep. 153.

Plea in Bar. — The defendant cannot waive jury trial of issues raised by a plea in bar. *Arnold v. State*, 38 Neb. 752.

Trial before Magistrate — Appeal to Court with Jury. — The guaranty of jury trial allows by implication an accused who is tried before a magistrate without a jury to appeal to a court where a jury is provided. *Johnson's Case*, 1 Me. 230.

2. Right to Trial by Jury in Misdemeanors. — *Bond v. State*, 17 Ark. 290; *State v. Maine*, 27 Conn. 281; *People v. Smith*, 9 Mich. 193; *State v. Holt*, 90 N. Car. 749, 47 Am. Rep. 544.

Contra. — *Darst v. People*, 51 Ill. 286, 2 Am. Rep. 301.

The Supreme Court of Iowa, while holding that a defendant may consent to a jury of eleven in felony cases, *State v. Kaufman*, 51 Iowa 581, 33 Am. Rep. 148; *State v. Grossheim*, 79 Iowa 75, denies his right to waive a jury and be tried and sentenced by the court, even in the trial of a misdemeanor. *State v. Douglass*, (Iowa 1895) 65 N. W. Rep. 151; *State v. Tucker*, (Iowa 1895) 65 N. W. Rep. 152.

3. Statutes Authorizing Waiver — Connecticut. — *State v. Worden*, 46 Conn. 349, 33 Am. Rep. 27, 1 Crim. L. Mag. 178.

Indiana. — *Murphy v. State*, 97 Ind. 579.

Louisiana. — *State v. Robinson*, 43 La. Ann. 383; *State v. White*, 33 La. Ann. 1218.

Maryland. — *League v. State*, 36 Md. 257.

Michigan. — *Ward v. People*, 30 Mich. 116.

Missouri. — *State v. Larger*, 45 Mo. 510.

New Jersey. — *Edwards v. State*, 45 N. J. L. 419.

Ohio. — *Dillingham v. State*, 5 Ohio St. 280; *Dailey v. State*, 4 Ohio St. 57.

Pennsylvania. — *Lavery v. Com.*, 101 Pa. St. 560.

Texas. — *Langbein v. State*, 37 Tex. 162.

West Virginia. — *State v. Cottrill*, 31 W. Va. 162; *State v. Griggs*, 34 W. Va. 78; *State v. Denoon*, 34 W. Va. 139.

Wisconsin. — *In re Staff*, 63 Wis. 285, 53 Am. Rep. 285.

No Distinction Between Felonies and Misdemeanors. — It has been held that there was no distinction to be drawn between felonies and misdemeanors in this connection. *State v. Worden*, 46 Conn. 349, 33 Am. Rep. 27; *In re Staff*, 63 Wis. 285, 53 Am. Rep. 285.

In *State v. Worden*, 46 Conn. 349, 33 Am. Rep. 27, the defendant was indicted for rape, waived his right to a jury, pleaded not guilty, and was tried and sentenced by the court. The statute allowing the waiver of jury trial was held not to conflict with the constitutional rights of the accused to a "speedy public trial by an impartial jury," and that "the right of trial by jury shall remain inviolate."

In re Staff, 63 Wis. 285, 53 Am. Rep. 285. The prisoner was convicted in the municipal court and sentenced to two years in the state penitentiary. His express waiver of a jury, as provided by statute, was entered in the minutes of the court.

In *State v. Cottrill*, 31 W. Va. 162, on the question whether under a section of the Bill of Rights, declaring "that trial of crimes and misdemeanors * * * shall be by a jury of twelve men," the legislature could provide for the trial of misdemeanors by the court with the consent of the defendant, the court was equally divided. The subject is discussed at length, and the cases and constitutional provisions reviewed. In the later cases of *State v. Griggs*, 34 W. Va. 78, and *State v. Denoon*, 34 W. Va. 139, the court unanimously upheld the constitutionality of the above statute.

Award of New Trial — Waiver on First Not Applicable to Second. — Where a party has waived his right, and after trial and conviction by the judge has obtained a new trial, he has then a right to withdraw his waiver and demand that the new trial shall be by jury. *State v. Touchet*, 33 La. Ann. 1154.

demand a speedy trial,¹ and one conducted according to fixed rules, regulations, and proceedings of law, free from vexatious, capricious, and oppressive delays manufactured by the ministers of justice.²

Prosecution Entitled to Time for Preparation — Unreasonable Delay. — The prosecution is not to be denied a reasonable time for preparation,³ but if the trial is delayed beyond the term of court at which a trial might have been had, by the neglect or laches of the prosecution, the prisoner will be discharged upon application by *habeas corpus*.⁴

cc. TO BE PRESENT AT TRIAL — (*aa*) In *Felonies* — *aaa.* Generally. — One accused of a felony has the right to be and must be present at the whole trial.⁵

1. Right to Speedy Trial. — Amd. Con. U. S., art. VI.; *Brooks v. People*, 88 Ill. 327; U. S. *v. Fox*, 3 Mont. 512; *Ex p. Stanley*, 4 Nev. 113.

2. *Nixon v. State*, 2 Smed. & M. (Miss.) 497, 41 Am. Dec. 601; U. S. *v. Fox*, 3 Mont. 512.

Postponement of Trial — Effect on Application for Bail. — That the utmost effect of the refusal by the judge to afford a prisoner a trial, when demanded at the time appointed therefor by law where no legal reason for a continuance of the case exists, would be to strengthen greatly an application by him for bail, see *Ex p. Caples*, 58 Miss. 358. See also the title BAIL AND RECOGNIZANCE, vol. 3, p. 678.

3. *Ex p. Stanley*, 4 Nev. 113.

Failure to Obtain Jury. — All efforts to obtain a competent jury at the term at which the accused was properly triable having failed, the prisoner will not be discharged until it appears that all possible means of obtaining a jury have failed and a trial cannot be had within a reasonable time. *Ex p. Stanley*, 4 Nev. 113.

4. Unreasonable Delay. — U. S. *v. Fox*, 3 Mont. 512. In this case Congress had failed to make an appropriation for paying for serving process. By reason of which the court ordered all cases continued until the next term of court. The defendant demanded a trial, and upon being refused, filed this application for discharge upon habeas corpus. The court, in discharging him, said: "The prosecution was guilty of laches and a neglect of duty, in so failing and refusing to prosecute, and such failure was a denial to the defendant of his constitutional right to a speedy trial. The government of the United States cannot cast a man into prison and then fold its arms and refuse to prosecute."

5. Accused Person's Presence at Trial for Felony — United States. — *Hopt v. Utah*, 110 U. S. 574.

Alabama. — *State v. Hughes*, 2 Ala. 102, 36 Am. Dec. 411; *Cook v. State*, 60 Ala. 39, 31 Am. Rep. 31; *Ex p. Bryan*, 44 Ala. 402.

Arkansas. — *Bearden v. State*, 44 Ark. 331; *Swerden v. State*, 19 Ark. 205.

Connecticut. — *State v. Hurlbut*, 1 Root (Conn.) 90.

Florida. — *Gladden v. State*, 12 Fla. 562; *Holton v. State*, 2 Fla. 500.

Georgia. — *Nolan v. State*, 55 Ga. 521, 21 Am. Rep. 281.

Illinois. — *Brooks v. People*, 88 Ill. 327.

Kansas. — *State v. Myrick*, 38 Kan. 238; *State v. Muir*, 32 Kan. 481; *State v. Moran*, 46 Kan. 318.

Kentucky. — *Allen v. Com.*, 86 Ky. 642.

Louisiana. — *State v. Davenport*, 33 La. Ann. 231.

Missouri. — *State v. Cross*, 27 Mo. 332; *State v. Smith*, 90 Mo. 37, 59 Am. Rep. 4.

Mississippi. — *Scaggs v. State*, 8 Smed. & M. (Miss.) 722; *Dyson v. State*, 26 Miss. 362; *Stubbs v. State*, 49 Miss. 716; *Rolls v. State*, 52 Miss. 391.

New York. — *Maurer v. People*, 43 N. Y. 1.

North Carolina. — *State v. Jenkins*, 84 N. Car. 812, 37 Am. Rep. 643.

Ohio. — *Jones v. State*, 26 Ohio St. 209; *Rose v. State*, 20 Ohio 31.

Pennsylvania. — *Dougherty v. Com.*, 69 Pa. St. 286; *Dunn v. Com.*, 6 Pa. St. 384.

Tennessee. — *Hutchinson v. State*, 3 Coldw. (Tenn.) 95; *Andrews v. State*, 2 Sneed (Tenn.) 550; *Witt v. State*, 5 Coldw. (Tenn.) 15; *State v. Jones*, 2 Yerg. (Tenn.) 22.

Texas. — *Brown v. State*, 38 Tex. 483; *Mapes v. State*, 13 Tex. App. 85; *Gordon v. State*, 13 Tex. App. 196.

Virginia. — *Sperry v. Com.*, 9 Leigh (Va.) 623, 33 Am. Dec. 261; *Hooker v. Com.*, 13 Gratt. (Va.) 763; *Lawrence v. Com.*, 30 Gratt. (Va.) 845; *Jackson v. Com.*, 19 Gratt. (Va.) 656.

West Virginia. — *State v. Sutfin*, 22 W. Va. 771.

Misdemeanors. — The same rule does not extend to trials for misdemeanors even though punishable by imprisonment. U. S. *v. Shepherd*, 1 Hughes (U. S.) 520.

The court, in *State v. Harris*, 34 La. Ann. 121, states the general doctrine thus: "However sacred this constitutional right may be, it has not been construed to be so absolute in character as to require the constant presence of the defendant at each and every proceeding in his case. It has been construed as entitling him to be present at the arraignment, trial, charge, verdict, and sentence, but we have been shown no precedent in this country where the accused is entitled to be present at any other proceeding. It is not to our knowledge, from the books or otherwise, that the defendant has ever claimed, or been recognized, the right to be present, when therein represented by counsel, in the court of last resort."

Absence During Argument. — The absence of the defendant on the trial of an indictment for an offense less than capital, during a portion of the argument, must affirmatively appear to have been prejudicial. *State v. Paylor*, 89 N. Car. 539.

Illness. — If during the trial of a felony the defendant becomes too sick to be present in court at every stage of the trial, the case

Recalling Jury in Accused's Absence for Further Instructions. — It is reversible error to recall the jury in his absence to give further instructions,¹ even though his counsel be present,² and fail to object,³ and an appellate court will not inquire into the correctness of the additional instructions.⁴

Presence When Jurors Challenged — Witnesses Sworn — Charge Given. — The trial, by triers, appointed by the court, of challenges of proposed jurors must be in the presence of the accused,⁵ as must be the swearing of witnesses and putting

should be either temporarily passed, to await his convalescence, or a juror withdrawn and the cause continued. The accused should not only be within the walls of the court-house, but he should be present where the trial is conducted, that he may see and be seen, hear and be heard, under such regulations as the law has established. *Brown v. State*, 38 Tex. 483.

Presence of Co-defendant. — Absence from trial of a co-defendant is not ground for a new trial. *People v. O'Brien*, 88 Cal. 483. But it is error to exclude the accused from the court-room while his co-defendant is testifying. *Garman v. State*, 66 Miss. 196.

Appeal. — A bond given by a defendant, convicted for robbery, upon an appeal to the supreme court, to appear in the circuit court of Union county on the 1st Monday after the 4th Monday in September is void, and confers no jurisdiction on the supreme court to try the case. A court of error has no jurisdiction to try a defendant for a felony, unless he is present in person. *Hutchinson v. State*, 3 Coldw. (Tenn.) 95.

The Record Must Show affirmatively in capital felonies that the prisoner was present at the trial, verdict, and passing of sentence. *State v. Cross*, 27 Mo. 332; *State v. Able*, 65 Mo. 37; *Scaggs v. State*, 8 Smed. & M. (Miss.) 722; *Oyson v. State*, 26 Miss. 362; *Dunn v. Com.*, 5 Pa. St. 384; *Hamilton v. Com.*, 16 Pa. St. 129, 15 Am. Dec. 485; *Dougherty v. Com.*, 69 Pa. St. 286. *Contra*, *People v. Bealoba*, 17 Cal. 389; *Hill v. State*, 17 Wis. 675, 86 Am. Dec. 736.

That the record must show presence affirmatively in all felonies, see *State v. Johnson*, 35 La. Ann. 208; *State v. Davenport*, 33 La. Ann. 231; *Sperry v. Com.*, 9 Leigh (Va.) 623, 33 Am. Dec. 261.

The presence of the accused may be inferred from the record, though not formally stated. *Lawrence v. Com.*, 30 Gratt. (Va.) 845; *State v. Collins*, 33 La. Ann. 152; *Cluverius v. Com.*, 81 Va. 787; *Sweeden v. State*, 19 Ark. 205. In the last case it was inferred from the order of the court that the accused "be and remain in the custody of the sheriff."

It is sufficient in the trial of a criminal action involving corporal punishment, if the defendant's presence may be inferred from the whole record. *Kie v. U. S.*, 27 Fed. Rep. 351; *Cluverius v. Com.*, 81 Va. 787.

If the record shows his presence at the opening of the court it will be presumed to continue until adjournment. *State v. Lewis*, 69 Mo. 92; *State v. Cox*, 33 La. Ann. 1056.

That the court may during the same term at which the motion for a new trial was overruled, and sentence pronounced, order the record changed to conform to the facts, and show the defendant's presence at the whole trial, see *Johnson v. Com.*, 115 Pa. St. 369.

But that the records fail to show in a trial for murder that the defendant was present when a motion for a new trial was made and refused is immaterial, see *State v. Coleman*, 27 La. Ann. 691.

The record showed the presence of the accused on the first day, and when the jury were impaneled and sworn; and at its close when the judgment was rendered; and that at the latter period, being asked if he had anything to say why judgment should not be pronounced against him, he alleged no reason to the contrary. During all the intermediate days of the trial, the record merely showed the entry of continuance in the usual form without referring to the presence or absence of the prisoner. It was held that this condition of the record was no ground of error. *Grimm v. People*, 14 Mich. 300.

In *People v. Bealoba*, 17 Cal. 390, it was held that the record must affirmatively show error. The fact that the record states generally that the prisoner was absent during a portion of the trial is insufficient to reverse the judgment.

The burden is upon the defendant to show that he was deprived of his right to be present. *Hill v. State*, 17 Wis. 675, 86 Am. Dec. 736.

1. Recalling Jury for Further Instructions in Accused's Absence Is Error. — *Wade v. State*, 12 Ga. 25; *State v. Myrick*, 38 Kan. 238; *Maurer v. People*, 43 N. Y. 1; *Jones v. State*, 26 Ohio St. 209; *Shipp v. State*, 11 Tex. App. 46.

State v. Myrick, 38 Kan. 238, was decided under a statute prohibiting the trial of any person accused of felony unless he was personally present throughout the trial.

In *Maurer v. People*, 43 N. Y. 1, the jury returned into court during the absence of the accused, and asked certain questions of the court as to what had been the evidence on particular points, to which the court replied, giving the information.

Compare State v. Jones, 29 S. Car. 201, holding that it is not error for the court to call in the jury and ask if they desire further instruction, the reply being in the negative.

And it has been held that such a proceeding does not constitute reversible error unless it appears that the substantial rights of the accused have been prejudiced. *Meece v. Com.*, 78 Ky. 586.

2. Presence of Counsel Does Not Suffice. — *State v. Myrick*, 38 Kan. 238; *Jones v. State*, 26 Ohio St. 209; *Maurer v. People*, 43 N. Y. 1; *Shipp v. State*, 11 Tex. App. 46.

3. Maurer v. People, 43 N. Y. 1; *Shipp v. State*, 11 Tex. App. 46.

4. Jones v. State, 26 Ohio St. 209.

5. Right to Be Present at Trial of Challenges. — *Hopt v. Utah*, 110 U. S. 574, where the Code of Criminal Procedure of Utah provided "if the indictment is for a felony, the defendant must

them under the rule,¹ and the giving of the charge by the court²

The Discharge of Jurors on Account of Sickness of one of their number is a part of the trial within the meaning of this rule.³

bbb. Preliminary and Formal Matters — Argument of Preliminary Questions of Law. — The constitutional guaranty is not violated by the absence of the defendant during the presentation by counsel of preliminary questions of law, prior to the selection of the jury;⁴ as on the hearing of a motion to quash the information⁵ or indictment,⁶ a demurrer to the information,⁷ or a plea in abatement.⁸

Formal Preparations for Trial. — The defendant need not be present during the preliminary preparations for the trial;⁹ for instance, during the placing in the box of the slips of paper containing the regular panel, preparatory to drawing a jury,¹⁰ or while a special venire is being drawn,¹¹ or a motion for a continuance¹² or change of venue¹³ being presented.

ccc. View of Premises. — The constitutional right of the defendant in a criminal trial to appear and defend in person and by counsel and meet the witnesses against him face to face, guarantees him the privilege of being present when the jury, by direction of the court, is taken to view the premises where the offense is alleged to have been committed.¹⁴ The right is in the nature of a

be personally present at the trial." The triers took the juror from the court-room into a different room and tried the ground of challenge out of the presence as well of the court as of the defendant and his counsel. Their findings were returned into court, and the challenge being found not true, the jurors so challenged resumed their seats among those summoned to try the case. Of the six challenged for actual bias, four were subsequently challenged by the defendant peremptorily. The other two were sworn as trial jurors, one of them, however, after the defendant had exhausted all his peremptory challenges. No objection was made to the triers leaving the court-room, nor was any exception taken thereto during the trial. A judgment of the Supreme Court of Utah affirming a sentence pronounced in the trial court upon a verdict of guilty was reversed by the United States supreme court.

1. Presence When Witnesses Sworn. — Bearden v. State, 44 Ark. 331, the court saying: "We may readily conceive advantages to be derived by his personal presence at such time. He is interested in seeing that the witnesses are all actually sworn, that the proper oath is administered, and that all of his own witnesses are included in the rule. He would be apprised, too, of what witnesses the state would call against him, and thus be better enabled to prepare for his defense."

2. Presence When Jury is Charged. — People v. Kohler, 5 Cal. 72; State v. Davenport, 33 La. Ann. 231; State v. Blackwelder, Phil. L. (N. Car.) 38; Witt v. State, 5 Coldw. (Tenn.) 11; Jackson v. Com., 19 Gratt. (Va.) 656.

3. Sickness of Juror and Discharge of Jury Therefor. — State v. Smith, 44 Kan. 75, 21 Am. St. Rep. 266, the court observing that "the determination of the fact of sickness on the part of the absent juror must be by judicial methods, and these include the presence of the defendants while that fact is being investigated."

4. Presentation of Preliminary Questions of Law. — Territory v. Gay, 2 Dakota 125; Epps v. State, 102 Ind. 539; State v. Fahey, 35 La. Ann. 9; State v. Dominique, 39 La. Ann. 323;

Miller v. State, 29 Neb. 437; People v. Vail, 6 Abb. N. Cas. (N. Y. Supreme Ct.) 206; Rothschild v. State, 7 Tex. App. 519.

Contra. — State v. Hughes, 2 Ala. 102, 36 Am. Dec. 411.

In State v. Dominique, 39 La. Ann. 324, the defendant was absent during the argument of a motion to amend the surname of the owner of stolen property in the information.

"It can now be considered as elementary," said Poché, J., in State v. Fahey, 35 La. Ann. 9, "that the absence of the accused during the trial of motions not making part of the actual trial of his guilt or innocence, but having reference to the form or conduct of the trial, will not vitiate the proceedings."

5. Miller v. State, 29 Neb. 437.

6. Territory v. Gay, 2 Dakota 125; Epps v. State, 102 Ind. 539; People v. Vail, 6 Abb. N. Cas. (N. Y. Supreme Ct.) 206.

7. Miller v. State, 29 Neb. 437.

8. Miller v. State, 29 Neb. 437.

9. Bearden v. State, 44 Ark. 331; State v. Elkins, 63 Mo. 159; Pocket v. State, 5 Tex. App. 552; Cordova v. State, 6 Tex. App. 207.

Under a statute giving the accused the right to challenge the panel of the grand jury, or any individual grand juror, he is not entitled to be present in court during the impaneling of the grand jury. Territory v. Young, 2 N. Mex. 93.

10. Bearden v. State, 44 Ark. 331.

11. Pocket v. State, 5 Tex. App. 552; Cordova v. State, 6 Tex. App. 207.

12. State v. Fahey, 35 La. Ann. 9; Miller v. State, 29 Neb. 437; Ex p. Bryan, 44 Ala. 402.

13. Rothschild v. State, 7 Tex. App. 519; State v. Elkins, 63 Mo. 159.

14. Right of Prisoner to Be Present at View of Premises. — Benton v. State, 30 Ark. 328; People v. Bush, 68 Cal. 623; People v. Lowrey, 70 Cal. 193; State v. Adams, 20 Kan. 311; Ruth-erford v. Com., 78 Ky. 639; State v. Bertin, 24 La. Ann. 46; Carroll v. State, 5 Neb. 31; Neal v. State, 32 Neb. 120; Eastwood v. People, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 25; Smith v. State, 42 Tex. 444.

"Though no witnesses are examined at the view, yet the jurors, from their observation of

personal privilege, which is for the benefit of the accused alone,¹ and may be waived expressly by counsel,² or by the failure of the accused to request the privilege of accompanying the jury.³

add Verdict. — The accused has an absolute right to be present when the verdict is rendered;⁴ which counsel cannot waive.⁵ There is a mistrial where verdict is taken in defendant's absence and the jury discharged.⁶

the place and its surroundings, may receive a kind of evidence from mute things, which cannot be brought into court to confront the accused, and are in their nature incapable of cross-examination." *Per* English, C. J., in *Benton v. State*, 30 Ark. 328.

In *Eastwood v. People*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 25, after the testimony was closed several members of the jury, while walking out for exercise, by leave of the court and in charge of an officer, visited and examined the place where the homicide occurred; it was held sufficient reason for a new trial.

1. A Personal Privilege of Accused. — *Shular v. State*, 105 Ind. 298, 55 Am. Rep. 211; *State v. Adams*, 20 Kan. 311, where, in an opinion by Justice Brewer, the Supreme Court of Kansas held the provision in the Bill of Rights a grant of personal privilege, which an accused could waive. *Cited with approval* in *Neal v. State*, 32 Neb. 120.

The Supreme Court of Indiana, in an exhaustive review of the authorities, in *Shular v. State*, 105 Ind. 289, 55 Am. Rep. 211, said: "The rights secured by the constitution are fundamental, but they may, where the statute so provides, be waived by the accused. 'These rights may be separated into two classes, namely, those in which the public generally and as a community is interested, as well as the individual to whom they happen directly to apply in any particular instance; and those, more in the nature of privileges, which are for the benefit of the individual alone, and do not in any way affect the general public, whether the individual avails himself of them or not.' (Citing 6 Crim. Law Mag. 182.) The provision in the twelfth section of the bill of rights securing to one accused of crime the privilege of being confronted by the witnesses, belongs to the second of the two classes named, and is a privilege which may be waived." The only provision in the statute for waiver by the accused, was a failure to provide for his presence.

2. Express Waiver by Counsel in Prisoner's Presence. — *Neal v. State*, 32 Neb. 120, where the record showed that the waiver was made in defendant's presence in open court.

3. Implied Waiver. — *Shular v. State*, 105 Ind. 298, 55 Am. Rep. 211; *State v. Adams*, 20 Kan. 311; *Neal v. State*, 32 Neb. 120; *State v. Ah Lee*, 8 Oregon 214; *State v. Congdon*, 14 R. I. 458.

Contra. — *Benton v. State*, 30 Ark. 328; *People v. Bush*, 68 Cal. 623; *People v. Lowrey*, 70 Cal. 193; *Carroll v. State*, 5 Neb. 31. But see *Neal v. State*, 32 Neb. 120.

"We are of the opinion," said Justice Brewer, in *State v. Adams*, 20 Kan. 311, "that the fact that the jury were sent in a body under charge of an officer to view the place of the crime, unaccompanied by the defendant, is not necessarily an error fatal to the trial, and

that where the record discloses no objection thereto by the defendant, and no application for permission to accompany them, and no error alleged on account thereof in the motion for a new trial, it is too late to insist in this court that the judgment must be reversed therefor."

The court, in *People v. Bush*, 68 Cal. 623, the leading case holding *contra* to the rule stated in the text, said: "The order made by the court did not require the defendant to go and be present with his counsel at such view. Suppose that upon the trial, after the witnesses had testified as to the occurrences which transpired at the places named in the order, instead of making the order, a photograph of all such places had been offered and allowed by the court to go in evidence to the jury, in the absence of the defendant and his counsel; can it be successfully contended that the defendant could be debarred from claiming and having awarded him a new trial for manifest error? It is often most important for the defendant and his counsel to be able to perceive exactly what impression is being made upon the jury by any portion of the evidence given in on his trial. And it may frequently happen that it is within their power then to introduce other evidence which might tend to disabuse that body of a wrong impression, or the counsel might by fair and legitimate argument be able to convince them of the right view to be taken of such evidence."

4. Right to Be Present When Verdict Rendered — *Alabama.* — *Cook v. State*, 60 Ala. 39, 31 Am. Rep. 31.

Arkansas. — *Cole v. State*, 10 Ark. 318.

Colorado. — *Green v. People*, 3 Colo. 68; *Smith v. People*, 8 Colo. 457.

Illinois. — *Nomaque v. People*, 1 Ill. 145, 13 Am. Dec. 157.

Kansas. — *State v. Muir*, 32 Kan. 481.

Louisiana. — *State v. Ford*, 30 La. Ann. 311.

Missouri. — *State v. Buckner*, 25 Mo. 167.

New York. — *People v. Winchell*, 7 Cow. (N. Y.) 525; *People v. Perkins*, 1 Wend. (N. Y.) 91.

Ohio. — *Sargent v. State*, 11 Ohio 472; *Rose v. State*, 20 Ohio 31.

Pennsylvania. — *Prine v. Com.*, 18 Pa. St. 103.

Tennessee. — *State v. France*, 1 Overt. (Tenn.) 434; *Clark v. State*, 4 Humph. (Tenn.) 254.

5. Counsel Cannot Waive the Right. — *Prine v. Com.*, 18 Pa. St. 103; *Cook v. State*, 60 Ala. 39, 31 Am. Rep. 31.

In *State v. France*, 1 Overt. (Tenn.) 434, the court said: "The prisoner must be at the bar; otherwise the jury cannot be asked for their verdict; and if he does not appear, the jury must be discharged without rendering any."

6. Verdict and Discharge of Jury in Defendant's Absence. — *Ford v. State*, 34 Ark. 649; *State v.*

Judgment. — A judgment entered in a trial for felony in the absence of the defendant is void;¹ though the appellate court will not disturb the verdict, but remand the case for sentence to be pronounced according to law.²

See. Motion for New Trial. — It is not necessary that the defendant be present personally in court during the argument of a motion for a new trial;³ but a refusal to grant his request to be present is error.⁴

The Error Is Cured by an offer of the court to permit the defendant to file and argue his motion anew,⁵ or by setting aside the former action and again considering and overruling the motion in his presence.⁶

Jenkins, 84 N. Car. 812, 37 Am. Rep. 643; State v. Conkle, 16 W. Va. 736.

Setting aside the verdict on account of the defendant's absence at its rendition does not interfere with a new trial. State v. Hughes, 2 Ala. 102, 36 Am. Dec. 411; People v. Perkins, 1 Wend. (N. Y.) 91.

Compare Cook v. State, 60 Ala. 39, 31 Am. Rep. 31, holding that the discharge of the jury, after they had rendered their verdict, though it be inadvertently received when the prisoner is not in court, is therefore void, and, in case of felony, amounts to an acquittal. And see Nolan v. State, 55 Ga. 521, 21 Am. Rep. 281, that a motion to set aside a verdict because rendered in defendant's absence is distinguishable from a motion for a new trial, and consequently does not subject him to be again put in jeopardy as though a new trial had been applied for and granted.

1. Judgment Entered in Defendant's Absence Void. — Cole v. State, 10 Ark. 325; Kelly v. State, 3 Smed. & M. (Miss.) 528; Simpson v. State, 56 Miss. 297; Jewell v. Com., 22 Pa. St. 94; Mapes v. State, 13 Tex. App. 85.

The statute of Texas authorized the entry of judgment at a subsequent term; the defendant was convicted of a felony, and the appeal dismissed because the record failed to bring up a final judgment. At the ensuing term of the trial court, in the absence of the defendant, the state's counsel filed a motion for a judgment *nunc pro tunc*, which was entered over the objection of the defendant's counsel, and despite his demand that the defendant be brought into court. This was held error. Mapes v. State, 13 Tex. App. 85; Gordon v. State, 13 Tex. App. 196.

2. Verdict Stands — Case Remanded for Sentence. — Cole v. State, 10 Ark. 325; Kelly v. State, 3 Smed. & M. (Miss.) 528; Simpson v. State, 56 Miss. 297; Jewell v. Com., 22 Pa. St. 94; State v. Jefcoat, 20 S. Car. 383.

In Jewell v. Com., 22 Pa. St. 94, the court said that the defendant's absence when a new trial was asked and reasons filed, and a time fixed for their argument, would at most vitiate the sentence; and he might be sentenced anew by this court, or, if the sentence were reversed, the record might be remitted to the court below, with directions to proceed in the case according to law.

3. Presence at Motion for New Trial Unnecessary. — State v. Coleman, 27 La. Ann. 691; State v. Clark, 32 La. Ann. 558; State v. Somnier, 33 La. Ann. 237; State v. Harris, 34 La. Ann. 118; Com. v. Costello, 121 Mass. 371; People v. Ormsby, 48 Mich. 494; Jewell v. Com., 22 Pa. St. 94; State v. David, 14 S. Car. 428; State v. Jefcoat, 20 S. Car. 383.

Contra. — Hooker v. Com., 13 Gratt. (Va.) 703.

See also Rolls v. State, 52 Miss. 391, that he should be present.

The defendant cannot complain where his absence is of his own free will and accord. State v. Somnier, 33 La. Ann. 237.

In People v. Ormsby, 48 Mich. 494, the court said that after the regular conviction of a person charged with crime he can no longer insist on being personally present in court for further proceedings, such as the disposition of a motion for a new trial. The records in this case did not show the presence or absence of the accused, or that the court's attention was called thereto.

In Mississippi under statute it was held that the presence of the accused when motion is determined must affirmatively appear. Simpson v. State, 56 Miss. 297; Rolls v. State, 52 Miss. 391; Stubbs v. State, 49 Miss. 716. The law was subsequently changed (Act Feb. 12, 1878, Sess. Acts 200).

England. — In England the courts recognize the right of the prosecution to compel the presence of the accused while a motion for a new trial is being argued, because he has no right to be heard without submitting himself to the control of the court, so that he may be committed in case the motion is overruled. Rex v. Gibson, 2 Stra. 968, 7 Mod. 205; Rex v. Teal, 11 East 307; Rex v. Askew, 3 M. & S. 9; Rex v. Cochrane, 3 M. & S. 10, note *a*; Howard v. Reg., 10 Cox C. C. 54; Reg. v. Caudwell, 17 Q. B. 503, 79 E. C. L. 503.

And it is said that the prosecution cannot waive his presence. Rex v. Fielder, 2 D. & R. 46, 16 E. C. L. 72.

When a defendant convicted of a misdemeanor was committed to the county jail to abide the judgment of the court, and was detained for no other cause, the court, on a suggestion of his inability to bring himself up, allowed a motion for a new trial to be made without his personal attendance. Rex v. Boltz, 8 D. & R. 65.

The rule has been recognized in the United States in an early case. State v. Rippon, 2 Bay (S. Car.) 99.

4. Refusal to Allow Prisoner's Presence. — State v. Hoffman, 78 Mo. 256; State v. Lewis, 80 Mo. 110; Sweat v. State, 4 Tex. App. 617; Gibson v. State, 3 Tex. App. 437; Berkley v. State, 4 Tex. App. 122.

5. State v. Decklots, 19 Iowa 447.

6. Berkley v. State, 4 Tex. App. 122; Krautz v. State, 4 Tex. App. 534; Garcia v. State, 5 Tex. App. 337.

In the first case cited in this note the court below, at the instance of counsel for defend-

fff. Motion in Arrest of Judgment. — The defendant must be present in court when a motion in arrest of judgment is argued.¹

ggg. Proceedings in Error. — Upon a writ of error to reverse a conviction in a criminal case, the presence of the party convicted is not necessary.²

hhh. Waiver. — When the defendant, being released on bail, voluntarily absents himself from the court-room during a portion of the trial of an offense less than capital, it will not vitiate the proceedings.³ The right to be present is waived by his escape during the trial.⁴

(bb) In Misdemeanors. — The right to be present may be waived in misdemeanors where the punishment is not necessarily corporal.⁵

ant, twice postponed action on his motion for a new trial, and ultimately overruled it in the presence of the accused, but while the counsel was absent from the court-room. It not appearing that the counsel's absence was involuntary or unavoidable, or that injury resulted to the defendant, or that steps were taken in the court below to rectify the matter, it was held that no error was apparent.

1. Motion in Arrest of Judgment. — *Rex v. Spragg*, 2 Burr. 930; *Rolls v. State*, 52 Miss. 391.

Waiver. — That the prisoner may waive the right, see *State v. Jefcoat*, 20 S. Car. 383.

2. Proceedings in Error. — *Donnelly v. State*, 26 N. J. L. 463; *People v. Clark*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 360.

Contra. — *Reg. v. Foxby*, 6 Mod. 178.

3. Accused on Bail Voluntarily Absenting Himself. — *California*. — *People v. Bealoba*, 17 Cal. 390.

Georgia. — *Barton v. State*, 67 Ga. 653, 44 Am. Rep. 743.

Illinois. — *Sahlinger v. People*, 102 Ill. 241.

Indiana. — *State v. Wamire*, 16 Ind. 357.

Missouri. — *State v. Smith*, 90 Mo. 37, 59 Am. Rep. 4.

Mississippi. — *Stubbs v. State*, 49 Miss. 716.

New Jersey. — *Jackson v. State*, 49 N. J. L. 252; *State v. Peacock*, 50 N. J. L. 34.

Rhode Island. — *State v. Guinness*, 16 R. I. 401.

Wisconsin. — *Hill v. State*, 17 Wis. 675, 86 Am. Dec. 736.

In the absence of evidence to the contrary, it will be presumed that he was voluntarily absent. *State v. Guinness*, 16 R. I. 401.

Voluntarily going into an apartment connected with the court-room for a few minutes during the trial, against the objection of the district attorney, will not vitiate the trial. *People v. Bragle*, 88 N. Y. 585, 42 Am. Rep. 269. But see, as to capital felony, *Gladden v. State*, 12 Fla. 562.

Correction of Minutes. — The judge may make a correction of his minutes, on the suggestion of the prosecuting attorney, during absence of accused. *State v. Gonsoulin*, 38 La. Ann. 459.

4. Escape or Voluntary Absence During Trial. — *Price v. State*, 36 Miss. 531, 72 Am. Dec. 195, holding that the right of the defendant to be present at the rendition of a verdict may be waived; that the escape or voluntary absence of the defendant when the verdict is returned is no ground for setting it aside. To same effect see *State v. Wamire*, 16 Ind. 357; *Barton v. State*, 67 Ga. 653, 44 Am. Rep. 743; *Fight v. State*, 7 Ohio pt. I. 180, 28 Am. Dec. 626; *Sahlinger v. People*, 102 Ill. 241.

The *New Jersey* courts hold that the defendant may waive his right in crimes of less degree than capital. The court, in *Jackson v. State*, 49 N. J. L. 252, said: "The practice has become settled in this state to receive the verdict of the jury in all criminal cases, except capital cases, without the presence of the accused. Such a power in the court is essential to the due administration of justice, especially where the accused is out on bail. By the constitution of this state the accused, before conviction, is entitled to be admitted to bail in all cases, except for capital offenses when the proof is evident or the presumption great, and excessive bail is interdicted. * * * If the verdict of guilty, taken in the absence of the defendant, was held to be erroneous, it would practically be in the power of an accused out on bail to evade the just punishment of his crime, and commute by the payment of the sum for which he was bailed."

Compare Andrews v. State, 2 Sneed (Tenn.) 550, where the court said: "There is a want of jurisdiction over his person to proceed with the trial, or to receive the verdict, or to pronounce the final judgment." In case of an escape the proper practice is to discharge the jury, as in a mistrial, leaving the prisoner subject to be arrested and put on trial at another term.

The defendant's own act creating the necessity for the discharge of the jury, on a subsequent trial he could not plead former jeopardy. *People v. Higgins*, 59 Cal. 357.

5. Misdemeanors — *England*. — *Reg. v. Parkinson*, 2 Den. C. C. 459.

United States. — *U. S. v. Mayo*, 1 Curt. (U. S.) 433; *U. S. v. Santos*, 5 Blatchf. (U. S.) 104.

Arkansas. — *Sweeden v. State*, 19 Ark. 205; *Martin v. State*, 40 Ark. 364.

California. — *People v. Ebner*, 23 Cal. 159.

Illinois. — *Holliday v. People*, 9 Ill. 111; *Brooks v. People*, 88 Ill. 327.

Iowa. — *State v. Hughes*, 4 Iowa 554.

Kentucky. — *Canada v. Com.*, 9 Dana (Ky.) 304.

New York. — *Son v. People*, 12 Wend. (N. Y.) 344.

Pennsylvania. — *Lynch v. Com.*, 88 Pa. St. 189, 32 Am. Rep. 445.

Tennessee. — *State v. Jones*, 2 Yerg. (Tenn.) 22.

Texas. — *Cain v. State*, 15 Tex. App. 41.

Vermont. — *Ex p. Tracy*, 25 Vt. 93.

Virginia. — *Price v. Com.*, 33 Gratt. (Va.) 819, 36 Am. Rep. 797.

Justice Curtis, in *U. S. v. Mayo*, 1 Curtis (U. S.) 433, said: "I will state the results at which we have arrived:

"1. To save his recognizance, even in case

It Will Be Waived by failing to attend trial when notified,¹ or to appear when under recognizance,² and the verdict will be received and sentence pronounced.³

ad. BENEFIT OF COUNSEL. — One charged with a criminal offense is entitled to counsel to defend him.⁴

Assignment of Counsel by Court. — The court may require an attorney, as one of its officers, to defend a prisoner,⁵ but it is not error to fail to assign counsel

of a misdemeanor, the defendant must appear personally.

"2. He is liable to be called on his recognizance at any time, either on the motion of the district attorney, or by order of the court on its own motion, if it sees cause to direct it.

"3. It is in the discretion of the court to allow one indicted for a misdemeanor to plead and defend, in his absence by attorney. This discretion will be regulated by the following circumstances:

"(1) That it is not an offense for which imprisonment must be inflicted.

"(2) The court must be satisfied that the nature of the case, and its circumstances, are such that imprisonment will not be inflicted.

"(3) The district attorney must consent, or it must appear to the court that he unreasonably and improperly withholds his consent.

"(4) Sufficient cause must be shown, on affidavit, to account for the absence of the defendant.

"(5) A special power of attorney, to appear and plead and defend in his absence, must be executed by the defendant and filed in court by the attorney."

The defendant after consenting to a trial in his absence, cannot complain if imprisonment is a part of the punishment. *Martin v. State*, 40 Ark. 364.

In early cases it was held that on the trial of misdemeanors punishable by both fine and imprisonment, the verdict might be rendered in the absence of defendant. *Holliday v. People*, 9 Ill. 112.

Colorado. — Under the Crim. Code, § 272, which enacts that all trials for criminal offenses shall be conducted according to the common law, unless otherwise provided, it is error to try a defendant, for a misdemeanor punishable by fine and imprisonment in jail, in the absence of himself and attorney; notwithstanding the case is an appeal from a justice of the peace, and that the bond in such case is for the payment of the fine and not for the appearance of the defendant before the appellate court. *Lawn v. People*, 11 Colo. 343.

California. — In this state the defendant may appear by counsel on an arraignment for misdemeanor, and on his failure to appear personally the court has no power to declare his recognizance forfeited. (Crim. Pr. Act, § 259.) *People v. Ebner*, 23 Cal. 159.

Virginia. — In Virginia the verdict of guilty upon an indictment for a misdemeanor may be rendered in the absence of the accused, even though the penalty is imprisonment. (Code, c. 201, § 25, p. 1243.) *U. S. v. Shepherd*, 1 Hughes (U. S.) 520. It is so held on a conviction for involuntary manslaughter, the statute declaring it a misdemeanor. *Price v. Com.*, 33 Gratt. (Va.) 819, 36 Am. Rep. 797.

Appearance to Prosecute Appeal. — A party who appeals from a conviction and fine before a justice for an assault and battery, and enters into the recognizance required by statute, is not obliged to appear in person to prosecute his appeal, and it is error to affirm the judgment on his failure to do so. *State v. Buhs*, 18 Mo. 318.

Motion to Show Cause. — It is not necessary that a defendant appear in person on a motion to show cause why an attachment should not issue for not appearing as a witness after being regularly served with a subpoena. *People v. Van Wyck*, 2 Cai. (N. Y.) 333.

1. *Bloomington v. Heiland*, 67 Ill. 278.

2. *Canada v. Com.*, 9 Dana (Ky.) 304.

3. *Lynch v. Com.*, 88 Pa. St. 189, 32 Am. Rep. 445.

4. **Privilege of Counsel.** — *Rowe v. Yuba County*, 17 Cal. 61; *Vise v. Hamilton County*, 19 Ill. 78; *Hendryx v. State*, 130 Ind. 265; *Hall v. Washington County*, 2 Greene (Iowa) 473; *Johnston v. Lewis, etc., County*, 2 Mont. 159; *Wayne County v. Waller*, 90 Pa. St. 99, 35 Am. Rep. 636; *Early v. Com.*, 86 Va. 921.

In *Texas* the code is held to require the appointment only in capital felonies. In other cases it is within the discretion of the trial judge. *Pennington v. State*, 13 Tex. App. 44.

Defendant's Means of Procuring Counsel. — Where the person has means to employ counsel it is not error for the court to refuse to permit him to defend as a poor person. *Cross v. State*, 132 Ind. 65. But the fact that the parents of a defendant are amply able to secure counsel for him is no reason for refusing to assign him counsel when they refuse to do so. And the error of the court in refusing to assign is not cured by an attorney offering his services and conducting the defense over the protest of the accused, and which services the accused declines to accept. *Hendryx v. State*, 130 Ind. 265.

Private Interview. — The right to counsel includes the right to a private interview while the prisoner is confined in jail, even before indictment found. *People v. Riseley*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 186.

Impartial Counsel. — Where counsel appointed to defend were sufferers by the offense charged, but appeared to have been faithful, it was held not reversible error. *Early v. Com.*, 86 Va. 921.

5. **Court Requiring Attorney to Defend.** — *Vise v. Hamilton County*, 19 Ill. 78; *Johnston v. Lewis, etc., County*, 2 Mont. 159.

In *Blythe v. State*, 4 Ind. 525, a statute requiring an attorney at law, in case of a poor person, to prosecute or defend, upon his appointment by the court, without fee, was held a violation of the constitutional provision that "no man's particular services shall be demanded without just compensation."

where no request therefor is made.¹

Number and Selection of Assigned Counsel. — The number of counsel necessary to secure the accused, unable to pay for counsel, a fair and impartial trial, is within the sound discretion of the trial court,² and unless the statute provides otherwise the court may decline to assign him the counsel he desires, and assign him other counsel.³

Compensation. — The courts are divided as to whether an attorney appointed by the court can recover for his services from the county in which the prosecution is conducted.⁴

ee. **FREEDOM FROM SHACKLES.** — A prisoner undergoing trial should be free from shackles,⁵ unless they are deemed necessary in order to prevent his escape⁶ or to restrain him from doing violence to others.⁷

Must Be Immediate Necessity to Justify Use. — But if used there must be immediate necessity for their use,⁸ or a judgment of conviction will be reversed.⁹ The

In England the court may properly request counsel to give his honorary services to a prisoner. *Reg. v. Fogarty*, 5 Cox C. C. 161.

Civil Cases. — That the court may command the services of counsel in civil cases for persons unable to pay, see *House v. Whites*, 5 Baxt. (Tenn.) 690, where the defendant was a minor.

1. When No Request for Counsel is Made. — *State v. Vianna*, 37 La. Ann. 606; *People v. Cook*, 45 Hun (N. Y.) 34.

Under statute that the court, on his request, shall assign him "such counsel as he shall desire." *State v. De Serrant*, 33 La. Ann. 979.

2. *Keyes v. State*, 122 Ind. 527.

3. *Burton v. State*, 75 Ind. 477.

4. County Liable for Compensation. — *Hall v. Washington County*, 2 Greene (Iowa) 473; *Blythe v. State*, 4 Ind. 525; *Webb v. Baird*, 6 Ind. 13.

It is held that where the statute requires the appointment of counsel in defense of a pauper, it necessarily gives a right of action for compensation for the services rendered, in obedience to that law, and that a liability properly attaches to the county chargeable with the maintenance of the proceedings. *Hall v. Washington County*, 2 Greene (Iowa) 473.

In the Negative. — *Arkansas County v. Freeman*, 31 Ark. 266; *Rowe v. Yuba County*, 17 Cal. 61; *Johnston v. Lewis*, etc., County, 2 Mont. 159; *Wright v. State*, 3 Heisk. (Tenn.) 256. See also the title ATTORNEY AND CLIENT, vol. 3, p. 417.

In *Reg. v. Fogarty*, 5 Cox C. C. 161, the court said it could make no rule upon the subject of payment of counsel fees, but it would certainly recommend that they should be paid by the crown.

It is the duty of counsel to render their professional services, and for compensation they must trust to the future ability of the parties. *Rowe v. Yuba County*, 17 Cal. 61, followed in *Lamont v. Solano County*, 49 Cal. 158.

In *Vise v. Hamilton County*, 19 Ill. 78, it is said "that the law confers on licensed attorneys rights and privileges, and with them imposes duties and obligations, which must be reciprocally enjoyed and performed. The plaintiffs but performed an official duty, for which no compensation is provided." *Wayne County v. Waller*, 90 Pa. St. 99, 35 Am. Rep. 636; *House v. Whites*, 5 Baxt. (Tenn.) 690.

5. Free from Shackles. — *Faire v. State*, 58 Ala. 74; *Lee v. State*, 51 Miss. 566; *State v. Kring*, 64 Mo. 591; *Territory v. Kelly*, 2 N. Mex. 297; *Matthews v. State*, 9 Lea (Tenn.) 128, 42 Am. Rep. 667; *Rainey v. State*, 20 Tex. App. 455; 4 Black. Com. 322.

In *Rex v. Waite*, 1 Leach C. C. 36, the prisoner, at the time of his arraignment, desired that his irons might be taken off; but the court informed him that it had no authority for that purpose until the jury were charged to try him. He accordingly pleaded not guilty, and being put upon his trial, the court immediately ordered his fetters to be knocked off.

6. Shackles Necessary to Prevent Escape. — *Lee v. State*, 51 Miss. 566; *Territory v. Kelly*, 2 N. Mex. 297; *Poe v. State*, 10 Lea (Tenn.) 673; *Matthews v. State*, 9 Lea (Tenn.) 128, 42 Am. Rep. 667; *Rainey v. State*, 20 Tex. App. 455; 4 Black. Com. 322.

Bringing the defendant into court chained to other prisoners and then removing his shackles in the presence of the jury, by order of the court, is not error. *Rainey v. State*, 20 Tex. App. 455.

In *People v. Harrington*, 42 Cal. 165, 10 Am. Rep. 296, the court, by Sprague, J., declared that according to the common law, which still remains in this particular unchanged in California, a prisoner brought into the presence of the court for trial, upon his plea of not guilty to an indictment for any offense, was entitled to appear free of all manner of shackles or bonds; and it was declared that "to require a prisoner during the progress of his trial before the court and jury to appear and remain with chains and shackles upon his limbs, without evident necessity for such restraint for the purpose of securing his presence for judgment, is a direct violation of the common-law rule and of the 13th section of our Criminal Practice Act" [now § 688 of the Cal. Penal Code].

7. *Territory v. Kelly*, 2 N. Mex. 297.

8. Only Immediate Necessity Justifies Use. — *Rex v. Rogers*, 3 Burr. 1812; *People v. Harrington*, 42 Cal. 165, 10 Am. Rep. 296; *State v. Kring*, 64 Mo. 591; 4 Black. Com. 322.

9. Unnecessary Shackling Ground for Reversal. — *People v. Harrington*, 42 Cal. 165, 10 Am. Rep. 296; *State v. Kring*, 64 Mo. 591; *Territory v. Kelly*, 2 N. Mex. 297.

Where it appeared that they only remained

fact that the prisoner had made, in the court room, an assault upon a person, will not justify his being shackled three months thereafter when put upon trial.¹

Discretion of Trial Court. — It is left to the sound discretion of the trial court whether the prisoner should be kept in shackles or not, and the appellate court will not revise its action except in a clear case of the abuse of that discretion.²

(d) **Right of Appeal** — *aa.* IN CIVIL CASES. — In civil cases the right of appeal exists only when specially conferred.³

The Nebraska Constitution⁴ seems to be the only one⁵ which guarantees "the right to be heard in all civil cases in the court of last resort by appeal, error, or otherwise." This provision was said to effect the repeal of a statute requiring leave of court to file a petition in error,⁶ and it has also afforded ground for the refusal to enforce a statute awarding damages for dilatory appeals.⁷ Under this clause it has also been held that a party against whom the trial court rendered judgment without having acquired jurisdiction did not submit to jurisdiction by prosecuting error to the Supreme Court.⁸ But the guaranty is not violated by a statute requiring an appeal bond,⁹ nor by an act denying an appeal from the judgments of justices of the peace where the amount claimed does not exceed twenty dollars.¹⁰

bb. IN CRIMINAL CASES. — In criminal cases the prosecution has usually no right of appeal in the United States¹¹ except where provided by statute.¹²

on the defendant for an inconsiderable length of time, while a few only of the jurors were being called and examined, and were removed before any of the jurors were accepted and sworn, the rights of the accused were not prejudicially affected. *Territory v. Kelly*, 2 N. Mex. 297.

1. Past Conduct Held Not to Justify Use of Shackles. — *State v. Kring*, 64 Mo. 591, the court saying: "There must be some reason, based on the conduct of the prisoner at the time of the trial, to authorize so important a right to be forfeited. When the court allows a prisoner to be brought before a jury with his hands chained in irons, and refuses, on his application, or that of his counsel, to order their removal, the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted even under the surveillance of officers. Besides, the condition of the prisoner in shackles may, to some extent, deprive him of the free and calm use of all his faculties."

2. Court's Discretion. — *Territory v. Kelly*, 2 N. Mex. 297; *Poe v. State*, 10 Lea (Tenn.) 673. That the discretion is not subject to review, see *Faire v. State*, 58 Ala. 74, *Brickell, J.*, dissenting on this point.

In *Poe v. State*, 10 Lea (Tenn.) 673, two prisoners were chained together. The defendant's attorney asked to have the chains removed and the district attorney-general consented thereto. The trial court declined to make the order, saying they were loosely guarded and were desperate men, and if unmanacled, the court was of the opinion that they would, with the assistance of confederates, overpower the guards and escape in the confusion. This was held no error.

3. Appeal in Civil Cases. — *People v. Trezza*, 128 N. Y. 529; *Chicago, etc., R. Co. v. Headrick*, 49 Neb. 286. *Compare Ex p. McCardle*, 7 Wall. (U. S.) 506; *Baltimore, etc., R. Co. v. Grant*, 98 U. S. 398.

4. Nebraska Const., art. I, § 24.

5. See *Stimson's American Stat. Law*, p. 17, § 78. But in *Alabama* (Const., art. 14, § 7) and in *Pennsylvania* (Const. art. 16, § 8) appeals from appraisements by commissioners in eminent domain are guaranteed.

6. *State v. Babcock*, 19 Neb. 239. The statute in question had, however, been repealed by the legislature before this opinion was written. See Neb. Sess. Laws 1877, p. 14.

7. *Moore v. Herron*, 17 Neb. 703. *Compare Garneau v. Omaha Printing Co.*, 42 Neb. 847, where the court declined to overrule the decision first cited, as it had no jurisdiction to pronounce other than a judgment of dismissal.

8. *Hurlburt v. Palmer*, 39 Neb. 158, *overruling Shawang v. Love*, 15 Neb. 142.

9. *School Dist. Number Six v. Traver*, 49 Neb. 524.

10. *Chicago, etc., R. Co. v. Headrick*, 43 Neb. 286.

11. Criminal Cases — Prosecution Has No Appeal — *Georgia*. — *State v. Jones*, 7 Ga. 422.

Illinois. — *People v. Royal*, 2 Ill. 557; *People v. Dill*, 2 Ill. 257; *Martin v. People*, 13 Ill. 341.

Massachusetts. — *Com. v. Cummings*, 3 Cush. (Mass.) 212, 5 Am. Dec. 732.

Missouri. — *State v. Spear*, 6 Mo. 644; *State v. Heatherly*, 4 Mo. 478.

New York. — *People v. Corning*, 2 N. Y. 9, 49 Am. Dec. 364.

North Carolina. — *State v. Jones*, 1 Murph. (N. Car.) 257; *State v. Phillips*, 66 N. Car. 646; *State v. Freeman*, 66 N. Car. 647; *State v. West*, 71 N. Car. 263.

Tennessee. — *State v. Solomons*, 6 Yerg. (Tenn.) 360, 27 Am. Dec. 469.

Texas. — *State v. Daugherty*, 5 Tex. 1. In this state such appeals are prohibited by the Constitution.

Virginia. — *Com. v. Harrison*, 2 Va. Cas. 202.

Wisconsin. — *State v. Kemp*, 17 Wis. 669.

12. Statutory Right of Prosecution to Appeal — *Arkansas*. — *Jones v. State*, 15 Ark. 262.

(2) *Personal Liberty and Security.* — **Personal Liberty** consists in the power of locomotion, of changing situations, or moving one's person to whatever place one's own inclination may direct, without imprisonment or restraint, unless by due process of law.¹

Personal Security has been defined to include security of life, limb, body, health, and reputation.²

Constitutional Guaranties. — These rights are secured by various guaranties in the federal and state constitutions,³ the most important of which are provisions securing the writ of habeas corpus,⁴ prohibiting unreasonable searches and seizures,⁵ and prescribing that no person shall be deprived of life or liberty without due process of law,⁶ and that no person shall be twice put in jeopardy of life or limb for the same offense.⁷ Other guaranties regarding the rights of persons on trial for offenses have been treated elsewhere in this article.⁸ Subsidiary provisions securing these rights are the prohibition of excessive bail⁹ and of cruel and unusual punishment,¹⁰ and the declaration that no person shall be compelled to be a witness against himself in any criminal case.¹¹

(3) *Property Guaranties.* — The most important constitutional provisions securing the right of private property are those that private property shall not be taken for public uses without just compensation,¹² and that no person shall be deprived of property without due process of law.¹³ Other constitutional provisions which are of importance as giving security to the right of private property are treated in various titles in this work, which are referred to in a note.¹⁴

(4) *Other Civil Rights* — (a) **Freedom of Speech and of the Press.** — The first amendment to the Federal Constitution, providing that "Congress shall make no law * * * abridging the freedom of speech, or of the press"¹⁵ is substantially incorporated in all the state constitutions.¹⁶

Iowa. — State v. Douglass, 1 Greene (Iowa) 550.

Kentucky. — Mills v. Brown, 2 Metc. (Ky.) 404; Com. v. Van Tuyl, 1 Metc. (Ky.) 1, 71 Am. Dec. 455; Com. v. Thompson, 13 B. Mon. (Ky.) 159; Com. v. Jefferson, 6 B. Mon. (Ky.) 313.

Nebraska. — The prosecuting attorney is allowed to present to the Supreme Court exceptions on questions of law. Crim. Code, § 515. But this does not affect the judgment of acquittal.

Tennessee. — State v. Fields, Mart. & Y. (Tenn.) 137; Bishop's Crim. Pro., § 1363.

1. 1 Bl. Com. 134.

Liberty is frequently divided into natural, civil, and political liberty. See LIBERTY.

Civil Liberty is natural liberty so far restrained by human laws, and no farther, as is necessary and expedient for the public advantage. 1 Minor's Inst. 64.

Civil liberty exists only where every individual has the right to pursue his own happiness according to his own views, unrestricted except by equal, just, and impartial laws. Field, J., in concurring opinion in Butchers' Union Slaughter-House, etc., Co. v. Crescent City Live Stock Landing, etc., Co., 111 U. S. 758.

2. 1 Minor's Inst. 64.

3. Several state constitutions contain general declarations that men are born equal and free, and have an inalienable right to the pursuit of life, liberty, happiness, etc. See 1 Stimson Am. Stat. Law, §§ 10, 14.

The constitutions of several states also contain a provision abolishing slavery and regu-

lating involuntary servitude by apprenticeship. 1 Stimson Am. Stat. Law, §§ 30, 33. See also *supra*, this section, *In the Federal Constitution — The Thirteenth Amendment.*

4. See the title HABEAS CORPUS.

5. See the titles ARREST, vol. 2, p. 689; SEARCHES AND SEIZURES.

6. See the title DUE PROCESS OF LAW.

7. See the title JEOPARDY.

8. See *supra*, this section, *Jural and Forensic Rights.*

9. See the title BAIL AND RECOGNIZANCE, vol. 3, p. 651.

10. See the title CRUEL AND UNUSUAL PUNISHMENTS.

11. See the title WITNESSES.

12. See the title EMINENT DOMAIN.

13. See the title DUE PROCESS OF LAW.

14. See the titles IMPAIRMENT OF OBLIGATIONS OF CONTRACTS; JURY AND JURY TRIALS; TAXATION.

15. Const. U. S., art. I, amendments. See also the titles LIBEL AND SLANDER; NEWSPAPERS.

16. Stimson's American Statute Law, § 60.

Municipal Restriction on Employees. — A municipal regulation that no member of the police force shall be allowed to solicit aid for any political purpose has been held constitutional, the court saying: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. * * * The city may impose any reasonable condition upon holding offices within

No New Right Created.—The provision in the Federal Constitution confers no new right, but recognizes an existing one, and forbids any action by Congress which shall abridge it.¹

Right of Free Discussion.—Every man has a right to give every public matter a candid, full, and free discussion, being liable only for an abuse of that privilege.²

Inaccurate Report of Court Proceedings.—But punishing as a misdemeanor the publication of a grossly inaccurate report of the proceedings of any court does not abridge the freedom of the press.³

Play Based on Facts of Pending Case.—But a court has no power to enjoin the performance of a certain play based on the facts brought out in a case pending before that court.⁴

Statutes Regulating Circulation of Scandalous and Immoral Matter, etc.—An act to prevent the circulation and sale of newspapers especially devoted to the publication of scandals and accounts of lecherous and immoral conduct is not an invasion of the right to freedom of speech and of the press.⁵ Nor is a law prohibiting the transmission of obscene matter through the mails;⁶ or requiring the taking out of a license before publicly, "by printing, writing, and other methods," professing to treat and cure diseases by the use of drugs, etc.;⁷ or refusing the use of the mails to newspapers containing lottery advertisements;⁸ or making it a misdemeanor to mail lottery tickets, and other literature pertaining thereto;⁹ but it would be a violation of the provision to prevent its

its control." *McAuliffe v. New Bedford*, 155 Mass. 216.

1. For a full discussion of the general subject of liberty of speech and of the press, see the title **LIBEL AND SLANDER**.

"Though the law be solicitous to protect every man in his fair fame and character, it is equally careful that the liberty of speech and of the press should be duly preserved. The liberal communication of sentiment and entire freedom of discussion, in respect to the character and conduct of public men and of candidates for public favor, is deemed essential to the judicious exercise of the right of suffrage, and of that control over their rulers which resides in the free people of the United States. It has, accordingly, become a constitutional principle in this country that every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and that no law can rightfully be passed to restrain or abridge the freedom of speech or of the press." 2 Kent's Com. 17.

"The liberty of the press," said Lord Mansfield, "consists in printing without any previous license, subject to the consequence of law." *Rex v. St. Asaph*, 3 T. R. 428, note a.

2. **Right of Free Discussion.**—*Reg. v. Collins*, 9 C. & P. 456, 38 E. C. L. 180, where it was held that the people have a right to discuss any grievances they have to complain of, but they must not do it in a way to excite tumult; and if a party publish a paper on any such matter, and it contain no more than a calm and quiet discussion, allowing something for a little feeling in men's minds, that will be no libel.

3. *State v. Faulds*, 17 Mont. 140.

4. **Drama Based on Facts of Pending Case.**—One Durrant was upon trial in the city of San Francisco, charged with murder, and while the jury were being impaneled, the peti-

tioner, Dailey, advertised by posters and newspapers that he would produce in a certain theatre in said city a play entitled "The Crime of a Century." Durrant presented an affidavit to the court wherein his trial was then pending, setting forth that said play was based upon the facts of his case and would deprive him of a fair and impartial trial, etc. The court made an order directing Dailey to desist. On review by the Supreme Court this was held to be an infringement of the constitutional right freely to speak and write. *Dailey v. Superior Ct.*, 112 Cal. 94, Justices McFarland and Temple dissenting.

5. **Act to Prevent Circulation of Scandalous and Immoral Paper.**—*Matter of Banks*, 56 Kan. 242; *State v. Van Wye*, 136 Mo. 227, 44 Cent. L. J. 134.

Matter of Banks, 56 Kan. 242. B. was arrested on a charge of having sold a paper alleged to be a newspaper "devoted largely to the publication of scandals, lechery, assignations, intrigues between men and women, and immoral conduct of persons," in violation of the laws of Kansas. The constitutionality of the law was upheld.

An act of the legislature of Missouri, similar to the law of Kansas and directed at the same newspaper, was upheld in *State v. Van Wye*, 136 Mo. 227.

6. **Forbidding Transmission Through Mails of Obscene Matter.**—*U. S. v. Harmon*, 45 Fed. Rep. 414, affirmed in *Harmon v. U. S.*, 50 Fed. Rep. 921, following *Ex p. Jackson*, 96 U. S. 727, and *In re Rapier*, 143 U. S. 110. See also the title **OBSCENITY**.

7. *State v. Bair*, 92 Iowa 28.

8. *Ex p. Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110. See the titles **LOTTERIES**; **POSTAL LAWS**.

9. *In re Rapier*, 143 U. S. 110; *Ex p. Jackson*, 96 U. S. 727. And see the titles referred to in last note.

transportation in any other way as merchandise.¹

Contract to Refrain from Publication in Certain Territory. — A contract to refrain from publishing a newspaper within a certain territory is not void as abridging the freedom of the press.²

Prohibiting Addresses in Public Parks — Profanity. — The legislature may prohibit the delivering of addresses in public parks,³ or the use of profane language in certain places,⁴ without violating the right of free speech.

Inciting Railroad Receiver's Employees to Leave Employ. — Inciting employees of a railroad operated by a receiver to leave his employ, in pursuance of an unlawful combination to prevent the operation of the road, is a contempt, and is not protected by the constitutional guaranties of the right of assembly and free speech.⁵

(b) **Right of Assembly and Petition.** — Congress is forbidden to make any law abridging the right of the people peaceably to assemble and petition the government for a redress of grievances.⁶ The amendment containing this provision is not intended to limit the action of the state governments in respect to their own citizens, but to operate upon the national government only.⁷ The constitutions of all the states except *Minnesota* and *Virginia* have a similar provision.⁸

(c) **Religious Liberty.** — Religious liberty is secured to the people of the United States by provisions in the Federal Constitution and in those of the several states. The effect of these provisions is considered under another title.⁹

2. Form of Government — *a.* **IN GENERAL.** — The oldest and most prevalent classification of the forms of the state is into monarchical, aristocratic, and democratic.¹⁰ This classification, while much criticised of late,¹¹ is firmly rooted in legal terminology and was the one recognized by the framers of the Federal Constitution.

b. **IN THE UNITED STATES — MUST BE REPUBLICAN.** — By Virtue of the Constitution the federal government is republican,¹² and by the express terms of that instrument the same form is guaranteed "to every state in this Union."¹³

Guaranty to the States. — One of the objects of this guaranty was to preserve the harmony of the Union by preventing the existence therein of discordant

1. *Ex p.* Jackson, 96 U. S. 727, followed in *In re Rapiet*, 143 U. S. 110.

2. *Cowan v. Fairbrother*, 118 N. Car. 406.

3. *Com. v. Davis*, 162 Mass. 510, 44 Am. St. Rep. 389.

4. *State v. Warren*, 113 N. Car. 683.

5. *Thomas v. Cincinnati, etc.*, R. Co., 62 Fed. Rep. 803. See the title LABOR COMBINATIONS.

6. Const. U. S., art. I, amendments. See the titles PETITION; UNLAWFUL ASSEMBLY.

7. U. S. *v. Cruikshank*, 92 U. S. 542, the court saying: "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship; and, as such, under the protection of and guaranteed by the United States." The right existed long before the Constitution. The amendment guaranteed the right only against congressional interference.

8. Stimson's American Statute Law, § 63.

9. See the title RELIGIOUS LIBERTY.

10. Aristotle's Politics, bk. 3, c. 6; Ethics, bk. 8, c. 12. Willoughby, Nature of the State (1896), p. 360. Compare Bluntschli, The-

ory of the State (2d Eng. ed.), bk. 6, c. 1; Woodrow Wilson, The State, p. 599.

11. See Willoughby, Nature of the State, p. 360 *et seq.*; Bluntschli, Theory of the State (2d Eng. ed.), bk. 6, c. 1.

Gareis, Allgemeines Staatsrecht, p. 37 *et seq.*, proposes a new classification into responsible and irresponsible governments.

12. See The Federalist, No. 39.

Titles of Nobility — Emoluments and Titles from Foreign Powers. — In addition to the form of government actually provided by the Constitution there is also the express prohibition (art. I, § 9, clause 8) against granting any title of nobility and the acceptance by United States officials of emoluments, titles, etc., from foreign powers. Regarding this last clause, the attorney-general has expressed the opinion that it would prevent a United States marshal from acting, while in that office, as commercial agent of France. See 6 Opinions of Attys.-Gen. 409. The same clause was invoked against James Russell Lowell, who, while United States Minister to England, was tendered the honorary title of Rector of St. Andrew's University, Scotland.

13. U. S. Const., art. 4, § 4. See *State v. Keith*, 63 N. Car. 144; *Penn v. Tollison*, 26 Ark. 577.

and incompatible forms of government.¹

A Republic Has Recently Been Defined as "that form of control in which all executive officers are personally and legally responsible for the manner in which their duties are performed."²

Congress Determines What Is the Established Government of a State. — It rests with Congress to determine what is the established government of a state in order to decide whether it is republican.³

Province of the President. — But for the purpose of protection it is within the province of the President to determine which is the lawful government.⁴

The Judicial Department. — And the courts will follow the determination of these authorities in such particulars.⁵

Admission of States Into the Union. — It would seem to follow from this guaranty of a republican form of government that the admission of a state into the Union is a direct and positive declaration by Congress that the government created by its constitution was republican in form.⁶ But though this is so, such acceptance does not give the force of law to provisions of the state constitution which the constitution of the United States inhibits.⁷

Civil War — Re-establishment of Relations of State with Union. — The duty of the United States to guarantee to each state a republican form of government gives authority to the national government to re-establish the relations of a state with the Union which have been disturbed by civil war.⁸

Declaration of Martial Law by State. — But it does not prevent a state from declaring martial law in an endeavor to put down an armed insurrection too strong to be controlled by the civil authority.⁹

1. The Federalist (Hamilton's ed. 1880), No. 43, pp. 341, 342.

2. Gareis, Allgemeines Staatsrecht, p. 37 (Manquardsen's Handbuch des Oeffentlichen Rechts) quoted by Willoughby, Nature of the State (1896), p. 375; The Federalist (Hamilton's ed. 1880), No. 39, pp. 302, 303.

3. Luther v. Borden, 7 How. (U. S.) 42; Penn v. Tollison, 26 Ark. 575.

4. Luther v. Borden, 7 How. (U. S.) 42.

5. Luther v. Borden, 7 How. (U. S.) 42; Texas v. White, 7 Wall. (U. S.) 700; Calhoun v. Calhoun, 2 S. Car. 294.

6. See Blair v. Ridgely, 41 Mo. 64, 97 Am. Dec. 248.

7. Calhoun v. Calhoun, 2 S. Car. 283.

8. **Civil War — Re-establishment of Relations of a State with the Union.** — "All admit that during this condition of civil war the rights of the state as a member, and of her people as citizens, of the Union, were suspended. The government and the citizens of the state, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion. These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the state with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the national government. The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guarantee to every state in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves

the government of a state, and for the time excludes the national authority from its limits, seems to be a necessary complement to the former." Texas v. White, 7 Wall. (U. S.) 727.

9. "In Relation to the Act of the Legislature Declaring Martial Law, it is not necessary in the case before us to inquire to what extent or under what circumstances that power may be exercised by a state. Unquestionably, a military government, established as the permanent government of the state, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the state authorities. And, unquestionably, a state may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the states of this Union as to any other government. The state itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the state as to require the use of its military force, and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself and to overcome the unlawful opposition." Luther v. Borden, 7 How. (U. S.) 45. And see The Brig Amy Warwick, 2 Black (U. S.) 639.

Among the Implied Rights Which This Guaranty Connates is that of peaceable assembly and petition,¹ the right to remove the seat of government,² to be represented in Congress,³ and the selection of officers directly or indirectly by the people.⁴ The independence and separation of the several departments is also said to be essential to a republican form of government.⁵

3. Frame of Government — The Separation of Powers — *a.* GENERAL VIEW —

(1) *In Theory.* — Constitutional government in the United States is distinguished by the care that has been exercised in committing the legislative, executive, and judicial functions to separate departments, and in forbidding any encroachment by one department upon another in the exercise of the authority so delegated.⁶

The Underlying Theory upon which this tripartite division rests is very ancient. But it was in the written constitutions of the new American states that it was first practically applied.⁷

In Virginia, where, under the colonial system, judges sat in the legislature, the Bill of Rights, adopted in 1776, which marked the transition from province to commonwealth, provided "that the legislative and executive powers of the state should be separate and distinct from the judiciary."⁸

In Other States. — The distributive clause thus originated was inserted in other early constitutions,⁹ and from time to time adopted by the new states. So

1. **Right of Petition.** — "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *U. S. v. Cruikshank*, 92 U. S. 552.

2. **Removal of Seat of Government.** — *Edwards v. Lesueur*, 132 Mo. 439.

3. **Right of Representation in Congress.** — *Paschal*, Annotated Constitution (1882), § 475, citing *Flanders & Hahn's Case*, *Dawes Rep.* 3, Contested Election Cases 446 (Feb. 3, 1863).

4. **Selection of Officers by the People.** — "It may be regarded as a fundamental policy of our system of state governments in this country, that the selection of persons to perform the offices and functions of government shall be left to the people themselves, to be exercised at the ballot box. Indeed, the right and the attribute of the people in respect to the selection of their own officers by methods which they may prescribe in their written constitutions and laws are so firmly fixed in our institutions that the people themselves could not throw them off, to the extent of destroying our republican forms of government, for the people of the states have confided to the general government of the United States the power and duty to guarantee to every state in the Union a government republican in form. Section 4, art. 4, Const. U. S." *Fox v. McDonald*, 101 Ala. 51, 46 Am. St. Rep. 98. See also *Madison in The Federalist* (Hamilton's ed. 1880), No. 39, pp. 302, 303.

5. **Independence of Several Departments of Government.** — *Langenberg v. Decker*, 131 Ind. 471, the court saying: "The division of powers made by our constitution exists in the Federal Constitution, and in most, if not all, of the state constitutions. The powers of these departments are not merely equal; they are exclusive, in respect to the duties assigned to each; and they are absolutely independent of each other. The encroachment of one of these departments upon the other is watched with jealous care, and is generally

promptly resisted, for the observance of this division is essential to the maintenance of a republican form of government. *Wright v. Defrees*, 8 Ind. 298; *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185; *State v. Denny*, 118 Ind. 382; *State v. Noble*, 118 Ind. 350, 10 Am. St. Rep. 143; *Hovey v. State*, 127 Ind. 588, 22 Am. St. Rep. 663."

6. **Separation of the Several Departments.** — *Hare's American Const. Law*, p. 850; *Cooley's Const. Lim.* (6th ed.), p. 104; *Kilbourn v. Thompson*, 103 U. S. 168; *Greenough v. Greenough*, 11 Pa. St. 494, 51 Am. Dec. 567; *Hovey v. State*, 119 Ind. 395; *Merrill v. Sherburne*, 1 N. H. 199, 8 Am. Dec. 52; *Crane v. Meginnis*, 1 Gill & J. (Md.) 463, 19 Am. Dec. 237; *Hoke v. Henderson*, 4 Dev. L. (N. Car.) 1, 25 Am. Dec. 677.

"It is well settled that the apportionment of legislative power to one department of the government will not authorize it to exercise any portion of the judicial power which is apportioned to another department. The apportionment is of itself an implied prohibition upon its exercise by the legislature." *Cooley, J.*, in *Butler v. Saginaw County*, 26 Mich. 27.

7. 'This political maxim made its appearance, in some form, in all the state constitutions formed about the time of the war of the Revolution, and is said to have been borrowed by them of the celebrated Montesquieu's *Spirit of Laws*.' *Crane v. Meginnis*, 1 Gill & J. (Md.) 476, 19 Am. Dec. 237.

8. See 2 *Poore's Charters and Constitutions of the United States*, p. 1909.

9. The following commonwealths, in addition to Virginia, inserted distributive clauses in constitutions adopted prior to 1787:

North Carolina (1776), Const., art. 4. *Georgia* (1777), Const., art. 1. *Maryland* (1777). See *Poore's Charters and Constitutions of the United States*, vol. 1. *Massachusetts* (1780). See *Federalist*, No. 47. *New Hampshire* (1784), art. 37. See *Poore's Charters and Constitutions of the United States*, vol. 1.

that, except in a few instances,¹ all the American state constitutions contain a provision for the separation of governmental powers into legislative, executive, and judicial.² Many of these provide also that neither branch may exercise powers belonging to the other.³

(2) *In Practice* — (a) *Generally*. — But while such is the theory of American constitutional government, it is no longer an accepted canon among political scientists.⁴ It has never been entirely true in practice.⁵

Separation Not Complete. — The courts recognize that the separation of the powers is far from complete,⁶ and that the line of demarkation between them is often indefinite.⁷ Each of the three departments normally exercises powers

1. The constitutions of *Kansas*, *North Dakota*, *Ohio*, *Pennsylvania*, *Washington* and *Wisconsin* contain no such clause.

2. **General Distributive Clauses:** *Alabama* Const., art. 3, § 1; *Arkansas* Const., art. 4, § 1; *California* Const., art. 3, § 1; *Colorado* Const., art. 3, § 1; *Connecticut* Const., art. 2; *Florida* Const., art. 3, § 1; *Georgia* Const., art. 1, § 23; *Idaho* Const., art. 11, § 1; *Illinois* Const., art. 3, § 1; *Indiana* Const., art. 3, § 1; *Iowa* Const., art. 3, § 1; *Kentucky*, sections 27, 28; *Louisiana* Const., § 14; *Maine* Const., art. 3, § 1; *Maryland*, Decl. of Rights, § 8; *Massachusetts* Const., art. 1, § 30; *Michigan* Const., art. 3, § 1; *Minnesota* Const., art. 3, § 1; *Missouri* Const., art. 3, § 1; *Montana* Const., art. 4, § 1; *Nebraska* Const., art. 2, § 1; *Nevada* Const., art. 3, § 1; *New Hampshire* Const. art. 1, § 37; *New Jersey* Const., art. 3; *North Carolina* Const., art. 1, § 8; *Oregon* Const., art. 3, § 1; *Rhode Island* Const., art. 3; *South Dakota* Const., art. 11; *Tennessee* Const., art. II, § 1; *Texas* Const., art. 2, § 1; *Vermont* Const., art. 2, § 6; *Virginia* Const., art. 2, § 1; *West Virginia* Const., art. 5, § 1; *Wyoming* Const., art. 5, § 1.

3. **Restrictive Clause:** *Alabama* Const., art. 3; § 2; *Arkansas* Const., art. 4, § 2; *Idaho* Const., art. 2, § 1; *Kentucky* Const., §§ 27, 28; *Louisiana*, section 15; *Maine* Const., art. 3, § 1; *Michigan* Const., art. 3, § 2; *Mississippi* Const., art. 3, § 2; *Montana*, art. 4, § 1; *Nebraska* Const., art. 2, § 1; *Tennessee* Const., art. 2, § 2; *Wyoming* Const., art. 2, § 1.

4. "Modern Political Science has, however, generally discarded this theory, both because it is incapable of accurate statement, and because it seems to be impossible to apply it with beneficial results in the formation of any concrete political organization." Goodnow, *Comparative Administrative Law* (1893), p. 20, citing *Kirchenheim*.

"The separation of the executive power from the legislative is a dream, though Montesquieu has established the belief that it is one of the great securities of liberty." Goldwin Smith, in *The Bystander*, Toronto, May, 1880. See also Wilson's *Congressional Government*, pp. 235, 306; Stevens's *Sources of the Constitution of the United States* (2d ed.), p. 47.

5. Von Holst, *The Constitutional Law of the United States* (1887), pp. 67, 68.

6. **No Complete Separation of Powers** — *United States*. — Murray v. Hoboken Land, etc., Co., 18 How. (U. S.) 284; Livingston v. Moore, 1 Baldw. (U. S.) 449.

Alabama. — Fox v. McDonald, 101 Ala. 51, 46 Am. St. Rep. 98.

California. — People v. Provines, 34 Cal. 520; Staude v. Election Com'rs, 61 Cal. 313.

Colorado. — Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 31 Am. St. Rep. 284.

Kansas. — *In re Johnson*, 12 Kan. 102; Intoxicating Liquor Cases, 25 Kan. 759, 37 Am. Rep. 284; Martin v. Ingham, 38 Kan. 654; Matter of Sims, 54 Kan. 1.

Maryland. — Crane v. Meginnis, 1 Gill & J. (Md.) 476, 19 Am. Dec. 237.

Rhode Island. — Taylor v. Place, 4 R. I. 338.

Cooley's Const. Law, p. 44; Story on the Constitution, § 525; Hare's American Const. Law, vol. 2, p. 850.

"This article is not to be interpreted as enjoining a complete separation between these several departments. Practically, it has never been so in any of the states in whose fundamental law the principle has been asserted. There are numerous instances to show that it has not been so regarded in this state, for our statute books contain, time and again, laws affording relief where the judiciary possessed ample jurisdiction over the subject-matter. How this kind of legislation came to be introduced, it is useless now to inquire. It was commenced soon after the adoption of the Constitution, probably participated in by some of the framers of that instrument, and has been continued ever since." Baltimore v. State, 15 Md. 457.

"While it is true that the executive, legislative, and supreme judicial powers of the government ought to be forever separate and distinct, it is also true that the science of government is a practical one; therefore, while each should firmly maintain the essential powers belonging to it, it cannot be forgotten that the three co-ordinate parts constitute one brotherhood, whose common trust requires a mutual toleration of the occupancy of what seems to be a common because of vicinage, bordering the domains of each." Brown v. Turner 70 N. Car. 102.

"There are many acts possessing a legislative, executive, or judicial character, especially peculiar to the very nature of our system, and necessarily inherent in it, which time out of mind have not been exclusively exercised by these departments, and which, for the ease and efficiency of our system, could not be so exercised." Per Head, J., in Fox v. McDonald, 101 Ala. 51, 46 Am. St. Rep. 98.

"To some extent, and in some sense, each of the powers [of different departments] must be exercised by every other department of the government in order to the proper performance of its duty." Taylor v. Place, 4 R. I. 332.

7. **Line of Demarkation Indefinite.** — "What would come within the executive power in our form of government would fall within the legislative in another, and *vice versa*. The ques-

which are not strictly within its province.¹

Thus the Executive, by means of the veto shares the legislative power,² and in passing on claims, the judicial power.³

The Legislature may be authorized to exercise the appointing power,⁴ and in adjudicating claims⁵ and as in some states in granting divorces⁶ it acts judicially.

The Courts, too, legislate not alone by decisions which modify the existing law,⁷ but also by making rules,⁸ which often have nearly the force of statutes, and they are not infrequently clothed with the power of appointment.⁹

Local Administration. — Moreover, the application of the "distributive clause" is confined mainly to the sphere of the central government; it finds little observance in local administration.¹⁰

(b) **Interrelations of the Departments — Each Supreme Within its Own Sphere.** — Since all the departments of government derive their authority from the same source, they in equal degree represent the sovereignty, and each within its own sphere is supreme and independent,¹¹ though in practice they often conflict

tion here is whether under our constitution it is executive or legislative; and as the constitution has not confided the appointment of these or the like officers to the executive authorities, and has left it to the legislative discretion whether to create such offices, and how they shall be filled, it cannot be truly said that such an appointment is any more in the nature of the exercise of an executive than of a legislative power." *People v. Hurlbut*, 24 Mich. 63, 9 Am. Rep. 103.

"The boundaries which separate the functions of the different departments are broad, clear, and distinct, as applied to matters affecting property rights or private concern, or the execution or enforcement of existing law; but it is not easy where the constitution is silent to discriminate or formulate definitions, as to what constitutes legislative, executive, or judicial authority, when questions of public policy, or which relate to the best means and agencies for accomplishing a governmental end or of executing the law are involved." *Mitchell, J., in Hovey v. State*, 119 Ind. 395.

1. There are functions which are often performed by one of these departments of such a character that their performance does not necessarily belong to it, and, where such is the case, the authority of the department is not necessarily exclusive, and another department may be required to perform the same or a similar function. *Head, J., in Fox v. McDonald*, 101 Ala. 51, 46 Am. St. Rep. 98.

2. *Opinion to Governor*, 23 Fla. 297.

3. *Watkins v. Holman*, 16 Pet. (U. S.) 60, *per McLean, J.*

4. **Legislature Exercising Appointing Power.** — *Baltimore v. State*, 15 Md. 376.

"In whatever terms they have adopted it, in none of these constitutions are the several departments kept wholly separate and unmixed. In some of them, as in the constitution of this state, the executive is appointed by the legislature, and the judiciary by the executive; and in others the powers of the several departments are still more blended and mingled together." *Crane v. Meginnis*, 1 Gill & J. (Md.) 476, 19 Am. Dec. 237.

5. *Watkins v. Holman*, 16 Pet. (U. S.) 60.

6. See *infra*, this title, *Legislative Divorces*.

7. "The best and most rational portion of

the English law is in the main judge-made law. Our judges have always shown, and still show, a really marvelous capacity for developing the principles of the unwritten law, and applying them to the solution of questions raised by novel circumstances." Sir Frederick Pollock, in 9 *Law Quarterly Review*, 106 (1893).

8. *Watkins v. Holman*, 16 Pet. (U. S.) 60.

9. **Appointment by Judges — Georgia.** — *Russell v. Cooley*, 69 Ga. 215.

Illinois. — *People v. Nelson*, 133 Ill. 600; *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793; *Cornell v. People*, 107 Ill. 372; *People v. Morgan*, 90 Ill. 558.

Indiana. — *Terre Haute v. Evansville, etc., R. Co.*, (Ind. 1897) 46 N. E. Rep. 77.

10. **Distributive Clause Confined to Central Government.** — See the opinions in these cases: *People v. Provines*, 34 Cal. 520; *Staudé v. Election Com'rs*, 61 Cal. 313; *Fox v. McDonald*, 101 Ala. 51, 46 Am. St. Rep. 98.

11. **Each Department Supreme Within Its Own Sphere — Arkansas.** — *Hawkins v. Governor*, 1 Ark. 570, 33 Am. Dec. 346.

California. — *Parsons v. Tuolumne County Water Co.*, 5 Cal. 43, 63 Am. Dec. 76.

Colorado. — *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 156, 31 Am. St. Rep. 284.

Illinois. — *People v. Bissell*, 19 Ill. 229, 68 Am. Dec. 591.

Indiana. — *State v. Noble*, 118 Ind. 350, 10 Am. St. Rep. 143; *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185.

Kansas. — *In re Johnson*, 12 Kan. 102; *Intoxicating Liquor Cases*, 25 Kan. 759, 37 Am. Rep. 284; *Martin v. Ingham*, 38 Kan. 654; *Matter of Sims*, 54 Kan. 1.

Nebraska. — *Turner v. Althaus*, 6 Neb. 54.

Pennsylvania. — *De Chastellux v. Fairchild*, 15 Pa. St. 18, 53 Am. Dec. 570; *Sharpless v. Philadelphia*, 21 Pa. St. 147, 59 Am. Dec. 759.

No department can control or dictate to another department when acting within its proper sphere. *People v. Bissell*, 19 Ill. 229, 68 Am. Dec. 591; *Wright v. Wright*, 2 Md. 429, 56 Am. Dec. 723.

"The government being composed of departments independent of each other, and their powers separated, it follows that each has exclusive cognizance of the matters within

with each other.¹

A Grant of General Powers to one department constitutes of itself an implied exclusion of all other departments from the exercise of such powers² unless the power be conferred on such other departments in express terms,³ or unless the exercise thereof becomes necessary and appropriate to the discharge of other constitutional duties and functions expressly committed to it.⁴ But "the provision in a state constitution dividing the government into three great departments does not prohibit one department from exercising powers of the nature of those belonging to another department unless that power is expressly or impliedly conferred on the other department by the constitution."⁵

b. THE EXECUTIVE — (1) *In General* — *Definition.* — The executive department of a government is that to which the execution and enforcement of the laws is committed.⁶

The President. — In the *United States* the executive power in the federal branch is vested in the president.⁷

its respective jurisdiction, and that when acting within it the authority of each is and must be final and supreme." *Bates v. Kimball*, 2 D. Chip. (Vt.) 89.

1. See the preceding subdivision.

2. *General Grant to One Department* — *Exclusion of Others.* — *Cooley's Const. Lim.* (6th ed.) 104; 1 *Story on the Const.*, §§ 518, 525; *Federalist*, No. 47; *Montesquieu*, *Esprit des Lois*, b. II, c. 6; 1 *Bl. Com.* 146.

And this independently of the constitutional provision that no person or collection of persons, being of one of these departments, shall exercise any power properly belonging to either of the others. *Fox v. McDonald*, 101 Ala. 51, 46 Am. St. Rep. 98.

The creation of a department for the exercise of judicial authority constitutes of itself a delegation to that department of all the judicial power of the sovereignty except as otherwise limited by the constitution itself. *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567; *Alexander v. Bennett*, 60 N. Y. 204; *Van Slyke v. Trempealeau County Farmers' Mut. F. Ins. Co.*, 39 Wis. 390; *Cooley's Const. Law*, p. 45.

"The people, by the adoption of the constitution, created a legislative department upon which they conferred the legislative power, and in granting it in general terms they must be understood to grant the whole legislative power which they possessed, except so far as at the same time they imposed restrictions." *Bridges v. Shallcross*, 6 W. Va. 573.

3. *Dennett*, Petitioner, 32 Me. 508; *Kilbourn v. Thompson*, 103 U. S. 168; *People v. Keeler*, 99 N. Y. 463, 52 Am. Rep. 49; *State v. Warmoth*, 22 La. Ann. 1.

4. *Hovey v. State*, 119 Ind. 395.

The power of the executive and judicial departments in a state government is a grant, not a limitation, while the powers of the legislative department are absolute, except as restricted and limited by the constitution. *People v. Henderson*, (Wyoming 1894) 35 Pac. Rep. 517.

5. *Sawyer v. Dooley*, 21 Nev. 390.

6. *The Executive Department Defined.* — *Wayman v. Southard*, 10 Wheat. (U. S.) 46; *Greenough v. Greenough*, 11 Pa. St. 494, 51 Am. Dec. 567.

An Executive Duty is one "appertaining to

the execution of the laws as they exist." *Opinion to Governor*, 23 Fla. 298. See also *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, as to the nature of executive power.

7. *The Federal Executive.* — *United States Const.*, art. 2, § 1; *Mississippi v. Johnson*, 4 Wall. (U. S.) 500.

"The meaning of this clause is that he is the head of that department; that all its powers and functions immediately or mediately centre in him, and that he, and he alone, is ultimately responsible for their due execution. Certainly, it was never contemplated by the constitution that he alone was to perform, unaided, all the enormous detail of executive duties which fall to this department. These must of necessity be carried on by a vast retinue of subordinate officers, of various grades and functions; but all these officers represent the chief magistrate. In fact, then, the executive department includes the president at its head, as the embodiment of executive power, and the inferior ministerial officers — the cabinet, the foreign ministers, the revenue agents, the postal agents, and the like — who are but representatives of, and answerable to, the chief magistrate. He acts through them; they are his means and instruments for performing executive functions." *Pomeroy's Constitutional Law* (Bennett's ed. 188), § 630.

But, on the other hand, the court, in *Kendall v. U. S.*, 12 Pet. (U. S.) 610, said: "The executive power is vested in a president, and so far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. But it by no means follows that every officer in every branch of that department is under the exclusive direction of the president. Such a principle, we apprehend, is not, and certainly cannot be, claimed by the president. There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the president. But it would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases the duty and responsibility grow out of, and are subject to, the control of the

Governors. — Historically the office of governor was the prototype of the presidency.¹ And it has been said that "the chief magistrate or governor of the state bears the same relation to the state that the president does to the United States."²

Points of Difference. — But there is at least one important difference: that whereas, as has been shown, the president is vested with the federal executive power, in the states the functions pertaining thereto are often distributed among several officers of whom the governor is the most prominent.³ And even though the executive power may be vested in the governor by the state constitution, the legislature may join other state officers with him in constituting a board for the selection of prison directors.⁴

(2) *Encroachments by the Legislature* — (a) **Delegation of Executive Functions.** — When, by the terms of the constitution, certain powers are vested in the executive department, the legislature can neither exercise such powers itself, nor vest them in any other department or officer; nor can it relieve any executive officer from the performance of a duty enjoined upon him by the constitution.⁵ Nor can the legislature, under the guise of prescribing rules for the regulation of the executive department, divest the latter of or preclude it from exercising any of its constitutional functions.⁶

(b) **Appointments and Removals.** — Appointments and removals are by most courts held not to be *per se* executive functions,⁷ though there are contrary

law, and not to the direction of the president. And this is emphatically the case where the duty enjoined is of a mere ministerial character."

1. **State Executives.** — "The fact that in every one of their commonwealths there existed an officer in whom the state constitution invested executive authority, balancing him against the state legislature, made the establishment of a federal chief magistrate seem the obvious course. Assuming that there was to be such a magistrate, the statesmen of the convention, like the solid practical men they were, did not try to construct him out of their own brains, but looked to some existing models. They therefore made an enlarged copy of the state governor, or, to put the same thing differently, a reduced and improved copy of the English king." Bryce, *The American Commonwealth* (2d ed. 1891), vol. 1, p. 36.

The executive provided by the second constitution of *New Hampshire* was styled "President," and the same was true of some of the other colonies.

2. Bowie, C. J., in *Miles v. Bradford*, 22 Md. 184, 85 Am. Dec. 643. See also *Hawkins v. Governor*, 1 Ark. 585, 33 Am. Dec. 346; *Magruder v. Swann*, 25 Md. 173.

For a discussion of the nature and powers of the state governor's office, see *State v. Farwell*, 3 Pin. (Wis.) 426 *et seq.* And compare Bryce, *The American Commonwealth* (2d ed. 1891), vol. 2, c. 41.

3. **In Some States Distribution of Executive Functions.** — "In this state * * * it [the executive power] is vested in the magistracy composing the executive department." *Bledsoe v. International R. Co.*, 40 Tex. 566.

"This rule of associating the executive with administrative officers in the performance of supervisory administrative duties has obtained as to the President of the United States, and in the states of Alabama, Arkansas, California, Colorado, Connecticut, Dakota, Flor-

ida, Illinois, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, Nebraska, New Hampshire, New Jersey, Nevada, New York, North Carolina, Oregon, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, Washington and Wisconsin. In the states named the governor is a member of from one to twelve boards of the character of those of which the governor of this state is a member, as above shown." *French v. State*, 141 Ind. 618.

4. *French v. State*, 141 Ind. 618.

5. *Cooley's Const. Lim.* (6th ed.) 133, 136; *Atty.-Gen. v. Brown*, 1 Wis. 513.

When a Duty Is Devolved upon the Chief Executive of the state, rather than upon an inferior officer, it will be presumed to have been done because his superior judgment, discretion and sense of responsibility were confided in for a more accurate, faithful, and discreet performance than could be relied upon if the duty were imposed upon an officer chosen for inferior duties; and such a duty can seldom be considered as purely ministerial. *Sutherland v. Governor*, 29 Mich. 320.

6. *Cooley's Const. Lim.* (6th ed.) 136.

7. **Appointment Not an Executive Function** — *Alabama*. — *Fox v. McDonald*, 101 Ala. 51, 46 Am. St. Rep. 98.

Indiana. — *Hovey v. State*, 119 Ind. 403.

Maryland. — *Baltimore v. State*, 15 Md. 376.

Michigan. — *People v. Hurlbut*, 24 Mich. 63, 9 Am. Rep. 103.

New York. — *Achley's Case*, 4 Abb. Pr. (N. Y. Supreme Ct.) 35.

"No court has ever asserted that the right to make appointments to office was inherently, and exclusively an executive prerogative without regard to some express constitutional provision or legal enactment conferring the power. * * * The executive has no power of appointment to public office, except as it may relate to those who assist in the discharge

decisions;¹ and unless authority to make them be especially conferred on that department the legislature may vest it elsewhere.²

The Ordinary Constitutional Distributive Clause providing for the complete separation of governmental powers has generally been held insufficient to vest the appointing power solely in the executive.³

Statute Authorizing Judge to Fill Certain Offices. — Thus a statute conferring on a circuit judge the power to fill vacancies in a board of park commissioners is valid.⁴

So a Board of Civil Service Commissioners may be appointed by the legislature for the purpose of prescribing qualifications for officers except such as are otherwise provided for in the constitution.⁵

Prohibition Against Appointment — Designation of Officers Who Shall Appoint. — Even though the state constitution prohibits the legislature from appointing certain officers, it may designate the existing executive officers who shall make such appointments.⁶

In the Absence of an Express Grant of such power to the executive, the legislature itself may make appointments.⁷

Power to Provide Mode of Appointment. — But the power to provide by law the mode of appointment to a new office created by the legislature does not of itself include the power to appoint.⁸

Local Municipal Officers. — And it has been held that the right of local self government in towns and cities was vested in the people of the respective municipalities, and that the legislature could not appoint officers to administer municipal affairs, its power ending with the enactment of laws prescribing the manner of selection and the duties of the officers.⁹ But there is other authority opposed to this.¹⁰ And at any rate appointments thus made for the purpose of primary organization would doubtless be valid.¹¹ An act whereby the

of his personal executive duties, beyond such as is expressly conferred by the constitution, and the laws enacted in obedience thereto," *Hovey v. State*, 119 Ind. 403, *per* Mitchell, J.

1. *Evansville v. State*, 118 Ind. 426; *French v. State*, 141 Ind. 618; *Taylor v. Com.*, 3 J. J. Marsh. (Ky.) 401; *People v. McKee*, 68 N. Car. 429; *State v. Barbour*, 53 Conn. 85, 55 Am. Rep. 65.

2. **In the Absence of Constitutional Restrictions** it is competent for the legislature to provide the manner of making original appointments, the terms of office, how vacancies shall be filled, and when the term of an incumbent appointed to fill a vacancy shall expire. *People v. Osborne*, 7 Colo. 605.

3. *People v. Morgan*, 90 Ill. 558; *Biggs v. McBride*, 17 Oregon 640.

Contra. — *State v. Denny*, 118 Ind. 382.

Legislative Practice — Acquiescence. — The constitution may receive interpretation from long, constant, and uniform legislative practice, and where the legislature has in many instances exercised the power of appointment to office unquestioned, this is evidence of a construction of a constitutional provision concerning the separate nature of the departmental functions, and an acquiescence by the people and the various departments of the government in such practical interpretation. *Baltimore v. State*, 15 Md. 376.

4. *People v. Morgan*, 90 Ill. 558. And see *infra*, this title, *Conferring Power of Appointment on Judges*.

5. *Opinion of Justices*, 138 Mass. 601.

6. **Legislature Prohibited from Appointing**—May

Designate Officers Who Shall Appoint. — *Bridges v. Shallcross*, 6 W. Va. 562.

Under a constitutional provision conferring on the executive the appointment of all officers not otherwise provided for, "unless a different mode of appointment be prescribed by the law creating the office," the legislature may itself designate the officers in the law creating the office. *Baltimore v. State*, 15 Md. 376.

A constitutional provision vesting in the superintendent of public works the power to employ persons in the care and management of public parks is not violated by a statute regulating wages of such employees. *Clark v. State*, 142 N. Y. 101.

7. *People v. Hurlbut*, 24 Mich. 64, 9 Am. Rep. 103; *Collins v. State*, 8 Ind. 345.

8. **Power to Provide Mode of Appointment.** — *State v. Denny*, 118 Ind. 382; *Evansville v. State*, 118 Ind. 426; *State v. Kennon*, 7 Ohio St. 546. See *Davis v. State*, 7 Md. 151, 61 Am. Dec. 331.

9. **Power of Legislature in Case of Municipal Officers — General Rule.** — *State v. Denny*, 118 Ind. 449; *Evansville v. State*, 118 Ind. 426; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Atty. Gen. v. Lothrop*, 24 Mich. 235; *Atty. Gen. v. Detroit*, 29 Mich. 110; *Park Com'rs v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202.

10. *State v. Irwin*, 5 Nev. 111; *State v. Swift*, 11 Nev. 128, 137; *People v. Bennett*, 54 Barb. (N. Y.) 481; *Davis v. State*, 7 Md. 151, 61 Am. Dec. 331.

11. **Appointments for Purpose of Primary Organization.** — *State v. Swift*, 11 Nev. 128; *People*

appointment of members of a board of fire and police commissioners was to be by the legislature was held unconstitutional.¹

Vesting Power of Appointment in Governor. — But similar acts vesting the power of appointment in the governor have been upheld.² When, however, the constitution does confer such power upon the executive department³ or withhold it from the legislative,⁴ the latter cannot appoint by enactment.

Constitution Precluding Legislature from Appointing Officers. — A provision of the constitution precluding the legislature from electing or appointing officers does not invalidate an act creating a board of public works, of which the state officers shall be *ex officio* the members.⁵

Changing Time of Election — Extension of Term of Incumbent. — And an act changing the time of holding an election so that an incumbent holding until his successor qualifies will have his term extended, does not constitute an "appointment to office."⁶

Removals. — When the governor has power to appoint with the consent of the senate, and to remove the appointee, the consent of the senate is not necessary to a removal.⁷

Removal for Specified Causes. — A statute authorizing the governor for certain causes to remove any officer appointed by him, does not conflict with the organic law conferring judicial powers on the courts of a territory.⁸

Conviction for Corruption or Other High Crimes. — A constitutional provision that judges may be removed from office by "conviction for corruption or other high crimes" does not authorize the legislature to enact a law removing a judge from office at its will without giving him a day in court.⁹

(c) **The Pardoning Power — Not Necessarily an Executive Function.** — The pardoning power is not necessarily an executive function, and, when the constitution is silent, belongs no more to one branch of the government than to another.¹⁰

Where Power Conferred on Executive Without Limitation. — But where that function is conferred on the executive without express or implied limitations, the grant is exclusive, and the legislature can neither exercise such power itself¹¹ nor delegate it elsewhere,¹² nor interfere with nor control the proper exercise thereof.¹³

v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103, *per* Cooley, J.

1. *Evansville v. State*, 118 Ind. 426.

2. **Statutes Vesting Power of Appointment in Executive.** — *State v. Seavey*, 22 Neb. 454; *State v. Bemis*, 45 Neb. 724; *People v. Draper*, 15 N. Y. 532, holding that it was no objection that such act divested the local constituencies of the franchise of electing the police officers. But see a criticism of the general doctrine of this case by Allen, J., in *People v. Albertson*, 55 N. Y. 64.

3. **Power Vested in Executive by Constitution.** — *Wood's Case*, 15 Ct. of Cl. 151; *Taylor v. Com.*, 3 J. J. Marsh. (Ky.) 404. See *Baltimore v. State*, 15 Md. 376; *Davis v. State*, 7 Md. 161, 61 Am. Dec. 331; *Matter of Inquiries by Governor*, 58 Mo. 369; *State v. Kennon*, 7 Ohio St. 546.

See *People v. Henderson*, (Wyoming 1894) 35 Pac. Rep. 517, for an opinion containing a full review of the authorities on the question when the governor may fill vacancies within the meaning of a constitutional clause.

4. **Where the Power Withheld from Legislature by Constitution.** — The *Ohio* Constitution provides that the appointment of all officers "shall be made in such manner as may be directed by law. But no appointing power shall be exercised by the general assembly except

as prescribed in this constitution." It was held that the legislature could not appoint members of a board clothed with the power of selecting, appointing, and removing officers not otherwise provided for in the constitution. *State v. Kennon*, 7 Ohio St. 546.

5. *Bridges v. Shallcross*, 6 W. Va. 562.

6. *People v. Batchelor*, 22 N. Y. 128.

7. **Removals.** — *Lane v. Com.*, 103 Pa. St. 481.

8. *Cameron v. Parker*, 2 Okla. 277.

9. *State v. Friedley*, 135 Ind. 119; *State v. Bear*, 135 Ind. 701.

10. *State v. Dunning*, 9 Ind. 20.

A Provision Authorizing the Governor to Pardon "after conviction" has been held not to preclude the legislature from passing an act of pardon and amnesty for parties liable to prosecution but not yet convicted. *State v. Nichols*, 26 Ark. 74, 7 Am. Rep. 600.

11. *State v. Nichols*, 26 Ark. 74, 7 Am. Rep. 600.

12. *Butler v. State*, 97 Ind. 373.

Where the Constitution Confers the Pardoning Power on the Governor, the legislature cannot relieve persons from penalties incurred through violations of penal statutes. *State v. Sloss*, 25 Mo. 291, 60 Am. Dec. 467.

13. *Haley v. Clark*, 26 Ala. 439; *People v. Bircham*, 12 Cal. 50; *Ogletree v. Dozier*, 59 Ga. 800.

Remission of Fines and Penalties. — The foregoing principles apply to the remission of fines and penalties.¹

(a) The Veto Power is not strictly an executive function,² though wherever it exists³ it is exercised by executive officers.⁴

(3) *Encroachments by the Judiciary* — (a) *Mandamus Against the Executive* — aa. **PERFORMANCE OF DISCRETIONARY DUTIES.** — It is well settled that executive officers cannot be compelled by mandamus to perform acts concerning which they are vested with a discretion.⁵ As the executive branch of our state and

A Full Pardon Granted by the President cannot be qualified by a law requiring the recipient to establish loyalty as a condition for asserting legal rights. *Carlisle v. U. S.*, 16 Wall. (U. S.) 147. Nor can he be subjected to a civil suit for acts so pardoned. *U. S. v. McKee*, 4 Dill. (U. S.) 128.

Where Legislature Authorized to Make Regulations in Remission of Penalties by Executive. — But the legislature, under a constitutional provision authorizing it to prescribe regulations to govern the executive in remitting fines and penalties, may require the applicant to forward to the governor with his application the opinion of certain county officers as to the propriety of the remission. *State v. Dunning*, 9 Ind. 20.

Statute Authorizing Prison Board to Make Certain Regulations. — And a statute authorizing the board of managers of the penitentiary to establish rules and regulations under which certain persons then or thereafter under sentence, who had served the minimum term prescribed by law for the crime of which they were convicted, might be allowed to go upon parol under the control of the board and subject to recall at any time, is not an encroachment upon the executive power to grant pardons, reprieves, and commutations. *State v. Peters*, 43 Ohio St. 629; *In re Kline*, 6 Ohio Cir. Ct. Rep. 215.

1. Remission of Fines and Penalties — Intoxicating Liquors. — The legislature may absolve a person from the payment of a fine imposed for selling spirituous liquors. *Adams v. Fragiaco*, 71 Miss. 417.

The Constitution of Alabama confides in the governor the power to remit fines and forfeitures. It was held that any act of the legislature which attempted directly or indirectly to remit a fine either before or after it had been paid was an infringement on executive prerogatives and void. *Haley v. Clark*, 26 Ala. 439. To same effect, see *Butler v. State*, 97 Ind. 375, *disapproving* the declaration of a contrary doctrine in *State v. Speck*, 20 Ind. 211, and *State v. Shideler*, 51 Ind. 64.

Releasing Judgment Entered on a Recognizance. — But in *People v. Bircham*, 12 Cal. 50, a legislative act authorizing a court to release a judgment entered on a recognizance was held valid.

An Act to Relieve Certain Persons from the Penalties of "An Act to Regulate Dramshops," and releasing, on certain prescribed conditions, all persons under indictment for violations of the provisions thereof, was held unconstitutional as an attempted legislative exercise of the pardoning power. *State v. Sloss*, 25 Mo. 291, 69 Am. Dec. 467. See also *State v. Fleming*, 7 Humph. (Tenn.) 152, 46 Am. Dec. 73.

The Power Given by Congress to the Secretary of the Treasury to remit penalties incurred by a steamship for carrying too many passengers is not an infringement of the pardoning power vested in the President. *The Laura*, 114 U. S. 411.

An Act Giving to Parties Imprisoned for Non-payment of Fines the benefit of laws for the relief of insolvent debtors, and authorizing their discharge as such, is not unconstitutional as an attempt to place the pardoning power in other hands than those of the governor of the state. *Ex p. Scott*, 19 Ohio St. 581.

2. Nature of the Veto Power. — See the title VETO.

In Florida, where the constitution authorizes the governor to require the opinion of the supreme judges "upon any question affecting his executive powers and duties," they refused to answer a question as to what class of laws was prohibited by a certain constitutional clause, and whether, in view of this, it would be necessary for him to veto certain bills. The judges said: "The enactment of laws is a legislative duty, and when your excellency is required by the constitution to do any act which is an essential prerequisite thereto, such act is legislative and is performed by you as a part of the law-making power, and not as the law-executing power. We are of the opinion that the question affects a legislative duty imposed by the constitution, and believing that a compliance on our part with your request is unauthorized by the constitution, we, with great respect for your excellency, beg to be excused from expressing opinions on the question submitted." Opinion to Governor, 23 Fla. 298.

In West Virginia, however, a different view is taken. The court, by Lucas, Pres., in *State v. Mounts*, 36 W. Va. 179, said: "I interpret this action of the governor to be deliberative, but not legislative."

3. In Some States Executive Has No Veto Power. — In the states of *North Carolina*, *Ohio*, and *Rhode Island* no veto power is provided. There was formerly none in *Delaware*, but it has been conferred by the Constitution of 1897, art. 3, § 18. In *England* it is practically obsolete, not having been actually exercised since 1707. See Bryce, *The American Commonwealth* (2d ed. 1891), vol. 2, p. 56, note.

4. See *The Veto Power*, Harvard Historical Monographs, No. 1.

5. Mandamus — Performance of Discretionary Acts — *United States*. — *Decatur v. Paulding*, 14 Pet. (U. S.) 497; *Brashear v. Mason*, 6 How. (U. S.) 92; *Reeside v. Walker*, 11 How. (U. S.) 272; *Commissioner of Patents v. Whiteley*, 4 Wall. (U. S.) 522; *U. S. v. Seaman*, 17 How. (U. S.)

federal governments is administered by a variety of officers this principle necessarily has a wide application. It has frequently been applied in respect to fiscal officers.

Secretary of the Treasury. — Thus mandamus will not be granted against the secretary of the treasury to compel him to draw his warrant for the payment of money,¹ or to make credits on the treasury books,² whenever such acts involve the exercise of discretionary power.

State Auditors. — State officers, whose duties it is to audit public accounts, cannot be controlled in the exercise thereof by mandamus.³

The Commissioner of the General Land Office cannot be compelled by mandamus to issue a land patent,⁴ or to cancel a land entry.⁵

Secretary of the Navy. — Mandamus will not lie against the secretary of the navy to compel him to pay an officer, or to allow a pension.⁶

The Judgment of the Commissioner of Patents as to whether or not an applicant is an assignee with interest, within the meaning of a certain statute, cannot be controlled by mandamus.⁷

And the Superintendent of Insurance, who is endowed with the power of approving charges for examining insurance companies cannot be compelled by mandamus to audit a bill for such services.⁸

Governor. — Moreover, whatever view is adopted as to the power of the judiciary to grant the extraordinary writ against the governor of a state, it is agreed in all quarters that this will never be done so as to control the discretion of that officer.⁹

Thus the writ has been denied where it was sought in order to compel the governor to issue a commission to a claimant to an office,¹⁰ or, when acting as

225; *U. S. v. Guthrie*, 17 How. (U. S.) 284; *U. S. v. Windom*, 137 U. S. 636; *U. S. v. Commissioner*, 5 Wall. (U. S.) 563; *Gaines v. Thompson*, 7 Wall. (U. S.) 347; *Secretary v. McGarrahan*, 9 Wall. (U. S.) 298; *U. S. v. Schurz*, 102 U. S. 378; *U. S. v. Black*, 128 U. S. 40.

District of Columbia. — *U. S. v. Boutwell*, 3 MacArthur (D. C.) 172.

Florida. — *Towle v. State*, 3 Fla. 202.

Louisiana. — *State v. Cavanac*, 30 La. Ann. 237; *State v. Johnson*, 28 La. Ann. 932; *State v. Dubuclet*, 28 La. Ann. 85.

Maryland. — *Miles v. Bradford*, 22 Md. 170, 85 Am. Dec. 643; *Green v. Purnell*, 12 Md. 329.

Michigan. — *Ambler v. Auditor Gen.*, 38 Mich. 746.

Missouri. — *State v. Fletcher*, 39 Mo. 388.

Nebraska. — *State v. Babcock*, 18 Neb. 221; *State v. Benton*, 25 Neb. 834.

New York. — *Matter of Murphy*, 24 Hun (N. Y.) 597.

Texas. — *Chalk v. Darden*, 47 Tex. 438.

1. *U. S. v. Guthrie*, 17 How. (U. S.) 284; *U. S. v. Boutwell*, 3 MacArthur (D. C.) 172. Compare *U. S. v. Windom*, 137 U. S. 636.

2. *Reeside v. Walker*, 11 How. (U. S.) 272.

3. *State Fiscal Officers — Louisiana.* — *State v. Dubuclet*, 28 La. Ann. 85.

Maryland. — *Green v. Purnell*, 12 Md. 329.

Michigan. — *Ambler v. Auditor Gen.*, 38 Mich. 746.

Texas. — *Chalk v. Darden*, 47 Tex. 438.

4. *Commissioner of General Land Office.* — *U. S. v. Commissioner*, 5 Wall. (U. S.) 563; *Secretary v. McGarrahan*, 9 Wall. (U. S.) 298.

For an instance in which mandamus will lie against this department, see *U. S. v. Schurz*, 102 U. S. 378.

5. *Gaines v. Thompson*, 7 Wall. (U. S.) 347.

The remedy sought in this case was injunction, but the court considered it upon principles applicable to mandamus.

6. *Decatur v. Paulding*, 14 Pet. (U. S.) 497.

As to *When Mandamus Will Lie Against the Commissioner of Pensions*, see *U. S. v. Black*, 128 U. S. 40.

7. *Commissioner of Patents.* — *Commissioner of Patents v. Whiteley*, 4 Wall. (U. S.) 522. See *Butterworth v. Hoe*, 112 U. S. 50.

8. *Superintendent of Insurance.* — *Matter of Murphy*, 24 Hun (N. Y.) 592.

9. *Governor's Discretion Not Subject to Control — California.* — *Berryman v. Perkins*, 55 Cal. 483.

Colorado. — *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 156, 31 Am. St. Rep. 284.

Florida. — *State v. Drew*, 17 Fla. 67.

Indiana. — *Hovey v. State*, 127 Ind. 588, 22 Am. St. Rep. 663, explaining *Gray v. State*, 72 Ind. 567.

Maryland. — *Miles v. Bradford*, 22 Md. 170, 85 Am. Dec. 643; *Worman v. Hagan*, 78 Md. 152; *Magruder v. Swann*, 25 Md. 173, the court saying: "The governor, in his political and executive duties requiring the exercise of his judgment and discretion, is entirely independent of any other authority. But all judicial power is as absolutely committed to the judiciary department, as political or executive power is to the governor. Among these judicial duties is the decision of controversies between man and man, whether they involve the right to office, life, liberty, or property, or arise under the provisions of the constitution, statute or common law."

Missouri. — *State v. Fletcher*, 39 Mo. 388.

10. *Hovey v. State*, 127 Ind. 588, 22 Am. St. Rep. 663; *State v. Fletcher*, 39 Mo. 388. But

canvasser, to count or exclude votes in a certain way.¹

bb. PERFORMANCE OF MINISTERIAL, COLLATERAL, AND IMPERATIVE DUTIES — (aa) Control of Chief Executive — aaa. Doctrine that Writ Will Not Issue. — Applying strictly the theory of the tripartite division of governmental powers, the courts of the majority of the jurisdictions where the question has been decided have held that there was no power on the part of the judiciary to enforce by mandamus the performance of any duty whether discretionary or ministerial, by the chief executive of a state.²

In *Missouri* the supreme court has even gone so far as to say that such proceedings would be unauthorized even where the executive submitted himself to its jurisdiction.³

see *infra*, the subdivision *Control of Chief Executive*.

1 Miles *v.* Bradford, 22 Md. 170, 85 Am. Dec. 643.

2. Ministerial, Collateral, and Imperative Duties — View that Writ Will Not Lie — *Arizona*. — Territorial Insane Asylum *v.* Wolfley, 22 Pac. Repl. 383.

Arkansas. — Hawkins *v.* Governor, 1 Ark. 570, 33 Am. Dec. 346.

Florida. — State *v.* Drew, 17 Fla. 67.

Georgia. — State *v.* Towns, 8 Ga. 360.

In the earlier case of Bonner *v.* State, 7 Ga. 473, language is used *obiter* which appears inconsistent with the case first cited.

Illinois. — People *v.* Cullom, 100 Ill. 472; People *v.* Yates, 40 Ill. 126; People *v.* Bissell, 19 Ill. 229, 68 Am. Dec. 591.

In People *v.* Palmer, 64 Ill. 41, where the governor voluntarily submitted to jurisdiction, the writ was denied on other grounds.

Iowa. — In State *v.* Kirkwood, 14 Iowa 162, a writ against the governor was denied, but without a discussion of jurisdictional grounds.

Louisiana. — State *v.* Warmoth, 22 La. Ann. 1; State *v.* Board of Liquidation, 42 La. Ann. 647.

Maine. — Dennett, Petitioner, 32 Me. 508.

Michigan. — Sutherland *v.* Governor, 29 Mich. 320; Ayres *v.* State Auditors, 42 Mich. 422.

Minnesota. — Rice *v.* Austin, 19 Minn. 103, 18 Am. Rep. 330; Chamberlain *v.* Sibley, 4 Minn. 309.

In Minnesota, etc., R. Co. *v.* Sibley, 2 Minn. 13, the writ had been allowed.

Missouri. — State *v.* Stone, 120 Mo. 428, 41 Am. St. Rep. 705, explaining State *v.* Fletcher, 39 Mo. 388.

In Pacific R. Co. *v.* Governor, 23 Mo. 353, 66 Am. Dec. 673, the court granted the rule nisi against the chief executive, reserving the question of its right to allow a peremptory writ of mandamus.

New Jersey. — State *v.* Governor, 25 N. J. L. 331.

Rhode Island. — Mauran *v.* Smith, 8 R. I. 192, 5 Am. Rep. 564.

South Dakota. — Woods *v.* Sheldon, (S. Dak. 1896) 69 N. W. Rep. 602, particularly the opinion of Fuller, J.

Tennessee. — Bates *v.* Taylor, 87 Tenn. 319; Jonesboro, etc., Turnpike Co. *v.* Brown, 8 Baxt. (Tenn.) 490, 35 Am. Rep. 713.

Texas. — Bledsoe *v.* International R. Co., 40 Tex. 537; Galveston, etc., R. Co. *v.* Gross, 47 Tex. 428; Chalk *v.* Darden, 47 Tex. 438; Hous-

ton Tap, etc., R. Co. *v.* Randolph, 24 Tex. 317, the court in the latter case saying: "If the governor were to dictate to the judges the judgments to be pronounced, and enforce obedience by his power over the militia, the usurpation would be startling indeed, and too plain for discussion; not any more so in principle, however, than for the district court of Travis county, or for the supreme court of the state, to require by its mandate that the governor of the state shall sign a patent to land, or the comptroller shall audit an account, or the treasurer of the state shall pay a draft on the treasury."

All of the foregoing are cases in which the writ was prayed for as against other officers than the governor, but the reasoning of the court in deciding them is applicable *a fortiori* to the chief executive. The right to issue the writ as against other executive officers than the governor is now provided for by a constitutional amendment. See 85 Tex. 622.

Wisconsin. — See State *v.* Harvey, 11 Wis. 33, where the writ was prayed for against the secretary of state to compel him to issue a patent for certain lands, and the court said: "The school land commissioners are required to issue patents, and the statute provides that they shall be signed by the governor, and this court has frequently refused to attempt by mandamus to compel the executive to perform that duty, which the law devolves upon him."

3. Waiver of Jurisdiction. — State *v.* Stone, 120 Mo. 428, 41 Am. St. Rep. 705, the court saying: "The fact that the governor has voluntarily submitted himself to the jurisdiction of this court has been pressed upon our attention as a reason why we should pass on or adjudicate the question submitted; and cases have been cited, among them Pacific R. Co. *v.* Governor, 23 Mo. 360, 66 Am. Dec. 673, as showing that where the governor does not claim his exemption then this court may adjudicate the matters at issue and leave the governor to claim his exemption afterwards. But we regard such cases as wrong in theory and unsafe and unsound in practice. If we have authority to render a judgment, then we have jurisdiction to enforce that judgment by all appropriate process, and need not inquire whether any exemption from that process will be pleaded. If, however, we have no jurisdiction over the chief magistrate, his consent will not confer it on us. We will not 'assume a jurisdiction if we have it not;' we will not sit as a moot court and pass upon questions and enter a judgment thereon which we are

Though in Illinois it was said that the court might exercise this power with the consent of the governor.¹

bbb. Doctrine that Writ Will Issue in Such Cases — Reasons of Rule. — Under the rule adopted in eleven of the states a distinction is drawn between such acts and duties of the executive as are discretionary and such as are termed ministerial, and it is held that the performance of the latter may be enforced by the aid of the extraordinary writ of mandamus.² In this line of cases the courts recognize the threefold division of governmental powers, but urge that they are bound to give effect to the maxim *ubi jus ibi remedium*, and that the constitutional arrangement above referred to was never intended to deny the enforcement of private rights even against the executive, as would often result were none of his acts amenable to judicial control.³ It is also argued that such a doctrine is necessary to preserve the even balance of governmental powers and to prevent the executive branch from increasing its authority at the expense of the others.⁴

What Duties Are Ministerial Within the Meaning of This Rule. — A Ministerial Act within the meaning of the doctrine now under discussion has been judicially defined as "one which a person performs under a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or exercise of his own judgment upon the propriety of the act being done."⁵

powerless to enforce. 'For all jurisdiction implies superiority of power; authority to try would be vain and idle without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it.' 1 Cooley's Blackstone 242."

1. *People v. Bissell*, 19 Ill. 229, 68 Am. Dec. 591; *People v. Palmer*, 64 Ill. 41.

2. View that Writ Will Issue — *Alabama*. — *Tennessee, etc.*, R. Co. v. Moore, 36 Ala. 371. *California*. — *Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 432; *Stuart v. Haight*, 39 Cal. 87; *Middleton v. Low*, 30 Cal. 596.

Colorado. — *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 156, 31 Am. St. Rep. 284.

Indiana. — *Gray v. State*, 72 Ind. 567; *Baker v. Kirk*, 33 Ind. 517; *Governor v. Nelson*, 6 Ind. 496.

In the two latter cases the writ seems to have been allowed without considering the jurisdictional questions involved. The force of the three foregoing adjudications is somewhat shaken by *Hovey v. State*, 127 Ind. 588, 22 Am. St. Rep. 663.

Kansas. — *Martin v. Ingham*, 38 Kan. 641; *State v. St. John*, 21 Kan. 591, where the writ was granted without discussion of the jurisdictional grounds.

Maryland. — *Groome v. Gwinn*, 43 Md. 572; *Magruder v. Swann*, 25 Md. 173.

Montana. — *Chumasero v. Potts*, 2 Mont. 242.

Nebraska. — *State v. Thayer*, 31 Neb. 82.

Nevada. — *State v. Adams*, 19 Nev. 370; *State v. Blasdel*, 4 Nev. 241. In neither of these cases does the opinion contain any discussion of the right to grant mandamus under the facts there presented, and in the second case the writ was refused on the ground that the relator had not taken the proper steps to entitle him to the relief claimed, but the right to grant the writ seems to have been recognized.

North Carolina. — *Cotten v. Ellis*, 7 Jones L. (N. Car.) 545.

Ohio. — *State v. Chase*, 5 Ohio St. 528.

3. *Magruder v. Swann*, 25 Md. 173. See also

Groome v. Gwinn, 43 Md. 572; *Cotten v. Ellis*, 7 Jones L. (N. Car.) 545; *Tennessee, etc.*, R. Co. v. Moore, 36 Ala. 371.

4. *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 156, 31 Am. St. Rep. 284 the court saying: "The departments are distinct from each other, and, so far as any direct control or interference is concerned, are independent of each other. More, they are superior in their respective spheres. Nevertheless, indirectly, or, perhaps it should be said incidentally, by the action or non-action of one department the powers of the others may be more or less affected. The governor may refuse to exercise some of his governmental or political powers, or may exercise them in such a way as to embarrass the other departments. The legislature by passing or refusing to pass certain laws may affect both the executive and judicial departments. So the judiciary in passing upon a statute which has received both legislative and executive approval may give it a construction different from what its authors intended, thus affecting or perhaps defeating its operation. Thus it appears that the different departments, though separate, distinct, and independent to a certain extent, are by no means absolute. The distribution of governmental powers to different departments was obviously intended as a check upon the exercise of arbitrary power by any department; thus a government of balanced powers was established with checks and counter-checks for the better protection of society and the better security of private rights and individual interests."

5. Ministerial Act Defined. — *Flournoy v. Jeffersonville*, 17 Ind. 174, 79 Am. Dec. 468. Quoted with approval in *Gray v. State*, 72 Ind. 567.

In *Mississippi v. Johnson*, 4 Wall. (U. S.) 475, the court, per Chase, C. J., thus defines the phrase: "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple definite

Illustrations. — The writ seems to have been most frequently granted in such cases to compel the chief executive to issue commissions to newly elected officials,¹ or to perform acts as a member of a board of election canvassers.² It has also been allowed to compel him to issue patents³ or warrants⁴ in the sale of state lands; to accept a bond executed by a railroad company to secure a loan from the state;⁵ to redeem certain state bonds as required by statute;⁶ to issue a proclamation to show that a banking company was authorized to commence business;⁷ to issue a warrant for the payment of an officer's proper salary;⁸ and even to authenticate a bill submitted to his approval by the legislature, but not properly returned.⁹

Limitation — Right Must Be Clear. — Of course, even in those jurisdictions where this doctrine prevails, a writ is subject to its ordinary limitations and will not be granted unless the relator's right is clear.¹⁰

(bb) *Other Officers than Governor.* — In some of the states the doctrine that mandamus against the governor will not issue has been extended so as to apply to other state executive officers,¹¹ and to prohibit the issuance of the writ against the secretary of state,¹² the state treasurer,¹³ the state comptroller,¹⁴ or the

duty, arising under conditions admitted or proved to exist and imposed by law."

In *Bledsoe v. International R. Co.*, 40 Tex. 537, the court says: "The word 'ministerial' has reference generally to an act done under authority of a superior; and in this sense it could never apply to the chief executive with respect to anything required by the legislative authority. The word 'discretion' strictly applies to but few acts. The governor has a discretion in the exercise of the pardoning power, and sometimes a court in determining the amount of a fine; but the instances are few indeed where an officer, executive or judicial, in exercising the functions of his office is left to act solely at his discretion. 'The discretion of a judge is said to be the law of tyrants.' Bouvier. So, also, the word 'judgment' most generally has reference to some determination by a judicial tribunal. It is evident then that these words are not to be used in a restricted sense. Where the line of demarkation lies between a ministerial act and an act involving the exercise of judgment is not always easy to determine."

See also the opinion of the court in *Houston Tap, etc., R. Co. v. Randolph*, 24 Tex. 317, where mandamus was prayed for against the state treasurer to compel him to pay over money on a certain warrant. And see *Decatur v. Paulding*, 14 Pet. (U. S.) 497.

1. Issuance of Commissions — *Indiana*. — *Baker v. Kirk*, 33 Ind. 517; *Governor v. Nelson*, 6 Ind. 496.

In the later case of *Hovey v. State*, 127 Ind. 588, 22 Am. St. Rep. 663, it is held that the writ cannot be granted for this purpose.

Maryland. — *Groome v. Gwinn*, 43 Md. 572; *Magruder v. Swann*, 25 Md. 173.

See also *State v. St. John*, 21 Kan. 591, where the writ was issued to compel the governor to appoint a census enumerator. In *Missouri* an application for a writ to compel the governor to issue a commission was denied. *State v. Fletcher*, 39 Mo. 388. See also *Bonner v. State*, 7 Ga. 483, and compare with this case, *State v. Towns*, 8 Ga. 360.

2. Acts as Member of Board of Election Canvassers. — *Chumasero v. Potts*, 2 Mont. 242; *State v. Thayer*, 31 Neb. 82.

But in *Miles v. Bradford*, 22 Md. 182, 85 Am. Dec. 643, the prayer for a writ commanding the governor as a state commissioner to count certain votes and exclude others was denied.

3. Issue of Land Patent. — *Middleton v. Low*, 30 Cal. 596; *Greenwood, etc., Co. v. Routt*, 17 Colo. 156, 31 Am. St. Rep. 284; *State v. Blasdel*, 4 Nev. 241.

4. Stuart v. Haight, 39 Cal. 87.

5. Tennessee, etc., R. Co. v. Moore, 36 Ala. 371.

6. Gray v. State, 72 Ind. 567.

7. State v. Chase, 5 Ohio St. 528.

8. Cotten v. Ellis, 7 Jones L. (N. Car.) 545.

9. Harpending v. Haight, 39 Cal. 189, 2 Am. Rep. 432.

10. Martin v. Ingham, 38 Kan. 641; *State v. Adams*, 19 Nev. 370.

11. Other State Officers — *Illinois*. — *People v. Hatch*, 33 Ill. 9.

Louisiana. — *State v. Deslonde*, 27 La. Ann. 71.

Minnesota. — *State v. Braden*, 40 Minn. 174; *State v. Whitcomb*, 28 Minn. 50; *Western R. Co. v. De Graff*, 27 Minn. 1; *State v. Dike*, 20 Minn. 363.

Texas. — *Galveston, etc., R. Co. v. Gross*, 47 Tex. 428; *Chalk v. Darden*, 47 Tex. 438; *Bledsoe v. International R. Co.*, 40 Tex. 537; *Houston Tap, etc., R. Co. v. Randolph*, 24 Tex. 317. But see *Kuechler v. Wright*, 40 Tex. 600, explained in *Galveston, etc., R. Co. v. Gross*, 47 Tex. 428.

In 1891 an amendment to the constitution was adopted which authorized the legislature to confer on the supreme court original jurisdiction to issue writs of mandamus except as against the governor. See 85 Tex. 622.

Wisconsin. — See *State v. Harvey*, 11 Wis. 33.

12. Secretary of State. — *People v. Hatch*, 33 Ill. 9; *State v. Deslonde*, 27 La. Ann. 71; *State v. Dike*, 20 Minn. 363. Compare *State v. Harvey*, 11 Wis. 33.

13. State Treasurer. — *State v. Dike*, 20 Minn. 363; *Houston Tap, etc., R. Co. v. Randolph*, 24 Tex. 317.

14. State Comptroller. — *Bledsoe v. International R. Co.*, 40 Tex. 537; *Chalk v. Darden*, 47 Tex. 438.

state land commissioner.¹

Contrary Doctrine. — As in the case of the chief executive, however, there are other jurisdictions which hold that the performance of ministerial duties by these minor federal and state executive officers may be compelled by mandamus.²

Illustrations. — Thus it has been held that the writ might issue against the federal secretary of state,³ and the postmaster-general requiring him to allow certain credits to mail contractors,⁴ to the secretary of the interior,⁵ commissioner of patents,⁶ commissioner of pensions,⁷ and first comptroller of the treasury,⁸ compelling them to perform duties concerning which they were vested with no discretion. Under similar circumstances, the writ has been allowed against the state comptroller⁹ or auditor,¹⁰ the state treasurer,¹¹ and the secretary of state.¹² But in all these cases the relator must be without other adequate and specific remedy.¹³

(b) Injunction Against the Executive — The Diversity of Opinion among the courts with reference to their power to control the executive through mandamus exists also in reference to the writ of injunction.

The President. — And it has been held on the one hand that the President of the United States could not be enjoined from carrying into effect an act of Congress providing for the government of the states lately in rebellion, and this regardless of whether he was described in the bill officially or simply as a citizen.¹⁴

1. **State Land Commissioner.** — *State v. Braden*, 40 Minn. 174; *State v. Whitcomb*, 28 Minn. 50; *Galveston, etc., R. Co. v. Gross*, 47 Tex. 428.

2. **United States.** — *Marbury v. Madison*, 1 Cranch (U. S.) 137; *Kendall v. U. S.*, 12 Pet. (U. S.) 524; *U. S. v. Schurz*, 102 U. S. 378; *Butterworth v. Hoe*, 112 U. S. 50; *U. S. v. Black*, 128 U. S. 40.

Arkansas. — See *Pritchard v. Woodruff*, 36 Ark. 196.

California. — *McCauley v. Brooks*, 16 Cal. 11; *People v. Whitman*, 6 Cal. 659.

Kansas. — *State v. Francis*, 23 Kan. 495; *Crans v. Francis*, 24 Kan. 750.

Michigan. — *Ayres v. State Auditors*, 42 Mich. 422.

Ohio. — *Citizens' Bank v. Wright*, 6 Ohio St. 318.

3. *U. S. v. Bayard*, 5 Mackey (D. C.) 428; *Marbury v. Madison*, 1 Cranch (U. S.) 137. In the latter case the writ was denied for want of jurisdiction in the court, but the right to issue it was affirmed, though the language used is *obiter*.

In *U. S. v. Bayard*, 4 Mackey (D. C.) 310, the writ was denied.

4. *Kendall v. U. S.*, 12 Pet. (U. S.) 524.

5. *U. S. v. Schurz*, 102 U. S. 378.

6. *Butterworth v. Hoe*, 112 U. S. 50.

7. *U. S. v. Black*, 128 U. S. 40.

8. *Mississippi v. Durham*, 4 Mackey (D. C.) 235.

9. *People v. Whitman*, 6 Cal. 659.

10. *Citizens' Bank v. Wright*, 6 Ohio St. 318; *Bryan v. Cattell*, 15 Iowa 538; *Ayres v. State Auditors*, 42 Mich. 422. Compare *Lindsey v. Kentucky*, 3 Bush (Ky.) 231.

11. *Pritchard v. Woodruff*, 36 Ark. 196; *Crans v. Francis*, 24 Kan. 750; *State v. Francis*, 23 Kan. 495; *La Grange Tp. v. State Treasurer*, 24 Mich. 468; *State v. Hastings*, 15 Wis. 83.

12. *Illinois.* — *People v. Secretary of State*, 58 Ill. 90.

Kansas. — *State v. Barker*, 4 Kan. 379, 96 Am. Dec. 175.

Wisconsin. — *State v. Doyle*, 40 Wis. 175, 22 Am. Rep. 692.

13. *Chisholm v. McGehee*, 41 Ala. 192.

14. **Injunction — The President.** — In *Mississippi v. Johnson*, 4 Wall. (U. S.) 475, Chief Justice Chase, in delivering the opinion, after reviewing prior federal decisions in which the writ was granted against executive officers, says: "In each of these cases nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance it was held might be required by mandamus. Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as commander-in-chief. The duty thus imposed upon the President is in no just sense ministerial. It is purely executive and political. An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.' It is true that in the instance before us the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under legislation

Secretary of the Interior. — So the federal Supreme Court refused to authorize an injunction against the secretary of the interior prohibiting him from canceling a land entry.¹

Governor — Secretary of State — State Treasurer. — In *Minnesota* an injunction was denied as against the governor,² and in other jurisdictions as against the secretary of state.³ In *Kansas*, however, it was said that the ministerial duties of the governor might be controlled by injunction,⁴ and the same writ has been allowed there against the state treasurer.⁵

Diversion of Funds by State Officers. — In the federal Circuit Court state officers were enjoined from diverting a fund collected by taxation and set apart to pay certain bonded indebtedness.⁶

Payment of Salary — Office Abolished. — And in *England* the lords of the treasury were enjoined from paying a salary to a claimant to an office which had been abolished.⁷

(c) **Subpœna to the Executive — Secrets of State — Public Documents.** — It is well settled that public officials are not bound to disclose state secrets or to submit public papers to judicial scrutiny.⁸

Chief Executive as a Witness. — Partly on this ground, and partly because of the immunity of the executive from judicial control on account of the tripartite separation of powers, it seems now to be undisputed that courts cannot compel the attendance of the chief executive as a witness.⁹

Thus in the Famous Trial of Aaron Burr for treason, while a subpœna *duces tecum* was issued against President Jefferson requiring him to appear with a certain letter, no process was allowed to compel attendance upon the President's refusal.¹⁰

alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion. * * * Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court, and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?"

1. *Gaines v. Thompson*, 7 Wall. (U. S.) 347.

2. *Western R. Co. v. De Graff*, 27 Minn. 1, 58 Am. Rep. 375.

3. *Smith v. Myers*, 109 Ind. 1; *Doyle v. Continental Ins. Co.*, 94 U. S. 535. The latter case, however, was determined on different grounds than the immunity of the respondent from judicial process.

4. *Martin v. Ingham*, 38 Kan. 641 (dictum).

5. *Atchison, etc., R. Co. v. Howe*, 32 Kan. 737; *State v. Francis*, 26 Kan. 724.

6. *Chaffraix v. Board of Liquidation*, 11 Fed. Rep. 638.

7. *Ellis v. Grey*, 6 Sim. 214.

8. *State Secrets — Public Papers.* — Greenleaf

on Evidence, § 251; Wharton on Evidence, § 604; *Beatson v. Skene*, 5 H. & N. 838; *Hartranft's Appeal*, 85 Pa. St. 433, 27 Am. Rep. 667.

9. **Attendance of Chief Executive as Witness Cannot Be Compelled** — *United States*. — U. S. v. Burr. See this reported by Westcott & Co. in three volumes (Washington 1807); Hopkins & Earle (Phila. 1808).

Minnesota. — Process of this kind was refused by a *nisi prius* judge in 1897 to compel the governor of that state to produce certain evidence.

New Jersey. — *Thompson v. German Valley R. Co.*, 22 N. J. L. 111.

Pennsylvania. — *Hartranft's Appeal*, 85 Pa. St. 433, 27 Am. Rep. 667; *Gray v. Pentland*, 2 S. & R. (Pa.) 23.

10. **Trial of Aaron Burr.** — See Report of Burr's Trial by Westcott & Co., 3 vols. (Washington 1807); Hopkins & Earle (Phila. 1808).

Chief Justice Marshall, who presided at this trial and issued the subpœna, is reported to have said: "I suppose it will not be alleged in this case that the President ought to be considered as having offered a contempt to the court in consequence of his not having attended, notwithstanding the subpœna was awarded agreeably to the demand of the defendant; the court would indeed not be asked to proceed as in the case of an ordinary individual." Burr's Trial (Westcott & Co.'s ed., Washington 1807), vol. 3, p. 37.

And in Hopkins & Earle's edition (Phila. 1808), vol. 2, p. 536, he is thus quoted: "In no case of this kind would the court be required to proceed against the President as against an ordinary individual. The objections to such a course are so strong and obvi-

Directing Governor to Produce in Court Engrossed Copy of Statute and Deposition. — The same doctrine has been applied where the governor of a state refused to obey a subpoena directed to him as an individual and requiring him to produce in court an engrossed copy of a statute ¹ and deposition.²

Appearance Before Grand Jury. — And also where that officer had been subpoenaed to appear before the grand jury and give testimony concerning riots which were under investigation.³

c. THE LEGISLATURE — (1) *Nature and General Scope of Power.* — To the legislative department of government is confided the authority under the constitution or frame of government to make, alter, or repeal laws.⁴

Scope and Extent. — So great is the scope and effect of this authority that, in the absence of constitutional restrictions, the department wielding it might

ous that all must acknowledge them. * * * In this case, however, the President has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it he himself is the judge."

1. *Thompson v. German Valley R. Co.*, 22 N. J. Eq. 111.

2. *Gray v. Pentland*, 2 S. & R. (Pa.) 23.

3. **Appearance of Governor Before Grand Jury.** — *Hartranft's Appeal*, 85 Pa. St. 433, 27 Am. Rep. 667, the court saying: "If the governor as supreme executive, and as commander-in-chief of the army of the commonwealth, is charged with the duty of suppressing domestic insurrections, he must be the judge of the necessity requiring the exercise of the powers with which he is clothed, and his subordinates, who are employed to render these powers efficient and to produce the legitimate results of their exercise, can be accountable to none but him. In like manner, if he is constituted the judge of what things, knowledge or information, coming into his department through himself personally or from his subordinates, may or may not be revealed, then such subordinates without his permission cannot be compelled to disclose in court any such matters or information. * * * Observe, the supreme executive power is vested in the governor, and he is charged with the faithful execution of the laws, and for the accomplishment of this purpose he is made commander-in-chief of the army, navy, and militia of the state. Who then shall assume the power of the people and call this magistrate to an account for that which he has done in discharge of his constitutional duties? If he is not the judge of when and how these duties are to be performed, who is? Where does the Court of Quarter Sessions, or any other court, get the power to call this man before it, and compel him to answer for the manner in which he has discharged his constitutional functions as executor of the laws and commander-in-chief of the militia of the commonwealth? For it certainly is a logical sequence that if the governor can be compelled to reveal the means used to accomplish a given act, he can also be compelled to answer for the manner of accomplishing such act. If the Court of Quarter Sessions of Allegheny county can shut him up in prison for refusing to appear before it and reveal the means and methods used by him to execute the laws and suppress domestic

violence, why may it not commit him for a breach of the peace, or for homicide resulting from the discharge of his duties as commander-in-chief? And if the courts can compel him to answer, why can they not compel him to act? All these things, we know, may be done in the case of private individuals; such a one may be compelled to answer, to account, and to act. In other words, if, from such analogy, we once begin to shift the supreme executive power from him upon whom the Constitution has conferred it to the judiciary, we may as well do the work thoroughly and constitute the courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction. We had better, at the outstart, recognize the fact that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that, with it, in the exercise of these constitutional powers, the courts have no more right to interfere than has the executive, under like conditions, to interfere with the courts."

4. **Legislative Power.** — *O'Neil v. American F. Ins. Co.*, 166 Pa. St. 72, 45 Am. St. Rep. 650.

"The words 'legislative power' mean the power or authority under the constitution or frame of government to make, alter, and repeal laws." *O'Neil v. American F. Ins. Co.*, 166 Pa. St. 72, 45 Am. St. Rep. 650.

"The powers of legislatures are by most of our constitutions confined to legislative functions, but this term is broad enough to include a great mass of political and discretionary action which may be performed directly by the legislature or delegated to local authorities having general qualified control over local business." *Shumway v. Bennett*, 29 Mich. 460.

The legislature possesses sovereign legislative power over all subjects except such as are expressly or by clear implication prohibited to it in the state constitution. *Boyd v. Ellis*, 11 Iowa 97; *McMillin v. County Judge*, 6 Iowa 391; *Purcell v. Smidt*, 21 Iowa 540.

The general assembly possesses all legislative authority not delegated to the general government or prohibited by the constitution. The constitution as applied to the legislative department is a limitation and not a grant of power. *Morrison v. Springer*, 15 Iowa 304; *State v. Hockett*, 70 Iowa 442.

with comparative ease absorb within itself all the functions of the state.¹ It has been said that wherever the legislative power of a government is undefined, it includes the judicial and executive attributes.² Thus, under the authority of the colonial charter, the Connecticut general assembly exercised executive and judicial functions from the earliest times.³ The legislature cannot, as a rule, invade the right of private contract.⁴

(2) *Delegation of Legislative Functions* — (a) *In General* — “Keeley Cure” Statutes. — It is not within the province of the legislature to delegate to private corporations the power to make laws for the discharge of offenders. An act authorizing justices to acquit persons charged with disorderly conduct on account of drunkenness, on condition that such persons, within a given period, shall have taken the cure for drunkenness at some one of the institutions established for that purpose, “in conformity with the rules and regulations of the corporation administering such cure,” is unconstitutional.⁵

(b) *To the Electors* — *The Referendum* — *aa. INTRODUCTORY.* — It is a doctrine frequently reiterated by the courts that the functions of the legislature must be exercised by it alone and cannot be delegated.⁶ This, however, is true only in a qualified sense, and the qualifications are rapidly becoming larger.

1. *Scope and Extent.* — “The legislative department is nearest the source of power and is manifestly the predominant branch of the government. Its authority is extensive and complex, and being less susceptible on that account, of limitation, is more liable to be exceeded in practice.” Earle, J., in *Crane v. Meginnis*, 1 Gill & J. (Md.) 472, 19 Am. Dec. 237.

“How far the power of giving the law may involve every other power in cases where the Constitution is silent never has been, and perhaps never can be, definitely stated.” *Per* Marshall, C. J., in *Fletcher v. Peck*, 6 Cranch (U. S.) 136.

2. And see to like effect, *per* Patterson, J., in *Cooper v. Telfair*, 4 Dall. (U. S.) 19; *Martin v. Hunter*, 1 Wheat. (U. S.) 304; *Calder v. Bull*, 2 Root (Conn.) 350, 3 Dall. (U. S.) 386; *Ross v. Whitman*, 6 Cal. 361; *Smith v. Judge*, 17 Cal. 547.

3. *Wheeler's Appeal*, 45 Conn. 314, *per* Loomis, J.; *White School House v. Post*, 31 Conn. 257; *Woodruff v. New York, etc., R. Co.*, 59 Conn. 83, *per* Andrews, C. J.

4. *Jones v. Great Southern Fireproof Hotel Co.*, 79 Fed. Rep. 477.

5. *Senate, etc., v. Alpena County*, 99 Mich. 117. See also *Wisconsin Keeley Institute Co. v. Milwaukee County*, 95 Wis. 153, holding unconstitutional an act for the treatment of indigent drunkards in “Keeley institutes” at county expense. Somewhat similar acts were upheld, however, in *Baltimore v. Keeley Institute*, 81 Md. 106, and *Williamson v. Arapahoe County*, 23 Colo. 87.

6. *Legislative Power Cannot be Delegated* — *United States.* — *People's R. Pass. Co. v. Memphis R. Co.*, 10 Wall. (U. S.) 50, *per* Clifford, J.; *Wayman v. Southard*, 10 Wheat. (U. S.) 1; *Bank of U. S. v. Halstead*, 10 Wheat. (U. S.) 51; *Field v. Clark*, 143 U. S. 649.

California. — *Ex p. Cox*, 63 Cal. 21; *People v. Nevada*, 6 Cal. 143.

Delaware. — *Rice v. Foster*, 4 Harr. (Del.) 479.

Georgia. — *Georgia R. Co. v. Smith*, 70 Ga. 694.

Indiana. — *Maize v. State*, 4 Ind. 342; *Meshmeier v. State*, 11 Ind. 482.

Iowa. — *Santo v. State*, 2 Iowa 165, 63 Am. Dec. 487; *State v. Geebrick*, 5 Iowa 491; *State v. Beneke*, 9 Iowa 203; *State v. Weir*, 33 Iowa 134, 11 Am. Rep. 115; *Morford v. Unger*, 8 Iowa 82.

Kentucky. — *Auditor v. Holland*, 14 Bush (Ky.) 147.

Louisiana. — *State v. Gaster*, 45 La. Ann. 636.

Maine. — *Farnsworth Co. v. Lisbon*, 62 Me. 451; *Brewer Brick Co. v. Brewer*, 62 Me. 62, 16 Am. Rep. 395.

Maryland. — *Bradshaw v. Lankford*, 73 Md. 428, 25 Am. St. Rep. 602.

Michigan. — *People v. Collins*, 3 Mich. 343; *Senate, etc., v. Alpena County*, 99 Mich. 117.

Minnesota. — *State v. Simons*, 32 Minn. 540; *State v. Young*, 29 Minn. 551.

Mississippi. — *Montross v. State*, 61 Miss. 429.

Missouri. — *State v. Wilcox*, 45 Mo. 458.

New Hampshire. — *State v. Hayes*, 61 N. H. 264.

New Jersey. — *State v. Hudson County Ave. Com'rs*, 37 N. J. L. 12.

New York. — *Thorne v. Cramer*, 15 Barb. (N. Y.) 112; *Bradley v. Baxter*, 15 Barb. (N. Y.) 122; *Barto v. Himrod*, 8 N. Y. 483, 59 Am. Dec. 506; *People v. Stout*, 23 Barb. (N. Y.) 349; *State v. New York*, 3 Duer (N. Y.) 119.

North Carolina. — *Atlantic Express Co. v. Wilmington, etc., R. Co.*, 111 N. Car. 463, 32 Am. St. Rep. 805, 55 Am. & Eng. R. Cas. 498.

Ohio. — *Cincinnati, etc., R. Co. v. Clinton County*, 1 Ohio St. 77.

Oregon. — *Brown v. Fleischner*, 4 Oregon 132.

Pennsylvania. — *Parker v. Com.*, 6 Pa. St. 507, 47 Am. Dec. 480; *Com. v. McWilliams*, 11 Pa. St. 61; *Locke's Appeal*, 72 Pa. St. 491, 13 Am. Rep. 716; *Com. v. Judges*, 8 Pa. St. 391; *Com. v. Painter*, 10 Pa. St. 214; *Borough of West Philadelphia, 5 W. & S. (Pa.)* 283.

Rhode Island. — *State v. Copeland*, 3 R. I. 33.

Tennessee. — *State v. Armstrong*, 3 Sneed (Tenn.) 634.

The Present Tendency. — A marked tendency appears in the direction of assigning duties heretofore deemed legislative to other bodies: to boards and commissions, to local authorities, and especially to the voters. The plan of delegating greater legislative power to the last-named class, thus adopting in part the system known as the referendum, seems to be growing in favor.¹

In the United States, though the name referendum is of recent adoption, the principle is of long standing. Experiments with it were made in colonial *Rhode Island*.²

Submission of Constitution to Popular Vote. — The submission of constitutions and amendments to a popular vote is a direct application of this principle, and from about the middle of the present century the delegation of legislative power by the states has rapidly increased.³

The Various Forms. — The tendency has manifested itself in several forms:

(1) In referring matters of local interest and administration to the electors of the locality interested;⁴ (2) in enlarging the scope of state constitutions by adding multitudinous administrative provisions, all of them being submitted to the voters;⁵ and (3) in the great popular interest shown in the referendum itself.⁶ A political tendency of such marked proportions involves questions and is fraught with consequences of the highest importance. To determine its limits and possibilities under constitutional restrictions and judicial decisions will now be undertaken.

bb. WHEN NOT PERMISSIBLE. — Even the people of the state cannot, under the constitution, be reinvested with the function of legislation thus conferred by them on a department of the government, and the legislature cannot render the enactment of a law dependent upon its acceptance by the voters of the state.⁷

Texas. — *State v. Swisher*, 17 Tex. 441; *Willis v. Owen*, 43 Tex. 41.

Vermont. — *State v. Parker*, 26 Vt. 357.

Washington. — *Territory v. Stewart*, 1 Wash. 98.

Wisconsin. — *Matter of Oliver*, 17 Wis. 681.

"Under a well-balanced constitution the legislature can no more delegate its proper function than can the judiciary." Gibson, C. J., in *Borough of West Philadelphia*, 5 W. & S. (Pa.) 283.

1. See Oberholtzer, *The Referendum in America* (1893), pp. 17 *et seq.*

2. From 1647 to 1664. See *Providence Book Notes*, May 5, 1894.

3. See Oberholtzer, *The Referendum in America* (1893), c. 5, where the treatment awarded this class of legislation by the courts is traced in historical order.

4. See *infra* for examples of this.

5. Compare the earliest state constitutions with those recently adopted, and note the growing practice of submitting numerous amendments at a time. In *California*, in 1892, nine propositions were thus submitted. (See Oberholtzer, *The Referendum in America*, p. 17.) And in *Nebraska*, in 1896, the electors were called upon to vote on no less than twelve proposed amendments to the Constitution. See *Nebraska Laws* 1895, pp. 429-439. These latter were all rejected.

6. See Oberholtzer, *The Referendum in America*, p. 17 *et seq.*

7. **Enactment Cannot be Made Dependent upon Acceptance by the Electors** — *California*. — *Ex p. Wall*, 48 Cal. 279, 17 Am. Rep. 425.

Iowa. — *Morford v. Unger*, 8 Iowa 82; *Santo v. State*, 2 Iowa 165, 53 Am. Dec. 487; *State v. Beneke*, 9 Iowa 203.

Massachusetts. — *Opinion of Justices*, 160 Mass. 586.

Missouri. — *State v. Wilcox*, 45 Mo. 458.

Nevada. — *Gibson v. Mason*, 5 Nev. 283.

New Hampshire. — *State v. Hayes*, 61 N. H. 264.

New York. — *Thorne v. Cramer*, 15 Barb. (N. Y.) 112; *Barto v. Himrod*, 8 N. Y. 483, 59 Am. Dec. 506; *People v. Stout*, 23 Barb. (N. Y.) 349.

Pennsylvania. — *Parker v. Com.* 6 Pa. St. 507, 47 Am. Dec. 480. *Contra*, *Smith v. Janesville*, 26 Wis. 291. Compare *Paterson v. Society, etc.*, 24 N. J. L. 385; *Johnson v. Rich*, 9 Barb. (N. Y.) 680, with the *New York* cases, *supra*.

Statement of the Doctrine. — 'For the legislators to say that they deem a law expedient provided the people shall deem it expedient amounts to an abandonment of the legislative functions. A statute passed to take effect upon a subsequent event must be, when it comes from the hands of the legislature, a law *in presenti* to take effect *in futuro*. On the question of the expediency of the law the legislature must exercise its own judgment definitely and finally. If the law can be made to take effect on the occurrence of an event, the legislature must declare it expedient if the event shall happen, but inexpedient if it shall not happen. They can appeal to no other man or men to judge for them in relation to its present or future propriety or necessity; they must exercise that power themselves, and thus perform the duty imposed upon them by the Constitution. But in case of a law drawn to take effect if it shall be approved by a popular vote, no event affecting the expediency of the law is expected to happen. The expediency

Repeals. — Nor, manifestly, can the expediency of repealing an existing law be thus submitted to a popular vote.¹

Time When Statute Shall Take Effect. — However, it has been held that the question as to the time when an act shall take effect is referable to the people at large.²

cc. **WHEN PERMISSIBLE**—(aa) *Local Adoption of General Laws.* — While the legislature is incompetent merely to propose a law for rejection or adoption by the people, yet, when there is affirmative legislation, its enforcement in given localities may be made dependent on the will of the voters therein.³

But the Law Must Be Complete in all its terms and provisions when it leaves the legislative branch of the government, and the option to become or not to become subject to its requirements and penalties is the only matter that should be submitted to the vote of the electors.⁴

Matters of General Concern. — Nor can the practice be followed when the question to be submitted for determination is of general concern to the state at large rather than one of mere local importance.⁵

Illustrations. — The operation of an act creating a municipal court may be made dependent upon the approval of the municipal voters.⁶ A like reference may be of a proposition to establish a board of public works in a city.⁷ An act authorizing the sale of refreshments in certain cities on Sunday, provided it should receive the sanction of the qualified voters, was upheld.⁸ A statute

or wisdom of the law, abstractly considered, does not depend on a vote of the people. If it is unwise before the vote is taken it is equally unwise afterwards. The legislature has no more right to refer such a question to the whole people than to a single individual." *Ex p. Wall*, 48 Cal. 313, 17 Am. Rep. 425.

This inability arises no less from the joint principle applicable to every delegated power, requiring knowledge, discretion, and rectitude in its exercise, than from the positive provisions of the Constitution itself. The people in whom the power resided have voluntarily relinquished its exercise, and have positively ordained that it shall be vested in the assembly. To allow the general assembly to cast it back upon them would be to subvert the Constitution and change its distribution of powers, without their action or consent. *Cincinnati, etc., R. Co. v. Clinton County*, 1 Ohio St. 77.

Illustrations. — Where a statute regularly passed by the general assembly and approved by the governor contained provisions for submitting it to a vote of the people, as to whether it should become a law or not, it was held that such provisions were void, and that such vote of the people pursuant thereto had no legal effect whatever, and that it became a law when it passed the two houses and was properly signed. *Santo v. State*, 2 Iowa 165, 63 Am. Dec. 487; *State v. Beneke*, 9 Iowa 203.

Where a constitution allows a delegation to counties, cities, towns, and villages only of the taxing power, the legislature cannot vest in a majority of the property owners adjacent to a proposed county road the right, on their petition therefor, to have such road established, with a condition that it be paid for in part from the general county fund. *Parks v. Wyandotte County*, 61 Fed. Rep. 436.

In *Locke's Appeal*, 72 Pa. St. 508, 13 Am. Rep. 716, Read, C. J., observes that if the legislature can delegate the law-making power to a majority of the voters, it can also confer such power upon the minority.

But whether submitting the expediency of a law framed by the legislature to the consideration of the people before it takes effect is a delegation of legislative power was left undetermined in *Paterson v. Society*, etc. 24 N. J. L. 385.

1. Repeal of Existing Laws. — *Rice v. Foster*, 4 Harr. (Del.) 479; *State v. Geebrick*, 5 Iowa 491; *State v. Weir*, 33 Iowa 134, 11 Am. Rep. 115; *Parker v. Com.*, 6 Pa. St. 507, 47 Am. Dec. 480.

2. Time When Act Shall Take Effect. — *State v. Parker*, 26 Vt. 357; *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63; *State v. O'Neill*, 24 Wis. 149.

In *People v. Collins*, 3 Mich. 343, the court was equally divided on this question.

3. Local Enforcement of General Laws. — *State v. Francis*, 95 Mo. 44; *State v. Noyes*, 30 N. H. 279; *Johnson v. Martin*, 75 Tex. 33; *Armstrong v. Traylor*, 87 Tex. 598; *Rutter v. Sullivan*, 25 W. Va. 427; *State v. O'Neill*, 24 Wis. 149. And see authorities cited in succeeding notes.

4. Law Must Be Complete in All Its Provisions. — *O'Neil v. American F. Ins. Co.*, 166 Pa. St. 72, 45 Am. St. Rep. 650; *Locke's Appeal*, 72 Pa. St. 491, 13 Am. Rep. 716.

The legislature must enact a complete and valid law according to the prescribed usage. *Lammert v. Lidwell*, 62 Mo. 188, 21 Am. Rep. 411.

5. Matters of General Concern. — The voters of a particular locality are incompetent to determine whether female suffrage shall be allowed them, on the ground that the matter is one of general and not local concern, and that the principle of local option cannot apply. *Opinion of Justices*, 160 Mass. 586.

6. *State v. Sullivan*, (Minn. 1897) 69 N. W. Rep. 1094; *Rutter v. Sullivan*, 25 W. Va. 427. See also *Wales v. Belcher*, 3 Pick. (Mass.) 508.

7. *State v. O'Neill*, 24 Wis. 149.

8. *State v. Francis*, 95 Mo. 44.

declaring bowling alleys situated within a certain distance of a dwelling house to be nuisances, and containing a provision that it should be in force only in those towns which adopted it in town meetings, was held valid.¹ The voters of a city may determine whether an act relating to public parks shall take effect therein.²

In accordance with this rule it is generally held that a law intended to prevent stock from running at large may, if general in its terms, depend for its operation in any particular locality upon a vote of the inhabitants thereof.³

(bb) *Municipal Home Rule — City Charters.* — According to the weight of authority the legislature may grant a municipal charter conditioned to take effect upon its acceptance by the voters of the city for which it is intended.⁴

General Incorporation Act. — So a statute was upheld which authorized electors of an incorporated village to determine by what section of the general incorporation act it should be governed.⁵

Extension of Town Limits. — It is competent for the legislature to provide that an act extending the limits of a town shall depend for its validity on its acceptance by the mayor and commissioners.⁶

New Township — Consolidation. — The legislature may leave it to the voters of a new township, formed from an older one, to determine whether it shall be continued or annulled,⁷ and whether certain territory surrounding a city shall be consolidated with it.⁸

Election of Mayor. — A municipality may be allowed to determine the manner in which its mayor shall be elected.⁹

Irrigation Districts. — There is also high authority for the proposition that a statute providing for the creation of irrigation districts upon a vote of the inhabitants of the territory concerned is valid.¹⁰

Under the Massachusetts Constitution it is held that the General Court cannot, by a general statute, authorize the formation of cities at the option of the voters of a particular locality, who shall also determine the provisions of the charter.¹¹

1. *State v. Noyes*, 30 N. H. 279.

2. *State v. District Ct.*, 33 Minn. 235.

3. *Illinois.* — *Erlinger v. Boneau*, 51 Ill. 94.
Iowa. — *Dalby v. Wolf*, 14 Iowa 228. But see *Weir v. Cram*, 37 Iowa 649, in which the case first cited is sought to be distinguished.

Kansas. — *Noffziger v. McAllister*, 12 Kan. 315.

Missouri. — *Lammert v. Lidwell*, 62 Mo. 188, 21 Am. Rep. 411.

Texas. — *Armstrong v. Traylor*, 87 Tex. 598.

West Virginia. — *Haigh v. Bell*, 41 W. Va. 19.

4. *Municipal Charters — Georgia.* — *Brunswick v. Finney*, 54 Ga. 317.

Kentucky. — *Clarke v. Rogers*, 81 Ky. 43.

New Hampshire. — *Atty.-Gen. v. Shepard*, 62 N. H. 383.

New Jersey. — *Paterson v. Society, etc.*, 24 N. J. L. 385.

In some states there are constitutional provisions authorizing the inhabitants of a city to form their own charter, as in *California*, *People v. Hoge*, 55 Cal. 612; and *Washington*, *Reeves v. Anderson*, 13 Wash. 17.

5. *General Incorporation Act.* — *Chenango Bank v. Brown*, 26 N. Y. 467.

6. *Extension of Town Limits.* — *Manly v. Raleigh*, 4 Jones Eq. (N. Car.) 370.

7. *New Township.* — *Com. v. Judges*, 8 Pa. St. 391. Compare *Lum v. Vicksburg*, 72 Miss. 950.

8. *Annexation of Territory.* — *Smith v. McCarthy*, 56 Pa. St. 359; *Morford v. Unger*, 8 Iowa 82; *Graham v. Greenville*, 67 Tex. 62.

9. *Election of Mayor.* — *Brown v. Holland*, 97 Ky. 249.

10. *Irrigation Districts.* — *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, where the court says: "An objection is also urged that it is delegating to others a legislative right, that of the incorporating of public corporations, inasmuch as the act vests in the supervisors and the people the right to say whether such a corporation shall be created, and it is said that the legislature cannot so delegate its power, and that an act performed by such a corporation by means of which the property of the citizen is taken from him, either by the right of eminent domain or by assessment, results in taking such property without due process of law. We do not think there is any validity in the argument. The legislature delegates no power. It enacts conditions upon the performance of which the corporation shall be regarded as organized with the powers mentioned and described in the act."

11. *Massachusetts Constitution.* — *Larcom v. Olin*, 160 Mass. 102, the court saying: "It seems to us that the intention of the amendment is that the General Court should act upon each application made pursuant to the amendment, and should decide to grant or withhold a charter according to its judgment; and if it decides to grant one, that it should grant such powers, privileges, and immunities not repugnant to the Constitution as it may deem necessary or expedient in each case, and that it is not competent for the General Court, by a gen-

(cc) *Local Administration—Change of Political Boundaries.*—A reference to the voters of the territory involved, of such questions as the subdivision or consolidation of counties or townships, is not a delegation of legislative power.¹

County Seats—Public Buildings.—Nor is a like reference of a proposition to locate or relocate a county seat,² or to determine the site and provide for the erection of public buildings in the new county town.³

Schools and School Districts.—The establishment of local schools and school districts is a matter of such peculiar local concern that its determination is frequently and properly submitted to the voters.⁴

Internal Improvements.—Statutes empowering municipalities at their option to vote aid to works of internal improvement do not constitute a relinquishment of functions imposed by the constitution on the legislative body.⁵

eral statute, to empower the inhabitants of towns containing twelve thousand inhabitants or more to become cities, according to articles prescribed in the statute, at the will of a majority of the inhabitants present and voting at a meeting held for the purpose."

1. Change of Political Boundaries—Counties—Townships—California.—*People v. McFadden*, 81 Cal. 489, 15 Am. St. Rep. 66; *People v. Nally*, 49 Cal. 478.

Illinois.—*People v. Reynolds*, 10 Ill. 1.

Maine.—*Call v. Chadbourne*, 46 Me. 206.

Missouri.—*State v. Scott*, 17 Mo. 521.

Pennsylvania.—*Smith v. McCarthy*, 56 Pa. St. 359; *Com. v. Judges*, 8 Pa. St. 391.

Wisconsin.—*State v. Elwood*, 11 Wis. 17.

A county may be authorized to determine for itself whether it will accept the provisions of a general law for township organization. *Opinion of Judges*, 55 Mo. 295.

And so of the organization of a town or city by the people of a particular section of a county. *People v. Fleming*, 10 Colo. 553.

And a city council may be authorized to annex adjacent territory on petition of three fourths of the legal voters. *Whittaker v. Venice*, 150 Ill. 195.

2. County Seat.—*Clarke v. Jack*, 60 Ala. 271; *Apham v. Sutter County*, 8 Cal. 379; *Barnes v. Pike County*, 51 Miss. 305; *Peck v. Weddell*, 17 Ohio St. 272; *Com. v. Painter*, 10 Pa. St. 214. See *People v. Salomon*, 51 Ill. 37; *Slinger v. Henneman*, 38 Wis. 504; *Hall v. Marshall*, 80 Ky. 552; *Hamilton v. Carroll*, 82 Md. 326.

In *Minnesota* this method was provided by the constitution. *Roos v. State*, 6 Minn. 428.

It has been frequently employed in *Nebraska*. See *Laws v. Vincent*, 16 Neb. 208; *Hunter v. State*, 14 Neb. 506; *Ellis v. Karl*, 7 Neb. 381; *People v. Hamilton County*, 3 Neb. 241.

3. Com. v. Painter, 10 Pa. St. 214.

4. Schools and School Districts.—*Bull v. Read*, 13 Gratt. (Va.) 78. And so of the organization of school districts under the general law. *State v. Wilcox*, 45 Mo. 458. And their reconstruction or discontinuance. *Smyth v. Titcomb*, 31 Me. 272.

School Tax.—A like practice has been sanctioned with reference to the levying of a school tax within a particular district. *Steward v. Jefferson*, 3 Harr. (Del.) 335; *Burgess v. Pue*, 2 Gill (Md.) 11.

The Dissolution of Independent School Districts may likewise be left to the determination of

the local voters. *State v. Cooley*, 65 Minn. 406.

But an act authorizing cities to determine whether or not they will take control of their public schools has been adjudged void as a delegation of legislative power. *Werner v. Galveston*, 72 Tex. 22.

And in *Indiana* an act authorizing the voters of any township to determine how much they should expend for school supplies was declared invalid. *Greencastle Tp. v. Black*, 5 Ind. 557.

5. Municipal Aid to Internal Improvements—United States.—*Knox County v. Aspinwall*, 21 How. (U. S.) 539, 24 How. (U. S.) 376; *Knox County v. Wallace*, 21 How. (U. S.) 547; *Zabriskie v. Cleveland*, etc., R. Co., 23 How. (U. S.) 381; *Amey v. Allegheny City*, 24 How. (U. S.) 364; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Thomson v. Lee County*, 3 Wall. (U. S.) 327; *Rogers v. Burlington*, 3 Wall. (U. S.) 654.

Alabama.—*Stein v. Mobile*, 24 Ala. 591; *Wetumpka v. Winter*, 29 Ala. 651; *Gibbons v. Mobile*, etc., R. Co., 36 Ala. 410; *Ex p. Selma*, etc., R. Co., 45 Ala. 606, 6 Am. Rep. 722.

California.—*Pattison v. Yuba County*, 13 Cal. 175; *People v. Burr*, 13 Cal. 343; *Stockton*, etc., R. Co. v. *Stockton*, 41 Cal. 149; *Hobart v. Butte County*, 17 Cal. 24.

Connecticut.—*Bridgeport v. Housatonic R. Co.*, 15 Conn. 475.

Florida.—*Cotten v. Leon County*, 6 Fla. 610.

Georgia.—*Powers v. Dougherty County*, 23 Ga. 65.

Illinois.—*Prettyman v. Tazewell County*, 19 Ill. 406, 71 Am. Dec. 230; *Robertson v. Rockford*, 21 Ill. 451; *Johnson v. Stark County*, 24 Ill. 75.

Indiana.—*Aurora v. West*, 9 Ind. 74; *John v. Cincinnati*, etc., R. Co., 35 Ind. 539; *Lafayette*, etc., R. Co. v. *Geiger*, 34 Ind. 185.

Iowa.—*Stewart v. Polk County*, 30 Iowa 9.

Kansas.—*Leavenworth County v. Miller*, 7 Kan. 479.

Kentucky.—*Talbot v. Dent*, 9 B. Mon. (Ky.) 526; *Slack v. Maysville*, etc., R. Co., 13 B. Mon. (Ky.) 1.

Louisiana.—*Police Jury v. McDonogh*, 8 La. Ann. 341.

Missouri.—*St. Louis v. Alexander*, 23 Mo. 483; *St. Joseph*, etc., R. Co. v. *Buchanan County Ct.*, 39 Mo. 485; *State v. Linn County Ct.*, 44 Mo. 504.

New York.—*Gould v. Venice*, 29 Barb. (N.

Local Option. — The weight of authority supports the proposition that the question of authorizing the sale of liquor within a given locality may be left to the determination of its voters.¹ But there are contrary decisions,² and in *Michigan* the court was equally divided upon this question.³

(c) **To the Other Departments** — *aa. TO THE JUDICIARY.* — The prohibition against the delegation of legislative functions exists as against the judicial department.

Creation of Municipal Corporation. — Thus a court cannot be empowered to create a municipal corporation upon the petition of a designated part of the inhabitants of the territory to be incorporated.⁴

Issuance of Bonds. — A statute of *Minnesota* providing for the taking up of certain bonds and issuing new ones in lieu of them, and that the question whether this must be submitted to the people should be left to the supreme

Y.) 442; *Starin v. Genoa*, 23 N. Y. 439; *Rome Bank v. Rome*, 18 N. Y. 38.

North Carolina. — *Taylor v. Newberne Com'rs*, 2 Jones Eq. (N. Car.) 141; *Caldwell v. Justices*, 4 Jones Eq. (N. Car.) 323.

Ohio. — *Cincinnati, etc., R. Co. v. Clinton County*, 1 Ohio St. 77; *Weaver v. Cherry*, 8 Ohio St. 564; *Cass v. Dillon*, 2 Ohio St. 607; *State v. Clinton County*, 6 Ohio St. 280; *State v. Van Horne*, 7 Ohio St. 327; *State v. Union Tp.*, 8 Ohio St. 394; *Goshen Tp. v. Springfield, etc., R. Co.*, 12 Ohio St. 624; *State v. Hancock County*, 12 Ohio St. 596; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24.

Pennsylvania. — *Com. v. McWilliams*, 11 Pa. St. 61; *Sharpless v. Philadelphia*, 21 Pa. St. 147, 59 Am. Dec. 759; *Moers v. Reading*, 21 Pa. St. 188.

South Carolina. — *State v. Charleston*, 10 Rich. L. (S. Car.) 491.

Tennessee. — *Louisville, etc., R. Co. v. Davidson County Ct.*, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424; *Nichol v. Nashville*, 9 Humph. (Tenn.) 252.

Texas. — *San Antonio v. Jones*, 28 Tex. 19.

Virginia. — *Goddin v. Crump*, 8 Leigh (Va.) 120; *Bull v. Read*, 13 Gratt. (Va.) 78.

Wisconsin. — *Bushnell v. Beloit*, 10 Wis. 195; *Clark v. Janesville*, 10 Wis. 136.

1. Local Option Held Lawful — *Arkansas.* — *Boyd v. Bryant*, 35 Ark. 69, 37 Am. Rep. 6.

Colorado. — *Keilkopf v. Denver*, 19 Colo. 325.

Connecticut. — *State v. Wilcox*, 42 Conn. 364, 19 Am. Rep. 536.

Dakota. — *Territory v. O'Connor*, 5 Dakota 397.

Georgia. — *Caldwell v. Barrett*, 73 Ga. 604.

Illinois. — *Erlinger v. Boneau*, 51 Ill. 94; *Gunnarssohn v. Sterling*, 92 Ill. 569.

Indiana. — *Groesch v. State*, 42 Ind. 547. *Compare Maize v. State*, 4 Ind. 343; *Meshmeir v. State*, 11 Ind. 484.

Kentucky. — *Anderson v. Com.*, 13 Bush (Ky.) 485; *Com. v. Weller*, 14 Bush (Ky.) 218, 29 Am. Rep. 407.

Maryland. — *Fell v. State*, 42 Md. 71, 20 Am. Rep. 83.

Massachusetts. — *Com. v. Bennett*, 108 Mass. 27, 11 Am. Rep. 304; *Com. v. Dean*, 110 Mass. 357; *Com. v. Fredericks*, 119 Mass. 199.

Minnesota. — *State v. Cooke*, 24 Minn. 247, 31 Am. Rep. 344. See a contrary decision referred to in *Roos v. State*, 6 Minn. 428.

Mississippi. — *Schulherr v. Bordeaux*, 64 Miss. 59.

Missouri. — *State v. Pond*, 93 Mo. 606. *Compare State v. Field*, 17 Mo. 529, 59 Am. Dec. 275.

North Carolina. — *Cain v. Davie County*, 86 N. Car. 8.

New Jersey. — *Paul v. Gloucester Circuit Judge*, 50 N. J. L. 585; *State v. Morris C. P.*, 36 N. J. L. 72, 13 Am. Rep. 422.

Ohio. — *Gordon v. State*, 46 Ohio St. 607.

Pennsylvania. — *Locke's Appeal*, 72 Pa. St. 491, 13 Am. Rep. 716, *overruling Parker v. Com.*, 6 Pa. St. 507, 47 Am. Dec. 480. See *Com. v. McWilliams*, 11 Pa. St. 61.

Texas. — *Ex p. Kennedy*, 23 Tex. App. 77; *Holley v. State*, 14 Tex. App. 505.

Virginia. — *Savage v. Com.*, 84 Va. 619.

Vermont. — *Bancroft v. Dumas*, 21 Vt. 456; *State v. Parker*, 26 Vt. 357.

Washington. — *Thornton v. Territory*, 3 Wash. Ter. 482.

Wisconsin. — *Slinger v. Henneman*, 38 Wis. 504.

Canada. — *Fredericton v. Reg.*, 3 Can. Supreme Ct. 505.

The submission to the popular vote of the question as to the time when a law relating to the sale of intoxicating liquors should go into effect was held constitutional. *State v. Parker*, 26 Vt. 357.

A municipal charter may authorize the city council to license, prohibit, or suppress dram-shops. *Keilkopf v. Denver*, 19 Colo. 325.

2. Contrary Authorities — *California.* — *Ex p. Wall*, 48 Cal. 279, 17 Am. Rep. 425.

Delaware. — *Rice v. Foster*, 4 Harr. (Del.) 479.

Indiana. — *Maize v. State*, 4 Ind. 342. But see cases from this jurisdiction in the preceding note.

Iowa. — *State v. Geebrick*, 5 Iowa 495; *Santo v. State*, 2 Iowa 165, 63 Am. Dec. 487.

Rhode Island. — *State v. Copeland*, 3 R. I. 33.

Texas. — *State v. Swisher*, 17 Tex. 441. But see Texas cases cited in preceding note.

3. People v. Collins, 3 Mich. 343.

4. Delegation of Legislative Functions to Judiciary. — *Territory v. Stewart*, 1 Wash. 98.

An act of the legislature conferring on the District Court the power to incorporate towns is also unconstitutional, because the Constitution imposes that power on the legislature, and delegates power cannot be delegated. *People v. Nevada*, 6 Cal. 143; *Shumway v. Bennett*, 29 Mich. 451; *State v. Simons*, 32 Minn. 540. See *Blake v. People*, 109 Ill. 504.

court, or, in case it should decline to act, to an equal number of judges of the district courts, was held to be a delegation of legislative power to the judges, and therefore unconstitutional.¹

Annexation of Territory to a City. — The authority conferred by statute on a board of county commissioners to determine whether a petition presented by a city council for the annexation to the city of certain contiguous territory should be granted and the annexation ordered was held to be a delegation to such a board, for purposes of local government, of legislative authority from which no appeal to the courts could be authorized.²

Appointment of Commissioners of Election — Incorporation or Annexation to Be Voted Upon. — But a court may be authorized to appoint commissioners of election where the question of incorporating or adding territory to a municipal corporation is to be determined by the electors.³

bb. **TO THE EXECUTIVE.** — The executive department cannot be endowed with legislative functions.⁴ Thus the power to determine whether a bridge over a navigable stream is such an obstruction to navigation as to require its modification or removal cannot be delegated to the secretary of war.⁵ Congress cannot, under the constitution, delegate its legislative power to the President.⁶ But the taking effect of an act may be made dependent on a contingency the existence of which is left to executive determination.⁷

(d) **Delegation from Federal to State Government — Wilson Law.** — The act of Congress under which liquors imported in original packages are made subject to the laws of the state into which they are carried does not confer on the state power to legislate on that subject, but merely declares when the property in question shall become subject to state laws, and is not a delegation of federal legislative power.⁸

(e) **Delegation of Power to Local Authorities — aa.** **IN GENERAL — Permissible to Certain Extent.** — The central government may delegate to municipal and other public corporations some portions of its own powers for local purposes.⁹

1. *State v. Young*, 29 Minn. 474.

2. *Forsyth v. Hammond*, 71 Fed. Rep. 443.

3. *Ford v. North Des Moines*, 80 Iowa 626.

4. **Delegation of Legislative Functions to Executive.** — *U. S. v. Keokuk*, etc., *Bridge Co.*, 45 Fed. Rep. 178; *U. S. v. Rider*, 50 Fed. Rep. 406.

5. *U. S. v. Keokuk*, etc., *Bridge Co.*, 45 Fed. Rep. 178. But compare *People v. Kelly*, 5 Abb. N. Cas. (N. Y. Ct. App.) 383.

A Grant to the Secretary of War of authority to prescribe rules and regulations for the use, administration, and navigation of such canals as are operated by the government as in his judgment will conduce to the public interest is not invalid as constituting a delegation of legislative authority. *U. S. v. Ormsbee*, 74 Fed. Rep. 207.

6. *Field v. Clark*, 143 U. S. 649.

7. *The Brig Aurora v. U. S.*, 7 Cranch (U. S.) 382.

8. **Delegation from Federal to State Government.** — *In re Van Vliet*, 43 Fed. Rep. 761; *In re Spickler*, 43 Fed. Rep. 653; *In re Rahrer*, 140 U. S. 545.

9. **Delegation from Central to Local Government Lawful — United States.** — *Tilley v. Savannah*, etc., *R. Co.*, 5 Fed. Rep. 641; *Travelers' Ins. Co. v. Oswego Tp.*, 59 Fed. Rep. 58.

Alabama. — *Goldthwaite v. Montgomery*, 50 Ala. 486; *Stanfill v. Dallas County*, 80 Ala. 287.

California. — *Oakland v. Carpentier*, 13 Cal. 540; *People v. Kelsey*, 34 Cal. 470.

Colorado. — *Keilkopf v. Denver*, 19 Colo. 325.

Connecticut. — *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Hayden v. Goodnow*, 39 Conn. 164.

Illinois. — *Richland County v. Lawrence County*, 12 Ill. 1; *Tugman v. Chicago*, 78 Ill. 405.

Indiana. — *Robinson v. Schenck*, 102 Ind. 307.

Iowa. — *Dalby v. Wolf*, 14 Iowa 228.

Kansas. — *Callen v. Junction City*, 43 Kan. 627.

Kentucky. — *Bradley v. McAtee*, 7 Bush (Ky.) 667, 3 Am. Rep. 309; *Talbot v. Dent*, 9 B. Mon. (Ky.) 526; *McKee v. McKee*, 8 B. Mon. (Ky.) 433; *Brown v. Holland*, 97 Ky. 249.

Louisiana. — *New Orleans v. Turpin*, 13 La. Ann. 56.

Massachusetts. — *Stone v. Charlestown*, 114 Mass. 214.

Maryland. — *Burgess v. Pue*, 2 Gill (Md.) 11; *State v. Kirkley*, 29 Md. 85.

Michigan. — *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103.

Missouri. — *State v. Wilcox*, 45 Mo. 458; *Ruggles v. Collier*, 43 Mo. 353; *St. Louis v. Clemens*, 43 Mo. 395; *State v. Simonds*, 3 Mo. 414; *St. Louis v. Russell*, 9 Mo. 507; *Kelly v. Meeks*, 87 Mo. 396.

New Hampshire. — *State v. Noyes*, 30 N. H. 292.

New York. — *People v. Draper*, 15 N. Y. 532; *People v. Pinckney*, 32 N. Y. 377; *Tanner v. Albion*, 5 Hill (N. Y.) 121; *Smith v. Levinus*,

The Precise Limits of the powers that may be thus conferred are impossible of definition, and so long as they relate to matters of local self-government must be left in the main to the legislative discretion.¹

Grant of Corporate Franchise. — A village may be authorized to grant an exclusive franchise in aid of navigation.²

Crimes and Penalties. — But authority to define crimes and to designate what acts shall be punishable as such cannot be delegated,³ nor can the power to determine the penalty for the violation of a state law be delegated.⁴

Compensation of Local Officers — Justices of the Peace. — A statute authorizing the board of county commissioners to regulate the fees of justices of the peace in cases of the arrest and conviction of tramps is a proper delegation of legislative authority.⁵

County Attorney. — So is a statute conferring on the district court power to fix the salary of the county attorney on appeal from the action of the county commissioners.⁶

Constitutional Provision — General and Uniform Laws. — But when the constitution provides that the compensation of certain local officers shall be regulated by general and uniform legislative acts, a board of supervisors cannot be empowered by the legislature to change or suspend the provisions of such an amendment in relation to a particular officer.⁷ Nor can the legislature delegate the power of determining such compensation to county commissioners.⁸

City Council — Power to Change Charter. — In *New Jersey* a statute attempting to delegate to a city council extensive law-making power, including that of changing the municipal constitution, was declared invalid.⁹

8 N. Y. 472; *New York v. Ryan*, 2 E. D. Smith (N. Y.) 368.

North Carolina. — *Manly v. Raleigh*, 4 Jones Eq. (N. Car.) 370.

Ohio. — *Bliss v. Kraus*, 16 Ohio St. 55; *Cincinnati v. Cincinnati St. R. Co.*, 31 Ohio L. J. 308; *Cincinnati, etc., R. Co. v. Clinton County*, 1 Ohio St. 77; *Burckholter v. McConnellsville*, 20 Ohio St. 308.

Oregon. — *State v. George*, 22 Oregon 142, 29 Am. St. Rep. 586.

Pennsylvania. — *Durach's Appeal*, 62 Pa. St. 491; *Smith v. Baker*, 3 Pa. Dist. Rep. 626; *Com. v. McWilliams*, 11 Pa. St. 61; *Com. v. Conyngnam*, 65 Pa. St. 76.

Tennessee. — *Trigally v. Memphis*, 6 Coldw. (Tenn.) 382; *Nichol v. Nashville*, 9 Humph. (Tenn.) 252.

Texas. — *Perry v. Rockdale*, 62 Tex. 451.

Virginia. — *Jones v. Richmond*, 18 Gratt. (Va.) 517, 98 Am. Dec. 695; *Gilkeson v. Frederick County*, 13 Gratt. (Va.) 577.

Washington. — *Reeves v. Anderson*, 13 Wash. 17; *Nelson v. Troy*, 11 Wash. 435.

West Virginia. — *Cross v. Hopkins*, 6 W. Va. 328.

Wisconsin. — *State v. O'Neill*, 24 Wis. 149; *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578; *Farnum v. Johnson*, 62 Wis. 620; *Ryan v. Outagamie County*, 80 Wis. 336.

Where a state constitution authorizes the delegation of legislative powers for local purposes to boards of supervisors, the legislature may suspend, within certain districts, the operation of general state laws dealing with the same subjects. *Feek v. Bloomingdale Tp.*, 82 Mich. 393.

1. Cooley's Const. Lim. (6th ed.) 227.

2. *Farnum v. Johnson*, 62 Wis. 620.

3. In Relation to Crimes. — *State v. Gaster*, 45

La. Ann. 636; *Atlantic Express Co. v. Wilmington, etc., R. Co.*, 111 N. Car. 463, 32 Am. St. Rep. 805, 55 Am. & Eng. R. Cas. 498.

4. *Montross v. State*, 61 Miss. 429.

The Authority to Impose Penalties for a violation of regulations for the protection of navigation cannot be conferred by the legislature. *Harbor Com'rs v. Excelsior Redwood Co.*, 88 Cal. 491, 22 Am. St. Rep. 321.

5. *Ryan v. Outagamie County*, 80 Wis. 336.

6. *Rockwell v. Fillmore County*, 47 Minn. 219.

7. *Doughterty v. Austin*, 94 Cal. 601.

8. *People v. Johnson*, 95 Cal. 471.

9. **New Jersey Statute — City Council.** — *Dexheimer v. Orange*, (N. J. 1897) 36 Atl. Rep. 706, the court saying: "The Act of 1895 is also objectionable because it attempts to delegate to municipal bodies powers which can only be exercised by the legislature itself. By its terms, the common council can not only consolidate any two public offices of the city, but they have power by ordinance to fix and determine the nature of the duties of the consolidated office, and to a certain extent to fix the length of the term for which the holder thereof shall be elected and appointed. By the exercise of these powers, common council can change the whole scheme of government provided by the charter of its city. It can reduce the number of its councilmen one-half by consolidating the office of one councilman with that of another. It can wipe out of existence the office of mayor by consolidating it with that of one of the members of the council, and thus merge the executive in the legislative branch of the municipal government. By the powers conferred by this act I see no reason why common council cannot, by a series of consolidations, concentrate most, if not all, of the

Local By-laws, Regulations, and Ordinances. — In general it may be said that the legislature should delegate to local bodies the performance of such duties, and the framing and enforcement of such by-laws, ordinances, and regulations, as are incident to local self-government, and such as the legislature cannot itself attend to so intelligently and efficiently.¹

bb. REDELEGATION BY LOCAL AUTHORITIES — **Express Authority Necessary.** — The powers thus vested by the legislature in local governmental bodies cannot be redelegated or vicariously exercised by them unless authority to that end is specially granted by the legislature, nor can they divest themselves of the discretion with which they have been clothed.²

Wharves and Wharfage Charges. — Thus where a city is authorized by its charter to erect, maintain, and regulate public wharves and to regulate wharfage, it cannot lease its wharf, or empower any one else to fix its rates of wharfage.³

But the Legislature May Vacate Streets in a city notwithstanding a statute vesting in the county commissioners the authority to vacate streets in the county within which such city is located.⁴

(f) **Delegation of Merely Administrative or Executive Functions** — **Rule Stated.** — There is no constitutional reason why legislative functions which are merely administrative or executive in their character should not be delegated by that branch of the government to other departments, or to bodies created by it for that purpose. A distinction is drawn between a delegation of power to make the law, involving necessarily a discretion as to what it shall be, and a grant of authority relative to its execution, though the latter involves the exercise of discretion under and in pursuance of the law.⁵

powers of government in one and the same person. That this statute attempts to delegate to common council the law-making power, and is therefore in disregard of that article of the state constitution which declares that the legislative power shall be vested in a senate and general assembly, seems clear. *State v. Morris C. P.*, 36 N. J. L. 72, 13 Am. Rep. 422."

1. Local By-Laws and Ordinances. — *Tilley v. Savannah*, etc., R. Co., 5 Fed. Rep. 641; *Brown v. Holland*, 97 Ky. 249; *Cincinnati*, etc., R. Co. *v. Clinton County*, 1 Ohio St. 89; *State v. Garibaldi*, 44 La. Ann. 809; *State v. Parker*, 26 Vt. 357; *Smith v. Janesville*, 26 Wis. 291. See also *Thompson v. Floyd*, 2 Jones L. (N. Car.) 313.

2. Redelegation by Local Governmental Bodies — *United States*. — *Clark v. Washington*, 12 Wheat. (U. S.) 40.

California. — *Oakland v. Carpentier*, 13 Cal. 540; *Meuser v. Risdon*, 36 Cal. 239; *Smith v. Morse*, 2 Cal. 524; *People v. Nevada*, 6 Cal. 143.

Indiana. — *State v. Hauser*, 63 Ind. 155; *Evansville*, etc., R. Co. *v. Evansville*, 15 Ind. 395.

Iowa. — *Mullarky v. Cedar Falls*, 19 Iowa 21.

Massachusetts. — *Day v. Green*, 4 Cush. (Mass.) 433.

Michigan. — *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80.

Minnesota. — *Minneapolis Gas Light Co. v. Minneapolis*, 36 Minn. 159; *Darling v. St. Paul*, 19 Minn. 389.

Missouri. — *Ruggles v. Collier*, 43 Mo. 353; *Matthews v. Alexandria*, 68 Mo. 115, 30 Am. Rep. 776; *St. Louis v. Clemens*, 43 Mo. 395.

New Jersey. — *State v. Patterson*, 34 N. J. L. 163; *Paul v. Gloucester Circuit Judge*, 50 N. J. L. 585; *State v. Jersey City*, 25 N. J. L. 309.

New York. — *Brooklyn v. Breslin*, 57 N. Y. 591; *Milbau v. Sharp*, 17 Barb. (N. Y.) 435; *Thompson v. Schermerhorn*, 6 N. Y. 92, 55 Am. Dec. 385.

Ohio. — *State v. Bell*, 34 Ohio St. 194.

Tennessee. — *Whyte v. Nashville*, 2 Swan (Tenn.) 364.

Wisconsin. — *Lord v. Oconto*, 47 Wis. 386; *Lauenstein v. Fond du Lac*, 28 Wis. 336.

3. *Matthews v. Alexandria*, 68 Mo. 115, 30 Am. Rep. 776.

4. *Eudora v. Darling*, 54 Kan. 654.

5. Delegation of Merely Administrative or Executive Functions. — *Cincinnati*, etc., R. Co. *v. Clinton County*, 1 Ohio St. 88.

"Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such a discretion is the making of the law." *Moers v. Reading*, 21 Pa. St. 202.

"This must be understood, we think, as applicable only to cases where the discretion is not essentially a legislative one." *Dowling v. Lancashire Ins. Co.*, 92 Wis. 68, *per* Pinney, J.

"The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed is apparent and strikingly great, and this we understand to be the distinction recognized by all the courts as the true rule in determining whether or not in such cases a legislative power is granted." *Georgia R. Co. v. Smith*, 70 Ga. 694.

Grant of Authority to Municipality as to Street Railways. — Thus a constitutional prohibition against delegating legislative power to city councils is not violated by permitting such councils to authorize the extension of street railway lines over such streets as they may designate.¹

Authorizing Commissioners' Court to Fix Treasurer's Fees. — The authorization of the commissioners' court to fix the county treasurer's commissions, not to exceed a certain per cent., does not constitute a delegation of legislative power.²

Governor — Pilotage Regulations. — Neither is the giving of power to the governor to make pilotage regulations.³

A State Board of Fish Commissioners may be empowered to give permits for fish propagation to such persons as it may think proper.⁴

Site and Construction of Public Buildings. — A commission may be empowered to select a site for a public building,⁵ and to assume entire charge of the construction of a state capitol.⁶

Local Board — Extension of Highway. — A local board may be empowered to determine the propriety of submitting, and if deemed best, to submit, to the voters of a county the question as to whether a public road shall be extended through the county.⁷

Question of Benefit to Lands by Local Improvements. — Local commissioners may be authorized to determine what lands will be benefited by a proposed local improvement.⁸

Grants of State Lands. — The legislature may properly delegate to the commissioners of the land office the authority to grant lands under navigable waters for the promotion of state commerce or for the beneficial enjoyment of adjacent owners.⁹

The Superintendent of an Orphanage may be authorized to determine whether intoxicating liquors shall be sold within a certain distance thereof.¹⁰

Employment of Assistance in County Offices. — An act conferring on county commissioners the power to authorize the employment of additional help in certain offices does not constitute a delegation of legislative power.¹¹

The Certificate of Railroad Commissioners that no public interests are involved may be made conclusive of an attempt to forfeit the charter of a railroad company for failing to make an extension of its road.¹²

Maintenance of Gates — Railway Tracks. — A statute requiring the erection and maintenance of gates across a street occupied by railway tracks, provided the supreme or county court shall on application so order, does not confer legislative powers on the courts.¹³

Maximum Rate Laws. — It is held not to be an unauthorized delegation of power for the legislature to authorize a board of railway commissioners to provide reasonable rules and regulations in respect to fixing transportation tariffs.¹⁴

1. *Com. v. Union Pass. R. Co.*, 163 Pa. St. 22.

2. *Staples v. Llano County*, 9 Tex. Civ. App. 201.

3. *Martin v. Witherspoon*, 135 Mass. 175.

4. *People v. Brooks*, 101 Mich. 98.

5. *People v. Dunn*, 80 Cal. 211, 13 Am. St. Rep. 118; *Territory v. Scott*, 3 Dakota 357.

6. *State v. McGraw*, 13 Wash. 311.

7. *Noonan v. Chosen Freeholders*, 51 N. J. L. 454. Compare *Haney v. Bartow County*, 91 Ga. 770.

8. *State v. Stewart*, 74 Wis. 620.

An Act Authorizing a Board of Park Commissioners to order the construction of sidewalks by adjacent land owners and to determine when and of what material said walks shall be constructed is not unconstitutional as an unlawful delegation of legislative power. *Turner v. Detroit*, 104 Mich. 326.

9. *Rumsey v. New York, etc., R. Co.*, 130 N. Y. 88.

10. *State v. Barringer*, 110 N. Car. 525.

11. *Nelson v. Troy*, 11 Wash. 435.

12. *People v. Ulster, etc., R. Co.*, 128 N. Y. 240.

13. *People v. Long Island R. Co.*, 134 N. Y. 506.

14. **Railroad Tariffs.**—*Atlantic Express Co. v. Wilmington, etc., R. Co.*, 111 N. Car. 463, 32 Am. St. Rep. 805, 55 Am. & Eng. R. Cas. 498; *McWhorter v. Pensacola, etc., R. Co.*, 24 Fla. 417, 12 Am. St. Rep. 220; *Storrs v. Pensacola, etc., R. Co.*, 29 Fla. 617; *Georgia R. Co. v. Smith*, 70 Ga. 694. See *Woodruff v. New York, etc., R. Co.*, 59 Conn. 63.

And where the constitution vests in the legislature the power to fix reasonable maximum charges for the transportation of passengers and freight, a board of commissioners

Quarantine Inspection. — A statute declaring it unlawful for any person to refuse to permit his baggage and personal effects to be disinfected in accordance with the regulations of the state board of health is valid.¹

The Reciprocity Provisions of the Tariff Act of 1890 were upheld as against the objection that they conferred legislative powers upon the President.²

Appointment to Office. — A statute conferring on the attorney-general the authority to appoint some reputable attorney for the performance of certain duties does not confer the power to create a new office.³

Suspension of General Law. — In a general law affecting private rights which takes effect by its terms, a clause authorizing the county courts to suspend it at pleasure in the several counties is unconstitutional.⁴

Standard Fire Insurance Policy. — The legislature cannot delegate to a state insurance commissioner the preparation of "a printed form in blank of a contract or policy of fire insurance, together with such provisions, agreements, or conditions as may be indorsed thereon or added thereto," to which all subsequent fire insurance contracts are required to conform in all particulars.⁵

(g) **Contingent Legislation — The Rule Stated.** — Where an act is clothed with all the forms of law and is complete in and of itself, it is fairly within the scope of the legislative power to prescribe that it shall become operative only upon the happening of some specified contingency.⁶

Thus a Municipal Corporation may pass an ordinance within the limits of its delegated powers, contingent as to its operation and effect on the existence or occurrence of facts germane to its subject-matter.⁷

Erection of Railroad Station the Condition. — The taking effect of a statute may be conditioned on the erection of a station at a place named.⁸

Abandonment of Suits Against a City. — Ordinances of a city to take effect only when certain suits against the city are dismissed and abandoned are valid.⁹

Acts Taxing Foreign Corporations in the same manner and to the same degree as they are taxed in the state of their domicil have been upheld.¹⁰

may be authorized to establish maximum rates which are *prima facie* reasonable. *Chicago, etc., R. Co. v. Jones*, 149 Ill. 361, 41 Am. St. Rep. 278.

1. *Hurst v. Warner*, 102 Mich. 238, 47 Am. St. Rep. 525.

2. **Reciprocity Tariff Law.** — *Field v. Clark*, 143 U. S. 649. The President, by section 3 of the act, was authorized to reduce the revenue and equalize duties on imports, and for other purposes to suspend by proclamation the free introduction of sugar, molasses, coffee, tea, and hides, when he was satisfied that any country producing such articles imposed duties or exactions upon the agricultural or other products of the United States which he deemed to be reciprocally unequal or unreasonable. *Fuller, C. J., and Lamar, J., dissenting.*

3. **Appointments.** — *State v. Becker*, 3 S. Dak. 29.

An act authorizing judges of county courts to appoint other justices or constables than those specified in the constitution is upheld in *Ex p. Bassitt*, 90 Va. 679.

4. *State v. Field*, 17 Mo. 529, 59 Am. Dec. 275.

5. *Anderson v. Manchester F. Assur. Co.*, 59 Minn. 182; *O'Neil v. American F. Ins. Co.*, 166 Pa. St. 72, 45 Am. St. Rep. 650; *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63.

6. **Contingent Legislation — General Rule.** — *Connecticut.* — *Lothrop v. Stedman*, 42 Conn. 583.

Illinois. — *Erlinger v. Boneau*, 51 Ill. 94; *Home Ins. Co. v. Swigert*, 104 Ill. 653; *People v. Salomon*, 51 Ill. 37.

Kansas. — *Phoenix Ins. Co. v. Welch*, 29 Kan. 672; *State v. Hunter*, 38 Kan. 578.

Maine. — *Walton v. Greenwood*, 60 Me. 356.

Maryland. — *Baltimore v. Clunet*, 23 Md. 449; *State v. Kirkley*, 29 Md. 85.

Ohio. — *Peck v. Weddell*, 17 Ohio St. 271.

Vermont. — *State v. Parker*, 26 Vt. 357.

Virginia. — *Bull v. Read*, 13 Gratt. (Va.) 78.

Wisconsin. — *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63; *State v. O'Neill*, 24 Wis. 149.

"The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend." *Locke's Appeal*, 72 Pa. St. 498, 13 Am. Rep. 716.

Congress May Make the Revival of an Act Depend upon a Future Event, and direct that such event be made known by executive proclamation. *The Brig Aurora v. U. S.*, 7 Cranch (U. S.) 382.

7. *State v. Kirkley*, 29 Md. 85.

8. *State v. New Haven, etc., Co.*, 43 Conn. 351.

9. *Baltimore v. Clunet*, 23 Md. 449.

10. **Acts Taxing Foreign Corporations.** — *Home Ins. Co. v. Swigert*, 104 Ill. 653; *Phoenix Ins. Co. v. Welch*, 29 Kan. 672. *Contra, Clark v. Mobile*, 67 Ala. 217.

Determination of Some Fact by Municipality, Board, or Officers. — So a statute may be made to take effect on the determination of some fact or state of things on the part of the people or a municipality or other body or officers.¹

Road Law — Dependent upon Recommendation of Grand Jury. — A provision that a particular statute, known as the General Road Law, shall not go into effect in a particular county until recommended by the grand jury thereof is valid.²

Statute to be Inoperative Unless Specified Act Performed. — And the legislature may provide that a given enactment shall become inoperative or cease to exist as a law unless, within a designated period, an act required shall be performed by a person or body to be affected by it.³

(3) *Encroachments upon the Judiciary* — (a) **In General.** — By the attempted exercise of judicial functions legislative bodies frequently assume to trespass upon the domain of the judiciary.⁴

Distinction Between Legislative and Judicial Functions. — But the distinction between the two, in the main outline, is well defined. The former establishes rules that shall regulate and govern in matters or transactions occurring subsequent to the legislative action, while the latter determines rights and obligations with reference to transactions that are past or conditions that exist at the time of the exercise of judicial power.⁵ Still, it cannot be denied that this theoretic-

1. *United States*. — *Wayman v. Southard*, 10 Wheat. (U. S.) 46; *The Brig Aurora v. U. S.*, 7 Cranch (U. S.) 382; *In re Rahrer*, 140 U. S. 561.

Arkansas. — *Trammell v. Bradley*, 37 Ark. 374.

Connecticut. — *Lothrop v. Stedman*, 42 Conn. 583.

Illinois. — *Chicago, etc., R. Co. v. Dey*, 4 Ry. & Corp. L. J. (Ill.) 465; *People v. Reynolds*, 10 Ill. 1.

Iowa. — *Burlington v. Leebrick*, 43 Iowa 252.

Kentucky. — *Talbot v. Dent*, 9 B. Mon. (Ky.) 526.

Maine. — *Walton v. Greenwood*, 60 Me. 356.

Maryland. — *State v. Kirkley*, 29 Md. 85; *Baltimore v. Clunet*, 23 Md. 449.

Massachusetts. — *Wales v. Belcher*, 3 Pick. (Mass.) 508.

Minnesota. — *State v. Chicago, etc., R. Co.*, 38 Minn. 281.

Mississippi. — *Alcorn v. Hamer*, 38 Miss. 652.

Ohio. — *Peck v. Weddell*, 17 Ohio St. 271; *Cincinnati, etc., R. Co. v. Clinton County*, 1 Ohio St. 77.

Vermont. — *State v. Parker*, 26 Vt. 357.

Virginia. — *Bull v. Read*, 13 Gratt. (Va.) 78.

When an act provides for additional justices in counties of certain populations, the county commissioners may be authorized to determine the number of additional justices to which a particular county is entitled and to appoint them. The law being complete in itself, its taking effect in a locality may be made dependent on the finding of a certain state of facts. *Pueblo County v. Smith*, 22 Colo. 534.

2. *Haney v. Bartow County*, 91 Ga. 770.

3. **Statute to Cease to Exist Unless Certain Act Done within Specified Time.** — *Corning v. Greene*, 23 Barb. (N. Y.) 33; *Walton v. Greenwood*, 60 Me. 356.

"The legislature may determine absolutely what shall be done, or it may authorize the same thing to be done upon the consent of third parties. It may command or it may only permit; and in the latter case, as in the

former, its acts have the efficacy of laws." *Field, J.*, in *People v. Burr*, 13 Cal. 358.

A Statute Changing from One Town to Another the Holding of Terms of the Supreme Court in and for the county is not unconstitutional in making the change depend on the performance of certain acts by the citizens of the latter town, as to providing accommodations, etc. *Walton v. Greenwood*, 60 Me. 356.

Grant of Franchise — Conditioned upon Obtaining Consent. — The principle that a state legislature cannot delegate its legislative power does not forbid it to grant a franchise dependent on a condition of obtaining consent from another body. For the legislature to create a corporation with power to lay a street railroad, subject to the condition of obtaining the assent of the city to the use of the street, does not involve delegating legislative power to the city. *Philadelphia v. Lombard, etc.*, Pass. R. Co., 4 Brews. (Pa.) 14.

4. **Encroachments Upon Judicial Department.** — There is nothing in the Constitution of the *United States* which forbids the legislature of a state to exercise judicial functions. *Satterlee v. Matthewson*, 2 Pet. (U. S.) 413; *Baltimore v. State*, 15 Md. 376.

The inhibition arises from a construction of the provisions of the constitution. Under the colonial charter of *Connecticut* the legislature was not restrained from exercising judicial power, and was accustomed to grant appeals and new trials. *Calder v. Bull*, 2 Root (Conn.) 350.

In an early case the Supreme Court of the *United States* announced the rule that whenever the legislative power is undefined it includes the executive and judicial attributes. *Cooper v. Telfair*, 4 Dall. (U. S.) 14.

5. **Legislative and Judicial Power Distinguished.** — *Wayman v. Southard*, 10 Wheat. (U. S.) 46; *Thornton, J.*, in *Smith v. Strother*, 68 Cal. 194; *Newland v. Marsh*, 19 Ill. 382; *Shumway v. Bennett*, 29 Mich. 451; *Greenough v. Greenough*, 11 Pa. St. 494, 51 Am. Dec. 567, *per Gibson, C. J.*; *Jones v. Perry*, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430; *Ex p. Burns*, 1 Tenn. Ch. 83;

cal distinction often vanishes in practice, and that the actual work of the courts constitutes judicial legislation.¹

(b) **Legislative Construction of Laws** — *ad. DECLARATORY STATUTES.* — Declaratory statutes, therefore, which are defined to be "statutes passed in order to put an end to a doubt as to what is the common law, or the meaning of another statute, and which declare what it is and ever has been,"² are without the sphere of constitutional legislative action in so far as any retrospective operation is concerned,³ so that such acts can neither overturn an interpretation

Taylor v. Place, 4 R. I. 324; Bates v. Kimball, 2 D. Chip. (Vt.) 88; Wolfe v. M'Caull, 76 Va. 876.

"The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions." Field, J., in Sinking-Fund Cases, 99 U. S. 761, quoted with approbation in *Wulzen v. San Francisco County*, 101 Cal. 15, 40 Am. St. Rep. 17.

"In fine, the law is applied by the one [judicial] and made by the other [legislative]. To do the first, therefore — to compare the claims of parties with the laws of the land before established — is in its nature a judicial act. But to do the last — to pass new rules for the regulation of new controversies — is in its nature a legislative act; and if these rules interfere with the past or the present, and do not look wholly to the future, they violate the definition of a law 'as a rule of civil conduct,' because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated." *Per* Woodbury, J., in *Merrill v. Sherburne*, 1 N. H. 204, 8 Am. Dec. 52.

"The judicial power is exercised in the decision of cases; the legislative in making general regulations by the enactment of laws. The latter acts from considerations of public policy; the former by the pleadings and evidence in a case." *Per* McLean, J., in *Pennsylvania v. Wheeling, etc., Bridge Co.*, 18 How. (U. S.) 440.

The distinction between legislative and judicial power lies between a rule and a sentence. *Ex p. Shrader*, 33 Cal. 279.

"It is the province of judicial power, also, to decide private disputes 'between or concerning persons,' but of legislative power to regulate public concerns, and to 'make laws' for the benefit and welfare of the state. Nor does the passage of private statutes conflict with these principles; because such statutes, when lawful, are enacted on petition, or by the consent of all concerned, or else they forbear to interfere with past transactions and vested rights." *Merrill v. Sherburne*, 1 N. H. 199, 8 Am. Dec. 52; *Ogden v. Blackledge*, 2 Cranch (U. S.) 272; *Wilkinson v. Leland*, 2 Pet. (U. S.) 627; *Leland v. Wilkinson*, 10 Pet. (U. S.) 294; *State v. Hopper*, 71 Mo. 425; *Taylor v. Porter*, 4 Hill (N. Y.) 140, 40 Am. Dec. 274; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291.

"A judicial duty, within the meaning of the

constitution, is such a duty as legitimately pertains to an officer in the department designated by the constitution as judicial." *State v. Hathaway*, 115 Mo. 37, Gantt, J.

1. See Bentham's Works, vol. 5. pp. 235, 477, vol. 2, p. 223, vol. 7, pp. 260, 261, and compare *supra*, this section, *Frame of Government* — *The Separation of Powers — General View — In Practice*.

2. **Declaratory Statutes Defined.** — Bouvier's Law Dict., "Statutes;" Austin on Jurisprudence, § 37. See the title STATUTES.

3. **Force and Effect of Declaratory Statutes — Retrospective Operation** — *United States*. — Marshall, C. J., in *Postmaster-Gen. v. Early*, 12 Wheat. (U. S.) 148; *Union Iron Co. v. Pierce*, 4 Biss. (U. S.) 327.

Maryland. — *James v. Rowland*, 52 Md. 462.

Missouri. — *McNichol v. U. S. Mercantile Reporting Agency*, 74 Mo. 457.

New York. — *People v. New York*, 16 N. Y. 424.

Pennsylvania. — *Lambertson v. Hogan*, 2 Pa. St. 22; *Reiser v. William Tell Sav. Fund Assoc.*, 39 Pa. St. 137; *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567.

"A Legislative Mandate to Change the Settled Interpretation of a Statute and uproot titles depending on past adjudications, or a legislative direction to perform a judicial function in a particular way, would be a direct violation of the Constitution, which assigns to each organ of the government its exclusive function and a limited sphere of action." O'Connor v. Warner, 4 W. & S. (Pa.) 227, *per* Gibson, C. J.

"Legislation and Interpretation Are Naturally and Radically Distinct Functions. * * * In the very nature of things, interpretation follows legislation, and is not to be confounded with it, either as an act or as an authority. The duties are as distinct as possible, and the performance of them is given to different offices; yet without preventing the legislature from embodying in a statute rules for its interpretation, or from making a new law by changing the application or interpretation of an old one relative to future cases." Lowrie, C. J., in *West Branch Boom Co. v. Dodge*, 31 Pa. St. 285.

5. **A Legislative Interpretation of What Was the Previous Law** on the subject is not binding upon the courts. *Gough v. Pratt*, 9 Md. 527.

Wills — Testator's Signature. — The courts of *Pennsylvania* had decided that a testator's mark to his name, at the foot of a testamentary paper, but without proof that the name was written by his express direction, was not the signature required by the statute, and the legislature declared, in order to overrule it, that "every last will and testament heretofore made, or hereafter to be made, except such as

already given by the courts, nor bind the latter, with respect to the application of the original statutes, to transactions which occurred or rights of action which accrued prior to the passage of the declaratory act.¹

Appeal Bonds. — Thus when the courts have held that an appeal bond, signed by the attorney only is void, the legislature has no power to validate such bonds given prior to the enactment of the statute.²

Statute Requiring Annual Reports of Corporate Debts. — And where the incorporation laws impose certain liabilities for a failure to publish a report of corporate debts, etc., "annually," a statute declaring that "annually" should be construed to mean after the first twelve months, contrary to a previous judicial construction of the term, has no effect on a case arising prior to the date of such enactment.³

Tax. — A legislative act directing the levy and collecting of a tax which has already been declared illegal by the judiciary is void, as are attempted reversals of judicial actions.⁴

Changing Common Law — Modifying Existing Statute. — But a statute which changes the common law or modifies an existing statute is not invalidated by the fact that it assumes the law to have been in the past what it is now declared to be for the future.⁵

Service of Process on Agent of Foreign Corporation. — Thus it was enacted that statutory service on the agent of a foreign corporation should have the same effect as personal service, and this, while held retrospectively void, was sustained as to future cases.⁶

Mechanics' Lien Law. — An act providing that an existing mechanics' lien law

may have been fully adjudicated prior to the passage of this act, to which the testator's name is subscribed by his direction, or to which the testator has made his mark or cross, shall be deemed and taken to be valid." The act was held void so far as its operation was retrospective, but valid as to future cases. *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567.

1. *United States*. — Virginia Coupon Cases, 25 Fed. Rep. 647; *Union Iron Co. v. Pierce*, 4 Biss. (U. S.) 327.

Indiana. — *Dequindre v. Williams*, 31 Ind. 444.

Missouri. — *McManning v. Farrar*, 46 Mo. 376.

Nebraska. — *Lincoln Bldg., etc., Assoc. v. Graham*, 7 Neb. 173.

New York. — *Smith v. Syracuse*, 17 N. Y. App. Div. 63.

Pennsylvania. — *Greenough v. Greenough*, 11 Pa. St. 494, 51 Am. Dec. 567; *West Branch Boom Co. v. Dodge*, 31 Pa. St. 285; *Reiser v. William Tell Sav. Fund Assoc.*, 39 Pa. St. 137; *Haley v. Philadelphia*, 68 Pa. St. 45, 8 Am. Rep. 153; *Com. v. Warwick*, 172 Pa. St. 140.

Tennessee. — *Governor v. Porter*, 5 Humph. (Tenn.) 165.

Texas. — *Powell v. State*, 17 Tex. App. 345.

Vermont. — *Kelsey v. Kendall*, 48 Vt. 24.

"To the legislature belongs the power of enacting such laws, within the limits of the constitution, as the policy of society and its varying interests may seem to require. But after their enactment, it is then the province of the judiciary to ascertain their meaning and determine upon their construction. Any other doctrine would destroy the checks contained in the constitution against the abuse of power, and tend to a concentration of all

power in a single department of the government." *Governor v. Porter*, 5 Humph. (Tenn.) 165, *per White*, J.

Contra. — In *Baker v. Herndon*, 17 Ga. 568, a legislative act declaring that under the fourth section of the Statute of Frauds it was not essential that the consideration be expressed in the writing was held to control the courts in the interpretation of that provision of the Statute of Frauds, even on contracts existing at the time of the passage of such declaratory act.

In *O'Conner v. Warner*, 4 W. & S. (Pa.) 223, it is held that until the judiciary has fixed the meaning of a doubtful law upon which rights have become vested, it may be explained by legislative enactment, and such interpretation will be binding on cases arising prior to the passage of such explanatory statute.

2. *Andrews v. Beane*, 15 R. I. 451.

3. *Union Iron Co. v. Pierce*, 4 Biss. (U. S.) 327.

4. **Tax Already Adjudged Illegal.** — *Baltimore v. Horn*, 26 Md. 194; *Butler v. Saginaw County*, 26 Mich. 22; *Forster v. Forster*, 129 Mass. 559; though statutes intended to cure irregularities in the assessment of property for taxation and the levy of taxes thereon are valid. *Iowa R. Land Co. v. Soper*, 39 Iowa 112; *Lennon v. New York*, 55 N. Y. 361; *Butler v. Toledo*, 5 Ohio St. 225; *Strauch v. Shoemaker*, 1 W. & S. (Pa.) 166; *M'Coy v. Michew*, 7 W. & S. (Pa.) 386; *Montgomery v. Meredith*, 17 Pa. St. 42; *Dunden v. Snodgrass*, 18 Pa. St. 151; *Williston v. Colkett*, 9 Pa. St. 38; *Smith v. Hard*, 59 Vt. 13.

5. *Union Iron Co. v. Pierce*, 4 Biss. (U. S.) 327.

6. *McNichol v. U. S. Mercantile Reporting Agency*, 74 Mo. 471.

should apply to alterations and repairs was held to constitute an amendment and not an infringement on judicial functions.¹

Fellow Servants. — A statute, prospective in its operation, declaring who shall be considered fellow servants is not an unlawful interference with the prerogatives of the judiciary.²

A Legislative Construction of an Act Embodied in the Act Itself is binding on the courts.³ And, in the absence of intervening rights, an act declaratory of a former one has the same effect as if embodied in the original act at the time of its passage.⁴

Subsequent Cognate Enactment. — So where the legislature puts a construction on an act, a subsequent cognate enactment in the same terms would, *prima facie*, be understood in the same sense.⁵

Mandate to Courts, When No Amendment of Original Act. — There is, however, authority for the contention that a legislative body cannot compel the courts to adopt a particular construction of a law which the legislature permits to remain in force; and that unless the declaratory act constitutes an express or implied amendment of the original act, it will not be binding on the courts, even though it be entirely prospective in its operation and expressly confined to future cases.⁶

1. *Purvis v. Ross*, 158 Pa. St. 20.

2. *Galveston, etc., R. Co. v. Worthy*, (Tex. Civ. App. 1894) 27 S. W. Rep. 426.

3. **Construction Fixed by Legislature.** — *Smith v. State*, 28 Ind. 321. See also *U. S. v. Gilmore*, 8 Wall. (U. S.) 330; *Philadelphia, etc., R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20; *Byrd v. State*, 57 Miss. 243, 34 Am. Rep. 440. And see *Jones v. Surprise*, 64 N. H. 243.

"This definition is furnished by the act itself, and the definition is as much a part of the act as any other portion. The right of the legislature to prescribe the legal definitions of its own language must be conceded." *Reese, J.*, in *Herold v. State*, 21 Neb. 50.

A definition of the term "full value of the life of the deceased," in a statute giving a right of recovery for the homicide of a husband or father, does not constitute a usurpation of a judicial function. *Clay v. Central R., etc., Co.*, 84 Ga. 345.

4. *State v. Ohio Soldiers', etc., Orphans' Home*, 37 Ohio St. 275; *People v. New York*, 16 N. Y. 424.

Where a prior act of Congress had impliedly forbidden the organization of railroad companies under the authority of the legislature of Colorado territory, a subsequent Congressional act, declaring the former act to authorize such organization, was held valid as to subsequent transactions. *Stebbins v. Pueblo County*, 2 McCrary (U. S.) 197, *per Miller, J.*

5. *Goldsmid v. Hampton*, 5 C. B. N. S. 94, 94 E. C. L. 94; *Williams v. Lear*, L. R. 7 Q. B. 285, *overruling Purdy v. Smith*, 1 El. & El. 511, 102 E. C. L. 511. See *Ward v. Beck*, 13 C. B. N. S. 668, 106 E. C. L. 668. But "the intention of the legislature, when discovered, must prevail, any rule of construction declared by previous acts to the contrary notwithstanding." *Brown v. Barry*, 3 Dall. (U. S.) 367, *per Elsworth, C. J.*

6. **Mandate to Courts in Absence of Amendment of Original Act.** — *Governor v. Porter*, 5 Humph. (Tenn.) 165; *Lincoln Bldg., etc., Assoc. v. Graham*, 7 Neb. 173; *Planters' Bank v. Black*, 11 Smed. & M. (Miss.) 51, *per Clayton, J.* But

compare O'Conner v. Warner, 4 W. & S. (Pa.) 223.

This view is supported by the great authority of Judge Cooley. "If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and cannot be done by a mandate to the courts which leaves the law unchanged, but seeks to compel the courts to construe and apply it, not according to the judicial but according to the legislative judgment. But in any case the substance of the legislative action should be regarded rather than the form; and if it appears to be the intention to establish by declaratory statute a rule of conduct for the future, the courts should accept and act upon it without too nicely inquiring whether the mode by which the new rule is established is or is not the best, most decorous, and suitable that could have been adopted." *Cooley's Const. Lim.* (6th ed.), p. 113.

Judgment Liens. — By legislative enactment certain judgment liens expired in two years from the passage of the act. Subsequently the legislature enacted that such law "shall not be so construed as to affect the right or impair the lien of any judgment" wherever levy of execution had been prevented by a prior levy under a prior judgment. Of this it was observed: "Nothing is more clear than that it is beyond the scope of legislative authority to put a construction upon its laws which can be obligatory upon the courts. * * * If this be merely a legislative construction of the law, it is of no obligation; but if it be in reality a substantive enactment of a distinct provision, which operates an exception to the general terms of the statute, then, as such exception might have been made in the first instance, so it may equally be made at any time before the defense under the statute has attached." *Per Clayton, J.*, in *Planters' Bank v. Black*, 11 Smed. & M. (Miss.) 51.

Prior Judicial Construction of Constitution. — Where, by prior judicial construction, language used in a constitution has, at the time of its adoption, a settled meaning, such con-

A Statute Cannot Give to an Existing Contract a judicial construction binding on the parties or the courts.¹

Repeal of Statutes. — A recital in an act that a former statute was repealed or suspended by another is not conclusive upon the question of its repeal, that being a subject for judicial determination.²

Declaratory Statutes Are Entitled to Respectful Consideration by the Courts to the extent that they constitute legislative constructions of doubtful phraseology, even though their interpretation may not be binding.³

bb. CONSTITUTIONS. — The legislature is clearly incompetent to place a binding construction upon a constitutional provision.⁴ So the question as to the constitutionality of a statute is one for judicial and not for legislative determination.⁵ And the legislature cannot forestall judicial construction of the constitutionality of a statute by incorporating therein the proviso that "nothing in this act shall be considered contrary to the provisions of the constitution."⁶

cc. TREATIES. — Treaties constitute an exception to the general rule. The relations of the United States government with foreign nations being peculiarly within the province of the political department, any construction which that department has once placed on the provisions of a treaty will be accepted by

struction becomes a part of the constitution which it is beyond the province of the legislature to change. *Powell v. State*, 17 Tex. App. 345.

And Where Language Used in the Constitution Receives Subsequent Judicial Interpretation, such interpretation is binding on the legislature. *Calhoun v. McLendon*, 42 Ga. 405.

Practical Applications of Constitutional Provisions to Legislative Business. — But constructions placed upon provisions of the constitution through the enactment of laws, and other practical applications of such provisions to legislative business which have been long acquiesced in, will not be overturned by the courts, except on weighty considerations. *Moers v. Reading*, 21 Pa. St. 201; *Baltimore v. State*, 15 Md. 376. And see *People v. La Salle County*, 100 Ill. 495.

Legislative Divorces. — Thus the long continued exercise by the legislature of the power to grant divorces was held to establish the existence of the power under the constitution. *Cronise v. Cronise*, 54 Pa. St. 255; *Bingham v. Miller*, 17 Ohio 445, 49 Am. Dec. 471.

Subject Matter of Act to be Expressed in Title — Supplements. — Under a constitutional provision requiring the subject matter of an act to be expressed in the title, the invariable practice of passing statutes merely as "supplements" to certain other statutes, without giving other information of their contents, was held to settle the sufficiency of such designation. *State Line, etc., R. Co.'s Appeal*, 77 Pa. St. 429.

A Constitutional Requirement that Every Act Should Have But One Subject was held to be complied with where one bill prohibited the sale of liquors in various parts of the state, by reason of the sanction of legislative custom. *Howell v. State*, 71 Ga. 224, 51 Am. Rep. 259.

And the frequent passage of laws of a certain description was held conclusive that they did not fall within a certain constitutional prohibition. *Johnson v. Joliet, etc., R. Co.*, 23 Ill. 202.

The consideration shown such interpretation

is especially important where the legislative exposition is almost contemporaneous with the establishment of the constitution as indicative of the views entertained by its framers. *People v. Wright*, 6 Colo. 92; *People v. Green*, 2 Wend. (N. Y.) 274.

1. *King v. Dedham Bank*, 15 Mass. 447, 5 Am. Dec. 112.

2. **Recital in Act of Repeal of Former Statute.** — *U. S. v. Claffin*, 97 U. S. 546. And see *Trask v. Green*, 9 Mich. 358.

And So the Legislative Declaration that Former Acts Shall Not Be Deemed Repealed by later ones is not conclusive, though in *Jeffersonville, etc., R. Co. v. Dunlap*, 112 Ind. 93, it was held that such declarations should be carried into effect whenever it could be done without destroying the later act. And see *People v. Jaehne*, 103 N. Y. 182.

"The Question Whether a Law Has Formerly Existed is not one for legislative, but judicial cognizance." *Trask v. Green*, 9 Mich. 366, *per* Christianity, J.

Whether a Statute Is Repealed by a Subsequent One is a judicial question to be decided by the court, and not by the legislature. A subsequent recognition of a repealed act will not operate to prevent the repeal. *District of Columbia v. Hutton*, 143 U. S. 18; *South Ottawa v. Perkins*, 94 U. S. 260.

3. *People v. New York*, 16 N. Y. 434, *per* Shakeland, J.; *Cooley's Statutory Crimes* (2d ed.), § 91.

"Explanatory acts must be construed as operating in future cases alone, except where they are designed to explain a doubtful statute, in which case they deserve and always will receive the most respectful attention from the judicial branch of the government." *Lambertson v. Hogan*, 2 Pa. St. 25, *per* Rogers, J.

4. **Constitutions.** — *Foster v. Neilson*, 2 Pet. (U. S.) 309; *U. S. Arredondo*, 6 Pet. (U. S.) 711; *Garcia v. Lee*, 12 Pet. (U. S.) 511; *U. S. v. Reynes*, 9 How. (U. S.) 153; *Williams v. Suffolk Ins. Co.*, 13 Pet. (U. S.) 420.

5. *Opening of Ruan St.*, 132 Pa. St. 257.

6. *Ex p. Blanchard*, 9 Nev. 101.

the courts as a binding interpretation.¹

Existence of De Facto Government. — So the political department, and not the courts, determines the question as to the existence or non-existence of an alleged government *de facto*.²

Determining the Territorial Jurisdiction of a Foreign Country is of necessity vested in the treaty-making power; and where the President, in his official communications, has denied the jurisdiction of a foreign country over specified territory, it is not within the province of the courts to determine otherwise.³

In the Absence of Any Such Interpretation by the treaty-making or war-making power, however, the judicial department must construe and enforce a treaty just as it does the Constitution and Acts of Congress.⁴

(c) Legislation Affecting Settled or Pending Judicial Proceedings — *aa.* NEW TRIALS, REHEARINGS, AND OPENING JUDGMENTS. — The Colonial Legislatures frequently exercised the power of granting new trials in adjudicated causes.⁵

Since Formation of Federal Government. — Even since the formation of the Federal Government there has been some authorization of this practice,⁶ and at any

1. Treaties — Exception to the Rule. — "The judiciary is not the department of the government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. We think, then, however individual judges might construe the treaty of Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed." *Foster v. Neilson*, 2 Pet. (U. S.) 306, *per* Marshall, C. J.

Likewise, "when the executive branch of the government, which is charged with the foreign relations of the United States, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department. And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong." *Williams v. Suffolk Ins. Co.*, 13 Pet. (U. S.) 419, *per* McLean, J. See also *Marbury v. Madison*, 1 Cranch (U. S.) 170; *Gelston v. Hoyt*, 3 Wheat. (U. S.) 247; *U. S. v. Palmer*, 3 Wheat. (U. S.) 610; *Garcia v. Lee*, 12 Pet. (U. S.) 511; *Scott v. Jones*, 5 How. (U. S.) 343; *Kennett v. Chambers*, 14 How. (U. S.) 38; *Doe v. Braden*, 16 How. (U. S.) 635; *Fellows v. Blacksmith*, 19 How. (U. S.) 366; *U. S. v. Holliday*, 3 Wall. (U. S.) 407; *Georgia v. Stanton*, 6 Wall. (U. S.) 50.

2. U. S. v. Baker, 5 Blatchf. (U. S.) 12.

3. Koehler v. Hill, 60 Iowa 593; *Williams v. Suffolk Ins. Co.*, 13 Pet. (U. S.) 415.

4. Where There Has Been No Interpretation by the Political Department — United States. — *Holden v. Joy*, 17 Wall. (U. S.) 211; *Fellows v. Blacksmith*, 19 How. (U. S.) 366; *Gray v. Coffman*, 3 Dill. (U. S.) 393; *Hicks v. Butrick*, 3 Dill. (U. S.) 413.

Alabama. — *Wilson v. Wall*, 34 Ala. 288.

Kansas. — *Oliver v. Forbes*, 17 Kan. 113.

Massachusetts. — *Fox v. Southack*, 12 Mass. 143.

Virginia. — *Com. v. Bristow*, 6 Call. (Va.) 60.

5. Colonial Practice. — Under the colonial charter of *Connecticut* a large part of the legislative business was the hearing and granting of new trials. *Wheeler's Appeal*, 45 Conn. 306, *per* Loomis, J.; *Hamilton v. Hempsted*, 3 Day (Conn.) 338; *Calder v. Bull*, 2 Root (Conn.) 350; *Colonial Records*, vol. 10; *Swift's Digest*, 815.

In *Calder v. Bull*, 3 Dall. (U. S.) 386, a legislative enactment of *Connecticut*, setting aside a decree of the Court of Probate of Hartford, which decree disallowed the will of one Morrison, and granting a rehearing by said probate court with liberty of appeal therefrom in six months, was held valid. *Patterson, J.*, said: "The constitution of *Connecticut* is made up of usages, and it appears that its legislature have from the beginning exercised the power of granting new trials. From the best information which I have been able to collect on this subject, it appears that the legislature or general court of *Connecticut* originally possessed and exercised all legislative, executive, and judicial authority, and that from time to time they distributed the two latter in such manner as they thought proper. But be this as it may, they have, on certain occasions, exercised judicial authority from the commencement of their civil polity. This usage makes up part of the Constitution of *Connecticut*." See also opinions of *Iredell, J.*, and *Cushing, J.*

The doctrine above set forth has, however, no application under the present Constitution of *Connecticut*. In *New Hampshire*, also under colonial institutions the legislature claimed and exercised the power of granting new trials. *Merrill v. Sherburne*, 1 N. H. 199, 8 Am. Dec. 52. Though in that case the court, *per* Woodbury, J., said: "The uninterrupted usage of the legislature to grant new trials for a period of twenty-seven years would not sanction such usage if contrary to the letter and spirit of the written constitution."

6. In Bradlee v. Brownfield, 2 W. & S. (Pa.) 280, the legislature was held competent to authorize rehearings in cases already adjudicated. But this decision has been overruled. See *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567; *McCabe v. Emerson*, 18 Pa. St. 112; *De Chastellux v. Fairchild*, 15 Pa. St. 18, 53 Am. Dec. 570.

rate it is not forbidden by the Federal Constitution.¹

But the Modern Rule under the State Constitutions is that no power exists on the part of the legislature to grant new trials or rehearings,² or to authorize the opening of a judgment previously rendered, after that remedy under the general law has expired.³

1. Baltimore, etc., *R. Co. v. Nesbit*, 10 How. (U. S.) 395, the court saying: "The states have a right to direct the rehearing of cases decided in their own courts." But the question as to whether such action on the part of the legislature violated the Maryland Constitution was not considered, and in *Dorsey v. Gary*, 37 Md. 64, 11 Am. Rep. 528, the court held that it was not competent by legislation to authorize the court of final resort to reopen and rehear cases previously decided.

2. At Present Legislature Powerless to Grant New Trials or Rehearings — *Arkansas*. — *Oliver v. McClure*, 28 Ark. 555.

Alabama. — *Weaver v. Lapsley*, 43 Ala. 224; *Sanders v. Cabaniss*, 43 Ala. 173.

California. — *People v. Frisbie*, 26 Cal. 135.

Indiana. — *Young v. State Bank*, 4 Ind. 301, 58 Am. Dec. 630; *Beebe v. State*, 6 Ind. 515, 63 Am. Dec. 391.

Louisiana. — *Lanier v. Gallatas*, 13 La. Ann. 175.

Maine. — *Lewis v. Webb*, 3 Me. 326; *Durham v. Lewiston*, 4 Me. 140; *Atkinson v. Dunlap*, 50 Me. 111.

Maryland. — *Miller v. State*, 8 Gill (Md.) 145; *Baltimore v. Horn*, 26 Md. 194.

Massachusetts. — *Denny v. Mattoon*, 2 Allen (Mass.) 379, 79 Am. Dec. 784.

Michigan. — *Butler v. Saginaw County*, 26 Mich. 27, *per Cooley, J.*; *Moser v. White*, 29 Mich. 59.

Mississippi. — *Hooker v. Hooker*, 10 Smed. & M. (Miss.) 599; *Lawson v. Jeffries*, 47 Miss. 686, 12 Am. Rep. 342.

New Hampshire. — *Merrill v. Sherburne*, 1 N. H. 199, 8 Am. Dec. 52.

North Carolina. — *Herndon v. Imperial F. Ins. Co.*, 111 N. Car. 384.

Pennsylvania. — *De Chastellux v. Fairchild*, 15 Pa. St. 18, 53 Am. Dec. 570; *McCabe v. Emerson*, 18 Pa. St. 112; *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567.

Rhode Island. — *Opinion of Justices*, 3 R. I. 299; *Taylor v. Place*, 4 R. I. 324.

Vermont. — *Bates v. Kimball*, 2 D. Chip. (Vt.) 77; *Stanford v. Barry*, 1 Aik. (Vt.) 314, 15 Am. Dec. 691.

Virginia. — *Ratliffe v. Anderson*, 31 Gratt. (Va.) 105, 31 Am. Rep. 716.

West Virginia. — *Peerce v. Kitzmiller*, 19 W. Va. 564.

"If anything is self-evident in the structure of our government, it is that the legislature has no power to order a new trial or to direct the court to order it, either before or after judgment. The power to order new trials is judicial, but the power of the legislature is not judicial. * * * The legislature has gone no farther than to order a rehearing on the merits; but it is not more intolerable in principle to pronounce an arbitrary judgment against a suitor than it is injurious in practice to deprive him of a judgment, which is essentially his property, and to subject him to the vexation, risk, and expense of another con-

test." *De Chastellux v. Fairchild*, 15 Pa. St. 18, 53 Am. Dec. 570, *per Gibson, C. J.*

An act which requires a court to grant a new trial in any case in which a final judgment has been rendered, when the period previously limited by law for moving to set aside such judgment or for taking an appeal or writ of error had expired before the passage of the act, is unconstitutional. *Davis v. Menasha*, 21 Wis. 421.

The legislature has no authority to confer upon the court the power to set aside, annul, or affirm "as to the court may seem proper" the decisions of a court established by the military authorities under the reconstruction laws of Congress, even though the exercise of such power be limited to the first term of the newly constituted court. *Griffin v. Cunningham*, 20 Gratt. (Va.) 31; *Teel v. Yancey*, 23 Gratt. (Va.) 691.

3. *Cooley on Const. Law*, p. 45; *Butler v. Saginaw County*, 26 Mich. 27.

A Statute Authorizing the Opening of Judgments rendered since a certain anterior date impairs vested rights and infringes on the judicial department. *Ratliffe v. Anderson*, 31 Gratt. (Va.) 105, 31 Am. Rep. 716.

The doctrine of the case of *Braddee v. Brownfield*, 2 W. & S. (Pa.) 271, holding valid an act of the legislature directing a judgment to be opened and the defendant let into a defense upon the plea of payment, is overruled in *De Chastellux v. Fairchild*, 15 Pa. St. 18, 53 Am. Dec. 570; *Baggs's Appeal*, 43 Pa. St. 512, 82 Am. Dec. 582.

A vote of the general assembly opening judgments obtained in the common pleas on writs served by garnishee process, in order to let in the garnishees to amend and permitting them to amend their affidavits on the ground that the same had been erroneously made to their disadvantage from accident or mistake, and also setting aside a verdict obtained against the garnishees in a pending suit, brought to recover the amounts admitted by their affidavits, as first filed, to be attached in their hands, for the purpose of enabling them to avail themselves of such amendment, is an exercise of the judicial power in the constitutional sense, and void. *Taylor v. Place*, 4 R. I. 324.

The Doctrine in Maryland. — In *Garretson v. Cole*, 1 Har. & J. (Md.) 391, the Court of Appeals, at the June, 1801, term, reinstated the case which had been decided at the June, 1799, term, under the Act of 1800, which "authorized the court to reinstate the case if in their judgment and opinion under all the circumstances of the cause the same would tend to do justice between the parties." But it does not appear that any question was made or argued touching its constitutionality or validity.

In *Gover v. Hall*, 3 Har. & J. (Md.) 43, the Court of Appeals proceeded to consider and determine on its merits a case adjudicated nine years before "as if no such decree had been

The North Carolina Constitution provides that the general assembly may regulate the rules and practice of inferior courts, but this does not authorize it to require a rehearing in the supreme court contrary to the rules of that tribunal.¹

Probate Courts. — The legislature cannot confer new powers upon the probate court to set aside at a subsequent term a settlement made by a guardian or an executor;² nor to renew the appointment of commissioners of claims against the estate of a deceased person after the expiration of the time limited by law for such renewal.³

So a statute authorizing the probate court to entertain a bill to review its own decrees cannot affect those rendered prior to its enactment.⁴

bb. APPEALS — Prevailing Rule. — On the same principle, a statute is unconstitutional which seeks to confer a right to an appeal or writ of error in cases where no right existed when judgment was rendered,⁵ or where such right then existing has since become forfeited.⁶ Thus an act allowing an appeal from the decision of road commissioners is void as to those persons to whom dam-

entered," on the authority of a legislative act empowering and directing the court so to do. But here again the constitutionality of the act does not appear to have been brought in question. In the later cases of *Prout v. Berry*, 2 Gill (Md.) 147; *State v. Northern Cent. R. Co.*, 18 Md. 193, it is unequivocally held, however, that the legislature is empowered to confer on the Court of Appeals the right to hear appeals in special cases after the right to such appeal under the general law has expired. The apparent contrary holding in *Miller v. State*, 8 Gill (Md.) 145, is shown by the opinion in *State v. Northern Cent. R. Co.*, 18 Md. 193, to be in fact a decision of a different question.

In *Calvert v. Williams*, 10 Md. 478, an act of the legislature authorizing a court of equity, upon the application or petition of the defendant, in a certain cause, upon certain specified conditions and under certain specified circumstances, to open any decree or order which had been passed against him in said cause, was held constitutional. The court based its decision solely on previous holdings of the Maryland court. *Le Grand, C. J.*, in the opinion, says: "Were we called upon for the first time to pronounce on the constitutionality of such legislation, we would not hesitate to decide against it."

1. *Herndon v. Imperial F. Ins. Co.*, 111 N. Car. 384.

2. **Probate Courts.** — *Hooker v. Hooker*, 10 Smed. & M. (Miss.) 599.

The legislature has no authority to direct the Orphans' Court to grant a review of the administrator's account and decree of distribution after the expiration of the period therefor under the general law. *Baggs's Appeal*, 43 Pa. St. 512, 82 Am. Dec. 583.

In *Dorsey v. Gary*, 37 Md. 64, 11 Am. Rep. 528, it was held, after a review of the previous decisions of the court, that an act was unconstitutional and void as a usurpation of judicial functions which authorized the court "to reopen and rehear certain enumerated cases which had been previously decided by the court, and upon the hearing thereof to pass such judgments, orders and decrees in the said several cases as right and justice might require." See *Hagerstown v. Sehner*, 37 Md. 190.

3. *Bradford v. Brooks*, 2 Aik. (Vt.) 284, 16 Am. Dec. 715.

4. *Stewart v. Davidson*, 10 Smed. & M. (Miss.) 351.

5. **Conferring Right of Appeal When No Right Existed at Time of Judgment.** — *Lewis v. Webb*, 3 Me. 326; *Hill v. Sunderland*, 3 Vt. 507.

In *Converse v. Burrows*, 2 Minn. 229, it was held that a statute providing the right of appeal from an order granting or refusing a new trial would apply to an order granting a new trial which was entered prior to the passage of the act. The court, *per Atwater, J.*, says: "Statutes of this nature may be construed *ultra*, but not *contra*, the strict letter (1 Kent 465); and the doctrine that statutes retrospective in their effect are unconstitutional is held not to apply to remedial statutes which may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights. We cannot perceive how the act giving the right of appeal in this case impairs in any manner the contract between the parties or affects any vested right of the defendants."

But in *Beaupre v. Hoerr*, 13 Minn. 366, the power of the legislature to grant an appeal or review a writ of error, where the same is not given by existing law, or the right to them has been lost by the lapse of time, is expressly denied.

6. **Where Right Forfeited.** — *Burch v. Newbury*, 10 N. Y. 374; *Durham v. Lewiston*, 4 Me. 140; *Beaupre v. Hoerr*, 13 Minn. 366.

A special act of the legislature granting to a party the privilege of an appeal from a decision of the commissioners of claims on an insolvent estate, after the time allowed for taking appeals, is in effect a vacation of an existing judgment, and consequently a legislative attempt to exercise judicial power and void. *Bates v. Kimball*, 2 D. Chip. (Vt.) 77; *Stanford v. Barry*, 1 Aik. (Vt.) 314, 15 Am. Dec. 691.

So, also, is a statute authorizing a probate court to renew a commission of claims after such commission had been closed, and after the time limited by the general law for such renewal. *Bradford v. Brooks*, 2 Aik. (Vt.) 284, 16 Am. Dec. 715.

When a statute enlarges the time within which a petition for the vacation of a justice's judgment might be taken, it will not be construed as retrospective in its operation so as to allow a petition to be sustained in a case in which the limitation had expired before the

ages and costs had been awarded before its passage.¹ So the legislature cannot confer the right of appeal and trial *de novo* in the supreme court of a cause wherein no such right existed at the time the decision therein was rendered.²

Minority View. — There is some authority, however, for a doctrine contrary to the foregoing.³

Nature of Right to an Appeal. — In the absence of a contrary constitutional provision, the right to an appeal is not a vested right, but a privilege which the legislature may take away.⁴

cc. **GRANTING CONTINUANCES.** — The granting of continuances of pending cases is the exercise of judicial authority, and a legislative act assuming to do this is void.⁵

dd. **JUDGMENTS — ATTEMPTED VALIDATION OR INVALIDATION — Rule as to Invalidation.** — The legislature has no power to invalidate a judgment duly rendered by a court of competent jurisdiction, either by a direct enactment or indirectly by ignoring such judgment and proceeding or requiring others to proceed in disregard of its provisions.⁶

enactment of the statute. *Briggs v. Hubbard*, 19 Vt. 86.

1. Appeal from Decision of Road Commissioners. — *Hill v. Sunderland*, 3 Vt. 507.

When the law provided that the failure of a party to take out a writ of error until after the determination of his adversary's writ of error constituted a waiver of the right to such writ on his part, a subsequent statute changing the law in that regard was held inapplicable to any case in which an adjudication had been on the error proceedings of one of the parties. *McCabe v. Emerson*, 18 Pa. St. 111.

2. State v. Flint, 61 Minn. 539.

3. Minority Doctrine. — In *Wheeler's Appeal*, 45 Conn. 306, the commissioners on an insolvent estate of a deceased person made their report, and no appeal was taken within the twenty days allowed by law. A month after the time for appealing had expired, the general assembly passed a special act allowing appeals to be taken from the acts of the commissioners on that estate within twenty-one days after the rising of the general assembly. It was held that their act was constitutional and valid. In the opinion of the court, *per Loomis, J.*, admits that the general rule is as stated in the text. "At the outset we must concede that if the act in question should be tested by the decisions of the courts of the other New England States * * * it must be declared void. And such a weight of legal authority, we should at once accept as conclusive, were it not obvious from the past history of our own jurisprudence and long-continued legislative practice that we have reserved a much larger field for legislative action than has ever been recognized in the states referred to. * * * Long-continued legislative usage is of controlling weight upon the question of the constitutionality of an act. * * * A reference to the private acts of our legislature will show that it has always exercised without question many judicial or quasi-judicial powers."

A retroactive statute giving the right of appeal in cases decided within a certain period, though such right had lapsed under the general law, was upheld in *Page v. Matthews*, 40 Ala. 547.

But in *Carleton v. Goodwin*, 41 Ala. 153, the same court held unconstitutional a statute the

effect of which would have been to revive discontinued appeals. In the opinion the court seeks to distinguish *Page v. Matthews*, 40 Ala. 547, but admits that the doctrine in that case is very near the boundary of the legislative province.

4. Right to Appeal Not a Vested One. — *Ex p. McCardle*, 7 Wall. (U. S.) 506; *Baltimore, etc., R. Co. v. Grant*, 98 (U. S.) 398.

In these cases it is held that the rule applies even to causes that have been appealed and are pending in the higher court when the act was passed.

In *Grover v. Coon*, 1 N. Y. 536, it is so held, at least as to actions still pending and undetermined in the lower courts.

5. Burt v. Williams, 24 Ark. 91.

6. Rule as to Invalidating Judgments. — *Skiner v. Holt*, (S. Dak. 1896), 69 N. W. Rep. 595.

"An act of the legislature cannot set aside or annul final judgments or decrees." *Per Bigelow, Ch. J.*, in *Denny v. Mattoon*, 2 Allen (Mass.) 379, 79 Am. Dec. 784.

The legislature has no power to set aside a judgment rendered before the passage of the act, no matter how erroneous the judgment may be. *Arnold v. Kelley*, 5 W. Va. 447; *Griffin v. Cunningham*, 20 Gratt. (Va.) 31; *U. S. v. Klein*, 13 Wall. (U. S.) 128.

"It is not true that the Parliament of Great Britain or the legislatures of the particular states can rectify the exceptional decisions of their respective courts. * * * The theory, neither of the British nor the state constitutions, authorize the reversal of a judicial sentence by a legislative act. * * * A legislature, without exceeding its province, cannot revise a determination once made in a particular case; though it may prescribe a new rule for future cases." *Federalist*, No. 81.

Validating a Deed Previously Adjudged Invalid. — In *Menges v. Wertman*, 1 Pa. St. 218, it was held that a statute validating a deed previously declared invalid by the Supreme Court was constitutional. But this doctrine has been frequently criticised in subsequent cases. *Dale v. Medcalf*, 9 Pa. St. 110; *Greenough v. Greenough*, 11 Pa. St. 495, 51 Am. Dec. 567; *Lycoming v. Union*, 15 Pa. St. 172, 53 Am. Dec. 575. And has been directly repudiated in many other cases. *Lambertson v. Hogan*, 2 Pa. St. 22;

Decree of Treason. — The legislature cannot reverse and annul a decree of treason.¹

Attaching Conditions. — Nor can it impair a judgment by requiring the owner to make certain payments as a condition to its remaining in force.²

Taxes. — And where the courts have enjoined the collection of³ or decreed modifications in the assessment of⁴ taxes, no subsequent statute can nullify such action.

Rule as to Validating Judgments. — Nor can the legislature award validity to a void judgment or other judicial proceeding,⁵ especially if the defects are jurisdictional,⁶ or the person assuming to exercise judicial powers was without

Brown v. Hummel, 6 Pa. St. 87, 47 Am. Dec. 431; *De Chastellux v. Fairchild*, 15 Pa. St. 18, 53 Am. Dec. 570; *Snyder v. Bull*, 17 Pa. St. 58; *McCabe v. Emerson*, 18 Pa. St. 111; *Menges v. Dentler*, 33 Pa. St. 495, 75 Am. Dec. 616.

Judgment for Damages for Tort. — In Louisiana *v. New Orleans*, 109 U. S. 285, the Supreme Court of the United States held that a judgment for damages for a tort might be indirectly impaired by abrogating the means through which it could be enforced without violating any constitutional provisions. But, as is pertinently suggested by Mr. Hare (*American Const. Law*, p. 847, note), "A recovery of damages in trover is the substitute given by the law for the thing of which the owner has been deprived; and in denying the power to carry the judgment into execution, the legislature becomes the accomplice of the wrongdoer and renders the spoliation inevitable." See also the concurring opinion of Mr. Justice Bradley in the case last cited.

1. **Decree of Treason.** — Opinion of Justices, 3 R. I. 299.

2. **Attaching Conditions.** — *Gilman v. Tucker*, 128 N. Y. 190, 26 Am. St. Rep. 464.

3. **Taxes.** — Where a court of competent jurisdiction had enjoined the collection of certain gravel-road assessments, a subsequent legislative act authorizing the collection of such assessments is void. *Searcy v. Patriot, etc., Turnpike Co.*, 79 Ind. 274.

Where a court of competent jurisdiction has enjoined the authorities from proceeding to collect, from owners of adjacent property, certain assessments for street grading which were adjudged illegal, the legislature has no power to direct the levy of a tax against such property owners to pay a loan to be negotiated by the city for the payment of such grading contract. *Baltimore v. Horn*, 26 Md. 194.

4. Where the county court, acting within its jurisdiction, denied certain modifications in the assessment valuation of property, the legislature cannot subsequently direct the assessor and county clerk to disregard such modifications. *Ex p. Low*, 24 W. Va. 620.

5. **Rule as to Validating Judgments.** — *State v. Doherty*, 60 Me. 504; *Denny v. Mattoon*, 2 Allen (Mass.) 361, 79 Am. Dec. 784; *Lane v. Nelson*, 79 Pa. St. 407; *Griffin v. Cunningham*, 20 Gratt. (Va.) 109; *Nelson v. Rountree*, 23 Wis. 367.

The legislature cannot authorize a court to validate prior decrees. *Roche v. Waters*, 72 Md. 264.

It is not competent for the legislature to make a void proceeding valid. "Upon this question we cannot for a moment doubt or

hesitate. They [the legislature] can no more impart a binding efficacy to a void proceeding than they can take one man's property from him and give it to another. Indeed, to do the one is to accomplish the other." *McDaniel v. Correll*, 19 Ill. 226, 68 Am. Dec. 587.

6. **Where There Are Jurisdictional Defects** — *California*. — *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656.

Colorado. — *Israel v. Arthur*, 7 Colo. 5.

Illinois. — *McDaniel v. Correll*, 19 Ill. 226, 68 Am. Dec. 587.

Indiana. — *Johnson v. Wells County*, 107 Ind. 15; *Fahlor v. Wells County*, 101 Ind. 167; *Wells County v. Fahlor*, 132 Ind. 426.

Iowa. — *Tilton v. Swift*, 40 Iowa 78.

Kentucky. — *Yeatman v. Day*, 79 Ky. 186.

Maine. — *State v. Doherty*, 60 Me. 504.

Maryland. — *Roche v. Waters*, (Md. 1889) 18 Atl. Rep. 866.

Massachusetts. — *Denny v. Mattoon*, 2 Allen (Mass.) 361, 79 Am. Dec. 784.

New Jersey. — *Maxwell v. Goetschius*, 40 N. J. L. 383, 29 Am. Rep. 242.

Pennsylvania. — *Lane v. Nelson*, 79 Pa. St. 407; *Richards v. Rote*, 68 Pa. St. 248. See *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567; *De Chastellux v. Fairchild*, 15 Pa. St. 18, 53 Am. Dec. 570; *Baggs's Appeal*, 43 Pa. St. 512, 82 Am. Dec. 583; *Schafer v. Eneu*, 54 Pa. St. 304; *Hegarty's Appeal*, 75 Pa. St. 503.

Rhode Island. — *Taylor v. Place*, 4 R. I. 324; *Andrews v. Beane*, 15 R. I. 451.

Virginia. — *Griffin v. Cunningham*, 20 Gratt. (Va.) 109, *per* Joynes, J.

Wisconsin. — *Nelson v. Rountree*, 23 Wis. 367; *Cooley's Const. Lim.* (6th ed.), p. 471.

Statements of the Rule — Illustrations. — "Curative statutes will not be sustained as legalizing proceedings had without jurisdiction over the subject-matter, or the person, and where there was an entire lack of power on the part of the court, body, or officer, whose proceedings are sought to be legalized." *Johnson v. Wells County*, 107 Ind. 15.

"An act of the legislature cannot take the property of one man and give it to another, and when it has been attempted to be taken by a judicial proceeding, as a sheriff's sale, which is void for want of jurisdiction, it is not in the power of the legislature to infuse life into that which is dead, to give effect to a mere nullity. That would be essentially a judicial act, to pronounce judgment, to usurp the province of the judiciary, to forestall or reverse their decision." *Richards v. Rote*, 68 Pa. St. 256.

Where a statute provided that "all orders of publication [on non-resident defendants],

authority to so act.¹

Constructive Service — Jurisdiction. — Thus where by reason of non-compliance with the law regulating constructive service, jurisdiction has not attached, a retroactive statute cannot cure the defect.²

Insolvency Proceedings. — The legislature has no power to confirm proceedings in insolvency before a person claiming to act as judge of insolvency, but with no title to the office, and which had been adjudged invalid.³

When Property Has Been Sought to Be Taken by a judicial proceeding void for want of jurisdiction, the legislature cannot validate it.⁴

Bills of Exceptions — Depositions — Municipal Bonds. — The same doctrines have been applied to proceedings not strictly judicial, such as the preparation of bills of exceptions,⁵ taking of depositions,⁶ and the issue of municipal bonds.⁷

But a Statute Validating a Prior Tax Levy does not constitute an invasion of judicial functions because a court had previously declared the levy invalid in a suit on another levy.⁸

Remedial Legislation intended to cure mere irregularities or informalities in the proceedings of courts is not an usurpation of judicial functions.⁹ For example,

heretofore or hereafter made, shall be evidence that the court or officer authorized to grant the same was satisfied of the existence of all facts requisite to the granting of such order or orders, and shall be evidence of the existence of such facts," the court held that it was not competent for the legislature by such an enactment to give validity to a void judgment. *Nelson v. Rountree*, 23 Wis. 369.

In *Walpole v. Elliott*, 18 Ind. 259, 81 Am. Dec. 358, the court seems to say that a void judgment may be validated by a legislative act. But the language used is broader than the facts called for, since in that case there was not a failure of jurisdiction, but an irregular exercise of it; the act being one to make valid the proceedings of a court at a special term not held pursuant to law.

An act of the general assembly cannot validate a bill of exceptions presented and signed on the order of the court after the time authorized by statute. *Yeatman v. Day*, 79 Ky. 186.

The legislature has no power to validate a judgment of the probate court directing a sale of real estate, or to validate the sale made by an administrator or executor under such judgment, if the judgment was void for want of jurisdiction to render it. *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656.

The lack of jurisdiction of an appellate court consequent upon a void appeal bond cannot be cured by a legislative act. *Andrews v. Beane*, 15 R. I. 451.

1. The legislature was held incompetent to confirm and make valid proceedings had on indictments which were void by reason of illegality in the summoning of the grand jury by which such indictments were found. *State v. Doherty*, 60 Me. 504.

2. *Israel v. Arthur*, 7 Colo. 5; *McDaniel v. Correll*, 19 Ill. 226, 68 Am. Dec. 587.

3. *Denny v. Mattoon*, 2 Allen (Mass.) 361, 79 Am. Dec. 784; *Fayerweather v. Dickinson*, 2 Allen (Mass.) 385, note.

4. *Richards v. Rote*, 68 Pa. St. 248; *Dale v. Medcalf*, 9 Pa. St. 108; *Menges v. Dentler*, 33 Pa. St. 495, 75 Am. Dec. 616.

When a Board of Supervisors Had Attempted to Open a Road without observing certain legal requirements, a subsequent act of the legisla-

ture purporting to legalize such order was held to be void, as a legislative effort to determine a question essentially judicial. *Seibert v. Linton*, 5 W. Va. 57.

5. **Bills of Exceptions.** — The legislature can give no validity to a bill of exceptions that was not seasonably reduced to writing, and was therefore, under the existing law, a nullity. *Yeatman v. Day*, 79 Ky. 186.

6. **Depositions.** — A statute is unconstitutional which directs that a deposition which was not taken in accordance with law shall nevertheless be admitted in evidence on the hearing of a certain case. *Dupy v. Wickwire*, 1 D. Chip. (Vt.) 237, 6 Am. Dec. 729.

7. **Municipal Bonds.** — The legislature is incompetent to validate municipal bonds issued in violation of constitutional provisions still in force. *Quaker City Nat. Bank v. Nolan County*, 59 Fed. Rep. 660.

Manifestly, legislative recognition of the validity of such bonds will not give them binding force. *Folsom v. Township of Ninety-Six*, 59 Fed. Rep. 67.

8. *Marion County v. Louisville, etc., R. Co.*, 91 Ky. 388.

9. **Remedial Legislation — Mere Informalities.** — *Israel v. Arthur*, 7 Colo. 5; *Cookerly v. Duncan*, 87 Ind. 332; *Muncie Nat. Bank v. Miller*, 91 Ind. 441; *Walpole v. Elliott*, 18 Ind. 258, 81 Am. Dec. 358; *Lane v. Nelson*, 79 Pa. St. 407.

"The legislature may, by statute, validate judicial proceedings where the statute is only in aid thereof and tends to support the same, by precluding parties from taking advantage of errors or irregularities which do not affect their substantial rights." *Israel v. Arthur*, 7 Colo. 5.

"The legislature has power to legalize and validate a claim supported by a moral obligation and founded in justice, against a town, which has already been declared invalid by the courts because of failure on the part of the town officers to pursue strictly the prescribed statutory proceedings." *Wrought-Iron Bridge Co. v. Attica*, 119 N. Y. 204; *Guilford v. Chenango County*, 13 N. Y. 143.

The legislature was held competent to provide for the payment by a city of the just com-

a statute making certain judgments valid, where the only infirmity in the proceedings is the omission of the judge's signature to the record, is constitutional.¹

(d) **Legislative Adjudications** — *in GENERAL*. — Manifestly the legislature cannot directly usurp the functions of the judiciary by attempting to adjudicate controversies or cases which have arisen at law or in equity.² Thus acts releasing a bail bond after a breach thereof,³ discharging a debtor from imprisonment and freeing him from arrest,⁴ and authorizing sales and distributions by guardians⁵ or administrators,⁶ have been held unconstitutional. The legislature cannot adjudicate claims respecting title to lands⁷ or office,⁸ nor transfer

penetration for merchandise sold to the fire department, which was otherwise uncollectible because purchased from a firm of which one of the fire commissioners was a member. *People v. New York*, 3 Misc. Rep. (N. Y. Super. Ct.) 131.

Where jurisdiction has been attacked and there has been a formal defect in the proceedings, when the equity of the party is complete and all that is wanted is legal form, the legislature may correct such defect and provide a remedy. *Lane v. Nelson*, 79 Pa. St. 407.

1. *Cookerly v. Duncan*, 87 Ind. 332.

The legislature has power to legalize a judgment extended in a written waiver of summons on the part of the defendant, inasmuch as before the event such a waiver might have been declared equivalent to the issuance and service of a summons. *Muncie Nat. Bank v. Miller*, 91 Ind. 441.

2. **Legislature Cannot Adjudicate**. — "The legislature cannot sit in judgment, try causes and apply the rules of law to them, make decrees, and much less can they make decrees in the exercise of an arbitrary power independent of and in opposition to the rules of law." *Per Green, J.*, in *Jones v. Perry*, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430.

"That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced." *Ervine's Appeal*, 16 Pa. St. 256, 55 Am. Dec. 499.

Any legislative act "which undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, is to that extent a judicial act and is not the proper exercise of legislative functions." *Sinking Fund Cases*, 99 U. S. 761; *Wulzen v. San Francisco County*, 101 Cal. 15, 40 Am. St. Rep. 17.

"The legislative power extends only to making of laws, and in its exercise it is limited and restrained by the paramount authority of federal and state constitutions. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another, without trial and judgment in the courts, for to do so would be the exercise of a power which belongs to another branch of the government and is forbidden to the legislative." *Newland v. Marsh*, 19 Ill. 383.

When a controversy is regularly pending in the proper court touching the respective rights of the parties thereto, under existing laws, the legislature has no power to put an end to the contest and take away the right itself, for the enforcement of which the party alleging injury has appealed to such court. *Gaines v. Gaines*,

9 B. Mon. (Ky.) 295, 48 Am. Dec. 425, *per Marshall, C. J.*: "If the legislature could thus draw to itself by its own will the jurisdiction of rights actually in litigation before the proper tribunal, and either by its own judgment upon the merits decide conclusively against the right asserted, or by its own will independently of the merits absolutely and conclusively destroy it, the right thus to interfere with and control the regular administration of the law in the appointed tribunals implies a power over the law and its administration which would find no greater obstacle in a decree or judgment by which it was already ascertained and attempted to be enforced." See *Columbus, etc., R. Co. v. Grant County*, 65 Ind. 441.

3. **Releasing Bail Bond After Breach**. — *Starr v. Robinson*, 1 D. Chip. (Vt.) 257, 6 Am. Dec. 732.

4. **Discharging Imprisoned Debtor**. — *Ward v. Barnard*, 1 Aik. (Vt.) 121; *Lyman v. Mower*, 2 Vt. 517; *Kendall v. Dodge*, 3 Vt. 360.

5. **Sales and Distribution by Guardians**. — A private act of the legislature passed upon the application of the guardian of infants, authorizing the guardian to sell land inherited from the parent to pay debts of the parent is unconstitutional, as an attempted exercise of judicial power. *Jones v. Perry*, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430.

6. **Sales and Distribution by Administrators**. — A special act providing for the sale of a decedent's land and for the application of the proceeds to the claim of the administrator and another person for money advanced on behalf of the estate is unconstitutional, as an infringement of judicial functions. *Lane v. Dorman*, 4 Ill. 238, 36 Am. Dec. 543.

7. **No Power to Adjudicate Land Titles**. — The legislature has not the power to determine the rights of parties to land, either directly or through commissioners, without the consent of the parties. *Jackson v. Frost*, 5 Cow. (N. Y.) 346.

An act is unconstitutional as an assumption of judicial power if it professes to decide between adverse claims of right, or if it declares that an existing right of property shall cease. *Hoke v. Henderson*, 4 Dev. L. (N. Car.) 1, 25 Am. Dec. 677.

The legislature cannot confirm title to land on the ground of a moral right to it arising from the payment of the purchase money to the benefit of the former owner with his acquiescence. *Spragg v. Shriver*, 25 Pa. St. 282, 64 Am. Dec. 608.

8. **Title to Office**. — The legislature cannot adjudicate title to public office (except as to its own members). *State v. Carr*, 129 Ind. 44, 28 Am. St. Rep. 163.

property from one to another directly¹ nor indirectly.²

Requiring Alimony. — So an act requiring a husband to pay alimony for the maintenance of his wife, from whom such act divorced him, is an exercise of judicial power and void.³

Making Exception to General Rule of Law. — The legislature cannot usurp judicial powers by excepting one case or one party from the operation of a general rule of law, either as to right or remedy.⁴ Thus it cannot suspend the operation of the statute of limitations in a particular case.⁵

bb. LEGISLATIVE AUTHORIZATION OF TRUSTEE SALES — **Prevailing Doctrine.** — It is constitutional, and it is not an encroachment on judicial functions, for the legislature to authorize a trustee to sell the real estate constituting the trust in order to provide for the necessities or further the interests of the beneficiary, or to otherwise carry out the purpose of the trust.⁶

1. Transfer of Property from One Person to Another. — The legislature cannot arbitrarily declare the ownership of certain property to be vested in one person rather than another.

California. — *Wulzen v. San Francisco County*, 101 Cal. 15, 40 Am. St. Rep. 17.

Maryland. — *Per Bland*, Chancellor, in *Hepburn's Case*, 3 Blam (Md.) 98.

North Carolina. — *University Trustees v. Foy*, 2 Hayw. (N. Car.) 310, 374.

Kentucky. — *Gaines v. Gaines*, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425.

New York. — *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Taylor v. Porter*, 4 Hill (N. Y.) 147, 40 Am. Dec. 274; *Gilman v. Tucker*, 128 N. Y. 190, 26 Am. St. Rep. 464.

Pennsylvania. — *Sharpless v. Philadelphia*, 21 Pa. St. 147, 59 Am. Dec. 759; *Menges v. Dentler*, 33 Pa. St. 495, 75 Am. Dec. 616; *Grim v. Weissenberg School Dist.*, 57 Pa. St. 436, 98 Am. Dec. 237.

2. A Statute Which Assumes to Destroy or Invalidate a Party's Muniments of Title is just as effective in depriving him of his property as one which bestows it directly upon another. *Gilman v. Tucker*, 128 N. Y. 190, 26 Am. St. Rep. 464; *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

3. Alimony. — *Crane v. Meginnis*, 1 Gill & J. (Md.) 463, 19 Am. Dec. 237.

4. Taking a Case Out of General Rule of Law. — *Guy v. Hermance*, 5 Cal. 73, 63 Am. Dec. 85.

5. Suspending Operation of Statute of Limitations. — *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174; *Bagg's Appeal*, 43 Pa. St. 512, 82 Am. Dec. 583.

6. Legislative Authorization of Trustee Sales — Prevailing Rule — *United States.* — *Suydam v. Williamson*, 24 How. (U. S.) 427; *Williamson v. Suydam*, 6 Wall. (U. S.) 723; *Florentine v. Barton*, 2 Wall. (U. S.) 210; *Hoyt v. Sprague*, 103 U. S. 613; *Wilkinson v. Leland*, 2 Pet. (U. S.) 660; *Watkins v. Holman*, 16 Pet. (U. S.) 60; *Ward v. New England Screw Co.*, 1 Clif. (U. S.) 565.

Alabama. — *Holman v. Norfolk Bank*, 12 Ala. 369; *Bruce v. Bradshaw*, 69 Ala. 360.

Illinois. — *Mason v. Wait*, 5 Ill. 134; *Davenport v. Young*, 16 Ill. 548, 63 Am. Dec. 320; *Rozier v. Fagan*, 46 Ill. 404.

Indiana. — *Doe v. Douglas*, 8 Blackf. (Ind.) 10.

Kentucky. — *Kibby v. Chitwood*, 4 T. B.

Mon. (Ky.) 91, 16 Am. Dec. 143; *Shehan v. Barnett*, 6 T. B. Mon. (Ky.) 594.

Maryland. — *Dorsey v. Gilbert*, 11 Gill & J. (Md.) 87.

Massachusetts. — *Rice v. Parkman*, 16 Mass. 326; *Davison v. Johannot*, 7 Met. (Mass.) 388, 41 Am. Dec. 448; *Sohier v. Massachusetts General Hospital*, 3 Cush. (Mass.) 483.

Mississippi. — *Williamson v. Williamson*, 3 Smed. & M. (Miss.) 715, 41 Am. Dec. 636; *McComb v. Gilkey*, 29 Miss. 146; *Boon v. Bowers*, 30 Miss. 246, 64 Am. Dec. 159; *Coleman v. Carr*, Walk. (Miss.) 258.

Missouri. — *Stewart v. Griffith*, 33 Mo. 13, 82 Am. Dec. 148; *Gannett v. Leonard*, 47 Mo. 205.

New York. — *Cochran v. Van Surlay*, 20 Wend. (N. Y.) 365, 32 Am. Dec. 570; *Clark v. Van Surlay*, 15 Wend. (N. Y.) 436; *Brevoort v. Grace*, 53 N. Y. 245; *Towle v. Forney*, 14 N. Y. 423; *Leggett v. Hunter*, 19 N. Y. 445.

Ohio. — *Carroll v. Olmsted*, 16 Ohio 251.

Pennsylvania. — *Norris v. Clymer*, 2 Pa. St. 277; *Sergeant v. Kuhn*, 2 Pa. St. 393; *Estep v. Hutchman*, 14 S. & R. (Pa.) 435; *Kerr v. Kitchen*, 17 Pa. St. 433.

Rhode Island. — *Thurston v. Thurston*, 6 R. I. 296.

Statements of the Rule. — "It is clearly within the powers of the legislature, as *parens patriæ*, to prescribe such rules and regulations as it may deem proper for the superintendence, disposition, and management of the property and effects of infants, lunatics, and other persons who are incapable of managing their own affairs." *Cochran v. Van Surlay*, 20 Wend. (N. Y.) 373, 32 Am. Dec. 570.

"It seems absolutely necessary for the interests of those who by the general rules of law are incapacitated from disposing of their property, that a power should exist somewhere to convert lands into money. For otherwise, many minors might suffer although having property; it not being in a condition to yield an income. This power must rest in the legislature. * * * that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves." *Rice v. Parkman*, 16 Mass. 326, *per Parker*, C. J.

The legislature, in the exercise of its tutelary power over the persons and property of infants and others under disabilities, may provide by public or private acts for converting real estate, in which they have vested or

So Where Lands Are Held in Fee Tail by devisees under a will, an act authorizing a sale for the purpose of partitioning said lands and cutting off the entailment is constitutional.¹

Sales and Investment of Proceeds. — And an act authorizing a guardian to sell certain real estate of *cestuis que trustent* to erect a pest-house thereon to accommodate a village, and authorizing the investment of the proceeds for the minors, is valid.² The legislature has been held competent to provide by special statute for the investment in a manufacturing corporation of the proceeds of the sale of lands of minors.³

Transfer of Naked Title to Owner of Equitable Title. — Of course, too, an administrator or trustee may be authorized to transfer the mere naked title to the owner of the equitable title.⁴

Existence of General Law No Obstacle. — The existence of a general law providing for such sales will not prevent the legislature from authorizing them by a special act.⁵ For the same reason it has been held competent for the legislature to legalize by a retrospective enactment such a sale made under the general law but without strict compliance with its terms.⁶

Disability of Party in Interest. — It is not necessary that the special act should show the disability of the party in interest where it in fact exists.⁷

Contrary Rule and Qualifications. — But while the foregoing is the prevailing doctrine, authority is not wanting for a contrary one,⁸ and at any rate the former is subject to qualifications.

Payment of Demands Not Enforceable. — A guardian cannot be empowered to sell the land of his ward to pay demands which are not obligations against the estate.⁹

Persons Sui Juris. — But the legislature cannot, against the consent of persons *sui juris* with vested estate, authorize the sale of their real estate;¹⁰ nor the

contingent interests, into personal property or securities when necessary for their benefit, and may exercise this power as well in respect to the rights of persons *in esse* as to the contingent interest of persons yet to be born. *Leggett v. Hunter*, 19 N. Y. 445.

The Legislature of Connecticut was held to have the power of an English court of chancery to direct a sale of real estate devised to charitable purposes — even though it was provided by the devisee that the estate should never be sold — in cases where lapse of time and changes in the condition of property or circumstances attending it make it prudent and beneficial to the charity, to alien the specific lands and invest the proceeds in other securities. *Stanley v. Colt*, 5 Wall. (U. S.) 119.

1. *Carroll v. Olmsted*, 16 Ohio 251.

2. *Ward v. New England Screw Co.*, 1 Cliff. (U. S.) 565.

3. *Hoyt v. Sprague*, 103 U. S. 613.

4. *Moore v. Maxwell*, 18 Ark. 469; *Reformed Protestant Dutch Church v. Mott*, 7 Paige (N. Y.) 77, 32 Am. Dec. 613.

5. And this even though the general statute be much more full and provident in its nature. *Florentine v. Barton*, 2 Wall. (U. S.) 210.

A Private Sale may be authorized by special act, though under the general law a public sale is required. *Florentine v. Barton*, 2 Wall. (U. S.) 210.

6. So held in a sale of an infant's land, made under an order of the probate court without appraisal. *Davis v. State Bank*, 7 Ind. 316.

Where an executrix, under a license from the probate court, made sales of lands of

minors for the payment of debts, but failed to publish the required notice, a legislative resolution confirming such sales was held constitutional and valid. *Sohier v. Massachusetts General Hospital*, 3 Cush. (Mass.) 483.

7. *Gannett v. Leonard*, 47 Mo. 205.

8. **Contrary View.** — In *Jones v. Perry*, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430, a special act authorizing guardians to sell lands of infant wards to pay debts of the latter's ancestor, was held judicial in its character and unconstitutional. See also *Opinion of Court*, 4 N. H. 565; *Brenham v. Story*, 39 Cal. 179.

9. **Demands Not Obligations Against the Estate.** — *Burke v. Mechanics' Sav. Bank*, 12 R. I. 513.

An act of the legislature authorizing an administrator to sell real property belonging to the estate of his decedent except in the satisfaction of the lien of creditors, for support of the family or to pay the expenses of administration, was held unconstitutional. *Brenham v. Story*, 39 Cal. 179.

Where a minor has a guardian the legislature is incompetent to authorize another to sell his lands. *Lincoln v. Alexander*, 52 Cal. 482, 28 Am. Rep. 639.

But if there be no guardian, the infant himself or any suitable person may be authorized to act. *McComb v. Gilkey*, 29 Miss. 146.

10. **Where Parties Are Sui Juris.** — *Brevoort v. Grace*, 53 N. Y. 245; *Powers v. Bergen*, 6 N. Y. 358; *Hegarty's Appeal*, 75 Pa. St. 503; *Ervine's Appeal*, 16 Pa. St. 256, 55 Am. Dec. 499; *Kneass's Appeal*, 31 Pa. St. 87. Compare *Kerr v. Kitchen*, 17 Pa. St. 433.

foreclosure by special enactment of a mortgage thereon.¹

Sale of Trust Property — Based on Legislative Determination of Disputed Claims. — An authorization of the sale of trust property, based upon a legislative determination of disputed claims against such estate or of conflicting interests therein, is unconstitutional and void.²

cc. **DIVORCES** — **Prevailing Rule.** — Divorces by legislative enactment are valid under the prevailing doctrine unless prohibited by the state constitution.³

There Is Some Contrary Authority,⁴ but the question is of but little practical importance, as the constitutions of most of the states forbid legislative divorces, and the practice of granting them is nearly obsolete.⁵

Federal Constitution — **Territorial Legislature.** — It has been held that the Federal Constitution does not forbid a legislative divorce,⁶ and that a territorial legislature has such power.⁷

Where Courts Empowered by General Laws — **As to Cases Within Such Laws.** — Some authorities hold that when under general laws the courts are empowered to grant divorces, such power is exclusive as to cases falling within the terms of the general laws, but that it is no infringement of judicial functions for the legislature to grant divorces in other cases.⁸

The legislature has no power by special act to authorize the sale of the property of parties *sui juris*, for other than public purposes, without their consent, and the facts which would create a necessity for the exercise of such power will not be presumed when neither shown by the proof nor recited in the act. *Powers v. Bergen*, 6 N. Y. 358.

Illustrations. — Where one devised a life estate in the proceeds of lands under the terms of a will whereby on his death, and not before, the property was to be sold and the proceeds divided among designated heirs, it was held that the legislature did not possess the constitutional power in such a case to direct a sale against the consent of the other parties in interest who were of full age and under no disability within the time during which the sale was forbidden by the legislature, and that such an act was unconstitutional. *Ervine's Appeal*, 16 Pa. St. 256, 55 Am. Dec. 499.

The sale of real estate in partition is not in conflict with this principle. When it is judicially established that the estate of tenants in common cannot be divided without prejudice or spoiling the whole, and when no one of the parties will take the property at the valuation, the power to sell is exercised by the courts, and these powers derived from the legislature. But it is justified by the necessities of practice — the parties in interest cannot otherwise enjoy their rights, and a sale in such a case is just as valid as a judicial sale for payment of debts. *Kneass's Appeal*, 31 Pa. St. 90.

1. *Ashuelot R. Co. v. Elliot*, 58 N. H. 451.

2. *Lane v. Dorman*, 4 Ill. 242, 36 Am. Dec. 543; *Matter of Selby*, 6 Mich. 193; *Rozier v. Fagan*, 46 Ill. 404.

An act authorizing an administrator to sell land to pay debts, without providing for any judicial ascertainment that debts were due, was held to be clearly unconstitutional. "The legislature has no power to assume that debts were due and payable. * * * The power to determine the existence of debts is judicial not legislative." *Rozier v. Fagan*, 46 Ill. 404.

3. Legislative Divorces — **Prevailing Rule** —

United States. — *Maynard v. Hill*, 125 U. S. 190.

Connecticut. — *Starr v. Pease*, 8 Conn. 541.

Delaware. — See *Townsend v. Griffin*, 4 Harr. (Del.) 440.

Indiana. — *Noel v. Ewing*, 9 Ind. 37.

Iowa. — *Levins v. Sleator*, 2 Greene (Iowa) 604.

Kentucky. — *Maguire v. Maguire*, 7 Dana (Ky.) 181; *Cabell v. Cabell*, 1 Metc. (Ky.) 319; *Gaines v. Gaines*, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425.

Maine. — *Adams v. Palmer*, 51 Me. 480; *Opinions of Justices*, 16 Me. 480.

Maryland. — *Crane v. Meginnis*, 1 Gill & J. (Md.) 463, 19 Am. Dec. 237. Compare *Wright v. Wright*, 2 Md. 429, 56 Am. Dec. 723.

Divorces having been granted by the general assembly from the earliest times must be held to be a regular exercise of legislative power. *Crane v. Meginnis*, 1 Gill & J. (Md.) 463, 19 Am. Dec. 237.

Massachusetts. — *West v. West*, 2 Mass. 223. Compare *Sparhawk v. Sparhawk*, 116 Mass. 315.

New York. — *Holmes v. Holmes*, 4 Barb. (N. Y.) 295.

Pennsylvania. — *Cronise v. Cronise*, 54 Pa. St. 255. See *Melizer's Appeal*, 17 Pa. St. 449.

South Carolina. — *Hull v. Hull*, 2 Strobb. Eq. (S. Car.) 174.

4. Contrary Doctrine — *Florida.* — *Ponder v. Graham*, 4 Fla. 23.

Missouri. — *State v. Fry*, 4 Mo. 120; *Bryson v. Campbell*, 12 Mo. 498; *Bryson v. Bryson*, 17 Mo. 590, 44 Mo. 232.

5. See the title **DIVORCE**.

6. Federal Constitution. — *Maynard v. Hill*, 125 U. S. 190.

7. Territorial Legislature. — *Maynard v. Hill*, 125 U. S. 190; *Levins v. Sleator*, 2 Greene (Iowa) 604.

8. Where Courts Empowered by General Laws. — *Levins v. Sleator*, 2 Greene (Iowa) 604; *Opinion of Justices*, 16 Me. 479; *Adams v. Palmer*, 51 Me. 480; *Jones v. Jones*, 12 Pa. St. 350, 51 Am. Dec. 611. See also *Townsend v. Griffin*, 4 Harr. (Del.) 440.

Cases Not Within the General Law. — Under the usual constitutional inhibitions the legislature cannot usurp judicial functions by requiring the court to grant a divorce in a specific case not within the province of the general law.¹

Property Rights. — And in no event can such a statutory decree affect the property rights of the parties.²

Alimony cannot be ordered by the legislature.³

(e) **Legislative Control of Courts and Judges** — *aa. CONSTITUTION OF COURTS* — **Division of Territorial Jurisdiction.** — Where the legislature is empowered to create new courts it may divide the territorial jurisdiction of a court already established and provide an additional court therein.⁴ But it is otherwise where the judicial districts are prescribed by the constitution itself.⁵

Number of Judges. — Under the *New Jersey* constitution the number of judges of the court of common pleas may be reduced.⁶

Terms of Judges. — Where the constitution fixes the term of a circuit judge the legislature cannot, by virtue of its power vested to divide the state into judicial districts, remove a circuit judge from office by attaching the entire territory constituting his circuit to another circuit, and empowering a judge of the latter to act as judge of the new circuit.⁷

Authorizing Appeals in Certain Cases. — A constitutional prohibition against the creation of additional courts is not violated by a statute authorizing an appeal to the circuit court from a decision of a license board on an application for a license.⁸ So a statute allowing an appeal from a decision of a board of public works to the circuit court is not in violation of the provision of the *West Virginia* constitution requiring legislative, executive, and judicial functions to be kept separate.⁹

Appointment of Assistants to aid in the performance of judicial functions is vested in the courts themselves, and cannot be otherwise exercised.¹⁰

Supreme Court Commissioners. — An act providing for the appointment by the legislature of commissioners to assist the Supreme Court was held unconstitu-

The prevailing doctrine is based rather on long established usage than on principle, as it is generally conceded that, in the language of Chancellor Kent (2 Kent Com. 106), the question of divorce involves investigations which are properly of a judicial nature, and the jurisdiction over divorces ought to be confined exclusively to the judicial tribunals. *Starr v. Pease*, 8 Conn. 541. And see authorities cited *supra* in this and the preceding note.

1. A legislative enactment authorizing a court to grant a divorce between certain parties, provided it should be made to appear satisfactory to the court that the defendant had been for a term of five years preceding the time of filing the bill of complaint, and still continued to be, hopelessly and miserably insane, where no general law of the state authorized the granting of a divorce, was held to be contrary to the constitutional provisions of the state. *Teft v. Teft*, 3 Mich. 67. See also *Clark v. Clark*, 10 N. H. 380, 34 Am. Dec. 165; *Simonds v. Simonds*, 103 Mass. 572.

2. **Property Rights.** — *Gaines v. Gaines*, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425; *Cooley's Const. Lim.* (6th ed.) 133.

3. **Alimony.** — *Crane v. Meginnis*, 1 Gill & J. (Md.) 463, 19 Am. Dec. 237.

4. **Dividing Territorial Jurisdiction of Courts.** — *Lowery v. State*, 103 Ala. 50.

The power of the legislature to provide for more than one judge in a judicial circuit is not limited by the provision of the *Arkansas* con-

stitution that for each circuit "a judge" shall be elected. *State v. Martin*, 60 Ark. 343.

5. "The constitution cannot be evaded by a change in the name of an office, nor can an office be divided and the duties assigned to two or more officers under different names, and the appointment to the offices made in any manner except as authorized by the constitution." *People v. Albertson*, 55 N. Y. 50.

6. **Number of Judges** — *New Jersey*. — *Kenny v. Hudspeth*, 59 N. J. L. 504.

7. **Terms of Judges.** — *State v. Friedley*, 135 Ind. 119; *State v. Bear*, 135 Ind. 701.

8. **Authorizing Appeals.** — *Thompson v. Koch*, 98 Ky. 400.

9. *Wheeling Bridge, etc., R. Co. v. Paull*, 39 W. Va. 142.

10. **Appointment of Assistants.** — Neither the legislature nor the executive can select persons to assist courts in the performance of their judicial duties. *State v. Noble*, 118 Ind. 350. 10 Am. St. Rep. 143.

The right of courts to select their own assistants was extended to the appointment of janitors by the supreme court of *Wisconsin*. *Matter of Janitor*, 35 Wis. 410.

The Supreme Court of *Missouri* holds that the exclusive power of the legislative courts does not go to that extent, but does not deny the general right of the court to select those who share its duties as ministers and assistants. *State v. Smith*, 82 Mo. 51.

tional in *Indiana*,¹ but similar acts providing for appointment by the court itself were sustained in *California*² and *Nebraska*.³

bb. JURISDICTION. — Since the constitution of its own vigor, and as the sole source of all delegated authority, vests the judicial power in designated tribunals,⁴ it follows that the essentials of jurisdiction there conferred are unalterable and indestructible, and can neither be increased nor diminished by the legislature,⁵ nor can the inherent powers of courts thus established be abrogated or abridged.⁶

Contempt. — The legislature cannot, in the absence of constitutional provisions, limit or regulate the inherent power of courts to punish for contempt.⁷

Supreme Court — Colorado. — The judicial power, both appellate and original, lodged by the constitution in the supreme court, cannot be transferred to another court created by the legislature in any manner so as to make its decisions and opinions final.⁸

Appellate Tribunals Inferior to Supreme Court — Indiana. — But under the Indiana constitution a statute creating appellate tribunals inferior to the supreme court and transferring certain causes from the latter to the former was upheld.⁹

Texas Constitution. — That clause of the Texas constitution which provides that the appellate jurisdiction of the supreme court shall "extend to questions of law" arising in cases of which the courts of civil appeals have appellate jurisdiction, under such restrictions and regulations as the legislature may prescribe, is not infringed by an act providing that the judgment of the court of

1. *Commissioners — Indiana.* — The act provided that the commissioners were "to assist that court in the performance of its duties, to hold office for the term of four years and until their successors were elected and qualified, and to perform such work as the supreme court shall assign or appoint, but in no event to be binding or conclusive upon the supreme court." It was held unconstitutional as an attempt to confer judicial powers on the commissioners when the entire judicial power of the state is by the constitution vested in certain courts, and on the further ground that if the act were otherwise unobjectionable the appointment of such commissioners could not be vested elsewhere than in the court itself. *State v. Noble*, 118 Ind. 350, 10 Am. St. Rep. 143.

2. *People v. Hayne*, 83 Cal. 111, 17 Am. St. Rep. 211.

3. *In re Supreme Ct. Com'rs*, 37 Neb. 655.

4. *Legislative Control Over Jurisdiction of Courts.* — *Branson v. Studabaker*, 133 Ind. 147.

"The legislature has no judicial power, and can confer none upon any person or tribunal. Under the constitution it may establish courts, but it does not invest the courts with judicial power; the constitution alone can do that, for all judicial power comes from that instrument, and is invested by it in courts and judges." *Per* Elliott, C. J., in *State v. Noble*, 118 Ind. 350, 10 Am. St. Rep. 143. See also *Shultz v. McPheeters*, 79 Ind. 373; *Perkins v. Corbin*, 45 Ala. 103, 6 Am. Rep. 698; *People v. Maynard*, 14 Ill. 419.

5. *Harris v. Vanderveer*, 21 N. J. Eq. 424; *State v. Mace*, 5 Md. 347, *per* Le Grand, Ch. J.

It is beyond the power of the legislature to confer any original jurisdiction on a court which by the terms of the constitution is limited to an appellate jurisdiction. *State v. Gannaway*, 16 Lea (Tenn.) 124; *Stewart v. Wilcox*, 1 Lea (Tenn.) 81; *Scoggins v. Cow-*

den, 1 Lea (Tenn.) 134; *Allen v. Harris*, 4 Lea (Tenn.) 190; *State v. East Tennessee Bank*, 5 Sneed (Tenn.) 573; *Miller v. Conlee*, 5 Sneed (Tenn.) 434; *Ward v. Thomas*, 2 Coldw. (Tenn.) 565.

A constitutional provision that the supreme court shall have "appellate jurisdiction only" precludes the legislature from conferring original jurisdiction on that court. *Klein v. Valerius*, 87 Wis. 54.

By a provision of the state constitution, the superior court of the city of New York was continued with such jurisdiction as it exercised at the time of the adoption of such constitutional provision. A subsequent act of the legislature seeking to limit that court's prior jurisdiction in actions by a resident of the state against foreign corporations was held unconstitutional. *Flynn v. Central R. Co.*, 142 N. Y. 439.

The *New Jersey* Constitution provided that the then existing courts should continue "with the like powers and jurisdiction as if this constitution had not been adopted." An act providing for review in the Supreme Court of the action of the circuit court on motion for a new trial was held void, inasmuch as the latter "had always exercised, as an important branch of their jurisdiction, the right to decide finally and without review whether a new trial shall be granted." *Central R. Co. v. Tunison*, 55 N. J. L. 561.

6. *Brown v. Buck*, 75 Mich. 274, 13 Am. St. Rep. 438.

7. *Contempt.* — *State v. Morrill*, 16 Ark. 384; *Wyatt v. People*, 17 Colo. 252; *Little v. State*, 90 Ind. 338, 46 Am. Rep. 224; *Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650; *Tyler v. Hamersley*, 44 Conn. 393, 26 Am. Rep. 471; *Hale v. State*, 55 Ohio St. 210; *Burke v. Territory*, 2 Okla. 499.

8. *Matter of Senate Bill No. 76*, 9 Colo. 623.

9. *Branson v. Studabaker*, 133 Ind. 147.

appeals shall be conclusive in certain cases.¹

Jurisdiction Cannot Be Indirectly Destroyed by depriving a party of the right to appeal to the courts for redress of a legal wrong.²

Where Extension of Jurisdiction Does Not Infringe on Powers of Another Court. — But an extension of jurisdiction in harmony with the court's character, and not infringing on the inherent powers of any other court, is valid.³ An act providing for the payment into the surrogate's court of certain moneys arising from the foreclosure of mortgages upon real estate of deceased persons is not an infringement of the constitutional jurisdiction of the *New York* Supreme Court.⁴

cc. PROCEDURE — (aa) *In General.* — "The legislature could not command a court of justice to stay or depart from its regular course of proceeding in a particular case."⁵ It cannot generally require⁶ or forbid⁷ the rendition of a particular judgment. Thus an act giving parties jointly sued a right to sever, and if not sued in the county of their residence to take a change of venue, was held void in so far as it applied to pending suits.⁸ The legislature cannot direct a *nisi prius* court to set out in the record of a cause exceptions and points of law decided in a similar previous cause.⁹ A legislative act requiring the court in a murder case to instruct the jury as to murder in the second degree where there is no evidence thereof is invalid.¹⁰

The foregoing general rule applies even though the subject of the case or controversy be such that the legislature could have acted thereon originally.¹¹

(bb) *Appellate Procedure* — **Written Opinions** — **Syllabi.** — Statutory enactments requiring appellate courts to file written opinions,¹² or to write the syllabi

1. *Maddox v. Covington*, 87 Tex. 454.

2. "It is not competent for the legislature to deny for any cause, to a party who has been illegally deprived of his property, access to the constitutional courts of the state for relief." *Gilman v. Tucker*, 128 N. Y. 190, 26 Am. St. Rep. 464.

Every person must have the right to resort to the courts for redress under substantially the same terms. *State v. Berkley*, 92 Mo. 471.

3. *Harris v. Vanderveer*, 21 N. J. Eq. 424.

4. *Matter of Stilwell*, 139 N. Y. 337.

5. **Legislative Control of Procedure of Courts.** — *Per* Bland, Chancellor, in *Hepburn's Case*, 3 Bland. (Md.) 98.

"It is within the power of the legislature to change the formalities of legal procedure, but it is not competent to make such changes as to impair the enforcement of rights." *Brown v. Buck*, 75 Mich. 274, 13 Am. St. Rep. 438, *per* Campbell, J.

6. **Requiring Rendition of Particular Judgment.** — *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174.

But in Wyoming it is competent for the legislature to require the dismissal of a cause wherein a change of venue is had on the failure of the applicant therefor to furnish security for costs of such change. *Barkwell v. Chatterton*, (Wyoming 1893) 33 Pac. Rep. 940.

7. **Forbidding Rendition of Particular Judgment.** — A portion of a statute providing that no injunctions shall issue against commissioners appointed by the statute was held invalid as an exercise of judicial functions by the legislature. *Guy v. Hermance*, 5 Cal. 73, 63 Am. Dec. 85.

8. *Mabry v. Baxter*, 11 Heisk. (Tenn.) 682.

9. *Miller v. State*, 8 Gill (Md.) 145.

10. **The Legislature Cannot Prescribe What Instructions the Court Shall Give**, "unless they have previously embodied into a legislative

enactment, as the law of the land, the substance of such instructions." *Per* Henry, J., in *State v. Hopper*, 71 Mo. 426.

11. *Taylor v. Place*, 4 R. I. 337.

12. **Written Opinion Cannot Be Required** — *Arkansas*. — *Vaughn v. Harp*, 49 Ark. 160.

California. — *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565.

Illinois. — *Speight v. People*, 87 Ill. 595.

In *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565, Field, J., for the court, says: "If the power of the legislature to prescribe the mode and manner in which the judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter. If the legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension; but where is the limit of this power if its exercise in any particular be admitted? The truth is, no such power can exist in the legislative department, or be sanctioned by any court which has the least respect for its own dignity and independence. In its own sphere of duties this court cannot be trammelled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions. The legislature can no more require this court to state the reasons of its decisions than this court can require, for the validity of the statutes, that the legislature shall accompany them with the reasons for their enactment. * * * The court must therefore exercise its own discretion as to the necessity of giving an opinion upon pronouncing judgment, and, if one is given, whether it shall be orally or in writing. In the exercise of that discretion the authority of the court is

thereof,¹ have been declared unconstitutional in some of the states, though in others² the requirements of such acts have been observed apparently without question.

Reversals. — It is held that an appellate court cannot be required to sanction a reversal by a majority of its membership, rather than by a majority of the judges participating in the hearing.³

In Cases Where Court Equally Divided in Opinion. — So an act providing that in all cases where the supreme judges might be equally divided the decision of the lower court should be considered as affirmed, except in cases depending on the constitutionality of a legislative act, and that in those cases the act should be held valid, was declared unconstitutional.⁴

Petition for Rehearing — Rule of Court. — A statute cannot nullify a rule of the supreme court requiring the indorsement of one of its judges to the granting of a petition for a rehearing, though the constitution authorized the regulation of procedure in courts "below the supreme."⁵

Clerks of Inferior Courts. — And an act requiring the supreme court to direct the clerks of inferior courts to execute its decrees was held invalid.⁶

(cc) **Qualifications — Conduct of Court Officers — Writs.** — But the legislature may avail itself of judicial agency in determining the mode of obeying a writ or in regulating the conduct of court officers in the exercise of their duties.⁷

Judgment in Ejectment. — So it may provide that one recovering a judgment in ejectment may either pay the occupant the present value of his improvements or recover the value of the premises at the time the defendant took possession.⁸

Attorney's Fees. — And it may require an unsuccessful defendant to pay an attorney's fee in an action against him on a claim due the state.⁹

Judges in District Sitting Separately. — The legislature is competent to provide that each of the several judges in a district shall sit separately to try causes and exercise all the powers he might if sole judge thereof.¹⁰

Sessions of Courts. — A statute providing that district courts shall be at all times in session and open at any place in the district where the judge may be, for the purpose of hearing and determining motions, rendering final decrees in equity, etc., is valid.¹¹

dd. **EVIDENCE.** — It is equally incompetent for the legislature to give an existing state of facts a judicial construction which shall be binding upon the parties or upon the courts,¹² or to determine disputed questions of fact affecting the rights of persons or property.¹³

Indirection — Conclusive Rules of Evidence. — The legislature cannot indirectly dispose of causes by prescribing conclusive rules of evidence.¹⁴ Thus a statute making a tax deed conclusive evidence of a complete title, and precluding the

absolute. The legislative department is incompetent to touch it."

1. **Preparation of Syllabi.** — *Ex p.* Griffiths, 118 Ind. 83, 10 Am. St. Rep. 107. But see Hart v. Shribling, 25 Fla. 435, where such a statute is referred to as valid.

2. *E. g.*, *Nebraska*, where (Consol. Stat., § 1032) it is required that the opinions of the court on all questions shall be reduced to writing. See also *Georgia* Code, § 4270.

3. *Clapp v. Ely*, 27 N. J. L. 622.

4. *Perkins v. Scales*, Legal Reporter, May 1877, cited in 2 Lea (Tenn.) 612. See discussion of the case in *Northern v. Barnes*, 2 Lea (Tenn.) 612.

5. *Herndon v. Imperial F. Ins. Co.*, 111 N. Car. 384.

6. *Northern v. Barnes*, 2 Lea (Tenn.) 603.

7. *Marshall, C. J.*, in *Wayman v. Southard*, 10 Wheat. (U. S.) 44.

8. *Leighton v. Young*, 52 Fed. Rep. 439.

9. *U. S. Electric Power, etc., Co. v. State*, 79 Md. 63.

10. *Jordan v. People*, 19 Colo. 417.

11. *U. S. v. Gwyn*, (N. Mex. 1888) 42 Pac. Rep. 167.

12. **Rules of Evidence.** — *King v. Dedham Bank*, 15 Mass. 447, 8 Am. Dec. 112; *Weaver v. Mail-lot*, 15 La. Ann. 395.

13. *Parmelee v. Thompson*, 7 Hill (N. Y.) 77; *Cooley's Const. Law*, p. 45.

14. *Cooley's Const. Law*, p. 45; *Groesbeck v. Seeley*, 13 Mich. 329. *Per Alvey, J.*, in *Johns v. State*, 55 Md. 362.

It is beyond the power of a legislature to restrain a defendant in any suit from setting up a defense to an action against him. It has no power to establish rules which, under pretense of regulating evidence, altogether prohibit a party from exhibiting his rights. *Larson v. Dickey*, 39 Neb. 463, 42 Am. St. Rep. 595.

original owner from raising jurisdictional defects therein, is void,¹ as is also an act making the finding of appraisers conclusive evidence of value.² So an act of Congress making a recruit's oath of enlistment conclusive evidence of his age was held unconstitutional.³

Recitals of Facts in a Statute cannot prejudicially conclude private citizens,⁴ and statutes which declare certain facts presumptively true are ineffectual.⁵

Directing Admission of Rejected Deposition. — An act directing the admission in evidence of a deposition that had been rejected by the court because its caption did not correctly describe the parties to the action is an attempt to exercise judicial functions and unconstitutional.⁶

Tax Proceedings. — But a tax deed may be made conclusive evidence that the proceedings are free from irregularities,⁷ and that directory and non-jurisdictional requirements have been met.⁸ It may also be *prima facie* evidence of compliance with all requirements.⁹

Affidavits — Oaths — Burden of Proof — Fraudulent Intent — Stolen Property. — And the legislature may lawfully provide that affidavits on which is based an attachment for contempt in violating an injunction shall make a *prima facie* case for the state;¹⁰ that the oath of the mother of a bastard child shall be presumptive evidence against the putative father;¹¹ that the burden of proof must

1. **Statute Making Tax Deed Conclusive Evidence of Title** — *United States*. — *Bannon v. Burnes*, 39 Fed. Rep. 892; *Marx v. Hanthorn*, 30 Fed. Rep. 579; *Kelly v. Herrall*, 10 Sawy. (U. S.) 169.

Indiana. — *White v. Flynn*, 23 Ind. 46.

Iowa. — *McCready v. Sexton*, 29 Iowa 356, 4 Am. Rep. 214; *Allen v. Armstrong*, 16 Iowa 508.

Louisiana. — *In re Douglas*, 41 La. Ann. 765.

Michigan. — *Groesbeck v. Seeley*, 13 Mich. 329; *Case v. Dean*, 16 Mich. 13; *Quinlon v. Rogers*, 12 Mich. 169.

Missouri. — *Roth v. Gabbert*, 123 Mo. 21; *Abbott v. Lindenbower*, 42 Mo. 162.

Compare Ewart v. Davis, 76 Mo. 129; *People v. Mitchell*, 45 Barb. (N. Y.) 212; *Curry v. Hinman*, 11 Ill. 428; *Larson v. Dickey*, 39 Neb. 463 42 Am. St. Rep. 595, the court saying: "The constitution of this state has not committed to the legislature the power of conclusively determining what facts are jurisdictional or vital to the exercise of the power of taxation or sale divesting the title of the citizen's property for the non-payment of taxes. Such determination belongs to the judiciary."

2. *Graves v. Northern Pac. R. Co.*, 5 Mont. 555, 51 Am. Rep. 81.

3. *Wantlan v. White*, 19 Ind. 470, the court saying that "it is not competent for the legislative power to declare what shall be conclusive evidence of a fact."

4. **Recitals Inconclusive.** — The facts recited in the preamble of a private statute may be evidence between the commonwealth and the applicant, or the party for whose benefit the act was passed; but as between the applicant and another individual, whose rights are affected, the recital has no effect. *Elmondorff v. Carmichael*, 3 Litt. (Ky.) 473, 14 Am. Dec. 86; *per Shipman, J.*, in *Lothrop v. Stedman*, 42 Conn. 592; *Parmelee v. Thompson*, 7 Hill (N. Y.) 80.

It is equally incompetent for the legislature indirectly to dispose of controversies by a recital of facts in a statute. *Parmelee v. Thompson*, 7 Hill (N. Y.) 77; *per Shipman, J.*, in *Lothrop v. Stedman*, 42 Conn. 592.

A recital in an act of the general assembly is not conclusive as to private parties affected thereby. *Duncombe v. Prindle*, 12 Iowa 1; *Koehler v. Hill*, 60 Iowa 543.

A recital of facts in an act providing for relief on a disputed claim against a board of education cannot preclude the latter from contesting such facts in the courts. *Board of Education v. Milligan*, 51 Ohio St. 115.

5. **Statute Declaring Certain Things Presumptively True.** — An act providing that the placing of certain obstructions in a river "shall be unlawful and presumptively injurious, * * * and the doing of any such act shall be enjoined at the suit of any resident taxpayer without proof that any injury has been or will be caused" by such act, is an attempted usurpation of judicial functions and void. *Janesville v. Carpenter*, 77 Wis. 288, 20 Am. St. Rep. 123.

A legislative act requiring the courts arbitrarily to assume the existence of certain facts that are not admitted by the parties is void. *Hepburn's Case*, 3 Bland (Md.) 98.

6. *Dupy v. Wickwire*, 1 D. Chip. (Vt.) 237, 6 Am. Dec. 729.

7. **Tax Proceedings.** — *Smith v. Cleveland*, 17 Wis. 556; *Smith v. Smith*, 19 Wis. 615, 88 Am. Dec. 707.

8. *Allen v. Armstrong*, 16 Iowa 508; *Larson v. Dickey*, 39 Neb. 463, 42 Am. St. Rep. 595.

9. *Callanan v. Hurley*, 93 U. S. 387; *In re Douglas*, 41 La. Ann. 765; *Raley v. Guinn*, 76 Mo. 263; *Abbott v. Lindenbower*, 42 Mo. 162; *Larson v. Dickey*, 39 Neb. 463, 42 Am. St. Rep. 595.

A provision that properly certified tax bills shall be "*prima facie* evidence of the validity of the charges against the property therein described, and of the liability of the person therein named as the owner," is not an encroachment on judicial functions. *St. Joseph v. Farrell*, 106 Mo. 437.

10. *State v. Mitchell*, 3 S. Dak. 223.

11. *State v. Rogers*, 119 N. Car. 793; *State v. Burton*, 113 N. Car. 664; *State v. Mitchell*, 119 N. Car. 784.

be assumed by a Chinese laborer arrested for having no certificate of residence; ¹ that the failure of a bank within a certain period after the receipt of deposits shall be *prima facie* evidence of an intent to defraud; ² that the possession of stolen animals shall be *prima facie* evidence of their recent acquisition, ³ and that certain evidence shall be sufficient to establish an offense. ⁴

Competency of Witnesses. — A court cannot be empowered to make a party a competent witness contrary to the general law. ⁵

ee. **JUDICIAL INTERPRETATION.** — The legislature has no power to direct the judiciary in the interpretation of existing statutes or to require the change of a previous interpretation. ⁶ Thus it is an invasion of judicial power to provide that in cases of doubt a statute shall be construed so as to save a lien provided thereby. ⁷

(4) **Judicial Control of the Legislature — Ministerial Officers — Mandamus.** — While the proceedings of a legislative body in reference to its own organization are not subject to judicial control, ⁸ the courts may nevertheless require its ministerial officers to perform their duties.

Thus the Keeper of the Legislative Rolls may be compelled by mandamus to publish a duly enacted statute. ⁹

Speaker of the House of Representatives. — And where the constitution requires the speaker of the House of Representatives, before proceeding to other business, to open and publish returns from the state election, the writ lies even against that officer to enforce performance of the duty. ¹⁰

Whether Organization in Violation of Constitution. — So the courts may determine whether a legislative house has been organized in a manner not permitted by the constitution. ¹¹

Election of Members. — But a legislative determination of who are members cannot, as a rule, be questioned by other governmental departments. ¹²

1. *Fong Yue Ting v. U. S.*, 149 U. S. 698.

2. *Meadowcroft v. People*, 163 Ill. 56; *State v. Buck*, 120 Mo. 479, the court saying: "It has been repeatedly held that the legislature has the right to declare what shall be presumptive evidence of any fact. *Hand v. Ballou*, 12 N. Y. 543; *People v. Mitchell*, 45 Barb. (N. Y.) 212; *Hickox v. Tallman*, 38 Barb. (N. Y.) 608; *Donahue v. O'Connor*, 45 N. Y. Super. Ct. 297; *Howard v. Moot*, 64 N. Y. 262; *Adkins v. Chicago*, etc., R. Co., 36 Mo. App. 652; *Heman v. Wolff*, 33 Mo. App. 200; *Ess v. Bouton*, 64 Mo. 105; *State v. Kingsley*, 108 Mo. 135."

3. *State v. Kyle*, 14 Wash. 550.

4. *Morgan v. State*, 117 Ind. 569; *State v. Kingsley*, 108 Mo. 135.

5. *Tillman v. Cocke*, 9 Baxt. (Tenn.) 429.

6. **Judicial Interpretation — Legislative Control** of. — *Reiser v. William Tell Sav. Fund Assoc.*, 39 Pa. St. 137; *Salters v. Tobias*, 3 Paige (N. Y.) 338.

7. *Meyer v. Berlandi*, 39 Minn. 438, 12 Am. St. Rep. 663.

By legislative act it was declared that the mechanics' lien law of Pennsylvania should apply to those who furnished work or labor to a subcontractor, contrary to the construction previously given by the courts. This was held void as an attempted legislative usurpation of functions of the judiciary. *Titusville Iron Works v. Keystone Oil Co.*, 122 Pa. St. 633.

8. **Organization — Ministerial Officers — Mandamus.** — "With respect to the title of the opposite claimant, Mr. Rogers, we hold that his title must be regarded as constitutional and

valid. Our resolution in this regard is founded entirely on the power that, touching the act of reorganizing its own body, the majority of senators are the absolute masters of the occasion. Such action is taken by a body co-ordinate with ourselves, and whose proceedings, when not violative of the constitution of the state, we have no capacity to supervise or control. In our opinion, when a majority of the senators organized the senate and elected Mr. Rogers as president, such action was and is conclusive upon this court, as well as upon all departments of the government." *State v. Rogers*, 56 N. J. L. 480.

9. *Wolfe v. McCaull*, 76 Va. 876.

10. *State v. Elder*, 31 Neb. 188, where it is observed: "It is said that the legislature is a co-ordinate branch of the government, and that it is entitled to construe the constitution and statutes for itself, and therefore is not governed by the construction placed upon it by the Supreme Court. That it is a very important co-ordinate branch of the government is true, and the Supreme Court has never, except when its action was invoked in some of the modes pointed out by law, sought to construe statutes or constitutional provisions for the legislature. It is the province of the legislature, however, to pass laws, and of the courts to construe the constitution and laws."

11. *State v. Rogers*, 56 N. J. L. 480. See also *Opinion of Justices*, 70 Me. 560, 600.

12. *Opinion of Justices*, 56 N. H. 570. See also *State v. Rogers*, 56 N. J. L. 480; *Opinion of Justices*, 35 Me. 576.

d. THE JUDICIARY — (1) *In General.* — The Term "Judicial Power" includes both the power to determine controversies¹ and to interpret laws.² But it is not properly an incident to the execution of a ministerial power.³

A Constitutional Grant of Judicial Power to one department carries the whole judicial power of the state and excludes any exercise thereof by other departments.⁴ Such a grant includes the power to determine equity causes, and cannot be taken away by the legislature.⁵

The Judicial Power of the Federal Government is vested in the Supreme Court and inferior tribunals established by Congress.⁶

Congress Conferring Power on State Courts. — And the exercise of such power in the trial of causes cannot therefore be conferred upon the state courts.⁷

Suits for Penalties. — Accordingly Congress cannot confer upon the state courts the right to try suits for the recovery of penalties for the violation of federal laws.⁸

Naturalizing Aliens. — In *California* it has even been held that the state courts cannot be endowed with jurisdiction to naturalize aliens;⁹ but it is said to be the better opinion that this clause relates only to the actual determination of causes and does not prevent Congress from conferring jurisdiction upon the state courts to perform certain quasi-judicial duties.¹⁰

Warrants by Justices of the Peace. — Hence it has been held that a justice of the

1. The Term "Judicial Power" Defined. — "To hear and decide adversary suits at law and in equity, with the power of rendering judgments and entering up decrees according to the decision, to be executed by the process and power of the tribunal deciding, or of another tribunal acting under its orders, * * * is the exercise of judicial power, in the constitutional sense." *Taylor v. Place*, 4 R. I. 336. See also *State v. Denny*, 118 Ind. 388.

Judicial Power Contrasted with Legislative Power. — "A marked difference exists between the employments of judicial and legislative tribunals. The former decide upon the legality of claims and conduct; the latter make rules upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what is the law upon existing cases. In fine, the law is applied by the one and made by the other. To do the first, therefore, to compare the claims of parties with the laws of the land before established, is in its nature a judicial act. But to do the last, to pass new rules for the regulation of new controversies, is in its nature a legislative act; and if these rules interfere with the past or the present, and do not look wholly to the future, they violate the definition of a law, 'as a rule of civil conduct;' because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated. It is the province of judicial power also to decide private disputes 'between or concerning persons;' but of legislative power, to regulate public concerns, and to 'make laws' for the benefit and welfare of the state." *Merrill v. Sherburne*, 1 N. H. 204, 8 Am. Dec. 52. See also *Wolfe v. McCaull*, 76 Va. 880; *Sinking Fund Cases*, 99 U. S. 761.

2. *State v. Denny*, 118 Ind. 382; *Wolfe v. McCaull*, 76 Va. 880, where the court says: 'To interpret law — to declare what law is, or has been — is judicial power. The power to declare what is the law of the state is dele-

gated to the courts. The power to declare what the law is, of necessity involves the power to declare what acts of the legislature are, and what acts of the legislature are not, laws.'

3. *Owners of Lands v. People*, 113 Ill. 296.

4. *Chandler v. Nash*, 5 Mich. 409; *Taylor v. Place*, 4 R. I. 354; *Greenough v. Greenough*, 11 Pa. St. 494.

5. *Callanan v. Judd*, 23 Wis. 343.

6. United States Constitution, art. 3, § 1.

7. Congress Conferring Powers on State Courts — *United States*. — *Robertson v. Baldwin*, 165 U. S. 275; *Martin v. Hunter*, 1 Wheat. (U. S.) 330; *Houston v. Moore*, 5 Wheat. (U. S.) 27.

Connecticut. — *Ely v. Peck*, 7 Conn. 239.

New York. — *U. S. v. Lathrop*, 17 Johns. (N. Y.) 8.

Ohio. — *U. S. v. Campbell*, 6 Hall's L. J. 113.

8. Recovery of Penalties for Violation of Federal Laws. — *Ely v. Peck*, 7 Conn. 239; *U. S. v. Lathrop*, 17 Johns. (N. Y.) 4; *U. S. v. Campbell*, 6 Hall's L. J. 113.

9. Naturalization. — *Ex p. Knowles*, 5 Cal. 300.

10. *Robertson v. Baldwin*, 165 U. S. 275, where it is observed: "The better opinion is that the second section was intended as a constitutional definition of the judicial power, *Chisholm v. Georgia*, 2 Dall. (U. S.) 475, which the constitution intended to confine to courts created by Congress; in other words, that such power extends only to the trial and determination of 'cases' in courts of record, and that Congress is still at liberty to authorize the judicial officers of the several states to exercise such power as is ordinarily given to officers of courts not of record — such, for instance, as the power to take affidavits, to arrest and commit for trial offenders against the laws of the United States, to naturalize aliens, and to perform such other duties as may be regarded as incidental to the judicial power rather than a part of the judicial power itself."

peace might be authorized to issue a warrant of commitment for a violation of the federal criminal laws,¹ or for the apprehension of a deserting seaman.²

(2) *Delegation of Judicial Functions* — (a) *In General.* — To assume to vest judicial functions elsewhere than in the tribunals established by the constitution,³ or interfere with the respective jurisdictions of courts of law and of equity as thus fixed,⁴ would clearly be without the sphere of legislative action. Statutes which attempt to confer judicial powers upon executive or ministerial officers are invalid.⁵

Election Boards. — The legislature cannot empower election boards to decide whether one by duelling has forfeited his right to vote or hold office.⁶

Board of Viticultural Commissioners. — Nor can power to decide what acts shall be a misdemeanor be conferred on commissioners of vine culture.⁷

Master Commissioner — Habeas Corpus. — A master commissioner cannot be empowered to grant writs of habeas corpus.⁸

Nor Can the Mayor of a City be invested with the power and jurisdiction of a justice of the peace in *Wisconsin*.⁹

So the Torrens Land Transfer Law has been declared unconstitutional in two states on the ground that it attempts to confer judicial functions upon the recorder.¹⁰

1. *Ex p. Gist*, 26 Ala. 156.

2. *Robertson v. Baldwin*, 165 U. S. 275.

3. **Delegation of Judicial Functions — General Rule.** — *Per Elliott, C. J.*, in *State v. Noble*, 118 Ind. 350, 10 Am. St. Rep. 158.

4. **The Constitution of the United States** recognizes the division of ordinary civil jurisprudence into cases of law and cases in equity, and it has been held that it is beyond the power of Congress to obliterate this distinction or make any essential modification thereof. *Carpentier v. Montgomery*, 13 Wall. (U. S.) 480.

Nor can Congress disregard this distinction in endeavoring to conform to the requirement that so far as possible uniformity of practice of state and United States courts shall obtain. *U. S. v. Howland*, 4 Wheat. (U. S.) 115; *Boyle v. Zacharie*, 6 Pet. (U. S.) 658; *Robinson v. Campbell*, 3 Wheat. (U. S.) 222; *Livingston v. Story*, 9 Pet. (U. S.) 654; *Russell v. Southard*, 12 How. (U. S.) 139; *Neves v. Scott*, 13 How. (U. S.) 268; *Boyce v. Grundy*, 3 Pet. (U. S.) 210; *Bodley v. Taylor*, 5 Cranch (U. S.) 191.

A State Legislature has no power to confer on courts of equity the jurisdiction to determine legal rights in regard to which courts of law exercise exclusive jurisdiction. *Pennington v. Pennington*, 70 Md. 418.

"The Right to Have Equity Controversies Dealt With by Equitable Methods is as sacred as the right of trial by jury. * * * Any change which transfers the power that belongs to a judge to a jury, or to any other person or body, is as plain a violation of the constitution as one which should give the courts executive or legislative power vested elsewhere. The cognizance of equitable questions belongs to the judiciary as a part of the judicial power, and under our constitution must remain vested where it always has been vested heretofore." *Per Campbell, J.*, in *Brown v. Buck*, 75 Mich. 274, 13 Am. St. Rep. 438.

But the fact that the state constitution confers on the chancery court control over the property of minors does not prevent the legislature from authorizing the guardian of minors

to stipulate with a railway as to the amount of damages to lands of such minor condemned for right of way. *Louisville, etc., R. Co. v. Blythe*, 69 Miss. 939.

5. **Executive or Ministerial Officers.** — An Act of Congress providing that the secretary of war, whenever he shall believe any bridge an obstacle to free navigation, shall give notice to the controllers of the bridge to so alter it within a reasonable time as to render navigation easy, and imposing a penalty upon them if the change is not made, is unconstitutional, as investing him with judicial power. *U. S. v. Rider*, 50 Fed. Rep. 406.

In *Campbell v. State Union Bank*, 6 How. (Miss.) 659, an act authorizing the executive of the state, upon certain proof of the bank's refusal to pay its notes, to issue his proclamation declaring the charter of the bank to be forfeited, was held void as an attempt to confer on the executive power which he could not constitutionally exercise.

6. *Com. v. Jones*, 10 Bush (Ky.) 725; *Burkett v. McCarty*, 10 Bush (Ky.) 758.

7. *Ex p. Cox*, 63 Cal. 21.

8. *Shoults v. McPheeters*, 79 Ind. 373.

9. *Atty.-Gen. v. McDonald*, 3 Wis. 805.

10. **Torrens Law Invalid.** — *People v. Chase*, 165 Ill. 527; *State v. Guilbert*, (Ohio 1897) 47 N. E. Rep. 559.

In the latter cases the duties of the recorder to which exception is taken are thus described and commented upon: "The principal powers conferred are to take proof after notice to the holder that a mortgage has been discharged, and after a hearing to enter a discharge upon the register; to make an entry that a lien has become inoperative at law by reason of limitation of time when application has been made therefor, the person interested notified, and he is satisfied that such is the fact; to correct memorials made or issued by mistake, if the rights of *bona fide* purchasers or lienholders for value have not intervened. It is true that the power to ascertain and decide is not necessarily a judicial power, and it is frequently exercised by ministerial officers and legislative bodies. Whether the power to hear and de-

Filling Place of Judge. — A statute authorizing an unofficial person to sit in the place of a judge who is disqualified is invalid.¹

Special Courts cannot be created for the trial of rights and obligations of particular parties.²

Transfer to Inferior Court of Jurisdiction of Supreme Court. — The legislature cannot transfer to an inferior court one of the established powers of the supreme court created by the constitution.³

But the Legislature May Create a Court or confer judicial powers when acting within the scope of its constitutional authority without designating the tribunal created as a court.⁴

Determination of Qualifications of Applicants to Practice Medicine. — And the appointment of commissioners to determine the qualifications of applicants to practice medicine is not an unconstitutional attempt to delegate judicial power.⁵

Police and Fire Commissioners. — So an act authorizing police and fire commissioners to discharge employees of the fire department on summary proceedings quasi-judicial in their nature is not an infringement on judicial power.⁶

Grand Jurors — Witnesses — Commitment. — A statute requiring grand jurors to

termine is judicial depends upon the nature of the subject of the inquiry, the parties to be affected, and the effect of the determination. While it is not supposed that any definition of judicial power, sufficient for all conceivable cases, has ever been attempted, it is clear that to 'adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department.' Cooley, Const. Lim. 109. Recurring to the duties of the recorder under the act, he is not merely to enter the evidence furnished by the agreement of the parties that a lien has been discharged, or that it has become void by the lapse of time, or that a mistake has intervened touching their rights, but he is to apply the rules of evidence to the ascertainment of disputed facts, to apply the rules of law concerning payment, to interpret and apply the statute of limitations as it may affect the enforcement of liens, including such questions of disability as may arise, to decide the questions of fact and law that may arise in determining whether mistakes have intervened, and who are *bona fide* purchasers; and then to make an entry which is to have the same effect in concluding the rights of the adversary parties as would a decree in equity. That these are judicial powers is entirely clear. They seem to have been so regarded by the general assembly, for there is a provision for appeal from the decisions of the recorder. This is not supposed to include all the judicial powers which the act assumes to confer on the recorder, but it is sufficient for present purposes. Nor is this objection to the act avoided by the provisions which contemplate a review of or repeal from the action of the recorder. It would perhaps be found upon a careful consideration of his powers that they are not all embraced within the provisions for review or appeal. But the assumption that they are so embraced would not validate the act in this respect. The recorder, as a ministerial officer, is incompetent to receive a grant of judicial power from the legislature. His acts in the attempted exercise of such powers are necessarily nullities. They cannot be effective to impose any obligation or burden upon a citi-

zen or to deprive him of any right. The act plainly contemplates that the person against whom the recorder decides in the exercise of any of the powers sought to be conferred must either submit to the adverse decision or take upon himself the burden of an appeal."

In *People v. Chase*, 165 Ill. 541, it is observed with reference to the same point: "It seems to us that it would be difficult to more clearly and positively confer judicial powers upon a person unqualified under the constitution to exercise those powers than is done by this law. This doubtless resulted from an attempt to adopt the provisions of a similar law in force in Australia, Canada, England, and perhaps other countries, by which the certificate of title issued becomes conclusive as to the ownership of the property, and in which countries no constitutional or other restriction exist against the legislative grant of such powers upon non-judicial officers. The powers of the registrar are no less judicial under our statute than those in the countries referred to. The only difference is, there this is no valid objection to the validity of the law, while here it is fatal. In *In re*, etc., *Ex p.* Bond, 6 V. L. R. (L.) 458, in construing the Transfer of Land Statute, it is said: 'The intention of the legislature was obviously to impose the duty upon the registrar to prevent instruments being registered which in law as well as in fact ought not to be registered in the first instance, and to determine the validity of the instruments, as well as the priority of registration in point of time. He has, therefore, to discharge not merely ministerial but judicial duties.' Without further discussion of the question, we are of the opinion that this law, for the reasons stated, is obnoxious to the constitution, and therefore void."

1. *Van Slyke v. Trempeleau County Farmers' Mut. F. Ins. Co.*, 39 Wis. 390.

2. *State Bank v. Cooper*, 2 Verg. (Tenn.) 599, 24 Am. Dec. 517.

3. *Conger v. Convery*, 52 N. J. L. 440.

4. *Matter of Sims*, 54 Kan. 1.

5. *People v. Hasbrouck*, 11 Utah 291; *State v. Hathaway*, 115 Mo. 37, *per* Gantt, J.

6. *Gilbert v. Board of Police, etc.*, 11 Utah 378.

require a justice to commit to jail witnesses refusing to answer proper question is not an infringement upon judicial functions.¹

Board to Hear Appeals from Drainage Commissioners. — In *Illinois* it is held that an act constituting certain ministerial officers a board to hear and determine appeals from the orders of drainage commissioners does not confer judicial powers upon them.²

Determination of County Boundaries. — In *Colorado* a statute which empowered the state engineer and county surveyors to determine county boundaries was held not to be a grant of judicial power, though by implication it authorized them to construe certain statutes.³

Appointment of Receivers for Insolvent Banks — Assessments. — So a federal statute which permits the comptroller of the treasury to appoint receivers for insolvent national banks, and to make assessments upon stockholders, without a prior judicial determination as to either matter, is not an unconstitutional grant of judicial power.⁴

Confinement of Convicts. — An act establishing an additional state penitentiary may authorize the executive council to confine there such convicts as their judgment may dictate, without an invasion of judicial functions, and the executive council may confine there convicts sentenced by the court to the penitentiary previously established.⁵

(b) **Clerks of Courts — Judgment by Default — Bail.** — **Clerks of Courts** are ministerial officers,⁶ and cannot be invested with judicial powers, such as the rendition of judgment by default in vacation,⁷ or in some states the determination of the amount of bail,⁸ though this is permitted

1. *In re Clark*, 65 Conn. 17.

2. *Owners of Lands v. People*, 113 Ill. 296.

3. **Determination of County Boundaries.** — *Hinsdale County v. Mineral County*, (Colo. App. 1897) 48 Pac. Rep. 679, the court saying: "The running out and defining of a line is not in itself a judicial act. But in order to find where the line should be established, the statutes bearing upon the question must be consulted, because there is no authority outside of the legislature to create counties and assign them boundaries, and it is the statutory boundaries that must be ascertained and followed. An examination of the statutes by the engineer and his assistants is therefore the first step to be taken in the performance of their duties. To deduce from them the line sought for involves, in some sense, their construction, or an interpretation of their language. Now, it is said that the construction of statutes is the exercise of a judicial function, and that this act, in prescribing duties of which statutory construction is a necessary part, confers judicial power, and hence is contrary to the constitution. The engineer and his assistant surveyors are supposed, by virtue of their occupation, to be familiar with the country in which they are called upon to act, and with its physical characteristics and landmarks. They hear no evidence and no argument. They do not even listen to the statements of the contending parties, but act solely upon their own knowledge and the information they are able to obtain from the statutes. They do not examine a statute to pass upon its legal effect, but to find facts. In a restricted sense they may be said to construe it; but the knowledge necessary to a construction of that kind is a knowledge derived from their calling, and from experience gained in their calling, and not a knowl-

edge of the principles of law. We may concede that construing a statute in that way, and for that purpose, is quasi-judicial, but it is not judicial in the sense in which the term is applied to proceedings in courts. There is something more than that involved in the judicial construction of a statute. An authority to gather from descriptions of boundaries contained in statutes the data of fact necessary to an intelligent performance of subsequent duties, even though it contemplates an exercise of judgment, is not a judicial power within the meaning of the constitution."

4. **Appointment of Receivers for Insolvent Banks — Assessments.** — *Bushnell v. Leland*, 164 U. S. 684, the court, *per White, J.*, saying: "All of these contentions have been long since settled, and are not open to further discussion. *Kennedy v. Gibson*, 8 Wall. (U. S.) 498; *Casey v. Galli*, 94 U. S. 674; *U. S. v. Knox*, 102 U. S. 423. When, after the adjudication in *Kennedy v. Gibson*, 8 Wall. (U. S.) 498, the questions were for a second time pressed in argument, the court contented itself with calling attention to the fact that they had been affirmatively adjudicated upon and were concluded. We see no reason now to reopen controversies which were then treated as concluded, and have since been approved and in all respects fully affirmed."

5. *O'Brien v. Barr*, 83 Iowa 51.

6. **Clerk of Court Ministerial Officer.** — *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49. See the title **CLERKS OF COURTS**, *ante*, p. 132.

7. **Judgments by Default.** — *Hall v. Marks*, 34 Ill. 358. But see *Terpening v. Holton*, 9 Colo. 317.

8. **Amount of Bail.** — *Gregory v. State*, 94 Ind. 384, 48 Am. Rep. 162, the court saying: "The origin of the common-law right to give bail

in other jurisdictions.¹

and the character of the proceeding are well stated and discussed in the recent work of Mr. Stephen and he shows that the authority to admit to bail was part of the judicial functions of sheriffs, but that by statute the authority has been gradually vested in superior courts and in those of justices of the peace. ¹ Stephen Crim. Law of England 233. Bishop assumes that the power is a judicial one, and says: 'Anciently the sheriff, possessing judicial with ministerial powers, was the principal bailing officer.' ¹ Bishop Crim. Proc. 251. In other works the same view is taken, and we have found in none of the text-books any intimation that the power is other than a judicial one. Harris Crim. Law 225; Barbour Crim. Law 575. Judge Cooley says: 'The magistrate, in taking bail, exercises an authority essentially judicial.' Cooley Const. Lim. (5th ed.) 378, n. 4. This is substantially the remark of Lord Denman in *Linford v. Fitzroy*, 13 Q. B. 240, 66 E. C. L. 240. This eminent judge there said: 'But, upon the fullest consideration, we are of opinion that the duty of the magistrate in respect to admitting to bail cannot be thus split and divided; that it is essentially a judicial duty.' There was some conflict among the older English cases as to whether the sheriff's judicial powers were sufficiently comprehensive to authorize him to fix bail for persons accused of crime. *Bengough v. Rossiter*, 2 H. Bl. 418; *Posterne v. Hanson*, 2 Saund. 59; ¹ *Chitty Crim. Law* 98. But it was unanimously agreed that the power was a judicial one. In the cases of *State v. Mills*, 2 Dev. L. (N. Car.) 555, and *State v. Hill*, 3 Ired. L. (N. Car.) 398, the power of admitting to bail is declared to be a judicial one which a sheriff or other ministerial officer cannot exercise. In several cases it has been held that the power cannot be delegated, for the reason that it is a judicial one. *Jacquemine v. State*, 48 Miss. 280; *State v. Clark*, 15 Ohio 595; *Morrow v. State*, 5 Kan. 563. In *State v. Crippen*, 1 Ohio St. 399, it was said: 'A recognizance is an obligation of record entered into before some court of record, or magistrate duly authorized, conditioned for the performance of some particular act.' The decision in *Solomon v. People*, 15 Ill. 291, is that 'a recognizance taken before an officer not having judicial power is without any binding force.' * * * It is clear on principle that the conclusion stated is the correct one. The officer by whom the bail is fixed must determine whether the offense is bailable, and what the amount of the recognizance shall be. Our constitution provides that excessive bail shall not be exacted, and the officer who fixes the amount must necessarily decide upon what will or will not be excessive bail in each particular case. What would be deemed excessive in one case might be entirely reasonable in another. Bail is to be fixed according to the circumstances of each case, and no general sum can be fixed for all cases. Crimes of the same class often differ greatly in their character, and the good of the public, as well as the constitutional right of the citizen, require that different provisions as to bail shall be made in different cases. The

atrociousness of some crimes increases the punishment, and the measure of punishment is always to be considered in determining the amount of bail. The object of requiring bail is to relieve from imprisonment until conviction and yet secure the appearance of the accused for trial, and it is obvious that what would be a sufficient sum in one case would be wholly inadequate in another, and what in one case would be excessive, in another would be insufficient, and that the question as to the amount of bail is therefore one for judicial decision."

1. *State v. Sureties of Krohne*, (Wyoming 1893) 34 Pac. Rep. 3, where it is observed: "The following cases hold that sheriffs or clerks may take bail, and some of them are to the effect that they can fix the amount thereof. *Moss v. State*, 6 How. (Miss.) 298; *State v. Edwards*, 4 Humph. (Tenn.) 226; *State v. Brown*, 32 Miss. 275; *Blackman v. State*, 12 Ind. 556; *Com. v. Roberts*, 1 Duv. (Ky.) 199; *Antonez v. State*, 26 Ala. 81; *Evans v. State*, 63 Ala. 195; *State v. Wyatt*, 6 La. Ann. 701; *State v. Gilbert*, 10 La. Ann. 524; *State v. Jones*, 3 La. Ann. 10; *Wallenweber v. Com.*, 3 Bush (Ky.) 68; *Schneider v. Com.*, 3 Metc. (Ky.) 411; *McCole v. State*, 10 Ind. 50; *Dickinson v. Kingsbury*, 2 Day (Conn.) 1; *State v. Hendricks*, 40 La. Ann. 719; *Ellis v. State*, 10 Tex. App. 324; *McClure v. Smith*, 56 Ga. 439. It was held in Kansas that when a court has failed to fix the amount of bail of a defendant arrested upon a warrant issued upon information, and there is no district judge in the county, the clerk of the district court may fix the bail of the defendant, and this upon the ground that the statute so provided. *State v. Schweiter*, 27 Kan. 499. See *People v. Kane*, 4 Den. (N. Y.) 530; *McCole v. State*, 10 Ind. 50. In *Ainsworth v. Territory*, 3 Wash. Ter. 270, it was held that the judge of a criminal court of record might accept and approve a bail bond in vacation, even where the prisoner had been previously committed in default of bail and was in custody of the sheriff, as the statute authorized a judge at chambers to determine all matters where a jury was not required; and in this case it was claimed that as the prisoner was held by the sheriff, that officer alone could accept bail. In Vermont a clerk of a county court issued a bench warrant upon an indictment in term time returnable forthwith. This warrant was served in another county, and the defendant was released in the county where it was issued, but rearrested upon the second warrant issued by the clerk of said court in vacation, the court having adjourned after the first warrant was issued. It was held that the statute conferred the power to issue the warrant in term time or vacation, as circumstances might require, without an express order from the judges for the arrest of a person indicted and for his detention for trial at the next term of court. The court say: 'If this seems to invest clerks with quasi-judicial power, it is not a new feature attaching to the office. At a very early day certain of the clerks of the court of chancery performed the duties which are now devolved upon masters in chancery. They were the number of twelve,

Issuance of Execution — Condition. — But a judgment on an insurance policy directing that no execution should issue until a receipt was filed with the clerk showing the payment of the premium note by the insured is not objectionable as conferring judicial powers on the clerk.¹

Hearing Complaints — Warrants of Arrest and Commitment. — So a statute authorizing the clerk of a court to hear complaints in all criminal matters and issue warrants or processes of commitment is not an infringement on judicial functions.²

Judgment on Referee's Report. — And the clerk of a court may be empowered to enter judgment on a referee's report subject to review by the court itself.³

In Louisiana a clerk may be empowered to homologate a family meeting which is unopposed.⁴

(c) **Delegating Power to Punish for Contempt** — *aa. GENERALLY.* — The power to punish for contempt, while belonging in a limited way to legislative bodies,⁵ is nevertheless a judicial function of high importance, and cannot, according to the weight of authority, be delegated to non-judicial officers or bodies.⁶

City Councils. — Thus in *Massachusetts* a statute which attempted to confer upon a city council the power to punish for contempt was held void;⁷ though in *Georgia* it was held that such a body might impose a fine upon one who created a disturbance during a trial conducted by it for an alleged infraction

distinguished from clerks under them by the name of "masters in chancery," and were the assistants to the chancellor, who referred to them interlocutory orders for stating accounts, computing damages, and the like. In process of time, as business increased, the clerk whose duty it was to keep the records, or, as formerly called, the "rolls," became distinguished as master of the rolls. 2 Bouv. Law Dict., p. 121. So our rules of court and statutes have long distinctly recognized the quasi-judicial function in the clerk in various ways; notably in the matter of assessment of damages and taxing of costs. The policy of legislation with us has been constantly to enlarge the powers of clerks.' *In re Durant*, 60 Vt. 176. That the clerk of a district court may perform, under our statutes, quasi-judicial functions has never been doubted. He may issue writs of attachments upon affidavits filed therefor, without submitting the same to a court or judge, and in vacation without consulting a court or judge. Other duties of like character have been imposed by statute upon the clerk, for the convenience of suitors. If a sheriff or a single judge in the recess or vacation of his court may constitutionally fix the amount of the bail, and let to bail a defendant in a criminal case, I do not see why this power could not be conferred upon a clerk of the district court. The object of the statute is humane. It is for the benefit of the accused, as the court may not be in session, or the judge thereof may be absent, at the time of his application to be let to bail."

For a Full Discussion of this subject, see the title BAIL AND RECOGNIZANCE, vol. 3, p. 659.

1. *Mutual L. Ins. Co. v. Gorman*, (Ky. 1897) 40 S. W. Rep. 571.

2. *State v. LeClair*, 86 Me. 522.

3. *Terpening v. Holton*, 9 Colo. 317.

4. *Lemoine v. Ducote*, 45 La. Ann. 857.

5. **Contempt — Legislative Bodies.** — *In re Chapman*, 166 U. S. 661, *affirming* 5 App. Cas. (D. C.) 122; *Kilbourn v. Thompson*, 103 U. S. 168, *modifying* *Anderson v. Dunn*, 6 Wheat. (U. S.) 204; *Whitcomb's Case*, 120 Mass. 118,

21 Am. Rep. 502; *Burnham v. Morrissey*, 14 Gray (Mass.) 226, 74 Am. Dec. 676.

6. "To arrest and punish for a contempt is the highest exercise of judicial power, and belongs to judges of courts of record, or superior courts. Where jurisdiction exists there can be no review. A pardon by the executive is in most cases the mode of release. This power is not, and never has been, an incident to the mere exercise of judicial function." *In re Mason*, 43 Fed. Rep. 515. See also *Matter of Kerrigan*, 33 N. J. L. 344; *Rhinehart v. Lance*, 43 N. J. L. 311. 39 Am. Rep. 592. And see the title CONTEMPT.

7. **City Council — Massachusetts Statutes.** — *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502. In the opinion, after a comprehensive review of the authorities relating to the power of legislative bodies in this connection, the court added (pp. 123, 124): "The city council is not a legislature. It has no power to make laws, but merely to pass ordinances upon such local matters as the legislature may commit to its charge, and subject to the paramount control of the legislature. Neither branch of the city council is a court, or, in accurate use of language, vested with any judicial functions whatever. Nor are its members chosen with any view to their fitness for the exercise of such functions. To allow such a body to punish summarily by imprisonment the refusal to answer any inquiry which the whole body, or one of its committees, may choose to make, would be a most dangerous invasion of the rights and liberties of the citizen. * * * The legislature may also provide for the punishment, upon indictment and trial in the courts of justice, of any person who, being duly summoned, refuses to appear and testify before any board or tribunal upon a matter which it is authorized by law to investigate or decide. But the legislature cannot delegate to or confer upon municipal boards or officers that are not courts of justice, and whose proceedings are not an exercise of judicial power, the authority to imprison and punish without right of appeal or trial by jury."

of a municipal ordinance.¹

Board of Tax Commissioners — County Attorneys. — It has been held that the power to punish for contempt could not be conferred upon a board of tax commissioners,² or upon county attorneys.³

Court Commissioner. — It has also been doubted whether a court commissioner could be invested with such power.⁴

Referee. — On the other hand, it has been held that a referee, when so authorized by statute, might exercise the power to punish for contempt.⁵

Grand Jury — Justices. — A statute authorizing grand jurors to require justices to commit witnesses who refuse to answer proper questions is not an invasion of judicial functions.⁶

bb. TO NOTARIES PUBLIC. — Where statutes expressly confer such power upon notaries public they have generally been allowed to exercise it,⁷ though in *Michigan* a statute conferring such power was declared unconstitutional.⁸

Strict Construction. — But the power so conferred upon these officers must be strictly construed, and under a statute authorizing them to imprison witnesses "who shall refuse to give evidence,"⁹ they cannot commit one for refusing to produce books and papers, though under a subpoena *duces tecum*,¹⁰ nor com-

1. *Swafford v. Berrong*, 84 Ga. 65.

2. **Tax Commissioners.** — *Langenberg v. Decker*, 131 Ind. 471. See the opinion for a valuable review of authorities on this question.

In *Noyes v. Byxbee*, 45 Conn. 382, it was denied that such power had been conferred upon the state insurance commissioner, though the question whether he could be so empowered by statute was not presented.

3. **County Attorneys.** — *Matter of Sims*, 54 Kan. 1, where the court, *per Allen, J.*, says: "The county attorney is peculiarly an executive officer. He is not only authorized to appear on behalf of the state and prosecute all criminal cases arising in his county, but it is his duty to do so; and the act concerning the sale of intoxicating liquors imposes on him the specific duty of making inquiries and investigations for the purpose of detecting violations of the prohibitory law, to compel witnesses to testify, to reduce their statements to writing, to cause them to be signed by the witnesses, to file them in the district or other court having jurisdiction, and with them his complaint or information charging offenders with such offenses as the testimony shows they are guilty of. In all these proceedings the county attorney acts as an administrative officer, prosecuting on behalf of the people. It is for the purpose of aiding him in the effectual execution of his duty that the power to commit for contempt is given him. It is given to him not as a judicial officer, but as county attorney, and for the very purpose of aiding him in performing the duties of that office. Such a combination of powers is not in accordance with the theory of our government, nor with the orderly administration of justice as administered in this country and in England. The power to punish for contempt is never exercised except by legislative bodies or judicial officers."

4. **Court Commissioners.** — *Ex p. Doll*, 7 Phila. (Pa.) 595. See also *Chandler v. Nash*, 5 Mich. 409.

In the following cases it was held that court commissioners were not empowered to punish

for contempt, though the question of the right to confer such power was not actually passed upon. *In re Mason*, 43 Fed. Rep. 510; *In re Remington*, 7 Wis. 643.

In *Haight v. Lucia*, 36 Wis. 355, it was held that a court commissioner could not issue attachments for contempt, except in cases where the power was expressly conferred by statute, thus implying legislative right to confer it.

5. **Referee.** — *Heerd v. Wetmore*, 2 Robt. (N. Y.) 697. The constitutionality of the statute was not discussed.

6. *In re Clark*, 65 Conn. 17.

7. **Notaries Public May Punish for Contempt — Kansas.** — *In re Abeles*, 12 Kan. 451; *Matter of Merkle*, 40 Kan. 27.

Missouri. — *Ex p. McKee*, 18 Mo. 599.

Nebraska. — *Dogge v. State*, 21 Neb. 272.

Ohio. — *DeCamp v. Archibald*, 50 Ohio St. 618, 40 Am. St. Rep. 692.

8. **Michigan Statute.** — *Chandler v. Nash*, 5 Mich. 409, where the court, after quoting the constitutional grant of judicial power, says (p. 417): "This, beyond all controversy, vests the whole judicial power of the state in the courts and officers named in this section, unless there be some further provision in the same constitution, conferring upon some other court or officer a part of such judicial power, or authorizing the legislature to confer it; and in the latter case it can only be possessed or conferred by such further provision expressly, or by necessary implication, which would have the effect to take the case out of the general provision above quoted. This must be so upon principle, or the constitution itself must be subject to legislative repeal."

This appears to have been overlooked by the courts deciding adversely, whose decisions are referred to in the preceding note, though its discussion of the point is the most elaborate of any.

9. **Power Strictly Construed.** — See the *Missouri* statute set out in *Ex p. McKee*, 18 Mo. 599.

10. *Ex p. Mallinkrodt*, 20 Mo. 493.

pel a witness to answer all incompetent or irrelevant questions,¹ nor fine one who is not a witness who uses vulgar and profane language during the taking of depositions.²

In the Absence of an Express Grant, a notary has no such power.³

How Exercised. — And when it is conferred, the notary exercises the power as a court.⁴

(3) *Imposing New Duties upon the Judiciary* — (a) **Conferring Power of Appointment upon Judges** — *aa.* **PREVAILING RULE.** — Whether the exercise by the judiciary of the appointing power is an infringement on the constitutional separation of governmental functions is a question upon which the authorities are somewhat divided. A majority of the courts which have passed upon it, however, have held to the negative of the proposition and have sustained the exercise of such power.⁵

Ministerial Officers. — So far as the question relates to ministerial officers and assistants of the courts, the power of appointment seems to have been exercised without question where it was properly conferred.⁶

1. *Ex p.* Krieger, 7 Mo. App. 367.

So **Where a Party Was Imprisoned by a Notary** for refusing to give testimony in a pending case, which was sought simply to "fish out" in advance what his testimony would be, and to annoy and oppress him, he was released on habeas corpus. *Matter of Davis*, 38 Kan. 408.

2. *Courtney v. Knox*, 31 Neb. 652. The *Nebraska* statute simply authorizes notaries "to punish witnesses for neglect or refusal to obey such summons, or for refusal to testify when present, by commitment to the jail of the county for contempt."

3. *Burt v. Pyle*, 89 Ind. 398, where, after referring to some of the authorities cited in note 7, p. 1059, the court says (pp. 399, 400): "The statutes of those states expressly authorize officers taking depositions, including notaries public, to imprison a witness as for contempt for refusal to answer a proper question in the taking of his deposition."

4. "A notary, as a notary, has no power to commit for contempt; and contempt of court is a recognized offense, but there is no such thing known to the law as contempt of a notary public. It is only by reason of the exercise of a function in the manner and under the circumstances contemplated by the legislature that there can here be contempt within the meaning of the law." *Ex p.* Krieger, 7 Mo. App. 367.

5. **Power of Appointment by Judges — Prevailing Rule** — *California*. — *People v. Provines*, 34 Cal. 520; *Stauder v. Election Com'rs*, 61 Cal. 313; *Tuolumne County v. Stanislaus County*, 6 Cal. 440.

Georgia. — *Russell v. Cooley*, 69 Ga. 215.

Illinois. — *People v. Nelson*, 133 Ill. 565; *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793; *People v. Morgan*, 90 Ill. 558; *Cornell v. People*, 107 Ill. 372.

Indiana. — *Terre Haute v. Evansville, etc.*, R. Co., (Ind. 1897) 46 N. E. Rep. 77.

Kentucky. — *Hoke v. Field*, 10 Bush (Ky.) 144, 19 Am. Rep. 58; *Johnson v. De Hart*, 9 Bush (Ky.) 640; *Taylor v. Com.*, 3 J. J. Marsh. (Ky.) 401.

New York. — *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312.

Ohio. — *State v. Kendle*, 52 Ohio St. 346.

Compare Walker v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24.

West Virginia. — *State v. Mounts*, 36 W. Va. 179.

6. **Ministerial Officers.** — *State v. Kendle*, 52 Ohio St. 346; *Tuolumne County v. Stanislaus County*, 6 Cal. 440; *State v. Mounts*, 36 W. Va. 179; *Matter of Janitor*, 35 Wis. 410; *State v. Noble*, 118 Ind. 350, 10 Am. St. Rep. 143, the court saying (p. 357): "A department without the power to select those to whom it must intrust part of its essential duties cannot be independent. If it must accept as 'ministers and assistants,' as Lord Bacon calls them, persons selected for them by another department, then it is dependent on the department which makes the selection. To be independent, the power of the judiciary must be exclusive, and exclusive it cannot be if the legislature may deprive it of the right to choose those with whom it shall share its labors or its confidences. If one kingdom possesses the right to send into another ministers and assistants to share with the governing power its functions and duties, the latter kingdom is in no sense independent."

"The justices of this court, as incidental to the large and varied judicial powers and jurisdiction conferred upon them by the constitution and laws, embracing cases criminal and civil, in common law, equity, probate, and divorce, may be and have been by many statutes authorized to appoint subordinate officers of various kinds to assist in the performance of their judicial duties, such as auditors, special masters in chancery, commissioners to take depositions in other states in cases pending here, commissioners to take bail, commissioners for the partition of lands, division of flats, or the setting off of dower, commissioners of sewers or for the improvement of meadows and low lands, and commissioners to adjust the rights of transportation and modes of connection between connecting lines of railroad, or to assess the expenses, as between different counties, towns, and other corporations, of maintaining roads or bridges. Parts of the duties performed by some of these officers in carrying out their functions are executive in their nature, and of a class which might be imposed by law upon strictly executive officers. But all the officers above enumerated, when

Appointment of Clerk. Thus the power of the court to appoint a clerk was not denied, though such appointment was construed as an executive act.¹

Appointment of Jury Commissioners. — Upon the same principle it has been held that a *nisi prius* court may appoint jury commissioners.²

Janitor — Commissioners to Settle Indebtedness of Counties. — And the rule has even been extended to include the appointment of a janitor,³ and of commissioners to ascertain and settle the respective proportions of indebtedness assumed by the different parts of a divided county.⁴

Election Board — Fire, Police, School, and Park Commissioners — Appraisers Tax Collectors. — But there are many other cases where the judicial power of appointment

appointed by the court, are, by express requirement or necessary implication, obliged to return a report of their doings to the court for its judicial action." Election Supervisor's Case, 114 Mass. 249.

1. Taylor v. Com., 3 J. J. Marsh. (Ky.) 401.

2. **Jury Commissioners.** — "The question here presented is whether the jury commissioners created by the act now under consideration are officers of the state, or whether they are in fact, like jurors themselves, mere officers of the court, such as commissioners in chancery, and, in a general sense, attorneys. We think there can be no doubt that such commissioners belong to the latter class and go to make up a part of the judicial machinery, such as commissioners in chancery, general and special receivers, and other similar officers. Jurors are themselves, in a certain sense, officers of the court; and this special commission is only a legislative device intended to aid the court in selecting them." State v. Mounts, 36 W. Va. 184.

"The power of the legislature to provide for the appointment of persons to act as assistants in an office filled by election has not been, and cannot well be, questioned. It is on this principle that the appointments of deputy clerks, deputy sheriffs, etc., are made and recognized, each of whom performs many, and in some cases all, the duties of the office in which he acts as deputy. So as to these jury commissioners: they are appointed by the common pleas judges to assist in the administration of justice, as are master commissioners and court constables. They are but handmaids of the court in the selection of judicious and discreet persons to serve on such juries as are required in the trial of causes and the presentation of indictments." State v. Kendle, 52 Ohio St. 356.

3. **Supreme Court Janitor.** — *In re* Janitor of Supreme Court, 35 Wis. 410, where, among other reasons, the following was advanced: "Another consideration, and by no means a slight one, entering into the employment or service in question, is the relation of trust and confidence existing between the members of the court and the person engaged in the position of janitor. In all the affairs and transactions of life, even down to those which are strictly private and domestic in their nature, where the services or agency of others are necessary, the fiduciary or confidential relation, more or less clearly marked and defined, and constituting in part the consideration of the engagement and the value of the services between employer and employed, or master and servant, is well known, and its existence recognized and

respected. This principle of trust and confidence, pervading every department of active life, both public and private, the law also recognizes and acts upon and will enforce and protect. As already observed, it is a principle which finds its way into the employment or service in question, and as such is entitled to some consideration and respect. The justices of this court assigned to permanent quarters or rooms set apart for their use in the capitol building, and in which they spend all the working hours of their judicial lives in constant and most unrelenting mental toil and labor, ought at least, and under any circumstances, as they think, to be consulted with respect to the character and qualifications of their assistant, who, though in a subordinate or inferior capacity, it may be, is to be always present at their command to give aid and relief by his manual labors. In the appointment of janitors heretofore much attention has been paid to the character and habits of the applicant and to ascertaining that he was a trustworthy person. In his capacity as assistant, having charge of the rooms and furniture, and seeing that they are kept in neatness and order, he has daily access to the desks of the justices, in which are always to be found opinions, papers, documents, and other things of importance and value, and as to which strict non-interference or secrecy is to be maintained. He is in a position to observe and to learn many things of an official nature which ought not to be spoken of, and which the interests of the public, and of suitors, and the ends of justice positively require should not be. An over-curious and obtrusive, and at the same time garrulous, leaky, or corrupt, assistant would be the source of the greatest public disorder and mischief. Hence it is that the relations between the members of the court and the janitor are, and of necessity must be, to a considerable extent confidential; and hence, also, the necessity and propriety of consulting them, and of the exercise of some care and caution on their part in the selection of a discreet, trustworthy, and honest assistant. The good of the public service imperatively demands this, and the justices of this court would be derelict in the performance of their solemn duty if they failed in its enforcement." See also *White County v. Gwin*, 136 Ind. 562, holding that a court has inherent power to order necessary repairs for a court house.

4. *Tuolumne County v. Stanislaus County*, 6 Cal. 440. The reasoning of this case, but not the result of it, was criticised in *People v. Provines*, 34 Cal. 531.

has been upheld which cannot be explained upon the principle above stated.¹ It has been held that judges might be authorized to appoint election boards,² police commissioners,³ park commissioners,⁴ appraisers of damages from the opening of streets,⁵ tax collectors,⁶ school commissioners,⁷ and commissioners⁸ or trustees⁹ to carry on the construction of a subsidized railway.

bb. MINORITY DOCTRINE. — On the other hand, authority is not wanting for the doctrine that appointment to office is an executive and not a judicial function,¹⁰ and where the power of appointment has by statute been vested in certain judges whose judicial functions are thereafter transferred, by the adoption of a new constitution, to another court, the appointing power does not pass therewith.¹¹

In Massachusetts the proposition has been squarely decided that the appointment of officers not connected with the machinery of the court, such as election supervisors, could not be conferred upon the judges because of the tripartite separation of powers.¹²

So in Michigan it was held that the appointment of surveyors to examine property in order to enable the court to relevy a tax in place of one which had been declared invalid was not within the province of judicial duty.¹³

1. *Alabama*. — *Fox v. McDonald*, 101 Ala. 51, 46 Am. St. Rep. 98.

Indiana. — *Hovey v. State*, 119 Ind. 403.

Maryland. — *Baltimore v. State*, 15 Md. 376.

Michigan. — *People v. Hurlbut*, 24 Mich. 63, 9 Am. Rep. 103.

New York. — *Achley's Case*, 4 Abb. Pr. (N. Y. Supreme Ct.) 35.

2. *Appointment of Election Commissioners*. — *Russell v. Cooley*, 69 Ga. 215; *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793; *Ford v. North Des Moines*, 80 Iowa 626.

In the case first cited it is observed: "It is earnestly and ably argued that the appointment of this board of registration is not a judicial function, because the duties of the said board relate to no judicial suit or proceeding, and therefore the appointment by judicial officers is illegal and void under the constitution. Had this been the view of the legislative and executive departments, they never would have conferred upon the inferior court, as it existed until recently, the power to appoint vendue masters, lumber measurers, road commissioners, notaries public, and county treasurers, as well as the power to fill vacancies in the offices of tax collectors and receivers. But it is said that these powers were conferred because the inferior court was clothed with powers other than judicial, and these were exercised under the latter grant. This might be sound if it were not for the fact that they were to be exercised by the inferior court, and the court could not exist for business except through its judges. Besides the power of appointment so exercised by that very highly respected and important part of the judiciary during its existence, we have had the power of appointments conferred upon the judges of the superior courts in many instances, such as members of the boards of education, when vacancies are to be filled, commissioners to revise the jury boxes, commercial notaries, and notaries public, who are *ex officio* justices of the peace." See also *McDonald v. Morrow*, 119 N. Car. 666, holding that judges might be required to exercise supervision over clerks of elections.

3. *Police Commissioners*. — *Staudé v. Election*

Com'rs., 61 Cal. 313. See also *People v. Provines*, 34 Cal. 520, holding that the police judge of the city and county of San Francisco might act also as police commissioner thereof.

4. *Cornell v. People*, 107 Ill. 372.

5. *Appraisers of Damages*. — *Terre Haute v. Evansville, etc., R. Co.*, (Ind. 1897) 46 N. E. Rep. 77. *Contra*, *Houseman v. Kent Circuit Judge*, 58 Mich. 364.

6. *Hoke v. Field*, 10 Bush (Ky.) 144, 19 Am. Rep. 58.

7. *Johnson v. De Hart*, 9 Bush (Ky.) 640.

8. *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312.

9. *Walker v. Cincinnati*, 21 Ohio St. 39, 8 Am. Rep. 24.

10. *Minority Doctrine as to Appointments by Judges* — *Connecticut*. — *State v. Barbour*, 53 Conn. 85, 55 Am. Rep. 65.

Indiana. — *Evansville v. State*, 118 Ind. 426; *French v. State*, 141 Ind. 618.

Kentucky. — *Taylor v. Com.*, 3 J. J. Marsh. (Ky.) 401.

North Carolina. — *People v. McKee*, 68 N. Car. 429.

11. *Heinlen v. Sullivan*, 64 Cal. 378.

12. *Election Supervisors Case*, 114 Mass. 247. Gray, C. J., in delivering the opinion, says: "These supervisors, although intrusted with a certain discretion in the performance of their duties, are strictly executive officers. They make no report or return to the court or to any judge thereof. Their duties relate to no judicial suit or proceeding, but solely to the exercise by the citizens of political rights and privileges. We are unanimously of opinion that the power of appointing such officers cannot be conferred upon the justices of this court without violating the constitution of the commonwealth. We cannot exercise this power as judges, because it is not a judicial function; nor as commissioners, because the constitution does not allow us to hold any such office."

Here it will be observed that the test employed is whether the appointee must report to the judge or court.

13. *Houseman v. Kent Circuit Judge*, 58 Mich. 364. The constitution of *Michigan*, however (art. 6, § 10), expressly prohibits the exercise

(b) **Imposing Other Nonjudicial Duties on Courts and Judges — Fixing Salaries.** — In *California* a statute providing that the salaries of court reporters should be fixed by the judges was declared unconstitutional.¹ But in *Kentucky* a similar statute authorizing the judges to fix the salaries of deputy county officers was upheld.²

Judge as Trustee of State Library — Time and Place of Elections — Conveyance of County Property — Operation of Statute or Ordinance. — It has been held that the chief justice of the supreme court could not be made a trustee of the state library;³ that a county judge could not be endowed with the right of designating the time and place of elections;⁴ that certain powers, including the conveyance of county property, could not be conferred upon a court;⁵ that courts could not be authorized to determine when certain sections of a legislative act should go into effect,⁶ or when a municipal ordinance should cease to be operative.⁷

Creation of Municipal Corporations. — So it has been held that courts could not exercise the power to create municipal corporations.⁸ But in *West Virginia* a statute which empowered a circuit judge to issue a certificate of incorporation after determining that the proper steps had been taken was upheld,⁹ and in *Illinois* an act which imposed upon certain judges the duty of fixing the territory to be embraced by a sanitary district was declared valid.¹⁰

of the appointing power by judges except in a few instances.

1. **Salaries of Officers.** — *Smith v. Strother*, 68 Cal. 194.

The ground of this decision was the distributive clause in the constitution, but the court ignored the numerous *California* cases in which notwithstanding the clause, the exercise of the appointing power had been upheld.

2. *Stone v. Wilson*, (Ky., 1897) 39 S. W. Rep. 49, *overruling* *Com. v. Addams*, 95 Ky. 588. See also *Staples v. Llano County*, 9 Tex. Civ. App. 201, holding that the commissioners' court might fix county treasurers' commissions.

3. *People v. Sanderson*, 30 Cal. 160.

A *Nebraska* statute which seems never to have been called into question makes the judges of the Supreme Court *ex officio* trustees of the law division of the state library. See Consolidated Stat. of Nebraska, § 2131.

4. *Dickey v. Hurlburt*, 5 Cal. 343.

5. *Burgoyne v. San Francisco County*, 5 Cal. 9.

6. *State v. Young*, 29 Minn. 474.

7. **Time of Taking Effect of Municipal Ordinance.** — *Shepherd v. Wheeling* 30 W. Va. 479. In this case the statute provided that any such ordinance might be superseded and annulled, if contrary to law, upon the petition of a certain percentage of the taxpayers. The court said (pp. 482, 483). "It is an elementary principle of universal application that the laws and ordinances of a city, adopted by its council, within the scope of its authority, partake of the nature and have the same effect within the corporate limits of the city that the same laws could have if they had been enacted by the legislature of the state in which the city is located. In the one case the legislature exercises its legislative power directly, while in the other it does so indirectly, by delegating to the city a portion of its functions; but whether the power is exercised directly by the legislature itself, or indirectly by the council of the city under a legislative grant, the result is the same, and in both instances the power exercised is legislative. The enactment of an

ordinance by a city council or the enactment of a statute by a legislature being in each case the exercise of legislative power, the repeal of such ordinance or statute must likewise be the exercise of legislative power. It does not require any precise definition of judicial power, or any nice discrimination as to its extent and limitations, to determine that the act of repealing a statute is not the exercise of judicial power. * * * When, in the course of determining the rights of the parties to a particular suit or controversy, the court finds it necessary to ascertain whether or not a statute is unconstitutional, the court must necessarily pass upon that question; but in doing so it does not annul or repeal the statute if it finds it in conflict with the constitution. It simply refuses to recognize it, and determines the rights of the parties just as if such statute had no existence. The court may give its reasons for ignoring or disregarding the statute, but the decision affects the parties only, and there is no judgment against the statute. The opinion or reasons of the court may operate as a precedent for the determination of other similar cases, but it does not strike the statute from the statute-book; it does not repeal, 'supersede, revoke, or annul' the statute. The parties to that suit are concluded by the judgment, but no one else is bound. A new litigant may bring a new suit based upon the very same statute, and the former decision cannot be pleaded as an estoppel, but can be relied on only as a precedent. This constitutes the reason and basis of the fundamental rule that a court will never pass upon the constitutionality of a statute unless it is absolutely necessary to do so in order to decide the cause before it." See also *Blake v. People*, 109 Ill. 504; *Territory v. Stewart*, 1 Wash. 98.

8. *People v. Nevada*, 6 Cal. 143; *Shumway v. Bennett*, 29 Mich. 451; *State v. Simons*, 32 Minn. 540.

9. *Elder v. Central City*, 40 W. Va. 222; *In re Union Mines*, 39 W. Va. 179.

10. **Sanitary District.** — *People v. Nelson*, 133 Ill. 565, the court saying: "But we are not

Claims in Nonjudicial Proceedings — County Seat. — There is some authority for the proposition that courts cannot be required to pass upon claims in nonjudicial proceedings,¹ but it has been held that the legislature may provide as one of the duties of judges that they indorse their order of approval upon the claim of a coroner for services rendered the state,² and that they perform certain ministerial acts upon the relocation of a county seat.³

Interstate Commerce Act — Process to Obtain Evidence. — The provision of the Interstate Commerce Act authorizing the federal courts to issue their process in procuring evidence to be used before the commission was, after adverse decisions by the inferior courts,⁴ finally sustained by the Supreme Court.⁵

Railway Commission — Notice to Common Carriers. — So a provision that courts may direct the manner in which notice shall be given to common carriers of proceedings by a railway commission is valid.⁶

Probate Judges. — An act assigning to probate judges certain duties in connection with sending inebriates to an asylum, but giving to such judges no real authority over the subject, was declared invalid in *Minnesota*.⁷

prepared to hold that the duties imposed by said act upon said judges are necessarily incompatible with their duties as judges of the circuit and county courts. So far as the act commits to the county court the political function of selecting the two judges of the circuit court who constitute the other two members of the commission, the principle is in no respect different from that involved in a variety of other cases in which statutes imposing analogous duties upon judicial officers have been held to be constitutional. Thus the statute giving the Circuit Court of Cook county the power to appoint the commissioners for the South Park has been held to be constitutional. *People v. Williams*, 51 Ill. 63; *People v. Morgan*, 90 Ill. 558. So, also, the provisions of the drainage laws giving the county courts the power to appoint drainage commissioners have been held valid. *Moore v. People*, 106 Ill. 376; *Blake v. People*, 109 Ill. 504; *Kilgour v. Drainage Com'rs*, 111 Ill. 342; *Huston v. Clark*, 112 Ill. 344; *Owners of Lands v. People*, 113 Ill. 206. The same is true of those provisions of the Election Law of 1885 giving the county court power to appoint election commissioners. *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793."

1. **Claims in Nonjudicial Proceedings.** — *U. S. v. Ferreira*, 13 How. (U. S.) 43. Compare *U. S. v. Todd*, 13 How. (U. S.) 52, note; *Hayburn's Case*, 2 Dall. (U. S.) 409. The two latter arose under an act of Congress providing that federal judges should pass upon applications for pensions.

2. *Locke v. Speed*, 62 Mich. 408.

3. *Jackson County v. State*, (Ind. 1897) 46 N. E. Rep. 908.

4. *In re Interstate Commerce Commission*, 53 Fed. Rep. 476. See also *Matter of Pacific R. Commission*, 32 Fed. Rep. 251.

An application to the court by a pension examiner to compel the attendance of a witness before him by subpoena was denied. *In re McLean*, 37 Fed. Rep. 648.

5. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447. See also *In re Gross*, 78 Fed. Rep. 107.

6. *State v. Adams Express Co.*, (Minn. 1896) 68 N. W. Rep. 1085.

7. **Probate Judges.** — *Foreman v. Hennepin County*, 64 Minn. 371, the court saying: "The Constitution undoubtedly confers upon the Probate Court jurisdiction of the general subject of guardianship. *Jacobs v. Fouse*, 23 Minn. 51; *State v. Wilcox*, 24 Minn. 143. While it maybe true that in England infancy and insanity were the only grounds for guardianship, yet in this country habitual drunkenness is now made by statute a ground for the appointment of a guardian of the person, or of the property, or of both. It was so in the territory of Minnesota at the time of the adoption of the Constitution. Rev. Stat. 1851, c. 6, § 12, and c. 69, art. 3, §§ 3, 17, 18. Hence, if the act under consideration provided for committing habitual drunkards to the guardianship of the officers of an institute for the treatment of drunkenness, as the statutes considered in *State v. Wilcox*, 24 Minn. 143, provided for committing insane persons to the hospitals for the insane, the jurisdiction of the probate judge could be sustained, and on the same grounds. But an examination of the act satisfies us that the proceedings provided for do not contain the first element of a legal guardianship of the person. The institute in which the drunkard is to be treated is designated, not by the probate judge, but by three citizens appointed by the judge. After the designation of the institute and the so-called 'commitment,' it is still entirely optional with the inebriate whether he will go there for treatment. Neither the probate judge nor the officers of the designated institute have any power to compel him to do so. And if he sees fit to go there voluntarily, no one has any power to compel him to stay there, or to submit to treatment for a single day. The only semblance of authority or control over him by any one is the authority given in the fifth section of the act to the officers of the institute to enforce such reasonable rules as may be necessary for the administration of proper treatment to the patient. Even this authority would only continue so long as the party saw fit to remain an inmate of the institute. The framer of the bill evidently attempted to give it the appearance of a proceeding for the appointment of a guardian for the inebriate, but when the provisions of the act are analyzed they fall very far short of it. The act is unconstitutional."

(4) *Advisory Judicial Opinions*—(a) *Introductory*. — The office of a judicial opinion under the common-law system is to set out the grounds upon which a legal controversy is decided in favor of one litigant and against the other, and incidentally to serve as a guide for determining similar controversies in the future. Broadly speaking it has always been considered irregular for judges under that system¹ to render opinions regarding hypothetical causes or in feigned controversies.² But while this is true as a general proposition there has at the same time been a counter undercurrent. From an early period in the history of English law, judges, at various times and under certain circumstances, have given opinions concerning matters which were not before them in the course of litigation and might never arise in that form. It is the object of this section to trace the development of this exceptional practice, to define its limitations, and to determine how far it remains a vital part of Anglo-American jurisprudence.

(b) *In England*. — The judges of England sat in the upper house of Parliament almost from the first organization of that body,³ but their function there was,⁴ or at least became,⁵ rather that of councillors or assistants than of ordinary members. The presence of such a group of experts among a body of laymen would naturally cause deference to be paid to the opinions of the former whenever technical legal questions arose, and it was but a step further to seek such opinions in a formal manner.

Reign of Henry VI. — At least as early, therefore, as the reign of Henry VI, (1422-1461) we find the lay lords applying to the judges for advice concerning the extent of their powers in regard to breaches of the privilege of parliament⁶ and the rights of conflicting claimants to the crown.⁷ And while upon both of these occasions the attempts to obtain extra-judicial opinions were unsuccessful,⁸ the crown but little later in the same century sought such advice with

tional, for the reason that it assigns to the probate judges powers and duties beyond those authorized by the constitution."

1. *Advisory Judicial Opinions*. — It was different in the Roman law where the *responsa prudentium* or answers by certain learned jurists to questions propounded by praetors and judges had, after Augustus, the force of law. See this practice described and its historical development traced in Sohm's *Institutes of Roman Law* (Oxford, 1892), p. 62 *et seq.*; Muirhead's *Historical Introduction to the Private Law of Rome* (Edinburgh, 1886), p. 310 *et seq.*; Morey's *Outlines of Roman Law* (New York, 1890), pp. 102-104; Poste's *Institutes of Gaius I.*, 50; Mackeldy's *Roman Law* (Dropsie's ed.), 50.

And "the cases submitted to these privileged jurists were not always those which had come up in actual experience. It appears that fictitious or imaginary cases were also presented for their judgment. * * * The Roman jurisconsult was liable to be called upon for his opinion on cases differing in every imaginable way from those which had occurred in practice, and was thus led to take into account and make provision for a multitude of relations which the English judge would leave untouched because they do not happen to be involved in the cases actually presented for his consideration." Hadley's *Introduction to Roman Law* (2d ed., New York, 1890), pp. 66, 67.

2. Fortescue's Rep. 384; Remarks attributed to Lord Coke by Bacon, in Peacham's Case, 2 How. St. Tr. 871. See note to George Sackville's Case, 2 Eden 372.

3. *Origin and History*. — See Stubbs's *Const. History of England* (2d ed., Oxford, 1877), vol. 2, p. 258, vol. 3, p. 445; Pike's *Const. History of the House of Lords* (London, 1894), p. 247.

4. 4 Coke's Inst. (London, 1670), p. 4; 1 Blackstone's Com., p. 68; Stubbs's *Const. History of England* (2d ed., Oxford, 1877), vol. 2, p. 258.

5. Pike's *Constitutional History of the House of Lords* (London, 1894), pp. 247, 248.

6. Rot. Parl., 31 Henry VI., Nos. 25-28 (printed vol. 5, pp. 239-240); Pike's *Constitutional History of the House of Lords* (London, 1894), p. 248.

7. Rot. Parl., 39 Henry VI. 12; Fortescue's Rep., p. 384.

8. *First Attempt Unsuccessful — Reasons Given by the Judges*. — The reasons given for declining to furnish the desired advice sound much like those advanced under similar circumstances in modern times. In the earlier case, Chief Justice Fortescue, speaking for all the justices, said that they "ought not to make answer, for it hath not been used aforetime that the justices should in anywise determine the privileges of this high court of Parliament. For it is so high and mighty in its nature that it may make law, and that that is law it may make no law, and the determination and knowledge of that privilege belongs to the lords of the Parliament and not to the justices."

Pike's *Const. History of the House of Lords* (London, 1894), p. 248; Rot. Parl., Henry VI., Nos. 25-28 (printed vol. 5, pp. 239-240).

In the second instance the answer was that "they were the king's judges to determine

better results.¹

In the Reign of the Stuarts this practice on the part of the crown seems to have been greatly extended,² and after the revolution frequent instances of it are reported.

Reign of William III. — To a question by William III., the judges answered that the pardoning power of the king might extend to all or any part of a sentence.³

Reign of Queen Anne. — In respect to a matter referred by Queen Anne ten of the twelve judges were of the opinion that a writ of error which her majesty had been petitioned to grant in a certain case should be allowed as a matter of right.⁴

Reign of George II. — And to a question by George II. as to whether a court martial had jurisdiction to try an army officer after his dismissal from the service, the judges replied in the affirmative, but also took occasion to say that if the matter should come before them judicially they would be ready to change their opinions for sufficient reason.⁵ Other instances of the practice at about this time are recorded,⁶ but the case just referred to is said to have been the last instance where the crown obtained extrajudicial opinions.⁷

On the Part of the House of Lords, however, the practice continued, and indeed has never been abrogated. And while the judges declined to answer a question which might amount to a construction of a pending bill,⁸ they afterwards, late in the present century, prepared an elaborate opinion in response to a question by the House as to the criminal responsibility of an insane person, and therein had occasion clearly to affirm the right of the lords to require such opinions.⁹

(c) **In the United States** — *aa.* IN THE ABSENCE OF CONSTITUTIONAL SANCTION — **American Colonies.** — As in England, so in her American colonies, the rendition of advisory opinions was occasionally practiced.¹⁰

matters that were actually before them in law, between party and party, and in such matters between party and party they could not be of counsel, and that this matter was between the king and the duke of York as parties. Also it has not been accustomed to call the king's justices to counsel in such matters; and especially such a matter which was so high in its nature, and touched the king's estate and royal crown, which is above the ordinary common law and passed their learning, wherefore they durst not enter into any communication about it, and therefore desired to be excused."

1. *Stafford's Case*, Year Book, 1 Henry VII., fol. 26, pl. 1.

2. See *Peacham's Case*, 2 How. St. Tr. 871; 3 *Coke's Inst.* 29; *Co. Litt.* 110, *Hargrave's* note; *Opinion of Justices*, 126 Mass. 557, 561.

3. *Fenwick's Case*, *Fortescue* 385.

4. *Aylesbury Case*, 14 East 92, note; 14 How. St. Tr. 861, note. See also *Lord Mansfield's* version of this case in *Rex v. Wilkes*, 4 Burr. 2551.

5. *Lord George Sackville's Case*, 2 Eden 371.

6. See note to *Lord George Sackville's Case*, 2 Eden 372.

7. See note to *Lord George Sackville's Case*, 2 Eden 372.

"We are not aware of any instance since 1760 in which the crown has exercised the power of asking the opinion of the judges." *Opinion of Justices*, 126 Mass. 562.

8. *Matter of London, etc., Bank*, 1 Bing. N. Cas. 197, 27 E. C. L. 353, 2 Cl. & F. 191.

9. *M'Naghton's Case*, 10 Cl. & F. 200. *Lord Brougham*, in his opinion in the case, says: "Generally speaking, it is most im-

portant that in questions put for the consideration of the judges, they should have all that assistance which is afforded to them by an argument by counsel; but at the same time there can be no doubt of your lordships' right to put in this way abstract questions of law to the judges, the answer to which might be necessary to your lordships in your legislative capacity."

Lord Cottenham says: "I fully concur with the opinion now expressed as to the obligations we owe to the judges. It is true that they cannot be required to say what would be the construction of a bill not in existence as a law at the moment at which the question is put to them; but they may be called on to assist your lordships in declaring their opinions upon abstract questions of existing law."

Lord Wynford says: "I never doubted that your lordships possess the power to call on the judges to give their opinions upon questions of existing law proposed to them as these questions have been. I myself recollect that when I had the honor to hold the office of Lord Chief Justice of the Court of Common Pleas, I communicated to the House the opinions of the judges on questions of this sort framed with reference to the usury laws. Upon the opinion of the judges thus delivered to the house by me, a bill was founded and afterwards passed into law."

Lord Campbell also speaks of a then recent case of the Canada Reserves, in which the justices had been called upon for an advisory opinion.

10. See *Dubuque*, "The Duty of Judges as Constitutional Advisers," 24 Am. Law Rev.

Federal System. — An unsuccessful attempt was made at the framing of the Federal Constitution to incorporate therein a provision perpetuating the practice,¹ and although no contrary provision was adopted, nor even the distributive clause which appears in so many state constitutions, advisory opinions have never been given under the federal system. A refusal by the judges of the Supreme Court to comply with a request by President Washington for a construction of the treaty with France² appears to have settled the point for that jurisdiction.³

In the States, the familiar constitutional clause which requires the separation of governmental powers is held impliedly to prohibit the rendition of advisory opinions⁴ unless other parts of the constitution expressly authorize it,⁵ and the attitude of the judiciary has generally been unfavorable to the practice.⁶

Thus in Ohio the legislature, by a joint resolution which recited the importance of obtaining answers to certain enumerated constitutional questions, for this purpose directed the attorney-general to institute quo warranto proceedings, but the supreme court declined to consider part of the questions thus pro-

373, note 2, referring to the custom in Massachusetts. Provision is made for the practice in some of the present British colonies. See Bryce, *The American Commonwealth*, p. 258, note 3.

1. Madison's Journal of the Federal Convention (Scott's ed., 1894) 558, 559. The proposed clause was a verbatim copy of the corresponding part of the Massachusetts constitution adopted seven years before and subsequently copied by New Hampshire.

2. See 5 Marshall's Life of Washington, c. 6; 10 Sparks's Life of Washington 359.

3. Thayer's Memo. on Advisory Opinions 13; Story, *Commentaries on the Constitution* (5th ed.), § 1571, where the author, speaking of the federal judiciary, says: "That branch of the government can be called upon only to decide controversies brought before them in legal form; and therefore are bound to abstain from any extrajudicial opinions upon points of law, even though solemnly requested by the executive."

4. **Advisory Opinions Prohibited by Distributive Clause.** — *Matter of Application of Senate*, 10 Minn. 78 *Rice v. Austin*, 19 Minn. 103, 18 Am. Rep. 330; *State v. Dike*, 20 Minn. 363; *State v. Baughman*, 38 Ohio St. 455.

In the case first cited the court says: "We are aware of but two instances under our state organization in which similar resolutions have been passed, and in both cases replies were made declining to express any opinion upon the points submitted. *Journal of the Senate*, 1858, p. 718; *Laws 1863*, p. 75. We might be justified in resting on these precedents. But we perceive that in neither case was the resolution considered by all the members of the court; nor does either of the opinions given by the judges cover the whole ground of the power of the legislature and the court under resolutions of this kind. We therefore deem it proper, out of respect to the senate, and in view of the important principles involved, to state briefly the reasons for the conclusions at which we have arrived. By the constitution the power of the state government is divided into three distinct departments, legislative, executive, and judicial. The powers and duties of each department are distinctly defined. The departments are independent of

each other to the extent at least that neither can exercise any of the powers of the others not expressly provided for. Const., art. 3, § 1. This not only prevents an assumption by either department of power not properly belonging to it, but also prohibits the imposition by one of any duty upon either of the others not within the scope of its jurisdiction; and 'it is the duty of each to abstain from and to oppose encroachments on either.' * * * The duty sought to be imposed by the section of the act referred to is clearly neither a judicial act nor is it to be performed in a judicial manner. It constitutes the supreme court the advisers of the legislature, nothing more. This does not come within the provisions of the constitution, and, as the constitution now stands, would be, in our opinion, not only inconsistent with judicial duties, but a dangerous precedent. The impropriety of an unauthorized expression of opinion by a judge or court, especially one of last resort, upon a matter which may subsequently come before the court for adjudication, will immediately suggest itself. If the statute under consideration is in conflict with the constitution, it imposes no duty, and any opinion expressed in pursuance of action under it is extrajudicial, and no official responsibility attaches to the judge or court voluntarily giving it. The evils which might result to the people from such a source will suggest themselves on a moment's reflection."

5. See the subdivisions *infra*.

6. "Courts determine what the rights of parties are in suits or controversies *inter partes* which come before them in the ordinary and proper course of judicial proceedings. In determining the rights of the parties to the suit, they incidentally determine the law; but the judicial function is as effectually performed by the court which expresses no formal opinion as by the court which in an opinion announces the reasons for its decision." *Shepard v. Wheeling*, 30 W. Va. 482, *per Snyder, J.*

"The general and abstract question whether an act of the legislature be unconstitutional cannot with propriety be presented to a court. The question must be whether the act furnishes the rule to govern the particular case. *Foster v. Wood County*, 9 Ohio St. 543.

pounded, giving as a reason that answers thereto were not necessary to a determination of the suit, and that advisory opinions concerning them would be unwarranted.¹

In *Minnesota* a statute² was enacted in 1869 which authorized either branch of the legislature to obtain advisory opinions, but this was declared unconstitutional,³ and the court refused to answer not only the legislature⁴ but also the governor.⁵ So in a controversy between a state and a county officer, where both parties joined in a request therefor, the court refused to give an advisory construction of a statute relating to the duties of one of such officers and which occasioned the suit.⁶

In *Vermont*, however, a statute⁷ similar to that of *Minnesota*, except in providing for questions by the governor, seems to have been observed by the supreme court without question.⁸

And in *Nebraska* the same practice was long in vogue without either constitutional or statutory sanction,⁹ but by a recently adopted rule of the supreme court that tribunal announces that it will entertain only matters in actual litigation.¹⁰

bb. ADVISORY OPINIONS AUTHORIZED — (*aa*) *In What States.* — The constitutions of the seven states of *Colorado*,¹¹ *Florida*,¹² *Maine*,¹³ *Massachusetts*,¹⁴ *New Hampshire*,¹⁵ *Rhode Island*,¹⁶ and *South Dakota*¹⁷ contain provisions requiring the supreme court to render advisory opinions at the request of the governor or legislature, or sometimes both. A former constitution of *Missouri*¹⁸ contained a similar clause, but it was omitted from the present constitution.¹⁹ In *Vermont* the practice of giving advisory opinions has obtained²⁰ by virtue of a statute²¹ only, and in *Nebraska*, without either constitutional or statutory sanction.²² The several constitutions of *Hawaii* have provided for advisory opinions.²³ In

1. *Ohio*. — *State v. Baughman*, 38 Ohio St. 455, where the court says: "The division of the powers of the state into legislative, executive, and judicial, and the confiding of these powers to distinct departments, is fundamental. It is essential to the harmonious working of this system that neither of these departments should encroach on the powers of the other. If the judiciary were to assume to decide hypothetical questions of law not involved in a judicial proceeding in a cause before it, even though the decision 'would be of great value to the general assembly,' in the discharge of its duties, it would nevertheless be an unwarranted interference with the functions of the legislative department that would be unauthorized and dangerous in its tendency. Not only this, but it would be an attempt to settle questions of law involving the rights of persons without parties before it or a case to be decided in due course of law, thus violating that provision of the bill of rights which declares that every person shall have a remedy for an injury done him by due course of law. Const., art. 1, § 16."

2. *Minnesota*. — Minn. Laws 1869, c. 96.

3. *Matter of Application of Senate*, 10 Minn. 78.

4. *Matter of Application of Senate*, 10 Minn. 78.

5. *Rice v. Austin*, 19 Minn. 103, 18 Am. Rep. 330.

6. *State v. Dike*, 20 Minn. 363.

7. *Vermont*. — Vt. Rev. Laws (1880), § 795.

8. *Opinion of Judges*, 37 Vt. 665.

9. *Nebraska*. — See *Nebraska* cases cited *infra passim*.

10. "Only questions involved in matters of actual litigation before the court will be entertained or judicially determined, and no opinion will be filed in answer to any merely hypothetical question." *Nebraska Supreme Court Rule No. 32*.

11. *Jurisdictions in Which Advisory Opinions Authorized* — *Colorado*. — Const., art. 6, § 2, as amended 1885.

12. *Florida*. — Const. (1885), art. 4, § 13.

13. *Maine*. — Const. (1820), art. 4, § 3.

14. *Massachusetts*. — Const. (1780), c. 3, art. 2.

15. *New Hampshire*. — Const. (1784), p. 2, art. 74.

16. *Rhode Island*. — Const. (1842), art. 10, § 3.

17. *South Dakota*. — Const. (1889), art. 5, § 13.

18. *Missouri*. — Const. (1865), art. 6, § 11.

19. *Missouri Const.* (1875).

20. *Opinion of Judges*, 37 Vt. 665.

21. Vt. Rev. Laws (1880), § 795.

22. See *Nebraska* cases cited *infra passim*.

23. See Thayer, *Cases on Constitutional Law*, vol. 1, p. 176, where the learned editor says:

"The Constitution of the Hawaiian Islands of 1887, art. 70, 5 Hawaiian 716, gives the king, his cabinet, and the legislature * * * authority to require the opinion of the justices of the Supreme Court upon important questions of law, and upon solemn occasions. This provision is said to run back through the Constitution of 1864 (art. 70), to that of 1852 (art. 88), where it seems to have been first introduced in a slightly different form. A number of such opinions are preserved in the Hawaiian Reports, beginning with one entitled *Segregation of Lepers*, 5 Hawaiian 162."

Illinois it was once intimated that an advisory opinion would be given if desired,¹ and in *Idaho* the constitution requires the supreme judges to report annually to the governor such defects and omissions as they find in existing laws, the district judges being also required to make a similar report to the supreme judges.²

(bb) *Who May Propound Questions* — **Legislative and Executive Branches.** — In most of the constitutional provisions above referred to, the privilege of obtaining advisory opinions is conferred upon both the legislative and executive branches of the government,³ but in some the latter only is awarded this power.⁴

Florida — South Dakota. — In *South Dakota*, where such is the case, the court declined to answer questions contained in a legislative resolution, though submitted in the form of a request by the governor,⁵ and a similar refusal was made in *Florida*.⁶

In *Vermont*, where similar restrictions exist, a question originating in the legislative branch was answered.⁷

In *Nebraska* the court answered a question submitted by the state auditor, to the effect that banknotes could not be considered as part of the required capital of life insurance companies.⁸ The same court answered questions by the state board of educational lands and funds⁹ and by the supreme court reporter.¹⁰

In *New Hampshire* the court declined to answer a question submitted by the mayor and aldermen of a city.¹¹

(cc) *Form of Inquiry.* — In *Colorado* the court has repeatedly insisted that questions submitted to it under the constitutional clause must be specific,¹² and that where a construction of constitutional provisions is sought, the particular clause of that instrument concerning which an opinion is desired should be pointed out.¹³

1. "This court has no control over him [the governor] to compel him to perform any public duty. In his sphere he is independent of the court. Should he consent to appear, asking our opinion on a point of duty, it would be readily given." Breese, J., in *People v. Bissell*, 19 Ill. 234, 68 Am. Dec. 591.

2. *Idaho Const.*, art. 5, § 25.

3. **Who May Propound Questions.** — See the subdivisions *supra*.

4. *Florida.* — *Const.* (1885), art. 4, § 13.

South Dakota. — *Const.* (1889), art. 5, § 13.

Vermont. — *Rev. Laws* (1880), § 795.

5. **South Dakota — Legislative Resolution.** — *In re Construction of Constitution*, 3 S. Dak. 548, the court saying: "In our opinion this constitutional provision was never intended to be called into requisition unless some 'important question of law' was involved in the exercise of executive functions, or upon 'solemn occasions.' It is confined exclusively to such questions as may raise a doubt in the executive department — never in the legislature. Were we to construe it otherwise, it would be liable to become the medium of great abuse. It certainly could not have been intended to authorize an *ex parte* adjudication of important questions of law by means of executive questions, nor could the purpose have been to exact a response for an exposition of a constitutional provision relating to a given general subject, in anticipation of certain rulings of the presiding officers of the Senate or House of Representatives, upon purely parliamentary law."

6. **Florida.** — *Opinion to Governor*, 23 Fla. 297.

7. **Vermont — Legislature.** — *Opinion of Judges*, 37 Vt. 665.

8. **Nebraska — State Auditor.** — *In re Babcock*, 21 Neb. 500.

9. **Educational Board.** — *In re School Fund*, 15 Neb. 684.

10. **Supreme Court Reporter.** — *In re Brown*, 15 Neb. 688, where the matter came before the court upon the report of that official.

11. **New Hampshire — Mayor and Aldermen.** — *Opinion of Justices*, 62 N. H. 706, the judges there saying: "By article 79 of the Constitution, and section 8 of c. 192 of the General Statutes, and by the principles of universal law, we are forbidden to give advice in matters that may come before us for decision. In article 74, the Constitution makes an exception to the general rule; but this case does not come within that exception. We are required by the law not to comply with the request set forth in the resolution of the mayor and aldermen."

12. **Form of the Inquiry.** — *In re Loan of School Fund*, 18 Colo. 195; *In re House Bill No. 165*, 15 Colo. 593; *Matter of Senate Resolution*, 9 Colo. 620, where it is observed: "It could not have been the intention to authorize an *ex parte* adjudication of individual or corporate rights by means of a legislative or executive question; parties must still adjudicate their rights in the ordinary and regular course of judicial proceeding. Nor could the purpose have been to exact in response to a legislative inquiry a wholesale exposition of all constitutional provisions relating to a given general subject in anticipation of the possible introduction or passage of measures bearing upon particular branches of such subject."

13. *In re Eight Hour Bill*, 21 Colo. 29; *In re House Bill No. 107*, 21 Colo. 32; *In re Canal Certificates*, 19 Colo. 63; *In re House Bill No. 165*, 15 Colo. 593.

(*dd*) *Character of Questions Answered* — *aaa. In General.* — Notwithstanding the constitutional provisions of these few states are mandatory in their requirement that the judiciary shall render advisory opinions upon the request of the proper authority, the courts, nevertheless, reserve it to themselves to determine whether the questions propounded fall within the scope of subjects concerning which advice is obtainable in this way.¹ Especially where the constitution provides for the submission of such questions upon "solemn occasions," the judiciary must be the final judges, as to whether the occasion presented is sufficiently "solemn."²

In *Massachusetts* the court declined to give a construction of a statute where the only exigency requiring it was a difference of opinion among the members of the House of Representatives.³

In *Colorado* the judges declared that the "solemn occasion" contemplated by the constitution did not arise in regard to a pending bill until it had progressed sufficiently to show some probability of passage through at least one house.⁴

And in *Maine* a question by the governor as to his right to remove a county attorney was not deemed to disclose a "solemn occasion," especially as the question was one which might be determined before any *nisi prius* judge.⁵

Must Involve Public Rights. — Another restriction which the courts of nearly all these states have announced is that the question submitted must be *publici juris*, and must not involve merely private and individual rights.⁶

Illustrations. — On this ground the courts have declined to answer questions involving the title to an office,⁷ and property rights of individuals or corporations,⁸ or the rights of conflicting claimants to a legislative appropriation.⁹ In *Colorado* the court has construed the phrase *publici juris* quite strictly, declining to answer questions as to the management of the state penitentiary;¹⁰ as to whether a proposed bill to increase the fees of district attorneys would apply to those already in office;¹¹ and even as to the constitutionality of existing laws.¹² In other states, where an advisory opinion could have no practical effect, and would amount to no more than a criticism of another branch of the government,¹³ and could not be affected by legislative or executive

1. **Character of Questions Answered.** — *Colorado.* — *In re Penitentiary Com'rs*, 19 Colo. 409; *Matter of Senate Bill No. 65*, 12 Colo. 466. *Missouri.* — *Answer to Questions by Senate*, 37 Mo. 135, 51 Mo. 586.

South Dakota. — *In re Construction of Constitution*, 3 S. Dak. 548.

2. **Submission of Questions upon "Solemn Occasions."** — *Opinion of Court*, 49 Mo. 216; *Matter of North Missouri R. Co.*, 51 Mo. 586; *Opinion of Court*, 55 Mo. 497; *In re Penitentiary Com'rs*, 19 Colo. 409; *Matter of Senate Bill No. 65*, 12 Colo. 466.

3. *Answer of Justices*, 148 Mass. 623. This appears to be something of a departure from the previous practice in that court, as a refusal seems never to have been placed upon that ground before, and questions were answered where the "exigency" was no greater.

4. *In re Eight Hour Bill*, 21 Colo. 29.

5. *Opinion of Justices*, 85 Me. 545.

6. **Questions Must Be Publici Juris** — *Colorado.* — *In re Appointments*, 21 Colo. 14; *In re Legislative Appropriations*, 19 Colo. 58; *In re Penitentiary Com'rs*, 19 Colo. 409; *In re Fire*, etc., *Com'rs*, 19 Colo. 496; *In re Continuing Appropriations*, 18 Colo. 192; *In re University Fund*, 18 Colo. 398; *In re House Resolution No. 25*, 15 Colo. 602; *In re Appropriations*, etc., 13 Colo. 316; *Matter of Senate Bill No.*

65, 12 Colo. 466; *Matter of Senate Resolution*, 9 Colo. 620.

Massachusetts. — *Opinion of Justices*, 122 Mass. 600.

Missouri. — *Opinion of Court*, 55 Mo. 497; *Matter of North Missouri R. Co.*, 51 Mo. 586; *Answers to Questions by Senate*, 37 Mo. 135.

New Hampshire. — *Opinion of Court*, 62 N. H. 704.

Rhode Island. — *Opinion of Judges*, 3 R. I. 299. See also page 311, where the court said that if the judgment concerning whose validity the opinion was sought could have been executed, the propriety of giving the opinion would be doubtful.

7. **Title to Office.** — *In re Appointments*, 21 Colo. 14.

8. **Property Rights.** — *Matter of North Missouri R. Co.*, 51 Mo. 586; *Opinion of Court*, 55 Mo. 497; *Answers to Questions by Senate*, 37 Mo. 135; *Opinion of Court*, 62 N. H. 704.

9. **Legislative Appropriation.** — *In re Appropriations*, etc., 13 Colo. 316.

10. **Management of State Penitentiary.** — *In re Penitentiary Com'rs*, 19 Colo. 409.

11. **Fees of District Attorneys.** — *Matter of Senate Bill No. 65*, 12 Colo. 466.

12. **Constitutionality of Existing Laws.** — *In re University Fund*, 18 Colo. 398; *In re House Resolution*, 15 Colo. 602.

13. *Opinion of Justices*, 56 N. H. 574.

action,¹ answers were refused.

Stress of Public Necessity. — Opinions may be found, however, given under the stress of public necessity, where the questions did not altogether conform to the foregoing requirements.²

Questions Outside Scope of Public Laws. — In some instances, *e. g.*, the answers pertain to questions quite outside of the scope of public law, such as the rights of railroad³ and other private corporations,⁴ the rights of an inmate of a state asylum, and the duties of a guardian.⁵

bbb. Suffrage and Election — Qualification of Voters. — In the states where this practice is in vogue the justices have frequently answered questions respecting the qualification of voters.

Free Negroes. — Long prior to the Fifteenth Amendment to the Federal Constitution it was in this way determined that free male colored persons having the other necessary qualifications were competent to be electors in *Maine*.⁶

That Persons Living on Disputed Territory became entitled to the voters' franchise by virtue of a treaty of cession.⁷

That Inhabitants of Unincorporated Plantations were not entitled to vote in *Massachusetts*.⁸

That a Student in a College Town did not necessarily lose his former domicile for the purpose of voting.⁹

That a Three-months' Residence in the town as well as in the state was necessary to constitute one an elector in *Maine*.¹⁰

That Persons Exempted from Taxation were disqualified from voting.¹¹

Assessment. — That a party could not be qualified for voting by being specially assessed after the general assessment had been made.¹²

That the Disqualification of Pauperism need not have ceased for a definite period in order to entitle one to vote.¹³

That Registration is a Prerequisite to voting in *Rhode Island*.¹⁴

That a Taxpayer in Rhode Island need not file a certain certificate required of other voters.¹⁵

That a Husband Who Was a Tenant by Curtesy Initiate had thereby sufficient property to qualify him to vote in *Rhode Island*.¹⁶

That an Act Withholding the Entire Municipal Franchise from certain registered voters was invalid.¹⁷

Recognition of Political Parties. — The judges have declared that the regulation of the nominating machinery and the consequent recognition of political parties is within the province of the legislature.¹⁸

State and Federal Officers. — That acts authorizing the exercise of the right of the franchise with respect to state officers without the state were unconstitutional.¹⁹

1. Answer of Justices, 122 Mass. 600.

2. *In re State Census*, 6 S. Dak. 540. Compare *In re Penitentiary Com'rs*, 19 Colo. 413.

3. *Massachusetts*. — Opinion of Judges, 5 Met. (Mass.) 596.

Missouri. — Answers to Questions by Governor, 37 Mo. 129, 139, Matter of North Missouri R. Co., 51 Mo. 586.

New Hampshire. — Opinion of Justices, 66 N. H. 629; Opinion of Justices, 65 N. H. 673.

4. Opinion of Justices, 9 Cush. (Mass.) 604.

5. Opinions of Justices, 4 R. I. 587.

6. **Suffrage and Elections.** — Opinion of Justices, 44 Me. 505, 516.

7. Opinion of Justices, 68 Me. 589.

8. Opinion of Justices, 3 Mass. 567.

9. Opinion of Justices, 5 Met. (Mass.) 587.

10. Opinion of Justices, 7 Me. 492.

11. Opinion of Justices, 11 Pick. (Mass.) 539; *In re Providence Voters*, 13 R. I. 737.

12. Opinion of Justices, 18 Pick. (Mass.) 575.

13. Opinion of Justices, 124 Mass. 596.

14. *In re Polling Lists*, 13 R. I. 729. Also see *In re Const. Amendment*, 16 R. I. 754.

15. *In re Registry Laws*, 12 R. I. 580.

16. *In re Voting Laws*, 12 R. I. 586.

17. *In re Newport Charter*, 14 R. I. 655. But see *In re Canvassers' Powers*, 17 R. I. 809, where, owing to a constitutional amendment, such restrictions were sanctioned.

18. **Exercise of Right of Suffrage.** — Matter of House Bill No. 203, 9 Colo. 631, where it was said: "We do not find any constitutional objection to the bill submitted for our consideration, nor is our attention called to any provision of the constitution as forbidding such legislation. The abuses sought to be corrected by the provisions of the bill are of the gravest character and are a proper subject of legislation, entirely within the legislative power. *Leonard v. Com.*, 112 Pa. St. 622; *McCreary on Elections* § 192, and cases there cited."

19. Opinion of Justices, 44 N. H. 633; Opinion of Judges, 37 Vt. 665.

but that such exercise might be authorized in respect to federal officers.¹

Australian Ballot Law. — That the Australian Ballot Act was constitutional,² and that its requirement that the voter place a cross at the right of the candidate's name was mandatory.³

Voting Machine. — That a voting machine might be used where the constitution speaks of elections by ballot.⁴

Election of Congressmen. — That a state constitutional provision for the election of congressmen by a plurality of the voters was void.⁵

Adjournment of Town Meetings. — And that town meetings for the election of officers could not be a second time adjourned.⁶

Canvassing Election Returns. — Answers to questions relating to the counting of votes and canvassing of returns are especially numerous.⁷ In *Rhode Island*, owing to its peculiar system of elections by a plurality and the consequent necessity of second elections, questions relating to these points have frequently been answered.⁸

ccc. Public Officers. — Questions relating to the creation of offices and the right and conditions of holding office have been frequently determined in this form.

Railroad Commissioners. — It has been declared that where the constitution forbade the creation of additional executive offices the legislature had no power to provide for railroad commissioners, but could confer the powers thereof upon existing officers,⁹ and that deputies might be appointed for such officers.¹⁰

Waiver of Right of Representation in State Legislature. — It was thus determined that a town might waive its constitutional right to send representatives to the legislature, even against the protests of a minority of the voters.¹¹

Abolishing Offices — Jurisdiction of Courts. — Opinions respecting the power to abolish as well as to appoint to office¹² and the jurisdiction of courts¹³ have also been given.

Naturalization of Aliens. — Advisory opinions have been given to the effect that aliens must be naturalized in order to be eligible to membership in the Massachusetts House of Representatives.¹⁴

War Veterans — Civil Service. — That veterans of the late war could not be preferred for appointment to offices without compliance with the civil service rules,¹⁵ but that the legislature might provide that such veterans should be preferred after they had passed the required examination.¹⁶

That Members of a Secession Convention were not officers whose subsequent services in aid of the Confederacy disqualified them within the meaning of the constitution.¹⁷

1. Opinion of Judges, 37 Vt. 665; Soldiers' Voting Bill, 45 N. H. 595.

2. *In re* Ballot Act, 16 R. I. 766.

3. *In re* Vote Marks, 17 R. I. 812.

4. Opinion of Justices, (R. I. 1897), 36 Atl. Rep. 716.

5. *In re* Plurality Elections, 15 R. I. 617.

6. Opinion of the Justices, 23 Pick. (Mass.) 547.

7. **Counting and Canvassing — Maine.** — Opinion of Justices, 68 Me. 587; Opinion of Justices, 64 Me. 596; Opinion of Justices, 54 Me. 602; Opinion of Justices, 38 Me. 597; Opinion of Justices, 25 Me. 567.

Massachusetts. — Opinion of Justices, 136 Mass. 583; Opinion of Justices, 117 Mass. 599.

New Hampshire. — Opinion of Court, 58 N. H. 621; Opinion of Justices, 53 N. H. 640.

Rhode Island. — *In re* Canvassers' Powers, 17 R. I. 809.

8. *In re* Representation Vacancy, 15 R. I. 621; *In re* Congressional Election, 15 R. I. 624; *In re* Narragansett Election, 16 R. I. 761;

In re Ballot Provision, 17 R. I. 825; *In re* Representative Election, 17 R. I. 820.

9. **Creation of New Offices — Railroad Commissioners.** — *In re* Railroad Commissioners, 15 Neb. 679. This case seems to be one of the earliest in which the *Nebraska* justices gave an advisory opinion.

10. *In re* Appropriations, 25 Neb. 662.

11. **Waiver of Right of Representation in State Legislature.** — Opinion of Justices, 15 Mass. 537; Opinion of Justices, 6 Me. 486.

In the latter case there is a strong dissenting opinion by Mr. Justice Preble which was followed by the House of Representatives in disposing of the case upon which it had requested the opinion.

12. Opinion of Justices, 117 Mass. 603.

13. Matter of House Bill No. 158, 9 Colo. 625.

14. **Eligibility of Officers.** — Opinion of Justices, 122 Mass. 594.

15. Opinion of Justices, 145 Mass. 587.

16. Opinion of Justices, 166 Mass. 589.

17. Opinions to Governor, 12 Fla. 651.

Eligibility of Women. — That a woman could not be appointed a justice of the peace,¹ or even a notary public,² but would be eligible to membership on a state board of health,³ or on a school committee.⁴

Pilot Commissioner — Massachusetts. — That the governor and council of Massachusetts could not appoint a pilot commissioner for Boston Harbor without a recommendation from the trustees of the Marine Society or their failure to recommend.⁵

Power of Appointment — Tenure. — Advisory opinions are numerous respecting the power of appointment,⁶ the tenure of officers, and the length of their terms.⁷

In Maine they declared that the reporter of the Supreme Court could not be removed by the governor without the advice of the council.⁸

In Colorado, while the governor's right of removal was upheld, he was cautioned against attempting to exercise it forcibly and with military aid.⁹ It was also declared by the same court in a carefully prepared answer that the speaker of the House of Representatives could not be removed by impeachment proceedings, but only by a vote of a majority of all the members.¹⁰

In South Dakota the judges answered a question by the governor that a vacancy existed on the supreme bench which might be filled by appointment for the unexpired term.¹¹

Other Answers Are to the Effect that a state auditor of accounts might be appointed¹² and that the "senior deputy sheriff" mentioned in a certain statute was the one longest continuously in office.¹³

Powers and Duties. — Opinions respecting the powers and duties of the governor and other officers are not infrequent.¹⁴

Salaries and Fees. — Opinions respecting the compensation of officers have not

1. Opinion of Justices, 107 Mass. 604.

2. Opinion of Justices, 150 Mass. 586; Opinion of Justices, 165 Mass. 599; Matter of House Bill No. 166, 9 Colo. 628.

In Colorado this opinion is now rendered obsolete by the constitutional amendment granting suffrage to women.

3. Opinion of Justices, 136 Mass. 578.

4. Opinion of Justices, 115 Mass. 602.

5. Opinion of Justices, 154 Mass. 603.

6. **Power of Appointment** — *Colorado*. — *In re* Question by Governor, 12 Colo. 399. See also *In re* Senate Bill, 12 Colo. 188.

Florida. — *In re* Advisory Opinion, 31 Fla. 1. *Nebraska*. — *In re* Board of Public Lands, etc., 18 Neb. 340.

Rhode Island. — *In re* Census Supt., 15 R. I. 614; *In re* Investigating Commission, 16 R. I. 751; *In re* Building Inspectors, 17 R. I. 819.

7. **Term and Tenure** — *Colorado*. — *In re* Board of Capitol Com'rs, 18 Colo. 220; *In re* Senate Resolution, 12 Colo. 339.

Florida. — *In re* Executive Communication, 15 Fla. 735; *In re* Executive Communication, 25 Fla. 426; *In re* Advisory Opinion, 31 Fla. 1; *In re* Tenure of Office, 16 Fla. 841.

Maine. — Opinion of Justices, 64 Me. 596; Opinion of Justices, 50 Me. 607.

Massachusetts. — Opinion of Judges, 3 Gray (Mass.) 601; Opinion of Judges, 14 Mass. 470; Opinion of Judges, 3 Cush. (Mass.) 584; Opinion of Judges, 132 Mass. 600.

New Hampshire. — Opinion of Justices, 62 N. H. 706.

8. Opinion of Justices, 72 Me. 542.

9. *In re* Fire, etc., Com'rs, 19 Colo. 482, where the court observes: "We are clearly of the opinion that the governor is greatly in error in assuming that it devolves upon him

to enforce his order of removal. His constitutional oath to 'take care that the laws be faithfully executed' imposes no such obligation upon him. His duty and responsibility cease upon the making of the order or appointment, and any attempt on his part to personally enforce such order or instal his appointee is beyond any express or implied duty or power imposed or conferred upon him by Constitution or statute. The police, fire, and excise commissioners, though appointed by the governor, are not charged with duties pertaining to the chief executive department of the state. They are municipal officers, the same as the mayor and other officers of the city elected by the people. We are unable to see how the governor is charged with the duty of seating a member of the fire and police board any more than he is charged with the duty of seating any municipal officer elected by the people. Will it be contended that it is the duty of the chief executive of the state to instal into office, by force if necessary, every county, precinct, or municipal officer whom he may deem entitled to such office in advance of the determination of any controversy that may arise concerning such office? A proposition so fraught with danger to every principle of free government cannot for a moment be entertained; and if such power cannot be lawfully exercised by the governor acting in his civil capacity, *a fortiori* is the use of military force to that end by him as commander in chief, unauthorized."

10. *In re* Speakership, 15 Colo. 520.

11. *In re* Supreme Court Vacancy, 4 S. Dak. 532.

12. Opinion of Justices, 45 N. H. 590.

13. Opinion of Justices, 126 Mass. 603.

14. Opinions of Justices, 4 R. I. 585.

been infrequent. It has been declared that a constitutional clause providing for the quarterly payment of salaries did not include "pay" of legislators,¹ and that they were entitled to mileage but one way, and that by the usual route;² that the reporter of the supreme court was not entitled to the difference between the actual cost of publishing reports and the maximum price allowed by the state,³ and that the legislature might provide for salaries for a deputy and stenographer for the attorney-general notwithstanding the clause in the constitution forbidding an allowance for "clerk hire" in that office.⁴

In *Maine* the justices prepared a schedule of costs and fees in litigation and transmitted the same to the legislature.⁵

ddd. The Legislature. — Many opinions pertain to the legislative department, its organization and membership, procedure and powers.

Number and Apportionment of Representatives. — Answers are frequent respecting the number and apportionment of representatives and the formation of legislative districts.⁶

Organization — Membership. — In *Maine* the judges gave their opinion as to who constituted a particular legislature.⁷ In the same way, also, it has been declared that a legislative determination as to who are members could not be questioned by the other departments.⁸

Presiding Officer — Quorum — Sessions. — The judges have said that the president of the senate, while acting as governor, could not preside or vote in that body;⁹ that a quorum necessary for impeachment proceedings required a majority of the whole number elected, regardless of subsequent vacancies,¹⁰ and that by a constitutional amendment authorizing biennial sessions, the legislature was no longer authorized to meet annually.¹¹

The Following Matters of Legislative Procedure have been thus determined:

Contests. — That a joint resolution to institute contest proceedings relative to the offices of governor and lieutenant-governor required the signatures of the *de facto* incumbents of both offices, notwithstanding they were the prospective contestants.¹²

That an Emergency Clause must be adopted by a vote of two-thirds of all members elected,¹³ and that without such clause no act would take effect prior to the time fixed by the Constitution.¹⁴

Return of Bill by Governor. — That a bill sent to the executive less than five days before a recess and not returned by him did not become a law in *Massachusetts*.¹⁵

That Actual Delivery of a Bill to the Governor was not required in *New Hampshire*, but that it was sufficiently presented when laid upon his table;¹⁶ but that in *Massachusetts*, personal delivery of the bill to the governor was required.¹⁷

That the Return of a Bill with Objections by the private secretary of the governor, acting under the latter's instructions, was sufficient, though the executive himself was absent from the state and the lieutenant-governor was acting in

1. Salaries and Fees. — *In re* Executive Communication, 12 Fla. 689.

2. Opinion of Judges, 69 Me. 596.

3. *In re* Brown, 15 Neb. 688.

4. *In re* Appropriations, 25 Neb. 662.

5. Opinion of Justices, 55 Me. 595.

6. Apportionment of Representatives — Legislative Districts. — *Colorado*. — *In re* House Resolution, 12 Colo. 186.

Maine. — Opinion of Judges, 33 Me. 587; Opinion of Judges, 18 Me. 458.

Massachusetts. — Opinion of Justices, 157 Mass. 595; Opinion of Judges, 142 Mass. 601; *Jackson v. Boston, etc., R. Corp.*, 1 Cush. (Mass.) 578; Opinion of Justices, 10 Gray (Mass.) 613; Opinion of Justices, 7 Mass. 523.

7. Organization — Membership. — Opinion of Justices, 70 Me. 600. See also Opinion of Justices, 70 Me. 560.

8. Opinion of Justices, 56 N. H. 570. See also Opinion of Justices, 35 Me. 576.

9. Opinion of Justices, 7 Me. 483.

10. *In re* Executive Communication, 12 Fla. 653.

11. *In re* Executive Communication, 15 Fla. 739.

12. *In re* Contest Proceedings, 31 Neb. 262.

13. *In re* Emergency Clause, 18 Colo. 291.

14. *In re* General Appropriation Bill, 16 Colo. 539.

15. Opinion of Justices, 3 Mass. 567.

16. *Soldiers' Voting Bill*, 45 N. H. 607.

17. Opinion of Justices, 99 Mass. 636.

his place during his absence.¹

That a Bill Might be Recalled by the legislature after having been sent to the governor.²

That the Reading of a Bill in Committee of the Whole might be treated as one of the several readings required by the constitution.³

That the Necessity for Convening a Special Session rested in the judgment of the executive.⁴

That the Amendments Proposed to a Certain Bill so changed its original purpose as to infringe a constitutional provision forbidding that result; ⁵ that an amendment by one house had not been concurred in by the other, and hence that the bill had failed of passage.⁶

Powers of Special Session. — That the legislature could not at a special session transgress the limits fixed by the executive proclamation, but that the latter need not be specific as to details.⁷

That the Title of a Bill might be so extended as to cover subsequent amendments.⁸

The Following Questions of Legislative Power have been thus determined:

Powers Limited Only by the Constitution. — That the power of a state legislature is unlimited save by the express terms of the constitution;⁹ and that such power cannot be suspended by a general statute requiring notice of petitions to be given before a session at which they were to be presented.¹⁰

Judgment of Treason. — That the legislature could not annul a judgment for treason.¹¹

That a Conditional Act extending the franchise to women upon its ratification by certain voters would be unconstitutional.¹²

Municipal Corporations. — That while a municipal charter might be amended, the corporate existence of adjacent towns could not be destroyed thereby.¹³

Appropriation Bills. — That the exclusive privilege of originating money bills, which was guaranteed to the lower house, did not include bills appropriating money from the state treasury to particular uses of government, but was limited to bills transferring money from the taxpayer to the state: ¹⁴ that appropriation bills referring to another subject than that which related to the raising of revenue were invalid.¹⁵

Valuation of Property. — That each house had an equal right with the other to institute inquiries into the returns made from the towns for the purpose of fixing the valuation of property therein.¹⁶

Election of United States Senator. — And that a certain legislature was charged with the duty of electing a federal senator.¹⁷

See. The Judiciary — The Power to Create a New Court with final jurisdiction in cases within the scope of constitutional provisions respecting the supreme court was denied in an advisory opinion,¹⁸ but the right to create such court with intermediate jurisdiction was affirmed.¹⁹

Juries — Commissioners of Insolvency — Wife's Allowance — Court Martial — Judicial Circuits — Court Docket. — It has been declared that the legislature could not provide for

1. Opinion of Justices, 135 Mass. 594. See also Soldiers' Voting Bill, 45 N. H. 607, where the judges declare that the governor could send his message "by any officer or member of the house, or other proper person."

2. *In re* Senate Resolution, 9 Colo. 630.

3. Matter of Senate Rule No. —, 9 Colo. 641.

4. *In re* Special Session, 9 Colo. 642.

5. Matter of House Bill No. 231, 9 Colo. 624.

6. Opinion of Justices, 35 Me. 579.

7. *In re* Governor's Proclamation, 19 Colo.

333.

8. *In re* Amendments, 19 Colo. 357.

9. *In re* Kindergarten Schools, 18 Colo. 234.

10. Opinion of Court, 63 N. H. 625.

11. Opinion of Justices, 3 R. I. 299.

12. Opinion of Justices, 160 Mass. 586.

13. *In re* Extension of Boundaries, 18 Colo. 288; *In re* Senate Bill No. 293, 21 Colo. 38.

14. Opinion of Justices, 126 Mass. 557.

15. Matter of Executive Communication, 14 Fla. 283, 285.

16. Opinion of Justices, 126 Mass. 547.

17. Opinion of Court, 60 N. H. 585.

18. *The Judiciary*. — Matter of Senate Bill No. 76, 9 Colo. 623.

19. *In re* Court of Appeals, 15 Colo. 578.

juries of less than twelve;¹ that an act which transferred the powers of commissioners of insolvency to the courts was unconstitutional;² that the county court might make a certain allowance to the wife of an adjudged lunatic from the latter's estate;³ that the proceedings of a court martial whose members were sworn by a judge-advocate, who had taken his oath of office before a military superior only, were invalid;⁴ that judicial circuits might be abolished and an entire new system created in spite of a constitutional clause forbidding change in such circuits;⁵ and that cases in the supreme court might be advanced where public interests required it.⁶

iff. Public Finance. — Advisory opinions relating to the arising, investing, and disbursing of public money have frequently been sought.

Income Tax. — The judges answered that in *New Hampshire* the statute providing for an income tax would be valid as to incomes from other securities than those of the United States.⁷

That *Taxes on Shares in National Banks* were to be applied to the use and benefit of the place in which the bank was located, regardless of the residence of the shareholders.⁸

School Tax. — That the legislature had power to assess a general school tax in *Maine*;⁹ but that no assessment could be made by the legislature in *Colorado*.¹⁰

That a *Tax for Repairing Roads* could not be imposed upon lands in unincorporated places, nor upon unincorporated towns.¹¹

Residents of Military Reservation — Local Taxation. — That the residents of a military reservation of the United States were not subject to local taxation.¹²

That *Aliens Are "Rateable Polls"* within the meaning of a constitutional clause.¹³

Taxation of Patented Mining Claims. — That the constitutional provision of *Colorado* for the taxation of patented mining claims is not self-executing.¹⁴

That a *Statute Providing for the Deduction of Indebtedness*, either in or out of the state, from the amount of taxable property is invalid under the *South Dakota* constitution.¹⁵

That *Special Assessments* for public improvements could not be made upon districts having territorial limits outside of and differing from the municipality which sought to levy the tax.¹⁶

That a *Statutory Contract of Tax Exemption* could not be invalidated by a change of judicial construction.¹⁷

State Loans. — That the state might borrow money,¹⁸ loan its school fund,¹⁹ and extend a loan previously made to a railroad company.²⁰

Investment of School Fund. — That the permanent school fund of the state might be invested in government bonds²¹ and state warrants.²²

County Indebtedness. — That counties might fund their indebtedness.²³

Bonds. — That the issue of funding bonds was valid, though they, together with the original bonds, exceeded the constitutional limit;²⁴ and that certain

1. Opinion of Justices, 41 N. H. 550.

2. Opinion of Justices, 8 Gray (Mass.) 20.

3. *In re* Senate Resolution, 12 Colo. 340.

4. Opinion of Justices, 3 Cush. (Mass.) 586.

5. Opinion of Judges, 55 Mo. 215.

6. *In re* Legislative Appropriations, 19 Colo. 58.

7. *Public Finance.* — Opinion of Justices, 53 N. H. 634.

8. Opinion of Justices, 53 Me. 594.

9. Opinion of Justices, 68 Me. 582.

10. Matter of House Bill No. 270, 9 Colo. 635.

11. Opinion of Court, 4 N. H. 565. This case is interesting as an early attempt to apply the principles of special assessments.

12. Opinion of Justices, 1 Met. (Mass.) 580.

13. Opinion of Justices, 3 N. H. 573.

14. Matter of House Resolution, 9 Colo. 622.

15. *In re* Assessment and Collection of Taxes, 4 S. Dak. 6.

16. *In re* House Bill No. 165, 15 Colo. 595.

17. Opinion of Court, 58 N. H. 623.

18. *In re* Contracting of State Debt, 21 Colo. 399.

19. *In re* Loan of School Fund, 18 Colo. 195.

20. Opinion of Court, 55 Mo. 497.

21. *In re* School Fund, 15 Neb. 684.

22. *In re* State Warrants, 25 Neb. 659.

23. *In re* Funding of County Indebtedness, 15 Colo. 421.

24. Opinion of Justices, 81 Me. 602.

state bonds were payable in coin exclusively from the funds appropriated for that purpose.¹

Bounties. — That towns had no power to raise money for the purpose of paying soldiers' bounties;² and that the state could not assume municipal debts contracted for such a purpose.³

Subsidies. — That an act authorizing towns to vote subsidies to manufacturing enterprises would be invalid.⁴

Authorizing Counties to Issue Bonds. — That the legislature might authorize counties to issue bonds for the distribution of seed grain, but not until the question had been submitted to a popular vote.⁵

Internal Improvements — Public Works — State Aid — County Purposes. — Defining internal improvements;⁶ that railroads were public works and entitled to state aid,⁷ but that in all cases where the county was not charged by the constitution with a certain expense, it must be for "county purposes" in order to justify the legislature in imposing a tax therefor;⁸ and that public money could not be appropriated to promote private enterprises.⁹

Manner and Purpose of Legislative Appropriations. — Advice concerning the manner and purpose of legislative appropriations has frequently been sought and obtained.¹⁰

ggg. Police Power. — Eight-hour Law — Wages — Mining Coal — Municipalities. — Advisory opinions have been given to the effect that a statute making eight hours a legal day's labor,¹¹ or requiring manufacturers to pay wages to their employees weekly,¹² or fixing the basis upon which compensation for mining coal should be computed,¹³ or authorizing municipalities to establish yards for the sale of fuel to their citizens,¹⁴ would be unconstitutional.

Railroad Rates. — But it has been declared that the legislature might prescribe railway rates.¹⁵

Liquor License. — That under a certain statute no license could be granted for the sale of liquor in a building or place any part of which was within a certain distance of a public school.¹⁶

Fugitive Slaves. — That a statute making it a criminal offense to aid in the arrest of a fugitive slave was valid.¹⁷

Militia. — That a state legislature could not determine who should compose the militia after a prior determination by Congress.¹⁸ That the power of determining when exigencies existed for the calling out of the militia was vested in the governor of the state.¹⁹

Registration of Deeds. — That the act providing for the registration of deeds in the offices of the town clerks was valid.²⁰

1. Opinion of Court, 49 Mo. 216.

2. Opinion of Justices, 52 Me. 595. But see Opinion of Justices, 45 N. H. 593, construing a federal bounty act.

3. Opinion of Justices, 53 Me. 587.

4. Opinion of Justices, 58 Me. 590.

5. *In re House Roll* 284, 31 Neb. 504.

6. *In re Canal Certificates*, 19 Colo. 63; *In re Internal Improvements*, 18 Colo. 317; *In re Senate Resolution*, 12 Colo. 285.

7. Matter of Executive Communication, 13 Fla. 699.

8. Matter of Executive Communication, 13 Fla. 687.

9. *In re Internal Improvements*, 18 Colo. 317; *In re Relief Bills*, 21 Colo. 62.

10. *In re Legislative Appropriations*, 19 Colo. 58; *In re Continuing Appropriations*, 18 Colo. 192; *In re Bounties*, 18 Colo. 273; *In re House Bill No. 168*, 21 Colo. 46; *In re Appropriations*, etc., 13 Colo. 316; Opinion of Justices, 1 Met.

(Mass.) 572; *In re Agricultural Funds*, 17 R. I. 815.

11. **Police Power.** — *In re Eight Hour Bill*, 21 Colo. 29.

12. Opinion of Justices, 163 Mass. 589.

13. *In re House Bill No. 203*, 21 Colo. 27; *In re House Bill No. 10*, 15 Colo. 600.

14. Opinion of Justices, 155 Mass. 598.

15. *In re Senate Bill No. 69*, 15 Colo. 601.

16. **Liquors.** — *In re Liquor Locations*, 13 R. I. 733. Also see Opinion of Justices, 25 N. H. 537, for an advisory opinion fatal to a proposed liquor law.

17. Opinion of Justices, 46 Me. 561. See also Opinion of Justices, 41 N. H. 553, holding also that an act guaranteeing citizenship to negroes was constitutional.

18. Opinion of Justices, 14 Gray (Mass.) 615.

19. Opinion of Justices, 8 Mass. 548. See this opinion practically overruled in *Martin v. Mott*, 12 Wheat. (U. S.) 19.

20. Opinion of Justices, 7 N. H. 599.

hhh. Criminal Law. — Questions relating to criminal jurisprudence, while not strictly, in all respects, *publici juris*, have not infrequently been the subjects of advisory opinions.

Degrees of Murder — General Verdict. — In *Maine*, where the jury is required to find what degree of murder the convicted one is guilty of, a general verdict of guilty, under an indictment charging murder without specifying the degree, was declared insufficient by a majority of the judges.¹ In this case the judges appear to have clearly invaded the province of private right, and to have considered the case much in the same way as if it had been regularly brought before them by appeal.

Arraignment — Sentence — Imprisonment — Discharge of Convict. — In *Massachusetts* it has been declared that a single justice of the supreme court might arraign an accused and impose sentence upon him if he pleaded guilty;² that one convicted of murder and imprisoned until the execution of his sentence might be transported from the place of confinement to the place of execution in the county where the sentence was imposed;³ that under the "good time" act, the warden of the prison might discharge a convict without pardon.⁴

Bail. — In *Maine* a bail commissioner was declared by the judges, through an advisory opinion, to have no power to admit persons to bail during a term of the supreme court, nor to change the amount of bail fixed by the justices thereof.⁵

Pardon — Commutation of Punishment. — It has been declared that in *Maine* the governor and council might grant a pardon to one convicted of murder in the first degree without first applying to the justices of the supreme court;⁶ that in *Rhode Island* a pardon by the governor would not embrace the restoration of the franchise to one convicted of a crime infamous at common law;⁷ and that in *Massachusetts* the general court could not, after sentence, commute by statute the punishment of convicts.⁸

iii. Miscellaneous Points — Constitutional Amendments. — In *Rhode Island* the judges gave an advisory opinion that the constitution of that state could not be changed through the medium of a convention, but only by amendment.⁹ In *Massachusetts*, that delegates to a convention would have no power to propose amendments to other parts of the constitution than those which the convention was called to alter;¹⁰ that an amendment might be submitted in the dual form, and that a resolution therefor, after passing one House and being concurred in by the other, was valid,¹¹ and that such amendment became operative immediately upon its receiving the required majority of the popular vote.¹²

Census. — It has been declared that a constitutional provision for a census was mandatory but not self-executing, and that upon failure by the legislature to observe it an existing legislative apportionment continued;¹³ that the court will take judicial notice of an official census;¹⁴ and that a superintendent of census might be appointed after the time limited by the statute providing therefor.¹⁵

Free Schools. — That a constitutional provision requiring the establishment of free public schools was mandatory.¹⁶

State's Liability. — And that the state was not liable to the trustees of a certain fund for lands held by them.¹⁷

1. Questions of Criminal Law. — *State v. Cleveland*, 58 Me. 564.

2. Opinion of Justices, 9 Allen (Mass.) 585.

3. Opinion of Justices, 11 Cush. (Mass.) 604.

4. Opinion of Justices, 13 Gray (Mass.) 618.

5. Opinion of Justices, 85 Me. 544.

6. Opinion of Justices, 85 Me. 548.

7. Opinions of Judges, 4 R. I. 583.

8. Opinion of Justices, 14 Mass. 472.

9. *In re Constitutional Convention*, 14 R. I. 649.

10. Opinion of Justices, 6 Cush. (Mass.) 573.

11. *In re Senate File 31*, 25 Neb. 864.

12. *In re Advisory Opinion to Governor*, 34 Fla. 500.

13. *In re State Census*, 6 S. Dak. 540.

14. *In re Senate Bill No. 293*, 21 Colo. 38.

15. *In re Census Superintendent*, 15 R. I. 614.

16. *In re Kindergarten Schools*, 18 Colo. 234.

17. Opinion of Justices, 7 Pick. (Mass.) 126, note.

(*cc*) *Force and Effect of Answers.* — As a rule advisory opinions are not awarded the force and effect of judicial precedents in litigated causes and do not conclude individual litigants in controversies arising subsequently.¹ The contrary view is taken in *Colorado*,² and has been expressed in *Maine*,³ but the other view has also been advanced in the latter state.⁴

(5) *The Judicial Power of Annulling Statutes* — (a) *The Current Doctrine — Statutes Conflicting with Constitution.* — It has become a settled canon of American jurisprudence, that the power of determining whether or not a statute is in harmony with the constitution resides in the judiciary alone, and that statutes which conflict with the constitution will be declared invalid by that department.⁵

State and Federal Constitutions. — So provisions of a state constitution that are in conflict with those of the federal organic law will be declared inoperative and

1. *Advisory Opinions Not Usually Precedents.* — Opinion of Justices, 160 Mass. 586; Opinion of Justices, 60 N. H. 585; Taylor v. Place, 4 R. I. 324, 362; Jameson, Const. Conventions (4th ed.), p. 667. See the "American Doctrine of Const. Law," 7 Harvard Law Review, by Prof. J. B. Thayer. The reason for this qualification has frequently been stated in Massachusetts decisions.

"As we have no means in such cases of summoning the parties adversely interested before us, or of inquiring in a judicial course of proceedings, into the facts, upon which the controverted right depends, nor of hearing counsel to set forth and vindicate their respective views of the law, such an opinion, without notice to the parties, would be contrary to the plain dictates of justice, if such an opinion could be considered as having the force of a judgment, binding on the rights of the parties. * * * An opinion upon an abstract question, without any investigation of facts, and without argument, must be taken as an opinion upon the precise question proposed, which cannot affect the rights of parties, should they thereafter be brought before the court in a regular course of judicial proceeding." Opinion of the Justices, 5 Met. (Mass.) 596.

"Although such an opinion has not the force of an adjudication, yet it is, in a sense, a pre-judgment of the question proposed, and would usually be followed by the subordinate judicial officers of the commonwealth; and any inhabitant, interested in the question, might well feel that his rights had been impaired by it without giving him an opportunity to be heard." Answer of Justices, 148 Mass. 625.

"In giving such opinions the justices do not act as a court, but as the constitutional advisers of the other departments of the government, and it has never been considered essential that the questions proposed should be such as might come before them in their judicial capacity." Opinion of Justices, 126 Mass. 566.

"While it is our duty to render opinions in all those cases in which either branch of the legislature or the governor and council may properly require them, it is not the less our duty, in view of the careful separation of the executive, legislative, and judicial departments of the government, to abstain from doing so in any case which does not fall within the constitutional clause relating thereto." Answer of Justices, 150 Mass. 601.

2. Matter of Senate Bill No. 65, 12 Colo. 466; *In re* Legislative Appropriations, 19 Colo. 58.

3. Opinions of Justices, 70 Me. 583.

4. Opinion of Justices, 72 Me. 562; Opinion of Justices, 58 Me. 573.

5. *Where Statutes Conflict With Constitution — United States.* — *Calder v. Bull*, 3 Dall. (U. S.) 386; *Cooper v. Telfair*, 4 Dall. (U. S.) 18.

Alabama. — *Dyer v. Tuscaloosa Bridge Co.*, 2 Port. (Ala.) 303. 27 Am. Dec. 655.

Connecticut. — *Derby Turnpike Co. v. Parks*, 10 Conn. 522, 27 Am. Dec. 700; *Goshen v. Stonington*, 4 Conn. 225, 10 Am. Dec. 121.

Florida. — *Cotten v. Leon County*, 6 Fla. 610.

Georgia. — *St. Mary's Bank v. State*, 12 Ga. 475.

Illinois. — *Phœbe v. Jay*, 1 Ill. 268.

Indiana. — *Rice v. State*, 7 Ind. 332; *Dawson v. Shaver*, 1 Blackf. (Ind.) 206; *Thomas v. Clay County*, 5 Ind. 4.

Kentucky. — *Bliss v. Com.*, 2 Litt. (Ky.) 90, 13 Am. Dec. 251.

Maine. — *Bowdoinham v. Richmond*, 6 Me. 112, 19 Am. Dec. 197; *Lewis v. Webb*, 3 Me. 326.

Maryland. — *Norris v. Abingdon Academy*, 7 Gill & J. (Md.) 7.

Massachusetts. — *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174; *Norwich v. Hampshire County*, 13 Pick. (Mass.) 60; *King v. Dedham Bank*, 15 Mass. 447, 8 Am. Dec. 112.

New Hampshire. — *Woart v. Winnick*, 3 N. H. 473, 14 Am. Dec. 384; *Dow v. Norris*, 4 N. H. 16, 17 Am. Dec. 400.

New Jersey. — *Vanuxem v. Hazlehursts*, 4 N. J. L. 218, 7 Am. Dec. 582.

New York. — *Bloodgood v. Mohawk, etc.*, R. Co., 18 Wend. (N. Y.) 9, 31 Am. Dec. 313.

Ohio. — *Cincinnati, etc., R. Co. v. Clinton County*, 1 Ohio St. 77; *Miller v. State*, 3 Ohio St. 475.

Pennsylvania. — *Stoddart v. Smith*, 5 Binn. (Pa.) 355; *Moore v. Houston*, 3 S. & R. (Pa.) 169; *Eakin v. Raub*, 12 S. & R. (Pa.) 330; *Cronise v. Cronise*, 54 Pa. St. 255.

Tennessee. — *Tate v. Bell*, 4 Yerg. (Tenn.) 202, 26 Am. Dec. 221.

Vermont. — *Hill v. Sunderland*, 3 Vt. 507; *Staniford v. Barry*, 1 Aik. (Vt.) 314, 15 Am. Dec. 691.

Virginia. — *Crenshaw v. Slate River Co.*, 6 Rand. (Va.) 245.

void by the courts.¹ And the state court will not hesitate in a proper case to declare provisions in the constitution of a sister state to be in conflict with the Federal Constitution and consequently void.²

City Ordinances. — In the same way city ordinances will be declared invalid when in conflict with the state or Federal Constitution.³

Origin of This Function. — But this function of the courts, whose exercise has now become so familiar, is of comparatively recent origin and has passed through several well-defined stages before attaining its present form. A proper conception of its nature and scope can best be acquired by considering its historical development.

(b) **Its Historical Development** — *aa. FIRST STAGE: THE LEGISLATURE OMNIPOTENT* — **The Earliest English Statutes** were promulgated by the crown and were generally mere expressions of the royal will, as unquestionable as the autocratic power of the monarch who framed them.⁴ When the law-making power finally passed from the king to the parliament⁵ no change was wrought in the force and effect of statutes. The English judicial view of this is well illustrated by a remark attributed to Lord Hobart, in the reign of Charles II., that "the statute is like a tyrant; where he comes he makes all void."⁶ There have indeed been contrary *dicta* by English judges,⁷ but no attempt seems ever to have been made by them to give them a practical application,⁸ and in this particular the law of England yet remains as it was when Blackstone said: "An Act of Parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land and the dominions thereunto belonging; nay, even the king himself, if particularly named therein. And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms and by the same authority of Parliament."⁹

In Other Countries. — The English doctrine of the immunity of legislative acts from judicial interference is in fact the one yet prevailing throughout almost¹⁰ the whole civilized world except the *United States*.¹¹ Thus in *France*,¹² *Spain*,¹³

1. **State and Federal Constitutions.** — *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Gunn v. Barry*, 15 Wall. (U. S.) 610; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 672; *State v. Young*, 29 Minn. 474; *Grigsby v. Peak*, 57 Tex. 142.

2. *Stoddart v. Smith*, 5 Binn. (Pa.) 355.

3. **Municipal Ordinances.** — *Savannah v. Hussey*, 21 Ga. 80; *Hestonville, etc., Pass. R. Co. v. Philadelphia*, 89 Pa. St. 210.

4. See Stubbs's *Constitutional History of England* (3d ed.), vol. I, p. 572 *et seq.*; Potter's *Dwarris on Statutes*, p. 40. See 1 Blackstone's *Com.* 185, to the effect that the king formerly had power to dispense with certain statutes.

5. The first parliament met in 1265, but it was not until the close of the seventeenth century that the crown ceased to be a potent factor in legislation.

6. Quoted by Twissden, J., in *Maleverer v. Redshaw*, 1 Mod. 35.

7. **Contrary Dicta.** — Lord Coke in *Bonham's Case*, 7 Coke 118a, says: "When an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law shall control it and adjudge such act to be void."

Similar expressions are found in *Calvin's Case*, 7 Coke 14a; *Day v. Savadge*, Hob. 87.

These cases were cited by counsel in *Robin v. Hardaway*, Jeff. (Va.) 109, one of the earliest American cases where this question was raised, and were relied upon by James Otis to

establish his claim that the British Parliament was not the final judge of the validity of its own acts. See Appendix to *Quincy (Mass.) 520 et seq.*

They are not now followed even in the British empire. See *Re Goodhue*, 19 Grant's Ch. U. C. 385; *Toronto, etc., R. Co. v. Crookshank*, 4 U. C. Q. B. 318.

8. See Thayer, *The American Doctrine of Constitutional Law*, 7 *Harvard Law Rev.* 133. But the doctrine has been practically applied in the United States. See *infra*, this title, *Exercises of the Power of Annulment*, note 5.

9. 1 Blackstone's *Commentaries*, pp. 185, 186.

10. See the exceptions noted *infra*, note.

11. Rogers, *Const. History as Seen in American Law* (1889), p. 11; Dillon, *Laws and Jurisprudence of England and America*, 200, 201.

12. **France.** — Dicey, *Law of the Constitution* (3d ed.), ch. II, p. 127, where the learned author observes: "The restrictions placed on the actions of the legislature under the French constitution are not in reality laws, since they are not rules which in the last resort will be enforced by the courts. Their true character is that of maxims of political morality which derive whatever strength they possess from being formally inscribed in the constitution, and from the resulting support of public opinion."

13. **Spain.** — Curry, *Constitutional Government in Spain* (1889), p. 94; Rogers, *Const. Hist. as Seen in American Law* (1889), p. 11.

Belgium,¹ the judicial power of annulling statutes appears never to have been asserted. In *Germany* a decision by an inferior court adopting the American doctrine² was afterwards overruled by the Reichsgericht³ and the contrary rule established,⁴ though the imperial courts may annul a state law which conflicts with a federal enactment.⁵ This last qualification is also true of *Switzerland*,⁶ though except in one instance⁷ the Swiss courts are powerless to annul a statute.⁸ The High Court of the *Transvaal*, or South African Republic, for a time assumed the right to test the validity of laws and resolutions of the Volksraad or legislature, but this power was recently taken away.⁹

United States.—The omnipotence of the legislature and the imperative character of its enactments having thus from the earliest period been a well-recognized part of English law, it was but natural that the idea should reappear in the jurisprudence of the United States.

In the **Early History of Vermont** the supremacy of the legislature was an accomplished fact,¹⁰ and until 1814¹¹ it is said that no statute was declared unconstitutional by the courts of that state.¹²

In **Connecticut** a similar view was advanced by high authority.¹³

The **Early Decisions in New York and Rhode Island**, which annulled acts of the legislatures of those states, were regarded as revolutionary and received severe condemnation.¹⁴

In **Ohio**, in the first decade of the present century, two of the judges who had declared an act unconstitutional were impeached by the legislature.¹⁵

1. *Belgium*. — Dicey, *Law of the Constitution* (3d ed.), p. 144; Dillon, *Laws and Jurisprudence of England and America*, pp. 201, 202.

2. *Garbade v. State of Bremen*, decided by the Hanseatic Court of Upper Appeal (Seuffert's Archives for the Decisions of the Highest Courts of the German States, vol. 32, No. 101). See the opinion quoted in Coxe, *Judicial Power and Unconstitutional Legislation* 95, 102; Thayer's *Cases on Const. Law*, p. 146.

3. The supreme tribunal of the empire.

4. **German Doctrine.** — Bluntschli, *Gen. Pub. Law* (1863) 550, 551; K. v. The Dyke Board of Niederwieland, 9 Reichsgericht Decisions in Civil Cases 233; Coxe, *Judicial Powers and Unconstitutional Legislation*, pp. 95-102; Thayer's *Cases on Const. Law*, pp. 148, 149.

5. Rogers, *Const. Hist. as Seen in American Law* (1889), pp. 11, 12; Jellinek, *Gesetz und Verordnung*, p. 401.

6. Rogers, *Const. Hist. as Seen in American Law* (1889), pp. 11, 12; Jellinek, *Gesetz und Verordnung*, p. 401.

7. That of Uri.

8. *Switzerland*. — Bondy, *The Separation of Governmental Powers* (Columbia College Studies, New York 1896), p. 56, note; Rogers, *Const. Hist. as Seen in American Law* (1889), p. 11; Adams & Cunningham's *Swiss Confederation* (1889), p. 267; *Const. of Switzerland* (1874), arts. 102, 110, 114; Dub's "Das Öffentliche Recht der Schweizerischen Eidgenossenschaft," pt. 1, p. 113.

9. **The Transvaal.** — See *The Nation* (1897), vol. 64, p. 175. The judges agreed to conform to the act subordinating them to the Volksraad upon the understanding that the constitution or fundamental laws of 1858 should be placed on a higher basis and subjected to change only by special legislation.

10. In **Vermont.** — 1 D. Chip. (Vt.) 21, 22,

preface, where the editor of that report says: "During the first septenary, the legislature frequently interfered with the judiciary department. They passed an act prohibiting the prosecution of any real or possessory action or any action on contract. They passed acts vacating and annulling judgments. They constituted themselves a court of chancery. They appointed a board of commissioners with full power to decide in a summary manner all disputes relative to the title of lands. They also frequently granted new trials in cases which had been finally decided by the judiciary. The powers thus exercised by the legislature with the approbation of a majority of the people, naturally confirmed the idea that the power of the legislature was unlimited and supreme. No idea was entertained that the judiciary had any power to inquire into the constitutionality of acts of the legislature, or pronounce them void for any cause, or even to question their validity. Indeed, the framers of the constitution could never have intended to confer on the courts the power of pronouncing an act of the legislature void for any cause, when they provided, for an annual election of the judges by the same legislature who were to pass the laws."

11. *Dupy v. Wickwire*, 1 D. Chip. (Vt.) 237, 6 Am. Dec. 729.

12. Thayer's *Cases on Const. Law*, vol. 1, p. 151.

13. In **Connecticut.** — Swift (afterwards Chief Justice), *System of the Laws of Connecticut* (1795), vol. 1, p. 50.

14. In **New York and Rhode Island.** — Coxe, *Judicial Power and Unconstitutional Legislation*, p. 233; 2 *Arnold's Hist. of Rhode Island* 525; 7 *Harvard Law Rev.*, p. 129 *et seq.*

15. In **Ohio.** — Cooley's *Const. Lim.* (6th ed.) 193, note; Thayer's *Cases on Const. Law*, vol. 1, p. 151, note; 1 *Chase's Ohio Stat.*, preface, pp. 38-40.

And in Kentucky in a similar case impeachment proceedings were nearly successful, while the legislature also proceeded to reaffirm the validity of the statute which the court had annulled¹ and to legislate the judges out of office.²

In Pennsylvania, as late as 1825, Judge Gibson, in a powerful dissenting opinion, upheld the view that the annulment of statutes could not be effected by the judiciary in the absence of an express provision to that effect in the constitution.³

bb. SECOND STAGE: TRANSITION FROM LEGISLATIVE TO JUDICIAL OMNIPOTENCE. — But while the traditional English view of the omnipotence of Parliament took root in the American colonies and lingered on after they had become states, conditions existed there which were destined to displace the doctrine altogether.⁴

Colonial Charters. — In the colonies, for probably the first time in history, governmental powers were strictly defined by written instruments. The colonial charters — germs and forerunners of the constitution — were expressions of a supreme external authority and constituted a fixed limitation on the powers of colonial legislatures. Early in the eighteenth century the English Privy Council declared invalid a statute of *Connecticut*, which had been in force nearly thirty years, upon the ground *inter alia* that it was “not warranted by the charter of the colony.”⁵ Other similar cases during about the same period are recorded,⁶ and the judicial exercise of the statute-nullifying power was therefore not unfamiliar in America, long before the Revolution.

During the Period Commencing Shortly Before the Revolution, and lasting for about thirty years, the existence of this power was mooted in a long series of decisions, and by the end of that time the power had been exercised and established in nearly two-thirds of the states.⁷

1. In *Kentucky*. — Lapsley *v.* Brashears, 4 Litt. (Ky.) 47.

2. See Bondy, *The Separation of Governmental Powers* (Columbia College Studies, New York, 1896), p. 56, citing Collins' *Hist. of Kentucky* 218, 222, where it is shown that this last attempt was unsuccessful and that the court retained its place.

3. In *Pennsylvania*. — Eakin *v.* Raub, 12 S. & R. (Pa.) 330.

This opinion of Judge Gibson is pronounced by Prof. Thayer (7 Harv. Law Rev. 130, note) to be “much the ablest discussion of the question which I have ever seen, not excepting the judgment of Marshall in *Marbury v. Madison*, which, as I venture to think, has been overpraised.” Its author, however, subsequently changed his views. See his remarks twenty years later in *Norris v. Clymer*, 2 Pa. St. 281.

4. See, on this point, Thayer, *The American Doctrine of Constitutional Law*, 7 Harvard Law Rev. 129, reprinted in Thayer's *Cases on Constitutional Law*, p. 149 *et seq.*

5. *Winthrop v. Lechmere* (Privy Council, 1727-8), reprinted in Thayer's *Cas. Const. Law*, 34, 5 Mass. Hist. Soc. Coll. (6th ser.), 440-511.

6. *Phillips v. Savage* (1734); *Clarke v. Fousey* (1745). See Thayer, *The American Doctrine of Const. Law*, 7 Harv. Law Rev. 131, note, reprinted in Thayer's *Cases on Const. Law* 149 *et seq.*; Talcott Papers, 4 Conn. Hist. Soc. Coll. 94, note.

7. **Early American Authorities on the Judicial Power of Annuling Statutes.** — Quite an extensive literature has appeared of late in this interesting field. See 5 Pol. Sc. Quar. 224; 19 Am. L. Rev. 180; 29 Am. L. Rev. 711. *The Nation*, March 7, 1889; Sept. 28, 1893 (p. 229); Oct. 12, 1893. Thayer, *The American*

Doctrine of Const. Law, 7 Harvard Law Review, 129; Bondy, *The Separation of Governmental Powers* (Columbia Studies, New York, 1896), c. 7; Carson's *The Supreme Court of the United States*, p. 120. See also Cooley's *Constitutional Limitations*, c. 7, p. 103, note; Dillon's *Laws and Jurisprudence of England and America*, p. 200, note; Coxe, *Judicial Power and Unconstitutional Legislation*, p. 223.

Early Cases in Chronological Order. — From these and other sources is compiled the following list in chronological order of the early cases in which the point was involved:

1772. — *Robin v. Hardaway*, Jeff. (Va.) 109. In this case the plaintiffs, who were descendants of enslaved Indian women, brought actions to try their right of freedom, attacking on two grounds the validity of a statute under which they were held: (1) That it was void as contrary to natural right and justice; (2) that it had been repealed. The first contention was elaborately argued by Mr. Mason, who cited the English cases referred to by Lord Coke in *Bonham's Case*, 8 Coke 118a. The point was ignored, however, by the court in its judgment (no real opinion was written), and the case decided solely on the second ground.

1778. — *Phillips' Case* (Va.). Legislative act of attainder disregarded, but whether on constitutional grounds uncertain. See 5 Pol. Sc. Quar. 235.

1779. — *Holmes v. Wharton* (N. J.), 2 Am. Hist. Ass'n Papers, p. 46. See this case, referred to in *State v. Parkhurst*, 9 N. J. L. 444.

1782. — *Com. v. Caton*, 4 Call (Va.) 21, where the Supreme Court of Virginia held void a resolution adopted by the state senate, but not concurred in by the lower house, whereby a pardon was sought to be granted to certain

In the Federal Convention of 1787 efforts were made to forestall the statute-nullifying power of judges by conferring upon them in conjunction with the executive the right of revision and veto.¹ But these were unsuccessful, and the federal tribunals for the most part followed and applied the doctrine already developed by the state courts.²

Case of Marbury v. Madison. — And in 1803 the Supreme Court of the United States finally and conclusively affirmed the power of the judiciary to declare statutes unconstitutional.³

parties convicted of treason. Wythe, J., in pronouncing the decision, says: "If the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will say to them, 'Here is the limit of your authority, and hither shall you go, but no farther.'" And the reporter comments on this as the "first case in the United States, where the question relative to the nullity of an unconstitutional law was ever discussed before a judicial tribunal."

1784. — *Rutgers v. Waddington*, (N. Y.) Dawson's Pamphlet, p. 44, a decision of the Mayor's Court, holding unconstitutional a statute authorizing actions by the owners of houses against the occupants thereof under British orders.

1786. — *Trevett v. Weeden*, Thayer's Cas. Const. Law 73, 2 Chandler's Criminal Trials 269, annulling an act imposing a penalty, collectible on summary conviction, for refusing to accept paper money at face value. *Brattle v. Hinckley* (Mass.); *Brattle v. Putnam* (Mass.). See 7 Harvard Law Rev. 415, where these cases are elaborately discussed.

1787. — *Bayard v. Singleton*, 1 Mart. (N. Car.) 48, annulling an act requiring the dismissal on motion of suits by owners against purchasers of property confiscated during the Revolution, thus depriving such owners of the right of jury trial. This, it will be seen, was quite similar to the New York and Rhode Island cases noted above. The court said that by the constitution every citizen undoubtedly had a right to a decision of his property by a trial by jury. For that, if the legislature could take away this right and require him to stand condemned in his property without a trial, it might, with as much authority, require his life to be taken away without a trial by jury, and that he should stand condemned to die without the formality of any trial at all; that if the members of the general assembly could do this, they might, with equal authority, not only render themselves the legislators of the state for life without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever. But that it was clear that no act they could pass, could by any means repeal or alter the constitution, because, if they could do this, they would at the same instant of time destroy their own existence as a legislature and dissolve the government thereby established. Consequently, the constitution (which the judicial power was bound to take notice of as much as of any other law whatever) standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same

act must, of course, in that instance, stand as abrogated and without any effect."

1788. — *Case of the Judges*, 4 Call (Va.) 135.

1792. — *Bowman v. Middleton*, 1 Bay (S. Car.) 252, holding an act to be "against common right as well as against Magna Charta." *Turner v. Turner*, 4 Call (Va.) 234, holding an act void as *ex post facto*.

1793. — *Page v. Pendleton*, Wythe (Va.) 127; *Kamper v. Hawkins*, 1 Va. Cas. 20.

1795. — *Taylor v. Reading*, cited in *State v. Parkhurst*, 9 N. J. L. 444.

1802. — *Ogden v. Witherspoon*, 2 Hayw. (N. Car.) 227; *Whittington v. Polk*, 1 Har. & J. (Md.) 236.

1. 2 Bancroft's Hist. of the Const. (6th ed. 1889), pp. 195-6; 5 Elliott Debates on the Federal Convention, 544 *et seq.*

2. Early Federal Decisions — 1791. — The judges announce the inability of Congress to impose upon them the duties of pension commissioners, though they consent to act as individuals. See note to *Hayburn's Case*, 2 Dall. (U. S.) 410.

1792. — *Hayburn's Case*, 2 Dall. (U. S.) 409. See other cases mentioned in the same year, in notes, pp. 411, 413.

1794. — *U. S. v. Todd*, 13 How. (U. S.) 52, note.

1795. — *Vanhorne v. Dorrance*, 2 Dall. (U. S.) 304.

1796. — *Hylton v. U. S.*, 3 Dall. (U. S.) 171.

1797. — *U. S. v. Villato*, 2 Dall. (U. S.) 370.

1798. — *Calder v. Bull*, 3 Dall. (U. S.) 386.

1800. — *Cooper v. Telfair*, 4 Dall. (U. S.) 14 (dictum).

3. Marbury v. Madison, 1 Cranch (U. S.) 137. Chancellor Kent declares that this opinion "approaches to the precision and certainty of a mathematical demonstration." 1 Kent Com. 453. Mr. Justice Miller says: "The immense importance of this decision, though in some respects obiter, since the court declared in the end that it had no jurisdiction over the case, may be appreciated when it is understood that the principles declared, which have never since been controverted, subject the ministerial and executive officers of the government all over the country to the control of the courts in regard to the execution of a large part of their duties. Its application to the very highest officers of the government, except, perhaps, the president himself, has been illustrated in numerous cases in the courts of the United States and in the reports of the Supreme Court." Ann Arbor Address, 1887.

Professor Thayer, on the other hand, expresses the view that the opinion in *Marbury v. Madison* "has been overpraised." See 7 Harvard Law Rev. 130, note.

Power Originally Confined to Acts Relating to the Judiciary. — For more than half a century, however, the exercise of this power was mainly confined to the annulment of acts which related directly to the judiciary, its organization, powers, procedure, etc.¹

Present Doctrine. — But it has been so extended as now to apply to all statutes which for any reason are deemed out of harmony with the constitution.²

Other Countries. — The doctrine thus established has found its way into systems of public law outside our own. In *Canada*, statutes not in accord with the British North America Act or with the provincial constitutions may be annulled by the courts.³ The constitution of the Republic of *Colombia* provides that the supreme court shall "decide finally upon the constitutionality of legislative acts which may have been objected to by the government as unconstitutional."⁴

(c) Exercise of the Power of Annulment — *aa.* WHEN CONSTITUTIONALITY WILL BE CONSIDERED. — A question involving the constitutionality of a statute should be determined only when it is impossible to dispose of a cause on its merits otherwise,⁵ and a court will be especially reluctant to investigate or determine the

"I do not know that I can point to one achievement in American statesmanship which can take rank for its consequences of good above that single decision of the Supreme Court which adjudged an act of the legislature contrary to the constitution is void, and that the judicial department is clothed with the power to ascertain the repugnancy and pronounce the legal conclusion." Rufus Choate, *Addresses and Orations* (5th ed.), p. 133.

1. *Dred Scott v. Sandford*, 19 How. (U. S.) 393, where an Act of Congress prohibiting slavery in the Louisiana territory was declared unconstitutional, is said to have been the first instance of judicial annulment of a statute outside the class mentioned in the text.

2. See *supra*, this title, note 1, *The Current Doctrine*.

3. *Canada*. — "The Provinces have properly a written and defined constitution, limited as to purposes and objects. The Dominion has in part a written and defined constitution, but it is not wholly limited by it. It possesses powers which are neither defined nor limited excepting by the Confederation Act and the imperial statute 28 and 29 Vict., c. 63. It may be said to have general jurisdiction, or, in the language of constitutional writers, general sovereignty, in all matters but those in which it is expressly excluded, or in which, from the inherent condition of a dependency, it is necessarily and impliedly restricted." * * * The courts, under such constitutions which the Dominion and the Provinces possess, will be obliged to declare when, in their opinion, the Dominion has encroached upon the exclusive powers of the Provinces, and when the latter have usurped the higher powers of the Dominion, and also whether the Dominion has exercised its powers properly subordinated to the imperial statute, before mentioned, which regulates the validity and extent of colonial legislation and government. There can be no restraint put upon the due exercise of the judicial power by any authority, Dominion or Provincial, for that would be to place these bodies above the law which created them, and granted them powers which are not absolute, and which no legislation of theirs can make so." Regina v. Taylor, 36 U. C. Q. B. 183.

"The local legislatures are now simply the creatures of a statute, and under it alone have they any legislative powers. The Imperial Parliament by the Union Act prescribed and limited their jurisdiction; and in doing so has impliedly but virtually and effectually prohibited them from legislating on any other than the subjects comprised in the powers given by that act. The right of the Imperial Parliament, when conferring legislative powers on the local legislatures, to limit the exercise of them, cannot be questioned; and any local act passed beyond the prescribed limit, being contrary to the terms of the Imperial Act, must necessarily be *ultra vires*." *Lenoir v. Ritchie*, 3 Can. Supreme Ct. 575. See also *International Bridge Co. v. Canada Southern R. Co.*, 28 Grant's Ch. (U. C.) 114.

4. Const. of Colombia. See a translation of this instrument in supplement to *Annals of American Academy*, January, 1893, by Professor Bernard Moses.

5. **Unconstitutionality Determined Only When Necessary** — *United States*. — *Ex p.* Randolph, 2 Brock. (U. S.) 447.

Alabama. — *Smith v. Speed*, 50 Ala. 276; *Mobile, etc., R. Co. v. State*, 29 Ala. 573.

Georgia. — *Board of Education v. Brunswick*, 72 Ga. 353.

Indiana. — *Parker v. State*, 133 Ind. 178; *Hoover v. Wood*, 9 Ind. 286.

New York. — *People v. Kenney*, 96 N. Y. 294; *Frees v. Ford*, 6 N. Y. 176; *White v. Scott*, 4 Barb. (N. Y.) 56.

Ohio. — *Ireland v. Palestine, etc., Turnpike Co.*, 19 Ohio St. 369.

Michigan. — *Allor v. Wayne County Auditors*, 43 Mich. 76.

South Carolina. — *Ex p.* Florence School, 43 S. Car. 11.

"The decision of a question involving the constitutionality of an act of Congress is one of the gravest and most delicate of the judicial functions, and while the court will meet the question with firmness, where its decision is indispensable, it is the part of wisdom, and a just respect for the legislature renders it proper, to waive it, if the case in which it arises can be decided on other points." *Ex p.* Randolph, 2 Brock. (U. S.) 447.

constitutionality of a statute on preliminary motions or on applications for provisional remedies,¹ such as motions to strike out part of a complaint as irrelevant,² or a proceeding to determine the right to costs in a case,³ or an application for a preliminary injunction.⁴ It has even been held that the constitutionality of a statute under which the petitioner was indicted would not be determined on an application for a writ of habeas corpus.⁵

bb. WHEN STATUTES WILL BE ANNULLED — Unconstitutionality Must Be Clear. — The unconstitutionality of a statute must be clear and manifest before a court should declare it,⁶ so that where any reasonable doubt exists as to its constitutionality it should be upheld.⁷

"While courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more proper and more respectful to a co-ordinate department to discuss constitutional questions only where that is the very *lis mota*." *Hoover v. Wood*, 9 Ind. 286.

A statute will not be declared unconstitutional by reason of objectionable features in the preamble not contained in the body of the act. *Lothrop v. Stedman*, 42 Conn. 583.

1. *Havemeyer v. Ingersoll*, 12 Abb. Pr. N. S. (N. Y. Supreme Ct.) 301.

2. *Brien v. Clay*, 1 E. D. Smith (N. Y.) 649.

3. *Burbank v. Williams*, Phil. L. (N. Car.) 37.

4. Upon a bill in equity praying for an injunction and for relief, an act of the legislature ought not to be adjudged unconstitutional on a mere preliminary hearing for the injunction, and before an examination into the general merits of the bill. *Deering v. York, etc.*, R. Co., 31 Me. 172.

It should be a very clear case to justify a court in deciding that an act of the legislature is invalid, upon a motion for a provisional injunction, a proceeding which addresses itself particularly to judicial discretion. *Lothrop v. Stedman*, 42 Conn. 583.

5. *Parker v. State*, 5 Tex. App. 579; *In re Brosnahan*, 18 Fed. Rep. 62.

6. **Invalidity Must Be Plain** — *United States*. — *Cooper v. Telfair*, 4 Dall. (U. S.) 18.

Alabama. — *Sadler v. Langham*, 34 Ala. 311.

Arkansas. — *Smithee v. Garth*, 33 Ark. 17; *Eason v. State*, 11 Ark. 481.

California. — *People v. San Francisco, etc.*, R. Co., 35 Cal. 606.

Colorado — *Alexander v. People*, 7 Colo. 155. *Connecticut*. — *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210.

Florida. — *Cheney v. Jones*, 14 Fla. 587.

Georgia. — *Cutts v. Hardee*, 38 Ga. 350; *Franklin Bridge Co. v. Wood*, 14 Ga. 80; *Macon, etc., R. Co. v. Davis*, 13 Ga. 68; *Carey v. Giles*, 9 Ga. 253; *Boston v. Cummins*, 16 Ga. 102, 60 Am. Dec. 717.

Illinois. — *Chicago, etc., R. Co. v. Smith*, 62 Ill. 268.

Indiana. — *Brown v. Buzan*, 24 Ind. 194; *Allen County v. Silvers*, 22 Ind. 491; *Lafayette v. Jenners*, 10 Ind. 70; *State v. Cooper*, 5 Blackf. (Ind.) 258.

Iowa. — *Morrison v. Springer*, 15 Iowa 304.

Kansas. — *State v. Robinson*, 1 Kan. 17.

Kentucky. — *Burnside v. Lincoln County Ct.*, 86 Ky. 424.

Maryland. — *Baltimore v. State*, 15 Md. 376. *Massachusetts*. — *In re Wellington*, 13 Pick. (Mass.) 95; *Foster v. Essex Bank*, 16 Mass. 245, 8 Am. Dec. 135.

Michigan. — *Scott v. Smart*, 1 Mich. 295.

Missouri. — *Blair v. Ridgely*, 41 Mo. 63, 97 Am. Dec. 248.

New Hampshire. — *Rich v. Flanders*, 39 N. H. 304.

New York. — *Kerrigan v. Force*, 68 N. Y. 381.

Oregon. — *Crowley v. State*, 11 Oregon 512.

Pennsylvania. — *Matter of Clinton St.*, 2 Brews. (Pa.) 599; *Speer v. Blairsville*, 50 Pa. St. 150.

West Virginia. — *Gutman v. Virginia Iron Co.*, 5 W. Va. 22.

The fact that questions of a political nature are involved will not diminish a court's disinclination to declare a statute unconstitutional. *People v. Thompson*, 155 Ill. 451.

7. *United States*. — *Vanhorne v. Dorrance*, 2 Dall. (U. S.) 309; *Calder v. Bull*, 3 Dall. (U. S.) 386; *Cooper v. Telfair*, 4 Dall. (U. S.) 14; *Fletcher v. Peck*, 6 Cranch (U. S.) 87.

Arkansas. — *State v. Ashley*, 1 Ark. 513.

California. — *Myers v. English*, 9 Cal. 341; *Ex p. Newman*, 9 Cal. 502; *Hobart v. Butte County*, 17 Cal. 23.

Connecticut. — *Derby Turnpike Co. v. Parks*, 10 Conn. 543, 27 Am. Dec. 700; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210.

Florida. — *Cotten v. Leon County*, 6 Fla. 610.

Georgia. — *Carey v. Giles*, 9 Ga. 253; *Macon, etc., R. Co. v. Davis*, 13 Ga. 68; *Franklin Bridge Co. v. Wood*, 14 Ga. 80; *Boston v. Cummins*, 16 Ga. 102, 60 Am. Dec. 717; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248.

Illinois. — *Newland v. Marsh*, 19 Ill. 384; *Chicago, etc., R. Co. v. Smith*, 62 Ill. 268.

Indiana. — *Dawson v. Shaver*, 1 Blackf. (Ind.) 206; *Beauchamp v. State*, 6 Blackf. (Ind.) 299; *Doe v. Douglass*, 8 Blackf. (Ind.) 10; *Maize v. State*, 4 Ind. 342; *Stocking v. State*, 7 Ind. 327; *Beebe v. State*, 6 Ind. 501, 63 Am. Dec. 391.

Iowa. — *Santo v. State*, 2 Iowa 165, 63 Am. Dec. 487; *Morrison v. Springer*, 15 Iowa 304.

Kansas. — *State v. Robinson*, 1 Kan. 17.

Kentucky. — *Bliss v. Comm.*, 2 Litt. (Ky.) 90, 13 Am. Dec. 251.

Maine. — *Lewis v. Webb*, 3 Me. 326; *Durham v. Lewiston*, 4 Me. 140; *Lunt's Case*, 6 Me. 412.

Maryland. — *Harrison v. State*, 22 Md. 468, 85 Am. Dec. 658; *Norris v. Abingdon Academy*, 7 Gill & J. (Md.) 7; *Whittington v. Pelk*, 1 Har. & J. (Md.) 236.

Presumption. — Every presumption is in favor of the constitutionality of a legislative enactment, and the judicial department will be justified in pronouncing it unconstitutional only when it becomes a manifest usurpation of power.¹

Policy of Act. — With the wisdom or expediency of a law the judiciary has nothing to do; such questions address themselves solely to the law-making

Massachusetts. — *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174; *Adams v. Howe*, 14 Mass. 340, 7 Am. Dec. 216; *Norwich v. Hampshire County*, 13 Pick. (Mass.) 60.

Michigan. — *Scott v. Smart*, 1 Mich. 295; *Williams v. Detroit*, 2 Mich. 560; *Weimer v. Bunbury*, 30 Mich. 201.

Mississippi. — *Campbell v. Mississippi Union Bank*, 6 How. (Miss.) 625.

Missouri. — *Wells v. Missouri Pac. R. Co.*, 110 Mo. 286; *State v. Simmons Hardware Co.*, 109 Mo. 118.

New Hampshire. — *Dow v. Norris*, 4 N. H. 16, 17 Am. Dec. 400.

New York. — *Sill v. Corning*, 15 N. Y. 297; *Varick v. Smith*, 5 Paige (N. Y.) 137, 28 Am. Dec. 417; *Cochran v. Van Surlay*, 20 Wend. (N. Y.) 365, 32 Am. Dec. 570; *Morris v. People*, 3 Den. (N. Y.) 381; *Wynehamer v. People*, 13 N. Y. 378; *People v. Orange County*, 17 N. Y. 235; *People v. New York Cent. R. Co.*, 34 Barb. (N. Y.) 123.

Pennsylvania. — *Stoddart v. Smith*, 5 Binn. (Pa.) 355; *Moore v. Houston*, 3 S. & R. (Pa.) 169; *Braddee v. Brownfield*, 2 W. & S. (Pa.) 271; *Harvey v. Thomas*, 10 Watts (Pa.) 63, 36 Am. Dec. 141; *Com. v. Maxwell*, 27 Pa. St. 444; *Pennsylvania R. Co. v. Riblet*, 66 Pa. St. 164, 169, 5 Am. Rep. 360; *Lewis's Appeal*, 67 Pa. St. 153; *Butler's Appeal*, 73 Pa. St. 448.

South Carolina. — *State v. Lylies*, 1 McCord L. (S. Car.) 238; *Byrne v. Stewart*, 3 Dessaus. (S. Car.) 466.

Tennessee. — *Yancy v. Yancy*, 5 Heisk. (Tenn.) 353, 13 Am. Rep. 5; *Tate v. Bell*, 4 Yerg. (Tenn.) 202, 26 Am. Dec. 221; *Andrews v. State*, 3 Heisk. (Tenn.) 165, 8 Am. Rep. 8; *Knoxville, etc., R. Co. v. Hicks*, 9 Baxt. (Tenn.) 446.

Virginia. — *Crenshaw v. Slate River Co.*, 6 Rand. (Va.) 245.

West Virginia. — *Gutman v. Virginia Iron Co.*, 5 W. Va. 22; *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640.

1. Presumption in Favor of Constitutionality —
United States. — *Cooper v. Telfair*, 4 Dall. (U. S.) 14; *Fletcher v. Peck*, 6 Cranch (U. S.) 128; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213.

Arkansas. — *Eason v. State*, 11 Ark. 481.

Colorado. — *People v. Richmond*, 16 Colo. 274; *Denver v. Knowles*, 17 Colo. 204.

Connecticut. — *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210.

Florida. — *Cotten v. Leon County*, 6 Fla. 610; *Cheney v. Jones*, 14 Fla. 587; *Holton v. State*, 28 Fla. 303.

Georgia. — *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248; *Carey v. Giles*, 9 Ga. 253; *Macon, etc., R. Co. v. Davis*, 13 Ga. 68; *Franklin Bridge Co. v. Wood*, 14 Ga. 80; *Gormley v. Taylor*, 44 Ga. 76.

Illinois. — *Lane v. Dorman*, 4 Ill. 238, 36

Am. Dec. 543; *Newland v. Marsh*, 19 Ill. 376; *People v. Thompson*, 155 Ill. 451.

Indiana. — *Hedley v. Franklin County*, 4 Blackf. (Ind.) 116; *Stocking v. State*, 7 Ind. 326; *Lafayette v. Jenners*, 10 Ind. 74; *Allen County v. Silvers*, 22 Ind. 491; *Parker v. State*, 133 Ind. 178.

Kansas. — *State v. Robinson*, 1 Kan. 17.

Maryland. — *Baltimore v. State*, 15 Md. 376.

Massachusetts. — *Kendall v. Kingston*, 5 Mass. 524; *Foster v. Essex Bank*, 16 Mass. 245, 8 Am. Dec. 135; *Norwich v. Hampshire County*, 13 Pick. (Mass.) 60; *Adams v. Howe*, 14 Mass. 340, 7 Am. Dec. 216.

Michigan. — *Sears v. Cottrell*, 5 Mich. 251; *Tyler v. People*, 8 Mich. 320.

Mississippi. — *Newsom v. Cocke*, 44 Miss. 352, 7 Am. Rep. 686.

Missouri. — *State v. Cape Girardeau, etc., R. Co.*, 48 Mo. 468; *Wells v. Missouri Pac. Co.*, 110 Mo. 286; *State v. Simmons Hardware Co.*, 109 Mo. 118.

Nebraska. — *Trumble v. Trumble*, 37 Neb. 348, *per Irvine, Com'r.*

Nevada. — *State v. Humboldt County*, 21 Nev. 235.

New Hampshire. — *Dow v. Norris*, 4 N. H. 16, 17 Am. Dec. 400; *Rich v. Flanders*, 39 N. H. 304.

New York. — *Ex p. M'Collum*, 1 Cow. (N. Y.) 550; *Coutant v. People*, 11 Wend. (N. Y.) 511; *Clark v. People*, 26 Wend. (N. Y.) 599; *Morris v. People*, 3 Den. (N. Y.) 381; *New York, etc., R. Co. v. Van Horn*, 57 N. Y. 473.

Pennsylvania. — *Farmers', etc., Bank v. Smith*, 3 S. & R. (Pa.) 63; *Weister v. Hade*, 52 Pa. St. 474; *De Walt v. Bartley*, 146 Pa. St. 529, 28 Am. St. Rep. 814.

South Dakota. — *State v. Becker*, 3 S. Dak. 29.

Tennessee. — *Cole Mfg. Co. v. Falls*, 90 Tenn. 466.

Vermont. — *Kellogg v. Page*, 44 Vt. 359, 8 Am. Rep. 383.

Virginia. — *Eyre v. Jacob*, 14 Gratt. (Va.) 422, 73 Am. Dec. 367; *Com. v. Moore*, 25 Gratt. (Va.) 951.

West Virginia. — *Slack v. Jacob*, 8 W. Va. 612.

Wisconsin. — *Oleson v. Green Bay, etc., R. Co.*, 36 Wis. 383.

"Every presumption is in favor of the constitutionality of a statute, and to justify the court in pronouncing it an unauthorized expression of the legislative will, it must be made to appear that when fairly and reasonably construed it is in clear and substantial conflict with some provision of the constitution. If the act and the constitution can reasonably be so construed as to enable both to stand, it is the duty of the court to give them that construction." *Sweet v. Syracuse*, 129 N. Y. 316. Laws are presumed to be constitutional until the contrary is judicially established. *State v. Shakespeare*, 41 La. Ann. 156.

department of the government.¹

Statutes Opposed to Natural Justice. — And the better opinion seems to be that the courts are not at liberty to nullify an act of legislation by reason of its presumed antagonism to natural right or abstract justice,² though there are authorities which support a contrary doctrine.³

Latent Spirit of the Constitution. — A statute should not be annulled on the vague ground of its conflict with a general latent spirit supposed to pervade or underlie the constitution, but which neither its terms nor its implications clearly disclose.⁴

Motives of Legislature. — It is not within the province of the judiciary to inquire into the motives actuating the law-making body.⁵

1. Policy Not Considered. — *Bennett v. Boggs*, 1 Baldw. (U. S.) 74; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248; *Hills v. Chicago*, 60 Ill. 86; *Perkins, J.*, in *Madison, etc., R. Co., v. Whiteneck*, 8 Ind. 217; *State v. Kruttschnitt*, 4 Nev. 178; *Ballentine v. Pulaski*, 15 Lea (Tenn.) 633; *Bull v. Read*, 13 Gratt. (Va.) 78, *per Lee, J.*

When a statute is otherwise free from objections on constitutional grounds, the courts cannot avoid its application and enforcement because of any disapprobation as to its policy, *Leonard v. Wiseman*, 31 Md. 201; nor because of its absurdity or unreasonableness, *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248; nor because, in their judgment, it is an unwise enactment, *Merchants' Union Barb-Wire Co. v. Brown*, 18 Rep. 591.

The consequences which may result from the enforcement of an act can be considered by a court only so far as they may affect constitutional rights. *Germond v. Tacoma*, 6 Wash. 365.

In determining the constitutionality of an act, public sentiment cannot be considered, although such sentiment may be unanimous in favor of sustaining an unconstitutional act. *Perkins v. Philadelphia*, 156 Pa. St. 554. See the title **STATUTES**.

2. Statutes Opposed to Natural Justice. — *Cooley's Const. Lim.* (6th ed.), p. 197 *et seq.* And see *People v. Gallagher*, 4 Mich. 244; *People v. Mahaney*, 13 Mich. 481; *Flint, etc., Plank-road Co. v. Woodhull*, 25 Mich. 99, 12 Am. Rep. 233; *Jewell v. Weed*, 18 Minn. 272; *Benson v. Albany*, 24 Barb. (N. Y.) 248; *Grant v. Courter*, 24 Barb. (N. Y.) 232; *People v. Rochester*, 50 N. Y. 525; *Wynehamer v. People*, 13 N. Y. 378, *per Comstock, J.*; *Praigg v. Western Paving, etc., Co.*, 143 Ind. 358.

"All the courts can do with odious statutes which are constitutional is to chasten their harshness by construction. Such is the imperfection of the best human institutions that, mould them as we may, a large discretion must at last be reposed somewhere. The best, and in many cases the only, security is in the wisdom and integrity of public servants and their identity with the people." *Beebe v. State*, 6 Ind. 528, 63 Am. Dec. 391, *per Stuart, J.*

So in Canada it is held that an act otherwise valid cannot be objected to by a court as contrary to reason and justice. *In re Goodhue*, 19 Grant's Ch. (U. C.) 366; *Toronto, etc., R. Co. v. Crookshank*, 4 U. C. Q. B. 318.

3. In Ham v. M'Claws, 1 Bay. (S. Car.) 98, it is said: "It is clear that statutes passed against plain and obvious principles of common right and common reason are absolutely

null and void as far as they are calculated to operate against those principles."

In *State University v. Williams*, 9 Gill & J. (Md.) 365, an act was declared void as opposed to fundamental principles of right and justice inherent in the nature and spirit of the social compact. And to the same general effect, see *Wilkinson v. Leland*, 2 Pet. (U. S.) 627; *Terrett v. Taylor*, 9 Cranch (U. S.) 43, *per Story, J.*; *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121; *Welch v. Wadsworth*, 30 Conn. 155, 79 Am. Dec. 239; *Baltimore v. State*, 15 Md. 376; *Benson v. New York*, 10 Barb. (N. Y.) 224; *Bowman v. Middleton*, 1 Bay. (S. Car.) 252; *Bonham's Case*, 8 Coke 118 a; *Calvin's Case*, 7 Coke 114 a; *Day v. Savadge*, Hob. 87; *Black on Const. Prohibitions*, § 177. But see a criticism of this line of cases in *Cooley's Const. Lim.* (6th ed.), pp. 197, 201.

4. People v. Richmond, 16 Colo. 274; *People v. Rucker*, 5 Colo. 455; *People v. Fisher*, 24 Wend. (N. Y.) 220; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *State v. Smith*, 44 Ohio St. 348; *Whallon v. Ingham Circuit Judge*, 51 Mich. 503; *State v. Staten*, 6 Coldw. (Tenn.) 238.

The Policy of the Constitution, an infraction of which will justify the court in declaring a statute unconstitutional, must be manifested by its terms, fixing with precision the particular rule, and not by general inference or vague and uncertain speculation as to the expressed meaning of the framers. *Pattison v. Yuba County*, 13 Cal. 175.

Where no express provision of the Constitution has been violated the court will not declare a law invalid because of irregularities in the proceedings of the legislature. *State v. Moore*, 37 Neb. 13.

5. Motive of Passage Not Material — *United States. — Ex p. McCordle*, 7 Wall. (U. S.) 514; *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Kountze v. Omaha*, 5 Dill. (U. S.) 443.

California. — Ex p. Newman, 9 Cal. 502.

Georgia. — Lyon v. Morris, 15 Ga. 480.

Indiana. — Wright v. Defrees, 8 Ind. 298; *McCulloch v. State*, 11 Ind. 424.

Kentucky. — Johnson v. Higgins, 3 Met. (Ky.) 566.

Louisiana. — State v. Fagan, 22 La. Ann. 545.

Maryland. — Baltimore v. State, 15 Md. 376.

Michigan. — Flint, etc., Plank-road Co. v. Woodhull, 25 Mich. 99, 12 Am. Rep. 233; *Atty.-Gen. v. Lake County*, 33 Mich. 298.

Missouri. — Brown v. Cape Girardeau, 90 Mo. 377, 59 Am. Rep. 28; *State v. Hays*, 49 Mo. 604.

cc. PARTIAL UNCONSTITUTIONALITY. — The fact that part of a statute is unconstitutional does not authorize the court to adjudge the remainder void, unless the provisions are so interdependent that one cannot operate without the other, or so related in substance as to preclude the supposition that the legislature would have passed one without the other.¹ The question is not whether valid and invalid portions are closely related in a particular clause or section, but whether they are essentially and inseparably connected in substance.²

Where the Unobjectionable Portion Is Distinct and Complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that portion which is invalid, the former will be upheld.³

Nebraska. — *Bradshaw v. Omaha*, 1 Neb. 16.
Nevada. — *Humboldt County v. Churchill County*, 6 Nev. 30.

New York. — *People v. Draper*, 15 N. Y. 545;
People v. Flagg, 46 N. Y. 401.

Pennsylvania. — *Sunbury, etc., R. Co. v. Cooper*, 33 Pa. St. 278; *Jones v. Jones*, 12 Pa. St. 350, 51 Am. Dec. 611.

South Carolina. — *State v. Cardozo*, 5 S. Car. 297.

Tennessee. — *Luehrman v. Taxing Dist.*, 2 Lea (Tenn.) 425.

West Virginia. — *Slack v. Jacob*, 8 W. Va. 635.

"The courts cannot impute to the legislature any other than public motives for their acts." *People v. Draper*, 15 N. Y. 545, *per Denio*, C. J.

"It is now proposed that one of the three powers [the judiciary] shall institute an inquiry into the conduct of another department, and form an issue to try by what motives the legislature was governed in the enactment of a law. * * * To institute the proposed inquiry would be a direct attack upon the independence of the legislature and a usurpation of power subversive of the constitution." *Wright v. Defrees*, 8 Ind. 298, *per Gookins*, J.

The court will not consider an objection that a statute was passed at the instance of private persons for their own advantage, and as a result of an agreement between such persons and the legislature. *Williams v. Nashville*, 89 Tenn. 487.

1. Partial Invalidity Not Necessarily Fatal — *United States*. — *Hamilton Bank v. Dudley*, 2 Pet. (U. S.) 492.

Alabama. — *Mobile, etc., R. Co. v. State*, 29 Ala. 573; *South, etc., Alabama R. Co. v. Morris*, 65 Ala. 193; *Lowndes County v. Hunter*, 49 Ala. 507.

Arkansas. — *State v. Cox*, 8 Ark. 436.

California. — *People v. Hill*, 7 Cal. 97; *Lathrop v. Mills*, 19 Cal. 513; *Rood v. McCargar*, 49 Cal. 117.

Colorado. — *People v. Hall*, 8 Colo. 485.

Connecticut. — *State v. Wheeler*, 25 Conn. 290.

Florida. — *English v. State*, 31 Fla. 340.

Georgia. — *Savannah v. State*, 4 Ga. 26; *Robinson v. Darien Bank*, 18 Ga. 65.

Illinois. — *Knox County v. Davis*, 63 Ill. 405; *Myers v. People*, 67 Ill. 503; *Donnersberger v. Prendergast*, 128 Ill. 229.

Indiana. — *McCulloch v. State*, 11 Ind. 424; *Armstrong v. Jackson*, 1 Blackf. (Ind.) 374; *Clark v. Ellis*, 2 Blackf. (Ind.) 8.

Iowa. — *Santo v. State*, 2 Iowa 165, 63 Am. Dec. 487.

Kansas. — *Turner v. Woodson County*, 27 Kan. 314.

Kentucky. — *Ely v. Thompson*, 3 A. K. Marsh. (Ky.) 70.

Louisiana. — *Williams v. Payson*, 14 La. Ann. 7.

Maryland. — *Davis v. State*, 7 Md. 151, 61 Am. Dec. 331; *State v. Baltimore County*, 29 Md. 521; *Hagerstown v. Dechert*, 32 Md. 369; *Berry v. Baltimore, etc., R. Co.*, 41 Md. 446, 20 Am. Rep. 69.

Massachusetts. — *Com. v. Clapp*, 5 Gray (Mass.) 97; *Fisher v. McGirr*, 1 Gray (Mass.) 1, 61 Am. Dec. 381; *Warren v. Charlestown*, 2 Gray (Mass.) 84; *Wellington, Petitioner*, 16 Pick. (Mass.) 87; *Com. v. Hitchings*, 5 Gray (Mass.) 482; *Com. v. Pomeroy*, 5 Gray (Mass.) 486, note; *Com. v. Kimball*, 24 Pick. (Mass.) 361, 35 Am. Dec. 326; *Norris v. Boston*, 4 Met. (Mass.) 282.

Mississippi. — *Thompson v. Grand Gulf R., etc., Co.*, 3 How. (Miss.) 240, 34 Am. Dec. 81; *Campbell v. Mississippi Union Bank*, 6 How. (Miss.) 625; *Isom v. Mississippi Cent. R. Co.*, 36 Miss. 300.

Missouri. — *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471.

Nebraska. — *State v. Stuht*, (Neb. 1897) 71 N. W. Rep. 941; *In re Groff*, 21 Neb. 647, 59 Am. Rep. 859.

New York. — *People v. Lawrence*, 36 Barb. (N. Y.) 177; *People v. Kenney*, 96 N. Y. 294.

Ohio. — *Exchange Bank v. Hines*, 3 Ohio St. 1.

Rhode Island. — *State v. Copeland*, 3 R. I. 33; *State v. Snow*, 3 R. I. 64.

West Virginia. — *Eckhart v. State*, 5 W. Va. 515.

Wisconsin. — *State v. Tuttle*, 53 Wis. 45. See generally the title STATUTES.

2. *California*. — *Robinson v. Bidwell*, 22 Cal. 379.

Illinois. — *Willard v. People*, 5 Ill. 461; *Eells v. People*, 5 Ill. 498.

Maryland. — *Hagerstown v. Dechert*, 32 Md. 369.

Massachusetts. — *Com. v. Hitchings*, 5 Gray (Mass.) 482.

Nevada. — *State v. Eastabrook*, 3 Nev. 173.

New York. — *People v. Kenney*, 96 N. Y. 294.

3. When Objectionable Part Distinct and Complete — *United States*. — *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80; *Unity v. Burrage*, 103 U. S. 459; *Penniman's Case*, 103 U. S. 717; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362; *Presser v. Illinois*, 116 U. S. 252; *Thomas v. Wabash, etc., R. Co.*, 40 Fed. Rep. 126; *Duer v. Small*, 4 Blatchf. (U. S.) 263; *Field v. Clark*, 143 U. S. 649; *Cantini v. Tillman*, 54 Fed. Rep. 969; *Hamilton Bank v. Dudley*, 2 Pet. (U. S.) 526; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122.

Where the Provisions Are Interdependent. — On the other hand, when the provisions are so interdependent as to raise a presumption that the legislature intended the act to operate as a whole, and would not have enacted the valid provisions alone, the entire statute will be adjudged invalid.¹

Alabama. — Mobile, etc., R. Co. v. State, 29 Ala. 573; Noble v. Mitchell, 100 Ala. 519; South, etc., Alabama R. Co. v. Morris, 65 Ala. 193; Harper v. State, 109 Ala. 28; Bradley v. State, 99 Ala. 177; Barnhill v. Teague, 96 Ala. 207.

Arkansas. — Morrison v. State, 40 Ark. 448.

California. — Rood v. McCargar, 49 Cal. 117; *Ex p.* Frazer, 54 Cal. 94; Mills v. Sargent, 36 Cal. 379; People v. McFadden, 81 Cal. 489, 15 Am. St. Rep. 66; Robinson v. Bidwell, 22 Cal. 379; Lathrop v. Mills, 19 Cal. 513; People v. Hill, 7 Cal. 97; McGowan v. McDonald, 111 Cal. 57; *Ex p.* Christensen, 85 Cal. 208.

Colorado. — Tripp v. Overocker, 7 Colo. 72; People v. Jobs, 7 Colo. 475; Callahan v. Jennings, 16 Colo. 471; *In re* Canal Certificates, 19 Colo. 63.

Connecticut. — State v. Wheeler, 25 Conn. 290.

Florida. — Bucky v. Willard, 16 Fla. 330; State v. Dillon, 32 Fla. 545; State v. Green, 36 Fla. 154; Jacksonville, etc., R. Co. v. Adams, 33 Fla. 608.

Georgia. — Robinson v. Darien Bank, 18 Ga. 65; Hall v. Burks, 96 Ga. 622; Gainesville v. Simmons, 96 Ga. 477; Irvin v. Gregory, 86 Ga. 605; Elliott v. State, 91 Ga. 694.

Illinois. — Nelson v. People, 33 Ill. 390; Chicago, etc., R. Co. v. Jones, 149 Ill. 361, 41 Am. St. Rep. 278; People v. State Reformatory, 148 Ill. 413.

Indiana. — McCulloch v. State, 11 Ind. 424; State v. Krost, 140 Ind. 41; State v. Newton, 59 Ind. 173; State v. Gerhardt, 145 Ind. 439; Henderson v. State, 137 Ind. 552.

Iowa. — Santo v. State, 2 Iowa 165, 63 Am. Dec. 487.

Kansas. — Turner v. Woodson County, 27 Kan. 314; State v. Bailey, 56 Kan. 81.

Kentucky. — Ely v. Thompson, 3 A. K. Marsh. (Ky.) 70.

Louisiana. — Williams v. Payson, 14 La. Ann. 7; State v. People's Slaughterhouse, etc., Co., 46 La. Ann. 1031.

Maryland. — Davis v. State, 7 Md. 151, 61 Am. Dec. 331; State v. County, 29 Md. 521.

Massachusetts. — Fisher v. McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381; Com. v. Clapp, 5 Gray (Mass.) 97; Com. v. Hitchings, 5 Gray (Mass.) 482.

Michigan. — Tuller v. Detroit, 97 Mich. 597.

Mississippi. — Campbell v. Mississippi Union Bank, 6 How. (Miss.) 677.

Missouri. — State v. Field, 119 Mo. 593; State v. Clarke, 54 Mo. 17, 14 Am. Rep. 471; Grimes v. Eddy, 126 Mo. 168, 47 Am. St. Rep. 653; Westport v. McGee, 128 Mo. 152.

Nebraska. — State v. Moore, 48 Neb. 870; State v. Lancaster County, 6 Neb. 474; State v. Hardy, 7 Neb. 377; State v. Lancaster County, 17 Neb. 85; State v. Hurds, 19 Neb. 323; Muldoon v. Levi, 25 Neb. 457; Messenger v. State, 25 Neb. 674; Magneau v. Fremont, 30 Neb. 843, 27 Am. St. Rep. 436.

Nevada. — State v. Humboldt County, 21 Nev. 235; State v. Swift, 11 Nev. 128; *Ex p.* Hewlett, 22 Nev. 333.

New Jersey. — McCullough v. Franklin Tp., 59 N. J. L. 106.

New York. — People v. Kenney, 96 N. Y. 294; Curtin v. Barton, 139 N. Y. 505; Harris v. Niagara County, 33 Hun (N. Y.) 279; New York, etc., Bridge Co. v. Smith, 148 N. Y. 540; Fort v. Cummings, 90 Hun (N. Y.) 481; Parfitt v. Ferguson, 38 N. Y. St. Rep. 466, 3 N. Y. App. Div. 176; Lawton v. Steele, 119 N. Y. 226, 16 Am. St. Rep. 813; Matter of Malone Water Works Co., (Supreme Ct.) 38 N. Y. St. Rep. 95; Sweet v. Syracuse, 129 N. Y. 316.

North Carolina. — Gamble v. McCrady, 75 N. Car. 509.

Ohio. — Exchange Bank v. Hines, 3 Ohio St. 1; State v. Baker, 55 Ohio St. 1; State v. Harvey, 8 Ohio Cir. Ct. Rep. 599; Korb v. Mitchell, 3 Ohio Dec. 267; State v. Owen, 3 Ohio N. P. 181; Yager v. Prout, 5 Ohio C. C. 33; Fayette County v. People's, etc., Bank, 47 Ohio St. 503.

Pennsylvania. — Com. v. Reynolds, 8 Pa. Co. Ct. Rep. 568, 137 Pa. 389, 398; Lea v. Bumm, 83 Pa. St. 237; Cornell v. Beaver County, 3 Pa. Dist. R. 783; *In re* Ruan St., 24 W. N. C. (Pa.) 460.

Rhode Island. — State v. Snow, 3 R. I. 64.

South Dakota. — State v. Morgan, (S. Dak. 1891), 48 N. W. Rep. 314; State v. Becker, (S. Dak. 1892), 51 N. W. Rep. 1018; *Re* Assessment, etc., of Taxes, (S. Dak. 1893), 54 N. W. Rep. 818.

Tennessee. — Franklin County v. Nashville, etc., R. Co., 12 Lea (Tenn.) 521; Tillman v. Cocke, 9 Baxt. (Tenn.) 429.

Texas. — Adams v. San Angelo Waterworks Co., (Tex. Civ. App. 1894) 26 S. W. Rep. 1104; Lytle v. Halff, 75 Tex. 128.

Utah. — McCormick v. Thatcher, 8 Utah 294; People v. Clayton, 4 Utah 421; People v. Jack, 4 Utah 438.

Washington. — Jolliffe v. Brown, 14 Wash. 155; Seanor v. Whatcom County, 13 Wash. 48.

Wisconsin. — Baker v. State, 80 Wis. 416.

1. Entire Statute Void — When — *United States.* — Western Union Tel. Co. v. Poe, 61 Fed. Rep. 449; Pollock v. Farmers' L. & T. Co., 158 U. S. 601; Allen v. Louisiana, 103 U. S. 80; Adams Express Co. v. Poe, 61 Fed. Rep. 470; Anderson v. Louisville, etc., R. Co., 62 Fed. Rep. 46.

Colorado. — *In re* House Bill No. 165, 15 Colo. 593; Wadsworth v. Union Pac. R. Co., 18 Colo. 600, 36 Am. St. Rep. 309; Valverde v. Shattuck, 19 Colo. 104.

Indiana. — Allen County v. Silvers, 22 Ind. 491; State v. Denny, 118 Ind. 449.

Kentucky. — Tate v. Parkland, (Ky. 1890) 13 S. W. Rep. 443.

Massachusetts. — Warren v. Charlestown, 2 Gray (Mass.) 84; Jones v. Robbins, 8 Gray (Mass.) 329.

Michigan. — Campau v. Detroit, 14 Mich. 276; Atty.-Gen. v. Detroit, 78 Mich. 548, 18 Am. St. Rep. 458.

Minnesota. — State v. Ramsey County, 43

dd. WHO MAY QUESTION THE CONSTITUTIONALITY OF AN ACT—(*aa*) *In General.*—Only Those Whose Rights Would be Prejudiced by the enforcement of an unconstitutional act will be heard to question its validity.¹

Illustrations.—Thus a white person indicted by a grand jury composed wholly of whites cannot complain because negroes are excluded by statute from the jury.² A person who is constitutionally taxed, and who receives his full share of the benefits accruing from the school system, cannot be heard to complain because a school fund is unequally apportioned between whites and blacks.³ One who has consented to the taking of his property under a statute will not be heard to complain that the statute is a violation of a constitutional provision limiting the taking of private property for public purposes.⁴ Especially, one who has tried to take advantage of a statute to the detriment of others will not afterwards be heard to object to its constitutionality.⁵

(*bb*) *Public Officers.*—It appears to be the prevailing rule that ministerial officers who are charged by a certain statute with a duty may urge the unconstitutionality of the act as a defense to a proceeding by mandamus to compel them to perform the duty.⁶ But after the writ has been granted in such a case the officer can no longer plead the unconstitutionality of a statute as an excuse for disobeying the writ.⁷ A sheriff prosecuted for corruptly failing to seize gambling devices cannot raise the constitutionality of that part of the statute which requires the magistrate before whom such devices are brought

Minn. 236; *Meyer v. Berlandi*, 39 Minn. 438, 12 Am. St. Rep. 663.

Nebraska.—*State v. Lancaster County*, 6 Neb. 474.

New Jersey.—*Benedict v. Columbus Constr. Co.*, 49 N. J. Eq. 23, 35 Am. & Eng. Corp. Cas. 637.

New York.—*Jones v. Jones*, 104 N. Y. 234; *People v. Upson*, 79 Hun (N. Y.) 87.

Ohio.—*State v. Perry County*, 5 Ohio St. 497; *State v. Pugh*, 43 Ohio St. 98; *Monroe v. Collins*, 17 Ohio St. 684; *Taylor v. Ross County*, 23 Ohio St. 84; *Hamilton County v. State*, 50 Ohio St. 653.

Pennsylvania.—*Com. v. Potts*, 79 Pa. St. 164.

Tennessee.—*Tillman v. Cocke*, 9 Baxt. (Tenn.) 429.

Texas.—*Western Union Tel. Co. v. State*, 62 Tex. 630.

Washington.—*Skagit County v. Stiles*, 10 Wash. 388; *Oregon R., etc., Co. v. Smalley*, 1 Wash. 206, 22 Am. St. Rep. 143, 42 Am. & Eng. R. Cas. 550.

West Virginia.—*Eckhart v. State*, 5 W. Va. 515.

Wisconsin.—*Slauson v. Racine*, 13 Wis. 398; *State v. Dousman*, 28 Wis. 541.

See the title *STATUTES*.

1. Who May Question the Constitutionality of a Statute—*Alabama.*—*Smith v. Inge*, 80 Ala. 283; *Jones v. Black*, 48 Ala. 540.

Colorado.—*Airy v. People*, 21 Colo. 155.

Florida.—*Franklin County v. State*, 24 Fla. 55.

Kansas.—*Newman v. People*, 23 Colo. 300.

Kentucky.—*Com. v. Wright*, 79 Ky. 22, 42 Am. Dec. 203; *Marshall v. Donovan*, 10 Bush (Ky.) 681; *Burnside v. Lincoln County Ct.*, 86 Ky. 423.

Louisiana.—*Moore v. New Orleans*, 32 La. Ann. 726.

Maine.—*Williamson v. Carlton*, 51 Me. 449.

Massachusetts.—*Wellington, Petitioner*, 16

Pick. (Mass.) 87; *Hingham, etc., Bridge, etc., Corp. v. Norfolk County*, 6 Allen (Mass.) 353. *Mississippi.*—*Dejarnett v. Haynes*, 23 Miss. 600.

New York.—*People v. Rensselaer, etc.*, R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 33; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543; *Heyward v. New York*, 8 Barb. (N. Y.) 486; *People v. Brooklyn, etc.*, R. Co., 89 N. Y. 75.

Pennsylvania.—*Smith v. McCarthy*, 56 Pa. St. 359.

Rhode Island.—*State v. Snow*, 3 R. I. 64.

South Carolina.—*Ex p. Florence School*, 43 S. Car. 11.

Virginia.—*Antoni v. Wright*, 22 Gratt. (Va.) 857.

2. Statute Excluding Negroes from the Jury.—*Com. v. Wright*, 79 Ky. 22, 42 Am. Dec. 203. See also *McKinney v. State*, 3 Wyoming 719, holding that the exclusion of women from the jury could not be availed of by a male convict.

3. Public School Funds.—*Marshall v. Donovan*, 10 Bush (Ky.) 681.

4. Taking of Private Property—Consent of Owner.—*Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Baker v. Brame*, 6 Hill (N. Y.) 47, 40 Am. Dec. 387; *Heyward v. New York*, 8 Barb. (N. Y.) 486; *Mobile, etc., R. Co. v. State*, 29 Ala. 586; *Haskell v. New Bedford*, 108 Mass. 208; *Cooley's Const. Lim.* (6th ed.) 196.

5. Hansford v. Barbour, 3 A. K. Marsh. (Ky.) 515; *Barnett v. Barbour*, 1 Litt. (Ky.) 396.

6. Ministerial Officers May Question—*Nebraska.*—*Van Horn v. State*, 46 Neb. 62, overruling contrary dicta in *State v. Douglas County*, 18 Neb. 506; *State v. Stevenson*, 18 Neb. 416. See also *State v. Bartley*, 40 Neb. 298; *State v. Cobb*, 44 Neb. 434; *State v. Douglas County*, 47 Neb. 428.

Wisconsin.—*State v. Tappan*, 29 Wis. 664, 9 Am. Dec. 622.

7. People v. Salomon, 54 Ill. 39. See also *State v. Johnson County*, 12 Iowa 237.

to destroy them.¹

(d) **Effect of Unconstitutionality.**—"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."²

VII. ABROGATION OF CONSTITUTIONS.—The regular adoption of a new constitution usually abrogates *ipso facto* a prior one.³ But a convention cannot by adopting a constitution destroy an existing state government and absolve the state from its allegiance to the Union.⁴

1. *Newman v. People*, 23 Colo. 300, *citing* *Gilchrist v. Schmidling*, 12 Kan. 263.

2. Mr. Justice Field, in *Norton v. Shelby County*, 118 U. S. 442; *Wyandotte County v. Kansas City, etc., R. Co.*, (Kan. App. 1896) 47 Pac. Rep. 326.

3. **Abrogating Constitution.**—"Where the people in the exercise of their sovereignty de-

liberately put an end to the existing constitution, and adopt an entirely new one in its stead, all powers of government under the old constitution necessarily cease, except in so far as they are maintained in existence in the new constitution." Ogden, J., in *Sigur v. Crenshaw*, 8 La. Ann. 401.

4. *Penn v. Tollison*, 26 Ark. 545.

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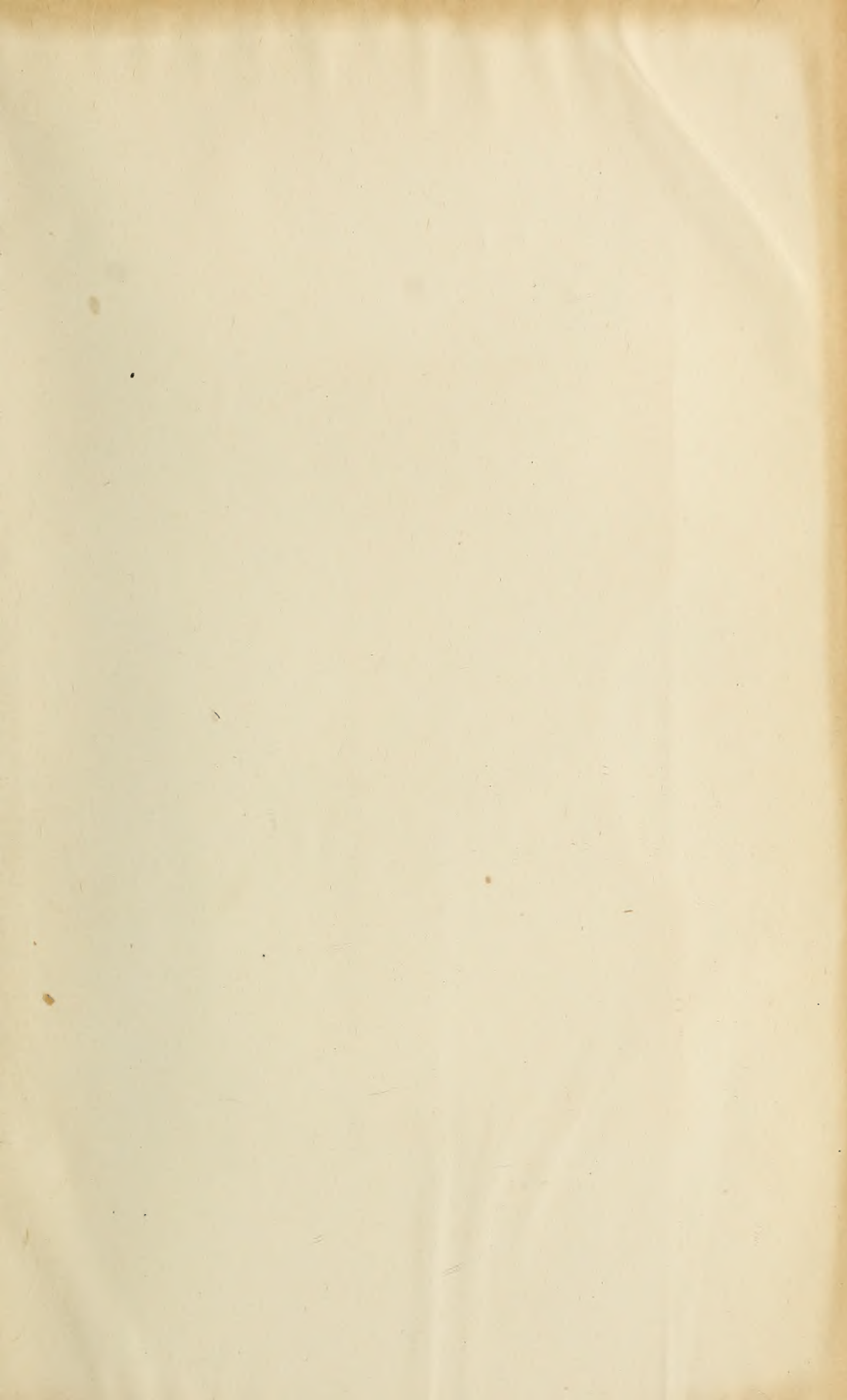
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